BODY CORPORATE HAS THE RIGHT TO INSPECT A UNIT!

The Body Corporate of the Sorronto Sectional Title Scheme, Parow v Koordom and Another (5439/2021) [2022] ZAWCHC 99 (26 May 2022)

This matter deals with a body corporate's successful action to hold an owner responsible for certain costs it had to expend to gain access to a unit to perform a leak inspection. The owner refused, up until the steps of the court, as he argued that he had on a previous occasion granted such access. However, with a recurring leak in a neighbouring unit, the body corporate needed to investigate the matter further so as to maintain the scheme, as prescribed by law. The recalcitrant behaviour had come back to bite, costing the owner.

The Judgment can be viewed here.

FACTS

During October 2020, damp marks appeared on the ceiling of Unit 100 in the Sorronto sectional title scheme. The adjacent owner of unit 101, Mr Booysen, was then asked to give access to his unit for purposes of an inspection. Consent was granted belatedly but the inspection showed no leaks emanating from his unit.

However, in January 2021, the owner of unit 100 informed the body corporate that the damp problem had not been resolved. A renewed effort commenced to gain access to unit 101 for another inspection, but with little success. Various requests to gain access through the managing agents, loss adjusters, leak detective agents and the attorneys for the body corporate, fell on deaf ears.

As the matter could not be resolved due to the recalcitrant conduct of Mr Booysen, the body corporate resorted to bringing an urgent application to court for access to the unit to inspect it ('the initial action'). In response, Mr Booysen maintained that a leak detection inspection was conducted on his unit in late November 2020, and that no leaks were found. There was therefore, in his opinion, no reason why another inspection should be conducted.

A day before the matter was set down for hearing, Mr Booysen had a turn of heart and, accepting that the body corporate was entitled to conduct reasonable inspections from time to time in order to properly manage the common property, he permitted access to his unit. A second leak detection test was conducted.

This matter deals with the body corporate's subsequent application for an order holding Mr Booysen responsible for the costs of the initial application. Mr Booysen defended the matter and attacked the validity of the resolutions passed by the trustees of the body corporate to institute the initial action. He denied that the body corporate had the standing (*locus standi*) to bring the present application due to the invalidity of the resolutions.

On the facts, it was agreed that in respect of the initial action, two resolutions were signed by the trustees of the body corporate: The first one dated 19 March 2021, was signed by two trustees and the second one dated 20 April 2021, signed by all five trustees.

HELD

Booysen argued that the first resolution was null and void as it was signed on a round robin basis and not signed by the majority of the trustees

- The argument was flawed in as far as it sought to hold that the first resolution was defective because it did not

record the date, place and time, or that it was signed on a round robin basis.

- It is common practice, with the onslaught and the lagging effects of Covid19, that trustees, shareholders, governing bodies and directors meet virtually and sign documents via round robin. To suggest that because same is not catered for in the Management Rules of the body corporate, any resolution would be fatally defective, is unplausible and unreasonable.

- Regulation (5) of the Management Rules specifically caters for a trustee meeting by "any other method" which in would encompass and encapsulate the extension of the method of signing resolutions. It would be absurd to consider or apply anything to the contrary.

- Further, the first resolution was clear in its content as to what the intended purpose thereof was. There can be no doubt thereon, as the urgent application was brought, and ensuing litigation commenced through the duly appointed managing agent of the body corporate.

Second resolution did not have the word "special" in the heading

- Regulation 10(1)(b) of the statutory Management Rules states:

  "No document signed on behalf of the body corporate is valid and binding unless it is signed on the authority of a trustee resolution by –

  (a) two trustees or the managing agent, in the case of a clearance certificate... ; and

  (b) two trustees or one trustee and the managing agent in the case of any other document."

- Notwithstanding the above, a "trustee resolution" in practise can take the format of either being a general or special resolution. Because this is not specifically stated for in the Management Rules, a resolution is a resolution if signed in the manner dictated above. The content would surely not be considered null and void simply because the word "special" was recorded thereon. The resolution was special in nature and specific in intent.

- Thus the second resolution having been signed by all five trustees was simply an extension and underscored the content and purpose of the first resolution. To infer that the second resolution was "installed" for the purposes of remedying a purported shortcoming of the first resolution, is incorrect. The signing of the second resolution did not provide the body corporate with any additional material or substantial advantage.

- The trustees complied with rule 11(1)(a) of the Management Rules in order to give effect to or ratify the first resolution which should be seen as commendable corporate governance compliance by a board of trustees. It must be remembered that trustees typically do not meet daily or weekly but normally once a quarter. It is therefore, not uncommon for them to manage the affairs of the body corporate as they deem fit. *Ad hoc* and informal meetings are often held in order to deal with incidents without having to call or convene a formal meeting of the trustees. To thus infer and consider the actions of the body corporate's trustees to have held a trustees meeting in terms of section 11(1) (a) of the Management Rules, as being untoward, or for sinister reasons and/or ulterior motives, is not sustainable and must be rejected.

Was it ratification of the first resolution?

- Ratification is "the action of signing or giving formal consent to a treaty, contract or agreement, making it officially valid."

- This is precisely what all the trustees implemented by signing the second resolution, thereby approving and confirming the acceptance of the cause and intent of the first resolution.

Conclusion

- What was clear in this matter was that throughout the entire process all the trustees were aware of and informed of what was transpiring. Nothing new was raised in the second resolution, save for the mentioning of the name of the owner of unit 101.

- Trustees that serve on body corporates are simply representatives (duly elected by the owners) usually not qualified in the managing and functioning of their respective body corporates. They are lay people that rely upon qualified and knowledgeable managing agents. To argue, as Booysen did, that certain words being "is" and "to" in the second resolution must be understood and attributed prospective in interpretation, is with respect, splitting hairs and a matter of semantics. The same argument applies to the contention that the word "ratification" is not recorded in the second resolution. The intent and purpose of the contents of the second resolution did not change anything and was in an affirmation of that which was stated in the first resolution.

- The managing agent ensured that all the trustees were "kept in the loop" as to what had transpired over several months with little cooperation from Booysen and was then authorised to take such legal action as per the wording on both resolutions.

CONCLUSION

The application for a cost order against Mr Booysen was therefore successful.

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