

CASE NUMBER CSOS 276/WC/16

IN THE ADJUDICATION

Between:

CECILIA CAMPHER

Applicant

and

BODY CORPORATE OF LENGRO PARK

Respondent

ORDER

1. This adjudication is made pursuant to the request for adjudication made by the Applicant under Section 38 of the Community Scheme Ombud Services Act, number 9 of 2011 ("CSOSA") which came into force on 7 October 2016. The Parties indicated that a conciliation attempt did not succeed, hence the referral to adjudication.
2. The Applicant is Cecilia Elizabeth Campher, the registered owner of Unit 47, a unit in the Lengro Park sectional title scheme.
3. The Respondent is the body corporate of the Lengro Park sectional title scheme, situated in Avondale, Parow (the "Scheme").
4. The dispute between the Parties arose on account of the implementation of a special levy by the Respondent pursuant to a decision of the trustees of the body corporate of 10 October 2016 to raise a special levy to fund certain maintenance works. It is the contention of the Applicant that the special levy was not lawfully raised and as such not due and payable. The relief sought by the Applicant is the revocation of the special levy.

5. The legal framework wherein the matter is to be adjudicated is that of the Sectional Titles Schemes Management Act, no 8 of 2011 ("the Act") which came into force on 7 October 2016. The Act is aimed at ensuring, inter alia, the proper functioning of sectional title schemes, transparency, prevention of the abuse of power, avoidance of reckless or negligent behaviour by elected representatives and participation of owners in the decisions and running of their own scheme.
6. One of the significant duties of a body corporate is to establish a fund for the operation of the scheme and to cover the costs of the scheme. Some of these costs are significant for the protection of owners' value in their properties, such as the requirement for insurance of the assets of the scheme and the provision for "the repair, maintenance, management and administration of the common property (Section 3. 1 (a) of the Act)."
7. The other relevant statutory provisions are:
 - 7.1 Section 3 (3) and Section 3 (4) of the Act which addresses the recovery of "special contributions" by a body corporate pursuant to "the passing of a resolution in this regard by the trustees of the body corporate";
 - 7.2 Section 7 (1) of the Act which reads as follows: "The functions and powers of the body corporate must, subject to the provision of this Act, the rules *and any restrictions imposed or direction given at a general meeting of the owners of sections* (my emphasis), be performed and exercised by the trustees of the body corporate holding office in terms of the rules.
 - 7.3 Section 41 of the CSOSA which requires that any application for an order declaring any decision of an association or an executive committee to be void, may not be made later than 60 days after such a decision has been taken.
 - 7.4 Section 39 (4) (c) of CSOSA which includes an order to declare a resolution purportedly passed at a meeting of the executive committee as void or invalid as a valid prayer for relief under an application in terms of Section 38.
 - 7.5 Section 3 (1) (a) of the Act which obliges a Body Corporate to establish a fund to maintain and repair the common property of the scheme.
8. The facts in this dispute are largely uncontested and can be summarized as follows:
 - 8.1 The minutes of the Annual General Meeting held on 1 December 2015 restricted the powers of the trustees to approve certain expenditure;
 - 8.2 There is no reason to believe that the minutes of the meeting of 1 December 2015 are not a correct reflection of the decision taken at the meeting (although the minutes of the Annual General Meeting of 26 October 2016

approves the minutes of the Annual General Meeting of 29 October 2015-it is unlikely that two annual general meetings were held within 2 months of one another and it appears that this may be an error);

- 8.3 The trustees of the Scheme, at a meeting of trustees held on 20 October 2016, resolved to recover a special contribution (commonly referred to as a "special levy") from owners in an amount of R3 100 00;
- 8.4 The purpose of the special contribution was to fund maintenance of, inter alia, the lifts in the Scheme, external painting of units, rectification of drainage works and a boundary wall;
- 8.5 The costs were discussed at the Annual General meeting held at 26 October 2016, but are not reflected in the budget of the Body Corporate tabled at such meeting;
- 8.6 A special general meeting was held on 2 February 2017 at which meeting new trustees were elected (the minutes of this meeting were not made available before at the hearing);
- 8.7 There seems uncertainty as to the approval of the minutes of the Annual General Meeting held on 26 October 2016 (it is understood that the minutes were in fact not approved at the special general meeting held on 2 February 2017).
- 8.8 The new trustee committee obtained further quotations and professional advice with respect to the proposed maintenance works and resolved to proceed with the implementation (it appears from these subsequent quotations that the problem with the drainage is more severe than originally anticipated and that the cost is likely to increase following a report from an engineer);
- 8.9 The new information and updating costing were discussed with all owners at an information session held on 17 May 2017;
- 8.10 A number of owners are evidently unhappy with the implementation of the special levy and in a few have lodged a dispute with the Community Schemes Ombud-these matters are still pending;
- 8.11 Some owners have paid the special levy in full and all owners are being invoice for it;
- 8.12 Interest (originally set at 2% per month, but subsequently changed to 1.25%) are being charged on the outstanding balance of those owners who are paying the levy off;
- 8.13 The new trustees allegedly invited all owners to discuss payment plans with them and at the meeting of 17 May 2017 it was stated (and appears to have been accepted) that no interest will be charged to pensioners;

