Community Schemes Ombud Service

Case Number: CSOS 430/WC/17

IN THE MATTER BETWEEN:

POLANA COURT BODY CORPORATE
(CHAIRMAN: JONATHAN SCHRIRE)

(Applicant)

and

FRANK BOLD and
TOM MC IVOR

(Respondents)

ADJUDICATION ORDER

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1. The Applicant is the Chairman of the Trustees of the scheme known as Polana Court Body Corporate, 43 Kloof Street, Cape Town, Western Cape.

2. The Respondents are:

    a. Mr Frank Bold, who is a member of Soundprops 2653 CC, the owner of unit 1 in the scheme.

b. Mr Tom and Mrs Shaida Mc Ivor, the owners of unit 5 in the scheme.

3. This is an application for dispute resolution in terms of Section 38 of the Community Schemes Ombud Service Act No.9 of 2011 ("the CSOS Act"). The application was made in the prescribed form and lodged with the Western Cape Provincial Ombud Office.

4. The adjudication hearing took place on 18 January 2018 at the CSOS offices in Cape Town.

5. The Adjudicator is empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the CSOS Act. The CSOS Act enables residents of community schemes including sectional title schemes to take their disputes to a statutory dispute resolution service instead of a private arbitrator or the courts. The purpose of this order is to bring closure to the case brought by the applicant to the CSOS.

6. In the Application for Dispute Resolution Form the Applicant sought the following relief:

"1. Order the two (2) units to immediately vacate the areas of common property which they are illegally occupying.

2. That their 30% blocking vote be set aside so that the BC can pass special resolutions.

(a) Authorising the BC to decide how to use common property including allocation of exclusive use areas.

(b) To amend the standard rules to allow the BC to impose fines for breaches of the rules."

7. Among other correspondence in the CSOS file there are three (3) legal opinions as follows:

   a. From Dr Carryn Melissa Durham from Paddocks dated 14 September 2016;

   b. From Dr Carryn Melissa Durham from Paddocks dated 9 March 2017;

   c. From Prof CG van der Merwe dated 14 July 2014, but that I can only assume should read 14 July 2017.

8. I am not going to repeat the content of the opinions herein, save insofar as may be necessary for the purposes of the outcome of the order.

9. Pursuant to the hearing on 18 January 2018, Mr Bold provided further submissions in a letter dated 18 January 2018 with the following content:

   I want to add the following submissions to those made earlier:

   1 As I read the Dispute Resolution document made out by Jonathan Schrire, the crisp issue for adjudication is that set out in the paragraph lifted from that document quoted below:

   POLANA COURT: APPLICATION TO OMBUD

   Two unit owners (Unit 1 and Unit 5) have been parking their cars on common property for their own exclusive use, without either a registered exclusive use arear having been registered in the registered sectional plan; or a rules-based exclusive use area having been established in terms of the rules of the scheme. They have refused to vacate the areas.

   2 My reading and understanding of the terms of the Sectional Titles Act (STA), should you find that in fact the arears concerned are <u>not exclusive use areas</u>, is that S27(2) will then be of application.

   4 S27(2) reads as follows:

A body corporate, duly authorized thereto by a unanimous resolution of its members, may, subject to the provisions of section 5 (1), request an architect or land surveyor to apply to the Surveyor-General for the delineation on a sectional plan in the manner prescribed of a part or parts of the common property in terms of section 5 (3) (f) for the exclusive use by the owner or owners of one or more sections:

Provided that no such delineation shall be made on the sectional plan in terms of this subsection if such delineation will encroach upon a prior delineation on the sectional plan of a part of the common property for the exclusive use by one or more of the owners.

5 *I understand that diagrams were prepared by Wiggins & Bolle in 1993 outlining the exclusive use areas G5 and G6 around which the current controversy turns. Those plans were not linked to the Sectional Title diagram as required by the Act, although clearly there must have been an intention so to do.*

6 *What this means, in my submission, is that levels of expectation were created at the time when our Close Corporation acquired the particular Sectional Title Unit it owns that it had, or would be given exclusive use rights to G5/G6 (whichever is applicable), with the equivalent level of expectation created as far as McIvor is concerned in relation to his Sectional Title Unit. Indeed in his case the level of expectation might have been greater, assuming these things can be measured in finite terms.*

7 *If that submission is accepted, i.e. that an analysis of the justice and equity position as referred to, for example, in the decision Residents of Joe Slovu Community, Western Cape vs Thubelisha Homes, demands in relation to the doctrine of substantive legitimate expectation, that we and Mr McIvor be given first opportunity to acquire by way of a purchase from the body corporate the areas referred to as G5/G6 on the diagrams prepared by Wiggins & Bolle, then that must be allowed to happen ito S27(2) of the STA.*

8 *If such an opportunity is not afforded the parties mentioned, then it seems to me that that refusal will lead to a dispute that might ultimately end up in a further process of adjudication.*

9 *Equally and in the alternative, if having denied ourselves and McIvor rights ito the doctrine of substantive legitimate expectation, the body corporate in the form of its*

Trustees resolves to lease G5/G6 to approved members of the body corporate, then that decision too might form the subject of further controversy leading to adjudication.

