

FORUM SHOPPING IN SECTIONAL TITLE DISPUTES: COURT OR CSOS?

Heathrow Property Holdings No 33 CC and Others v Manhattan Place Body Corporate and Others (7235/2017) [2021] ZAWCHC 109 (1 June 2021)

The judgment deals with disgruntled sectional title owners who sought to resolve a dispute regarding a management rule of the scheme, in court. The court emphasised that there are significant differences between its jurisdiction and powers and those of the Community Schemes Ombud. The Court explained that not only is it improper to try to circumvent the Ombud's jurisdiction (which will land you with an adverse cost order), the Ombud is specifically empowered to give practical relief to disputes in community schemes, as opposed to a court whose powers, in this context, are generally to address the legal questions and will refer application thereof back to the community members.

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

FACTS

Heathrow Property Holdings and 3 others (the Complainants) were individual owners of certain loft apartments in Manhattan Place, a 10 storey mixed-use sectional title scheme in the center of Cape Town and on the corner of Bree and Buitengracht streets.

The scheme's sectional title plan provides for a hotel which is operated from the 2nd floor (which houses the reception, bar and restaurant), the 5th floor (conference centre, restaurant and administrative offices) and the 6th to 8th floors (hotel suites), on the 3rd and 4th floors (office and commercial units) and 37 residential units in the form of loft apartments (on the 9th and 10th floors). The hotel is accessed via an entrance on Bree Street and the owners of the commercial and loft units access their properties via an entrance in Buitengracht Street. Ten of the loft units are in a rental pool which is run by the hotel.

Thus, in the main, the scheme envisaged that residential loft units would predominantly not be subjected to short-term rental use by outside parties, and would primarily be occupied and used by their purchasers or their long-term tenants.

In December 2003 the body corporate adopted a conduct rule, rule 12, as part of its management and conduct rules, which provides that an owner of a section who leases it out or in any other manner surrenders possession of it to a 3rd party is required to provide particulars thereof to the trustees or managing agents. In addition, the rule provides that a section may not be leased, nor may possession of it otherwise be surrendered, for a period of less than 6 months, without the prior written consent of the trustees, which consent shall not be unreasonably withheld. Thus, the introduction of the rule sought to acknowledge the right which owners had to let their units, but sought to regulate the terms thereof in respect of short-term rentals for periods of less than 6 months. According to the body corporate of the scheme, the rule was adopted with a view to addressing security issues pursuant to an increase in short-term rentals of residential units which began to occur outside of the rental pool agreement, and associated problems which were experienced with such rentals.

The Complainants' units were not included in the rental pool arrangement. They were purchased in terms of deeds of sale which expressly acknowledged that whilst certain residential units would be sold subject to the condition that the purchasers thereof would offer them for use to the hotel in terms of a rental pool agreement that they would be required to enter into, the remaining sections in the residential, office and commercial areas were to be 'exclusively' used by the purchasers thereof as residential apartments, offices or commercial enterprises. Owners of these units were however entitled to enter into individual rentals with the hotel on an ad hoc basis. Notwithstanding this, since their acquisition these units have been let on a short-term basis i.e. for less than 6 months at a time, and often for a

few nights only.

The Complainants' brought an application to Court arguing that the provisions of rule 12 and its implementation to be unfair and an unjustified fetter of their rights of use of their units. They complained that they were being discriminated against unfairly vis-à-vis the owners of other residential units, which fall within the hotel rental pool agreement, and who are thus not subject to it. The complainants averred in their papers that ever since November 2017 (some 3 years before the application was launched), the body corporate had been implementing the rule in a manner which amounts to a blanket prohibition on short-term letting in respect of residential units which do not fall within the rental pool. They also pointed out that, in February 2020, the managing agents addressed a letter to the owners of units in the scheme in which they indicated that although applications for short-term lets for a period of less than 6 months would continue to be considered by the trustees, as from 25 February 2020 applications for daily lets would not be considered, as these had allegedly resulted in a breach of access control measures with an increased security risk and an increased administrative burden and complaints. The managing agents accordingly directed that applications for short-term lets were to be submitted to the trustees at least 30 days in advance. In addition, a new biometric access security system was implemented.

