

FORUM SHOPPING: WHERE MUST SECTIONAL TITLE DISPUTES BE HEARD?

Wingate Body Corporate v Pamba and Another (33185/2021) [2022] ZAGPPHC 46 (21 January 2022)

The Community Schemes Ombud Service provides for a dispute resolution mechanism in community schemes. In establishing this service, the legislature had intended that it becomes the primary forum for the adjudication and resolution of disputes that fall within the wide ambit of the Ombud's jurisdiction. When there is a dispute between the management and a resident, the choice to go to court "just because you can" rather than to the Ombud, might cost you. The judgment below is a case in point.

The Judgment can be viewed [here](#).

FACTS

Pamba and Kopele reside in the Wingate sectional title scheme. Next to their residential unit is common property which they use as a carport.

The body corporate sought access to this area for plumbing service providers to replace aged water pipes running underneath the carport. Apparently there were incidents of recurrent water pipe bursts causing high water bills. In addition, damage caused by the water leakages has resulted in a threatened repudiation of the complex's insurance claims arising from the leakages. According to the chairperson of the trustees of the body corporate, Kotze, the conduct of Pamba and Kopele was obstructive to the operations and to the prevention of further leaks. (It was alleged that they were un-cooperative in not allowing the plumbers access to the area, and that they were rude and intimidating to the plumbers and trustees.)

Kotze applied to court, on behalf of the body corporate, for an order prohibiting Pamba and Kopele from interfering with the business operations and contractual relationship between the body corporate and the plumbers that it had contracted for the repairs.

Pamba and Kopele took the point that the relief sought by the body corporate fell within the purview and ambit of orders the Community Schemes Ombud Services ('CSOS'), whose adjudicators are statutorily empowered to make decisions in disputes concerning the administration of a sectional title development scheme. They contended that the body corporate ought to have approached the CSOS as the primary forum and that the failure to do so rendered its approach to the court premature and was accordingly fatal to the proceedings.

HELD

- The body corporate was established as provided for in the Sectional Title Schemes Management Act 8 of 2011 ('the STSMA'). Section 3(1)(o) of the STSMA makes it mandatory for a body corporate to be registered with the CSOS. The CSOS, in turn, prescribes the rules, regulations and procedures for the regulation, management, administration, use and enjoyment of sections and the common property. The body corporate was consequently mandatorily subject to the rules, regulations and procedures prescribed in the Community Schemes Ombud Services Act 9 of 2011 ('the CSOS Act') and the STSMA.

Purpose, function and authority of the CSOS

- In terms of section 3 of the CSOS Act, the purpose and function of the office of the Ombud include "providing for a dispute resolution mechanism in community schemes and to regulate, monitor and control the quality of all sectional titles scheme governance documentation". Section 38(1) regulates applications made in respect

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of disputes regarding the administration of a community scheme. More relevant for purposes of the present matter are the provisions of section 39(2)(a) of the STSMA which empowers the CSOS to grant orders in respect of behavioural issues, including an order that particular behaviour constitutes a nuisance and requires the relevant person to act or refrain from acting in a specified manner.

- Importantly, the CSOS was established, inter alia, for the purpose of providing an expeditious and informal cost effective mechanism for the resolution of disputes, including on urgency.

Does the body corporate have the liberty to choose a forum for the purpose of obtaining relief?

- Many cases have pronounced on this before. While it is trite that the High Court has concurrent jurisdiction to hear a matter properly brought before it, the courts have adopted the view that not all matters brought before them necessarily ought to be entertained by them. It is considered that by establishing the CSOS, whose personnel is required to consist of suitably qualified adjudicators, the legislature had intended that the CSOS be the primary forum for the adjudication and resolution of disputes in matters such as the present. A court is accordingly entitled to decline to entertain such matters as a forum of first instance, but may in fact be obliged to do so, save in exceptional circumstances.

Outcome

- It is trite that an applicant seeking an order of a final nature must show that: (a) it has a clear right; (b) that the right is under threat of infringement or that the applicant has a reasonable apprehension of irreparable harm being inflicted to its right and, (c) that the applicant has no other alternative, but to approach the court for the relief sought.
- It is apparent in the present matter that the body corporate did not meet, at least, the last mentioned requirement as the CSOS is the primary forum to adjudicate on all the issues concerned in this case, including on urgent basis. The nature of the disputes in this matter fell squarely within the ambit of adjudication by the CSOS. The body corporate, in this case, had attempted to circumvent the mandatory adjudication process of the CSOS.

CONCLUSION

The application was dismissed.