REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 30507/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

01/02/2019
DATE SIGNATURE

In the matter between:

BODY CORPORATE LE CHENE D'OR SS 114/2003 Applicant

and

SOHAIL CARIM First Respondent

SHABLAM HAROON CARIM Second Respondent

JUDGMENT

MASHILE, J:

INTRODUCTION

[1] The Applicant, as a body corporate contemplated in the Sectional Titles Schemes Management Act 8 of 2011 ("the Management Act") seeks

interdictory relief against the Respondents who are registered co-owners of the unit that they be ordered to:

1.1 Reinstate and restore the exterior common property appearance, façade and features of their section to its original condition prior to alterations having been affected by them;

1.2 Cease and bar the Respondents from effecting building alterations and extensions which has the effect of increasing the living area or varying the participation quota of the section in the scheme, without the Respondents having obtained the prior approval of the members of the Applicant by special resolution in terms of the provisions of section 5 of the Management Act and section 24 of the Sectional Titles Act 95 of 1986 ("Sectional Titles Act");

1.3 Cease and interdict the Respondents from proceeding with any other proposed additions or alterations to the common property within the scheme without compliance with the provisions of the Management Act and the Sectional Titles Act.

[2] In response to the application, the Respondent are opposing and have delivered a counterclaim seeking an order declaring that:

"1. *The Respondents works to the façade, including the bricking-up of windows and the substitution of one window for the two windows in the respondents' kitchen, is in keeping with the French style prevailing at the applicants Scheme. Thereby*

reviewing, setting aside and substituting the applicant's failure to provide the respondents with approval for such works or the denial of the respondents' approval consequent to the applicants failure to provide approval within a reasonable time.

2. *Ordering that the applicant-*

   2.1 *Within 10 days of this Order being made, to give 30 days' notice of a Special General Meeting, to all owners within the Scheme for the purpose of voting on the respondents' proposed extension;*

   2.2 *To constitute such meeting at the date and time stated in such notice;*

To have the then Chairperson of the Body Corporate preside over such meeting."

FACTUAL BACKGROUND

[3] On 4 July 2017, the Respondents purchased Unit 1 in the Sectional Title Scheme known as Body Corporate Le Chene D'Or. Registration of transfer of ownership of the Unit into the names of the Respondents was subsequently effected on 29 September 2017. The Respondents' acquisition of the unit subjectaed them to the provisions of the Management Act, the Rules promulgated thereunder and the rules made by the Applicant.

[4] During August 2011 and following their purchase of the unit in July 2011, the Respondents became members of the Applicant. On 24 August, they bound themselves to the Conduct Rules of the Applicant. Once they had become members of the scheme, they sought to make certain improvements, alterations and extensions to their unit According to the Applicant, since the improvements and/or alterations

involved demolition of certain walls within the unit, the trustees made a request to the Respondents that before commencement of such works, they be provided with an engineer's certificate confirming that the structural integrity of the building would not be compromised.

[5] In response, the Respondents provided the Applicant with an engineer's report. The trustees were not satisfied with the engineer's report. Consequently, they declined to provide written consent to the Respondents to commence demolition of the internal walls within their unit. In October 2017, the Respondents proceeded to demolish the internal walls within their unit notwithstanding the lack of consent from the trustees.

[6] In addition to effecting internal alterations, the Respondents sought to extend their unit. In this regard, on 17 October 2017, the attorneys of the Respondents addressed a letter to the Applicants attorney wherein they stated that they were confirming *that the Respondents had attended to request the proposed extension which they wished to undertake in their new unit. Replying to the letter on 20 October 2017, the Applicant's attorney stated:*

> *"Pursuant to the above we place on record and confirm that prior to your clients commencing with the proposed extension of their section they must seek the consent of the members of the body corporate, which consent must be obtained by special resolution in terms of the aforesaid act."*

[7] On 2 November 2017, the Respondent sought permission to combine 2 windows that were positioned adjacent to each other. On the 16th of November 2017, it was discovered that the Respondents had, without permission, broken through an exterior common property wall. On the same date, 16 November 2017, the Applicant delivered a letter to the Respondents demanding that they:

7.1 Immediately cease and desist with all structural alterations to the interior of the section until the applicant has satisfied itself that the structural integrity of the building had not been affected;

7.2 To immediately cease and desist with all alterations (structural or otherwise) to the exterior common property of the section until such time as the members have consented to such alterations;

7.3 Not to proceed with any extension unless and until they have complied with section 5(1)(h) of the Sectional Titles Act.