- 8.14 The parties are ad idem that the maintenance works are necessary, however, Ms Campher is of the view that further consideration should be given to the prioritizing and scheduling of the works.
9. Section 3 of the Act confers wide powers on trustees to approve special contributions and, as was the case under Rule 31 (4) of the Management Rule under the Sectional Titles Act 95 of 1986 (which preceded the Act), does not require approval by the owners. Old Rule 31(4) gave the trustees the power to raise special levies from time to time provided that two requirements are met: firstly the expense for which the special levy is raised must be necessary and secondly the expense must not have been budgeted for in the budget approved by the owners at the last annual general meeting. The intention certainly was that the trustees have been empowered with the ability to raise special levies for unforeseen and unexpected expenses. This has not changed in the Act and the judgement in the case of the Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 WLD still applies. In this case, an owner objected to the payment of a special levy which had been imposed by the trustees of the body corporate.

Dealing with this objection Malan, J said:

“It is the trustees, and not any individual owner, who are empowered to take a decision whether or not the imposition of a levy (which would include a special levy) is necessary as contemplated by Section 37(1)(b) of the Sectional Titles Act, and by Rule 31(4) of annexure “A” to the Regulations made in terms of the Sectional Titles Act. According to Section 37(1)(d) of the Sectional Titles Act one of the functions of a body corporate is to determine from time to time the amount to be raised for the purposes aforesaid. In accordance with Section 39(1) of the Sectional Titles Act and Rule 30 of annexure “A” to the Sectional Titles Regulations, the function of determining the amounts to be levied upon members of sectional title body corporates belongs to the trustees for the time being of the body corporate. No member of the body corporate is entitled to dispute liability for the payment of levies on the ground that it thinks those levies to be excessive.”

10. Whilst the powers of the trustees to impose special contributions appear to be largely unfettered (as long as it is needed and not budgeted for) and the body corporate, in practice, may not prevent the trustees from complying with their duties in terms of the Act to maintain the assets of the scheme, the powers of the trustee must at all times be exercised in terms of the Act and it is up to the owners to ensure that the trustees have at all times adhered to

the Act and acted with the necessary care and exercised their fiduciary duties in the best interest of the body corporate as a whole.

11. With reference to the facts in this matter and the powers of trustees to impose special contributions in terms of Section 3 (3) of the Act, the following is to be considered:
 - 11.1 The Trustees, on behalf of the Body Corporate, do have an obligation to maintain and repair the common property of the Scheme;
 - 11.2 The decision of the trustees at the meeting of trustees held on 20 October 2017: it appears that the decision was correctly taken at a duly called and constituted meeting. From the minutes of the meeting, it is evident that a proper discussion was held and that the matter was duly considered and debated;
 - 11.3 There is no dispute that the maintenance items for which the special contributions are levied are in fact necessary and to the benefit of the Body Corporate. No argument has been raised that these proposed works constitute improvements as opposed to essential maintenance and repairs.
 - 11.4 The items are not budgeted for (to the extent that this remains a requirement). Why the items are not contained in the budget is a valid question, seeing that the repairs were foreseen and cannot be regarded as emergencies (note, however, paragraph 8 of the minutes of the Annual General Meeting of 26 October 2016 where the trustees purportedly gave the owners the opportunity to reconsider the 2017/2018 budget).
 - 11.5 The next question then is whether any restrictions have been imposed on the trustees in terms of section 7 (1). In this regard, we must turn to the minutes of the Annual General Meeting held on 1 December 2015 and more specifically paragraph 11 of the minutes which reads as follows:

“GIVING OR IMPOSING OF ANY DIRECTIVES OR RESTRICTIONS (IN) TERMS OF SECTION 39 (1) OF THE SECTIONAL TITLES ACT

No directions were given nor were any restrictions imposed on the Trustees who were authorized to perform the functions and duties of the Body Corporate in terms of the Rules and the Act, *except that any single expense*

not budgeted for may not exceed R50 000 (this excludes the project per paragraph 13.7 of these minutes)." (my emphasis).

