



**ADJUDICATION ORDER IN TERMS OF SECTION 53 AND 54
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Case Number: CSOS 350/WC/17

IN THE MATTER BETWEEN

**WIANELLE BRIERS AND DAVID MAWBY
(Applicants)**

and

**WHITE SANDS HOME OWNERS ASSOCIATION: DR SUNNY STOUT-
ROSTRON
(Respondents)**

ADJUDICATION ORDER

PARTIES

1. The applicants Ms Wianelle Briers, owner of unit number 23 White Sands Gilquin Crescent Hout Bay and representative of Mr David Mawby, owner of unit 22 White Sands Hout Bay Cape Town.
2. The respondent (Dr Sunny Stout-Rostron) is the chairperson and representative of White Sands Home Owners Association ("WSHOA") situated in Gilquin Crescent Hout Bay Cape Town.
3. White Sands is a "community scheme" as contemplated in the CSOS Act of 2011. The definition of "community scheme" means any scheme or

arrangement in terms of which there is shared use of and responsibility for parts of land and buildings.

INTRODUCTION

4. This is an application for dispute resolution in terms of Section 38 of the Community Schemes Ombud Services Act No.9 of 2011. The application was made in the prescribed form and lodged with the Western Cape Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.
5. A separate claim was also lodged with CSOS Offices' (under case no 397/WC/17) containing similar issues. The two matters will therefore be combined for practical purposes and be dealt with simultaneously.
6. Mrs Wianelle Briers' applied for condonation (in claim CSOS 350/WC/17) in terms of Section 41(2) of the CSOS Act 9 of 2011 for the late filing of her claim, which was granted by the Provincial Ombud on 10 October 2017.
7. This adjudication hearing commenced on 14 November 2017 where after proceedings was postponed to 29 November 2017 for continuation. An application for legal representation was also made by Respondent in terms of Section 52 of the CSOS Act 9 of 2011, which was refused. This application is before me as a result of a referral sent by the Western Cape Provincial Ombud in terms of section 48 of the Act, which 'Notice of Referral' was communicated to both parties.

APPLICABLE PROVISIONS OF THE ACT

8. The application was submitted in terms of section 38 of the CSOS Act No,9 of 2011 which provides that –

"Any person may make an application if such person is a party to or affected materially by a dispute".

9. Section 39 provides that –

"An application made in terms of section 38 must include one or more of the following orders – in this instance:

- (3) *In respect of scheme governance issues – (d) an order declaring that the scheme governance provision, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable, and requiring the association to approve and record a new scheme governance provision –*

(i) to remove the provision;

(iii) to amend the provision or

(iv) to substitute a new provision.

- (7) *In respect of general and other issues –*

(b) any other order proposed by the chief ombud."

10. Section 47 provides that –

"on acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the

application, the ombud must refer the matter to conciliation’.

11. Section 48 provides that –

“If conciliation contemplated in section 47 fails, the ombud must refer the application together with any submissions and responses thereto to an adjudicator”.

SUMMARY OF DISPUTE

12. At the 2016 Annual General Meeting of WSHOA (held on 14 December 2016) a new Conduct Rule (clause 5.5.4) was introduced and adopted by majority vote restricting short-term letting in the complex to a minimum of three months. Applicants herein contest that this restriction unfairly prejudice them and infringes their constitutional rights and that WSHOA’s Conduct Rules contradict the Constitution of WSHOA in this regard.

APPLICANT’S VERSION

13. Applicant (Mrs W Briers) avers that she bought a townhouse (freehold property) in White Sands Complex in order to generate income from the property with permission from the previous chairperson.
14. WSHOA Constitution further states (as per clause 4.1.8); “to let any accommodation on the common property by means of a lease of not longer than 12 (twelve) months”.
15. A new Conduct Rule (5.5.4) was introduced and adopted at the Annual General Meeting on 14 December 2016 stating that; “no leases for rentals

being shorter than a three-month period, and that no B&B or Airbnb type operations be allowed at White Sands.”

16. Applicant apposed the motion because her right to earn an income would be compromised thereby.
17. Applicant contests that her flat is not suitable for long term tenants as it only has a kitchenette, no oven, no space for a washing machine, only microwave and a two plate hob. Therefore ideal for short term holiday makers. All her tenants further sign a lease agreement as required by WSHOA Constitution together with the Rules.
18. Applicant also contests that the Deed of Sale as registered states that; “This Erf shall be used only for such purposes as are permitted by the Town Planning Scheme”. Therefore the Deed of Sale and Constitution only prohibit her from leasing her property for longer than a year, no minimum period is provided for.
19. Applicant is of the opinion that respondent’s letter to the homeowners prior to the AGM as well as her speech at the 2016 AGM against Airbnb’s unduly influenced the members to vote in favour of the adoption of the new Rule 5.5.4 restriction. Applicant acknowledges that she however had an opportunity to raise her concerns in this regard at the AGM. She also addressed her concerns regarding the unfair and unprofessional manner the matter was handled via correspondence to Mr Collin Fisher (Operations Manager) the following day (15 December 2016).
20. Applicant(s) also contest that they do not ‘run a business from home’ as renting out of property does not constitute running a business.
21. No complaints have been received from other owners in the complex regarding tenants of Applicant.