HELD

- The application constituted an egregious abuse of the process of the Court.
- The application was not urgent and in any event should have been dealt with in terms of the dispute resolution procedures which have been established by the Community Schemes Ombud Service Act (the CSOS Act), and not by a court.

Abuse of process: lack of urgency and standing

- The Court noted that there was a failure on the side of the Complainants to show urgency. The provisions complained of had been in effect for quite a while already and there was no explanation why steps were not commenced with earlier. Thus no basis existed for the Complainants to bypass the ordinary rules and processes of the Court and to force the application before the Court as a matter of urgency.

Bypassing the dispute resolution mechanisms in the CSOS Act

- In addition, even if one were to hold that the Complainants were entitled to approach the Court for relief as parties whose rights could potentially be affected by the trustees' conduct in relation to rule 12, and whose rights were indeed affected by the installation of the new biometric security access control system, the further issue is that they effectively sought to bypass the dispute resolution mechanisms which were established by the CSOS Act.
- This is because the issues which the Complainants sought to have determined by this Court fell squarely within the express jurisdiction of the CSOS Act. An adjudicator has wide powers in terms of section 39(3)(c) and (d) of the Act to declare a 'governance provision' which regulates a scheme (i.e. a rule such as rule 12) to be invalid or unreasonable, and to issue an order directing the scheme to substitute it with an appropriate, alternative provision.
- The definition of what constitutes a 'governance provision' includes not only a sectional title scheme's constitution and its rules and regulations, but any 'terms, conditions or other provisions' which serve to control the 'administration or occupation', not only of a scheme's common areas but its 'private' areas as well. The additional limitations which were placed on the short-term letting of residential units by the trustees in their letter to the owners in February 2020, would arguably also be subject to adjudication in terms of the Act.

- Similarly, an adjudicator has the power in terms of section 39 (4)(c), (d) and (e) of the CSOS Act to issue an order declaring that any resolution which was passed by the trustees (such as that which was challenged in this matter in relation to the adoption of a new security access control system as well as any resolution which was passed in relation to the implementation and application of rule 12) is void or invalid, and that it unreasonably interferes with the rights of individual owners within a scheme.
- The Complainants conceded that the relief which they sought in relation to the biometric security access control system is relief which could be obtained from an adjudicator in terms of these provisions of the CSOS Act. They contended however that the general declaratory relief which is sought in relation to the interpretation and application of rule 12 by the body corporate did not fall within the statutory powers which are afforded to an adjudicator in terms of section 39, and only this Court is empowered to grant it. And, in the alternative, they contended that inasmuch as the declaratory relief which could be granted in terms of section 39(3) and (4) could be obtained either from a CSOS adjudicator or this Court in the exercise of its concurrent jurisdiction, they were at liberty either to approach the Ombud or to approach the Court for it, and the Court could not refuse to entertain the application by declining to exercise its jurisdiction.
- The arguments had to fail. The object of the CSOS Act is to provide a mechanism for the expeditious, informal and cost-effective resolution of disputes between owners of units in a sectional title scheme and its administrators via an Ombud, who has been given wide inquisitorial powers whereby such disputes can be resolved as informally and cheaply as possible by means of qualified conciliators and adjudicators, without the need for legal representation, save in certain limited circumstances.
- The jurisdiction of the Court is in substantial respects not concurrent with that which is afforded to adjudicators in terms of the CSOS Act and, in many instances, an adjudicator has powers in terms of the CSOS Act which this Court does not have, or which exceed those which it has.
- Thus, in terms of section 39(1)-(7) of the CSOS Act, an adjudicator has a number of express statutory powers in respect of financial, 'behavioural', governance, management, regulatory and other issues pertaining to a sectional title scheme, which a court does not. In this regard and by way of example, in respect of financial issues, an adjudicator has the power to make orders: (i) requiring a scheme to take out insurance or to increase the amount thereof; or (ii) to take action under an insurance policy to recover an amount; (iii) or to declare that a contribution which was levied on owners is 'unreasonable' and that it be adjusted to a 'reasonable' amount, and may even grant an order; (iv) requiring a tenant to pay over the rental which is payable under a lease agreement to the body corporate and not to his landlord, until an amount which is due by the landlord to the body corporate has been settled.
- Similarly, in regard to governance issues, an adjudicator has the power to make orders not only declaring a governance provision to be invalid or 'unreasonable', but directing a scheme to amend or substitute it with another provision. And in regard to a resolution which has been passed, an adjudicator has the power not only to declare that it is void for want of compliance with the formal requirements necessary, but may also do so on the grounds that it 'unreasonably interferes' with the rights of an owner or occupier, or a group of owners or occupiers, and may even make an order declaring that because a resolution was not passed as a result of 'unreasonable' opposition to it, it should be given effect to as if it had been passed, either in its original proposed form, or as varied by the adjudicator.
- An adjudicator not only has the power to direct a body corporate to have certain repairs and maintenance carried out, but may make an order requiring it to carry out certain specified works to or on the common areas for the 'use, convenience or safety' of owners or occupiers, or may make an order declaring that a body corporate's decision to reject certain proposed improvements or alterations to common areas was 'unreasonable', and may direct it to agree thereto. In a similar vein, an adjudicator may make an order declaring that a body corporate has 'unreasonably' refused to grant exclusive use rights to an owner or