Paragraph 13.7 reads as follows:

"Replacement/Maintenance of Woodwork, Painting of Balcony Ceilings, General Painting

The trustees to investigate and attend to the above. This project is excluded from the R50 000 restriction as per paragraph 11 (Directives and Restrictions) of these minutes. The outcome of the investigation will be communicated to owners. Wooden window frames beyond repair, doors beyond repair, to be replaced with aluminium. The 50:50 allocation of costs between Owners and the Body Corporate was re-confirmed."

The implication of the restriction contained in paragraph 11 of the minutes of the Annual General Meeting of 1 December 2015 is not entirely clear. The only logical conclusion is that the trustees were restricted, with respect to that category of expenditure, from taking a decision unless such decision is supported by a valid decision of the owners at a meeting (whether an annual general meeting or special general meeting). It is significant that the minutes of the Annual General Meeting of 26 October contains a similar restriction in paragraph 11, but the limit is increased to R100 000 and further excludes the special levy imposed by the trustees at their meeting of 20 October 2017 and presented to the owners at the meeting of 26 October 2016.

- 11.6 No evidence was produced to support an acceptance of the minutes of the Annual General Meeting of 26 October 2016 (in fact, to the contrary, both Mr Park and Ms Campher in evidence indicated that it had not been approved). The minutes also do not contain any record of the matter of the special levy or expenditure in excess of R50 000 being formally voted on, approved or decided on by the owners. The heading reads "Approval of the estimate of Income and Expenditure 2017/2018 with or without amendment" and states state further that the "meeting was *informed* (my emphasis), at the request of the chairman, by LMS of the underlying processes and steps taken by the trustees to be in a position to quantify and address the identified needs...". Mention is throughout made of the trustees' resolution and, whilst owners were allowed to ask questions about the trustees' decision and a host of information was presented, there is no evidence that the owners were invited to decide on the matter or to authorize the trustees to proceed with the expenditure. The minutes indicate that it was discussed as being a fait

accompli, given the earlier decision by the trustees. In the absence of clear evidence of the correctness of the minutes of the Annual General Meeting of 26 October 2017, paragraph 11 of those minutes suffers from the same difficulty.

11.7 If one accepts that a restriction was validly placed upon the trustees at the meeting of 1 December 2015 in terms of Section 7 (1), the conclusion must be that the trustees decision to impose the special contribution at their meeting of 20 October 2016, although it may potentially meet all other requirements for the imposition of a special contribution, falls foul of the requirement that expenses in excess of R50 000 needs the approval of the owners (on the basis that the maintenance items detailed in the exception noted in paragraph 13.7 is not part and parcel of the expenditure tabled at the meeting for purposes of which the special contribution was imposed). Even if one accepts that such consent of the owners may follow the decision of the trustees, it has not been conclusively proven that the owners, at the meeting of 26 October 2016, did in fact approve the expenditure and as result the special contribution imposed. This problem also haunts a further possible argument that the decision by the new trustees to proceed with the implementation of the special contribution in early 2017 (Mr Park confirmed that it was indeed the case and it is also evident from the minutes of the Special General Meeting held on 17 May 2017 which was made available at the hearing) is based on an approval of the expenditure by the owners on 26 October 2016. If the decision is not sufficient to support the trustees' decision of 20 October 2016 (albeit ex post facto), it also cannot underpin a later resolution by the trustees to impose the special contribution.

11.7 Ms Campher applied for dispute resolution in terms of the requirements of CSOSA on 6 December 2016 - less than two months after the trustees' decision of 20 October 2016. As such, the provisions of Section 41 (1) have been complied with.

12. On the basis of the above, I order that:

- 12.1 in terms of Section 39 (4) (c) (ii), the decision of the trustees of 20 October 2016 or thereafter to impose a special contribution is invalid;
- 12.2 the restriction imposed on the decisions of trustees as contained in the minutes of 1 December 2015 remains applicable. As such, a valid decision by the owners for expenditure in excess of R50 000 is required (save for the exceptions noted);


- 12.3 special contributions paid by owners thus far must be repaid unless these owners are satisfied for the Body Corporate to retain these in anticipation of a future decision to implement special contributions. The Trustees are further reminded of their duty to treat all owners equally and fairly and to act in a transparent manner;
- 12.4 given the technical nature of the basis of this order and the fact that no mala fide is evident in the conduct of the trustees, each party to pay its own costs.

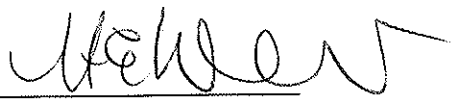
13. The Applicant, the Body Corporate or any person affected by the order may appeal to the High Court on a question of law.

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DATE: _____

ADJUDICATION ORDER





 H E Louw
 Adjudicator
 2 July 2017


ADJUDICATION ORDER
 DATE: 2 July 2017
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