22. Heuer & Associates (on instruction from Applicant) addresses a letter to Mr Fisher after Applicant received some complaint letters from Mr Fisher on behalf of the Trustees. The letter dated 7 April 2017 *inter alia* states the following;

22.1 "Save for the limitation on the powers of the WSHOA, as recorded in par 4.1.8 of the Constitution nor the Conduct Rules (prior to the purported amendment thereof) limit or otherwise restrict an Owners right to let their Unit.

The WSHOA Constitution expressly provides:-

At par 2.2.2.1 thereof – This Constitution may be substituted, added to, amended or repealed from time to time by a special resolution passed by ninty percent (minimum 27) of all the Owners of the WSHOA....

At par 2,3 thereof – A Conduct Rule may not be irreconcilable with this Constitution or any law.

From the foregoing it is immediately apparent that any amendments to the Conduct Rules in conflict with the express terms and conditions of the Constitution cannot be relied upon by the WSHOA and/or the Trustees, unless and until the Constitution itself is amended to permit the amendment sought to be introduced.

In the premises clients (Applicants) deny, for the reasons stated, that:-

- The resolution permitting the introduction of Rule 5.5.4 into the Conduct Rules has any force or effect and is binding upon them or any other member of the WSHOA;
- It is competent for WSHOA to place reliance thereon and/or demand compliance with the terms thereof, and/or
- It is competent for the Trustees to invoke the penalty provisions recorded at par 4.1.10 of the Constitution accordingly."

23. Heuer & Associates (on behalf of Applicants) have subsequently in their response of 15 May 2017 to Cox/Yeats Attorneys (on behalf of Respondents) conceded that: "Clients do not challenge the procedural or substantive validity of the amendments to the Conduct Rules, in terms of the December 2016 AGM." Also further on when it is stated that: "Client does not allege and/or argue that the introduction of Rule 5.5.4 was invalid."

APPLICANT'S PRAYERS

24. The following relief is sought by applicants in terms of the "Application For Dispute Resolution Form" submitted;

21.1 CSOS to order WSHOA to revoke the motion that was passed at the 2016 AGM on grounds that it is in contradiction with WSHOA Constitution.

21.2 CSOS to order WSHOA to call a special general meeting to vote on changing the Constitution (rule 2.2.1.1).

RESPONDENT'S VERSION

25. Dr Sunny Stout-Rostron (on behalf of WSHOA) contests that the majority of members 22 voted in favour and 7 against the Rule (over the required 66% support to amend the Conduct Rules) - introducing a new Conduct Rule stipulating a minimum of three months rental period. Despite this Respondents (of Units 23 and 21 respectively) continued to disobey this Rule.

26. Mrs Van Heerden (owner of Unit 9 and one of the seven members who voted against the new Rule 5.5.4) subsequently also started advertising three bedrooms for a minimum stay of 14 days. Mrs Van Heerden has been

requested by the managing agent (Steer & Co) to change the minimum stay to a period of three months.

27. Respondent fears that White Sands may change from a quiet and secure complex into a holiday resort. The three mentioned Units (9, 21 and 23) alone offer a total of 20 beds for holiday-makers in the complex of 30 Units in total and other owners may follow soon. This is the reason why the majority of members voted in favour of the three month minimum rental period.
28. Respondents' second fear is that the influx of holiday-makers may have a serious impact on security due to the fact that the automated gate is controlled via remote control devices in possession of the persons entering or leaving (with no security guard).
29. Following the 2016 AGM Mrs Briers was twice requested to desist from contravening new Rule 5.5.4. Letter from Attorneys Heuer & Associates then followed (refer to above).
30. Respondents then sought legal advice from Cox Yeats Attorneys in response to Heuer & Associates correspondence.
31. Cox Yeats' is of the opinion that;
 - 31.1 "Moreover, the powers of WSHOA are not limited to the common property as you argue. Closer scrutiny of par 3.1 of the Constitution reveals that WSHOA is charged with performing the functions 'enshrined in this Constitution, and entrusted to it by the Conduct Rules, including the functions...."
 - 31.2 "In addition, in terms of par 6.12.1.3 of the Constitution the Trustees are empowered to do all things reasonably necessary for the enforcement of the Constitution and the Conduct Rules and this is mirrored in terms of Conduct Rule 12.2 in terms of which the Trustees

are empowered to ensure that the Constitution and Conduct Rules are duly adhered to;

31.3 Your attempt to argue that the powers of WSHOA (and by extension its trustees) are limited to the common property only and that the Constitution must first be amended to permit the amendment sought is with respect not good in law;

31.4 The WSHOA accordingly strongly disputes your allegation that the introduction of Rule 5.5.4 is not valid.”

32. The Trustees also obtained counsel opinion (Sarah Pudifin-Jones), who confirmed that there is nothing irreconcilable between the provisions of the Constitution and the Conduct Rules and the argument that there is “irreconcilability” will likely not succeed in court.