10 Account also needs to be taken of the fact that my understanding is that currently the only means of access to the Sectional Title Unit owned by us is through the disputed area, G5 alternatively G6, whichever applies.

Clearly I accept that Jonathan Shrire should be given the opportunity of making written submissions in answer to this.

10. I received the following response from the Applicant:

Response on behalf of Applicant, Polana Court Body Corp, to late submission by Respondent Frank Bold dated 18 January 2018.

LATE SUBMISSION: Mr Bold had three months in which to prepare his submission for the Adjudication. So he attends the hearing, listens to the issues, is given an opportunity to make whatever points he likes, and then afterwards he employs a lawyer to address what he has heard, and to send in further submissions!

Even though the Applicant is given the right of further reply, that does not seem procedurally fair. These matters ought to have been presented at the adjudication hearing.

RESPONSE

1. *It is accepted by both sides that the areas in question were never validly allocated to either of the two flats, and remain common property under the control of the Body Corporate.*
2. *The Respondents' case rests on two arguments. The first is that there was evidence of* ***intention to so allocate****, and that the BC must now be ordered to execute such intention, some 25 years later.*
3. *The evidence of such intention is flimsy. It consists of*
   a) *A letter from Surveyors in 1993 to the Managing Agents asking for the Body Corp resolution necessary to make the allocation. The BC at the time did not proceed with this, and no such resolution has been found. Twenty five years later we are unable to know why this was not implemented, but presumably there were good reasons at the time. For Respondents to say "The BC at the*

time did not allocate these areas to us, but we now demand the present BC do so 25 years later" is not reasonable.

b) *For Flat 5 McIvor, the evidence is an Offer to Purchase in which the agent Rawsons, has scribbled onto the first page that the sale includes "exclusive rights to parking bay G6". This carries no legal weight whatsoever. If McIvor relied on this when he bought the flat, then he needs to take action against the Agent for misrepresentation, and also against the Conveyancer who ought to have verified the existence of such exclusive use as part of due diligence at the transfer. The fact that some estate agent wrote false information onto the OTP carries little evidential weight.*

c) *For Flat 1 Bold: Apparently FNB issued a bond over the property which included an exclusive use parking area. This too carries virtually no evidential weight. Legally FNB simply made a mistake and included an area which was not in the power of Mr Bold to bond. And practically, this has no adverse impact on Mr Bold that fairness and equity demand be rectified now. The sale price at the time was R200,000 so whatever bond FNB may have issued on security of the flat, it has ample security without relying on the security or value of the fictitious parking area.*

4. *In a tacit acknowledgement of the weakness of the above reasons, the Respondents now fall back on their second argument, that they have "**levels of expectation"** that they should be granted exclusive use.*

a) *Both the opinions from Paddocks and Prof CG vd Merwe confirm that "expectation" does not constitute sufficient reason to transfer property rights to the Respondents which, even they agree, they never had.*

b) *The case cited of Residents of Joe Slovo carries no precedential weight here. The landowner City of CT provided the Joe Slovo people with significant facilities which justified an expectation of them being allowed to stay on the land. In our case the BC never acknowledged, nor did anything which indicated acceptance of, the illegal occupation of the common areas. At most they suffered such illegal occupation in silence, and in latter years tried vainly to take action, but were blocked by the stubborn refusal of the two respondents, and their control of the Body Corporate Trustees and their having over 25% of the PQ votes.*

c) *Payment of additional rent/levies for the areas does not imply acceptance by the BC that such occupation was legal; nor does it support an expectation that it should continue forever. Even if the Respondents had parking areas properly allocated in terms of the rules (which they did not), such allocations are terminable like any other rental agreement and are not presumed to continue forever.*

5. *In Para 7 of the letter, Mr Bold proposes that the Adjudicator order the BC to sell the areas to the respondent;. ("respondents be given first opportunity to acquire by way of purchase..").This is a curious suggestion which seems to contradict the claim that they have a legal or moral right to the parking areas. If they have a right, then there is no need for them to offer to buy the use of the areas.*