occupier over a certain part of a common area and may direct it to do so, on terms that may require periodic payments to be made to the body corporate.

- Finally, the CSOS Act provides that any order which an adjudicator makes may contain such ancillary provisions as the adjudicator considers to be necessary or appropriate, and may provide that it has the effect of 'any type of resolution or decision' (sic) provided for in the scheme governance documentation.
- As is thus apparent, the statutory powers which an adjudicator has in terms of the CSOS Act are extremely wide and go beyond the powers which a court has in relation to neighbourly disputes and associations in terms of common law, not only insofar as their reach is concerned, but also in relation to their ambit. In numerous instances an adjudicator has an equity i.e. fairness-based power, not only to decide what is 'reasonable' in relation to the conduct of, or the decisions which have been taken by an association such as a body corporate of a sectional title scheme, but also to direct what should 'reasonably' be done in place thereof.
- A High Court does not have such powers. It is confined to reviewing the legality or rationality of the conduct of a decision-making body and not the fairness thereof, and when doing so it generally does not have the power to substitute its own decision as to what would be fair or reasonable, in place of the body. The best it can do ordinarily, unless it is clear that no other decision can be made on the issue and the relief which is sought must inevitably follow as a matter of law or logic, is to set aside the decision or conduct concerned and refer the matter back to the body for decision anew. As far as the High Court's appellate jurisdiction in respect of the decisions of adjudicators is concerned, in terms of section 57(1) of the CSOS Act this is limited to questions of law only.
- The difference between the powers which an adjudicator has vis-à-vis those which a court has is starkly illustrated by the relief which the Complainants sought in the notice of motion, whereby they asked for an order declaring that the trustees' application of rule 12 as 'prejudicial' and 'unfair' and that the body corporate should be ordered to consider all applications for short-term rentals within 5 business days from receipt thereof. Whilst these are orders which an adjudicator can make in terms of the CSOS Act, when counsel for the Complainants was asked on what basis the Court was entitled to make an Order based on fairness and on what basis the Court was empowered to stipulate a period of time for the consideration of applications for short-term lets by the body corporate of the Manhattan Place sectional title scheme, thereby effectively rewriting one of its conduct rules, he was constrained to concede that it did not have such powers, either statutorily or at common law. That is why adjudicators are best placed to decide on the reasonableness or otherwise of conduct rules and resolutions, and to propose the necessary remedial measures in respect of those which they take issue with.
- In the result, where disputes pertaining to community schemes such as sectional title schemes fall within the ambit and purview of the CSOS Act, they are in the first instance to be referred to the Ombud for resolution in accordance with the conciliative and adjudicatory processes established by the CSOS Act, and a court is not only 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. What will constitute exceptional circumstances entitling a litigant to approach the High Court directly will have to be determined on a case-by-case basis.

CONCLUSION

The application failed.