33. Respondent(s) contests that WSHOA has therefore done its best to be fair to all and to achieve a reasonable compromise herein.

34. Respondent also contended that the WSHOA is a member of the Association of Residential Communities (“ARC”), a body established to proactively support the volunteers/members of HOA’s and Bodies Corporate, and their management teams in the achievement of its vision which is to establish, maintain and enhance the value of the properties as well as the lifestyles of their residents and that at least 15 (fifteen) of the HOA’s associated with ARC had indicated to Respondent that their rules don’t allow rentals for less than a minimum of 30 (thirty) days.

EVALUATION OF EVIDENCE SUBMITTED

35. Applicants have conceded (via Heuer) in his correspondence of 16 May 2017 that his clients “do not challenge the procedural or substantive validity of

the amendments to the Conduct Rules in terms of the December 2016....”

Therefore the validity of the Rule is not in dispute here.

36. The HOA is entitled to impose rules relevant to the governance and administration of the property and the owners / members due to the contractual nature of their relationship.
37. Olsen J held in *Abraham v The Mount Edgecombe Country Club Estate Management Association Two (RF) NPC* [2014] ZAJ
38. KZDHC 36 that the Conduct Rules should be interpreted as a framework to safeguard and promote “appropriate, sensible and fair interaction” amongst residents, and a court should recognise that *“the have been agreed upon by the contracting parties to maintain a structure within which residents can feel secure as regards to the environment into which they have bought and as regards the conduct reasonably to be expected of their neighbours....”*
39. I am in agreement with the conclusions made by Sarah Pudfin-Jones regarding the question of “irreconcilability” where she stated that; “The Constitution does not expressly or impliedly permit short term lets – on the contrary, it specifically records that the ‘day to day activities, use and enjoyment of the Units’ will be controlled in terms of the Conduct Rules.”
40. The amendment of the Conduct Rules (at the December 2016 AGM) was passed by the members (not the Trustees) and the relevant threshold of 66% was exceeded (when 22 members voted in favour and 7 against). Having perused the minutes of this AGM (although not signed) it seems that there was no undue influence and such claim is not substantiated.
41. The Constitution specifically entrusts WSHOA with performing the functions enshrined in the Constitution “and entrusted to it by the Conduct Rules”, including but not limited to certain specified functions, and clause 6.12.1.3

of the Constitution empower the Trustees to do all things reasonably necessary for the enforcement of the Constitution and the Conduct Rules.

42. It is the adjudicator's task to weigh the probative value of all evidence adduced. In dealing with the question whether the amendment and adoption of new Rule 5.5.4 was unreasonable, cognisance has to be taken of the matter of Willow Waters Homeowners Association (PTY) Ltd v Koka (768/13) [2014] ZASCA 220 (12 December 2014), where appellant, the Willow Water HOA was duly incorporated in terms of section 21 of the Companies Act 61 of 1973 in respect of Willow Waters Estate. Its members comprised registered owners of property in the estate. The court held herein that all owners automatically assume that status and are bound by the association's Articles of Association and Rules until such ownership ceases.
43. In Wilds Home Owners Association & Others v Van Eeden & Others, Case No. 53643/09 Murphy J ruled that the amending of rules should be guarded against, i.e. *"...a court should be loath to re-write the bargain struck between the members with each other, especially where the impetus to do so is at the instance of a minority who think that the terms of the agreement are unfair or no longer in their interests."*
44. I am therefore of the opinion, taking all evidence and submissions into consideration, that the newly adopted Conduct Rule 5.5.4 seems reasonable in the circumstances and must be equally applied to all owners.

ADJUDICATION ORDER


30. In the circumstances, the following order is made in terms of Section 54(1)(a) and (4) of the Community Schemes Ombud Service Act No.9 of 2011, which must be complied with within 60 days of the parties having been given notice of this order in writing;
Applicant's relief sought in this instance is refused.

No order is made as to costs herein.

RIGHT TO APPEAL

Section 57 of the CSOS Act of 2011, also determines that;

- (1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.
- (2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.
- (3) A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.


ADV DRIES DUTOIT
ADJUDICATOR
06 December 2017


ADJUDICATION ORDER
DATE: 6/12/2017
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