6. *Paras 8 and 9 state that if the areas are not sold to the Respondents, then there might be further "**dispute and controversy**". It is in the nature of adjudications and judgements that one or other party may feel dissatisfied, and may exercise their legal rights to further appeal. That is not a cogent argument to sway an Adjudicator towards one or other decision!*

7. *Para 10 relates to a practical issue of **access for Mr Bold's ground floor unit** which is used as a Tattoo Parlour. The BC is obliged to, and will, arrange an access path to this unit through whatever common area is appropriate. Indeed most other flats have access to their front doors over common areas. There is no need for a flat to have exclusive use in order to obtain access.*

8. *I submit there are no legal grounds to justify the Respondents' claim that they have a right to the disputed common areas. However I am conscious that the Adjudicator in terms of CSOS process, is allowed to take into account non-legal issues like **fairness, equity and natural justice**. Indeed the Respondents' argument of "legitimate expectation" is for the most not based on legality, but on fairness. So I need, on behalf of the BC, to address that.*

   a) *There are no parking areas for any of the residents. Whatever "fairness" claim the Respondents have, is more than equalled by the rights of the other owners to be allowed the opportunity to share in whatever parking there may be. **For two flats to monopolise the only available common areas for their own use for 25 years, with no legal basis to do so, and paying levies a fraction of the market value, is an act of gross unfairness committed against the other 10 owners. Being forced to relinquish an unfair***

monopoly on the only parking area can hardly be contrary to natural justice!

b) *The proposal by the BC that all owners be given an equal chance to tender for the parking areas, is totally fair. Firstly it maximises the levy income to the BC, which benefits all owners, including those who do not rent the parking areas. It also allows all owners, including the two respondents, the same right to tender for the areas as anybody else. They are in no way disadvantaged by our proposal.*

11. I received the following reply from Mr Bold in a letter dated 26 January 2018:

This is written as a rejoinder to the response dated 25 January 2018 from Jonathan Schrire, Chairperson: Polana Court Body Corporate Trustees.

I submit that I am entitled to lodge this in answer to new issues raised by Mr Schrire and in answer to his misunderstanding of my original submission.

I point out in answer to his initial comments that a call was made at the meeting for legal representation to be present. My understanding is that a ruling was made that such representation would be permitted if you felt the need for it.

I mention this in passing, simply so as to put on record my understanding. It was never been my intention to "steal an extra march" on the Trustees by way of my submission.

REJOINDER (I use Jonathan Schrire's numbering)

1, 2 and 3

No point is served in rehashing the submissions made.

The crisp issue on which you are asked to adjudicate is that quoted in paragraph 1 of my original submission.

4 and 5

The point is made, ***obiter*** *if you like, that consequent upon a decision on the crisp issue on which you are asked to adjudicate, other decisions will have to be made.*

I submit that is not obligatory on you to make those decisions and it may not be appropriate that you do so. All the same, I believe there is no reason why you should not comment or offer guidance on those subsequent decisions from your point of view.

By way of example, I refer to the Judgment of Rogers AJ, as he then was, in the matter W M McKersie v SDD Developments, 06 March 2013 a decision of the Cape High Court in which he said:

If, despite the equity of the applicant's case, the body corporate is not willing or entitled to transfer the parking bay to the applicant free of consideration (I hope it can), the court cannot use s 33(1) to deprive the body corporate of its ownership. The applicant would then be confined to his contractual claim for damages against Humphrey. If, on the other hand, the body corporate is willing to transfer ownership of the parking bay to the applicant in order to give effect to what SDD, Humphrey and the applicant all intended, an order under s 33(1) is not needed nor competent, because the applicant would then be able to obtain registration in the usual way (My underlining)

and in which he made mention of the equities of the situation as a means to an appropriate solution.

The facts in McKersie are to all intents and purposes identical to those with which you are faced here.

I submit that the straightforward, common sense and decent solution to this issue is that to which Rogers AJ above, appeals.

*This is not the place and I am not the person equipped to made detailed submissions on issues having to do with the concept of "**levels of expectation**".*

I understand that it is something that was important into English Law from the European Union and subsequently into our Law in the matter Administrator, Transvaal v Traub in 1989 from whence it was been developed by the Courts. This has not been done without some degree of controversy, but from the Joe Slovo case 2010 3 SA 454 CC para 109, the following sentence is extracted "The issue can be appropriately accommodated in the justice and equity analysis".

This analysis is in fact not one that arises exclusively from the concept of substantive legitimate expectation and as much as anything is an application of ordinary common sense.

Nowhere is it submitted that you should order "the BC to sell the areas to the respondent" as the quote that Shrire himself extracts from my original submission makes clear.

There is a world of difference between being ordered to sell the areas to the respondent and giving the respondents the first opportunity to acquire by way of a purchase – i.e. to submit offers at their choosing, as you will appreciate.

Further it is not suggested that the respondents have a moral right to the parking areas. You are required to adjudicate upon whether they have a legal right and having done so, it is up to you to decide whether to offer further comment or advice to the parties concerned.

6

What was submitted is misunderstood.

You are asked to adjudicate on a crisp issue as to whether or not the respondents are owners. Should you decide that they are not owners consequential decisions follow, whether or not the respondents decide to appeal against your adjudication.

To make this clear to Mr Schrire, it is obvious that your decision on the crisp issue is not the end of the matter concerning the parking areas, rights to exclusive use and so on.

What is also obvious, is that a service such as that of which you are a part should in these circumstances make every effort to assist and guide the parties in dispute to an end that is both legal, equitable and generally acceptable in the light of the law and ordinary everyday life in which compromise constitutes a considerable part.

8

It is a fact that must be accepted that Polana Court does not offer all members of the Body Corporate/occupants off street parking.

It is also a fact that the members of the Body Corporate/occupants have over the course of many years accepted that the respondents have the use thereof on what may turn out to be incorrect assumptions, this dependent on your adjudication.

Further, it is the case that there is no basis for contending that the respondents had greater or better knowledge as to the legal underpinning, or lack thereof, to exclusive use rights as regards the parking area – i.e. there is no basis for the contention that the respondents acted ***mala fide****.*

It is also the case that over the years the respondents have paid a participation quota to the Body Corporate which took into account and incorporated their use of those parking areas.

Finally, there is the issue of the diagrams that were prepared back in 1993 and which were not registered for reasons now lost in time. The preparation of those diagrams can only have been done with one objective in mind.

SUMMARY

In summary then, the submission is that should you find against the respondents, on our understanding, you are not empowered or required to rule on what should happen next. The Sectional Titles Act provides the necessary next steps.

Where you might be of assistance to all stakeholders, is in the making of remarks intended to and designed to limit further controversy over the issue of the parking areas as between them.

This at the end of the day, is a decision for you to make.

12. I have considered the opinions in the file, and the submissions above, and note the submission that it is a decision for me to make. However, in my view, this application was launched prematurely.

13. As suggested in the opinion by Prof van der Merwe the body corporate should first convene a special general meeting to deal with this matter and, if the required majority is not obtained in the meeting, the body corporate should, in terms of section 9(6) of the Sectional Titles Schemes Management Act (8 of 2011) ("the STSMA"), apply to the ombud to ratify the special resolution.

14. I am of the view that I cannot anticipate the outcome of the meeting and make a ruling in advance. I can also not rule that the Respondents' 30% vote be set aside in advance.

15. Mr Bold has already referred to the judgment of Rogers AJ in **McKersie v SDD Developments (Western Cape) (Pty) Ltd and Others (21283/12)**

[2013] ZAWCHC 46; 2013 (5) SA 471 (WCC) (6 March 2013), but I suggest that the parties also consider the judgment of Loots AJ in **Biccari and Another v Body Corporate of Shoreham and Others (8961/2015) [2018] ZAWCHC 2 (24 January 2018)** insofar as it may be relevant.

16. As far as the relief sought to amend the standard rules to allow for the Body Corporate to impose fines, I refer to an article "***The Validity of a Penalty Rule and Enforceability of the Fine Implementation***" (18/08/2014) Paddocks Press Newsletter by Carryn Melissa Durham where it is written:

> *"In order for a* ***penalty rule*** *to be binding on the body corporate; enforceable and the fine recoverable must be entrenched in the governance documentation of the scheme. It therefore needs to be contained in either the* ***management or conduct rules.*** *The first step in ensuring that the provision will be enforceable is that it must be accepted by the body corporate. If is contained in a management rule it must be accepted by* ***unanimous resolution.*** *If is contained in a conduct rule it must be accepted by* ***special resolution*** *of the body corporate. Furthermore the rules must be filed in the Deeds Office to be binding on the body corporate. The second step is that the penalty rule must be both substantively and procedurally* ***reasonable and fair*** *in order to be enforceable.* ***Section 35(3)*** *of the Sectional Titles Act 95 of 1986 ("the Act") states that:*
>
> ***"Any management or conduct rule made by a developer or a body corporate shall be reasonable, and shall apply equally to all owners of units put to substantially the same purpose".***

In order for the penalty rule to be reasonable the imposition of the penalty in the form of a fine must have a legitimate purpose. The purpose of the penalty rule could ***generally*** *be to prevent nuisance.* ***Specifically*** *it could have the purpose of preventing transgressions of the rules. The fining provision could be even more specific in listing examples of transgressions that are finable such as noise nuisance; parking on common property; washing hanging on the balcony; being in arrears with levies; and damage to common property.*

The ***procedure*** *that must be followed in imposing the fine must also be reasonably, fairly and equally applied to all owners and residents put to substantially the same purpose. Although a fining provision might give the trustees a discretionary power to institute a fine, the rule cannot provide that the trustees can deviate from any process. The rules cannot contain a provision that excludes the owners'* ***common law rights*** *to natural justice and due process. Taking enforcement steps to deal with transgressions requires that the owner or occupier who is affected by the decision must be notified in writing and given an opportunity remedy the breach and to make representations at a trustee meeting.*

The procedure of imposing a fine *is the complainants should be required to lodge a written complaint or incident report to the trustees or the managing agent. The owner and tenant should then be given a written notice of the particulars of the complaint in writing and a reasonable opportunity to respond to the complaint. The transgressor must be given sufficient information and adequate detail on the nature of the conduct as*

well as the specific sections of the Act or rules that were allegedly breached in order to defend him or herself against the complaint. The ***offender must be warned*** *that if he or she persists with such conduct or contravention, a fine will be imposed. I suggest that the written notice should also include a reference to the rule allowing the fine to be imposed.*

If the owner or occupier persists with the conduct, the trustees should ***send a second notice*** *pointing out that the contravention is continuing or has been repeated and inviting the person to a trustee meeting at which the person can* ***explain or defend their actions.*** *The notice time of this meeting should be long enough for the person to prepare a defence. The rule must therefore include an opportunity and process for a hearing for the transgressor. The trustees must take into account any representations received or made by the owner. However, the opportunity for a hearing should be given before the fine is imposed. At the meeting the transgressor must be allowed to state their side of the matter, call witnesses in their support and cross examine any witnesses the executives might have to the transgression. The trustees should then discuss the evidence from both sides in the absence of the transgressor and witnesses; consider all the circumstances and make a final decision on whether or not to impose the fine.*

The rule should also set out ***the amount of the fine*** *for each example category of transgression. The trustees should, from time to time, at a trustees meeting determine the amount of the initial and subsequent fine. The members in the general meeting could then approve the amounts that*

are to be fined. The amount that is fined must also be set out in the warning notice and in the fine notice. The fine imposed must be a reasonable amount. This does not mean that the amount cannot be substantial. The amount must be proportionate to the purpose of the penalty.

It is ***important to note*** *that an immediate fine without following the due process set out above cannot be imposed for any category of contravention. The penalty rule and fining procedure must always be reasonably, fairly and equally applied to all owners and residents put to substantially the same purpose. There will always need to be a warning letter and a hearing in order for the penalty procedure to be properly implemented and the fine to be imposed.*

The fine imposed may not be added to the contribution which an owner is obliged to pay in terms of ***section 37(1)*** *of the Act and claimed by the trustees as part of the monthly installments payable by the owner.* ***Section 37(1)*** *states that the purpose of the contributions to the administrative fund is to pay for the scheme's expenses for maintenance of common property and rates and taxes. The duty to contribute to the fund in terms of* ***section 37(1)*** *cannot include the duty to make payment of fines. The fine must be paid by the owner or occupier separately."*

17. The Body Corporate will therefore need to go through proper process before fines can be imposed. While the above article was written before the STSMA came into operation, the corresponding sections of the STSMA and rules will apply.

18. I accordingly make the following order:

    a. the Application is dismissed;

    b. no order as to costs is made and each party will bear their own costs in this regard.

19. In terms of section 57 of the Community Schemes Ombud Service Act, 2011 (Act 9 of 2011) a person who is dissatisfied with an adjudicator's order is entitled to appeal to the High Court, but only on a question of law. The appeal must be lodged within 30 days after delivery of the order.

Signed at Cape Town on the 13th day of February 2018.

ADV GPC DE KOCK
CSOS ADJUDICATOR

CSOS
ADJUDICATION ORDER
DATE: 13/2/2018
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