[8] In an e-mail message dated 17 November 2017, the Respondents confirmed that structural changes have been suspended. Despite this and prior to the Applicants engineer submitting a report, the Applicant discovered that the Respondents had broken another window on 2[illegible] November 2017. Subsequent to sending a 'court warning letter' to the Respondents on the 22 November 2017, the Applicant discovered that further external windows were removed and that the respondents had changed the features of their glass door leading out onto the patio from their lounge.

[9] The Respondents contend that the Applicant has breached its obligations and specifically obligations imposed by the Conduct Rules in that they have failed to provide regulation, management, administration, use and enjoyment of sections and common property. The Respondents add that they have substantially complied with the Conduct Rules and the relevant legislation. On the contrary, the Applicant has acted mala fide and unreasonably by not consenting to the proposed alterations.

[10] The Applicant argues that it has a clear right and an obligation towards the members of the body corporate to ensure that the harmonious appearance of the scheme remains intact. The right and obligation are imposed upon the applicant by virtue of the Management Act, the Sectional Titles Act and Conduct Rules.

[11] The Applicant further states that the Respondents have effected structural alterations and alterations to the exterior scheme without obtaining the Applicant's consent. As a result, the possibility remains that without interdictory relief, the Respondents will effect an extension to their unit without having complied with section 5(1)(h) of the Sectional Titles Act. The Applicant declares further that it does not have any alternative remedy.

ISSUES

[12] From the above factual matrix, this Court is required to determine:

12.1 Were the Respondents permitted, alternatively justified to effec changes to the common property exterior of their section, which affect the appearance of the scheme, and may have compromised the structural integrity of the building, without first obtaining the consent of the Trustees and/or their fellow members?

12.2 Was the Applicant justified to bring an application to interdict the Respondents from proceeding with any further additions or alterations to the common property at the scheme that increase the living area of their section without complying with the provisions of the relevant legislation including the National Building Regulations?

12.3 Does the Respondents' counterclaim have any merit?

12.4 Did the applicant act *mala fide* and unreasonably in withholding consent and failing to exercise its discretion?

LEGAL POSITION

[13] Section 24 of the Sectional Titles Act is headed, Extension of Section, and it provides:

> *"(1) If an owner of a section proposes to extend the limits of his section, he shall with the approval of the body corporate, authorised by a unanimous resolution of its members, make application to the local authority for approval of the proposed extension of his section."*

[14] Subsection (2)-(8) of section 24 provides for the procedures the member needs to follow after the necessary consent has been obtained from the body corporate to extend his section which includes but is not limited to the appointment of a land surveyor, architect to draw up plans and the submission thereof to the local authority for approval.

[15] Section 4 subsection (1) and (4) of the NATIONAL BUILDING REGULATIONS AND BUILDING STANDARDS ACT NO. 103 OF 1977 states that:

> *"Approval by Local Authorities of Applications in Respect of Erection of Buildings*
>
> *(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.*
>
> (4) *Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building."*

[16] Section 4(i) of the Management Act provides that:

> *"A body corporate needs: 'to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property."*

[17] In terms of section 5(1)(h) of the Management Act:

> *"(1) In addition to the body corporate's main functions and powers under sections 3 and 4, the body corporate—*
>
> *(h) must, on application by an owner and upon special resolution by the owners, approve the extension of boundaries or area of a section in terms of the Sectional Titles Act;"*

[18] In terms of the Conduct Rules of the Body Corporate:

> *"Changes to the external appearance of a unit with building alterations or painting is not permitted without the written approval from the Trustees and the requisite plans being passed by the municipal authorities. Standards to ensure uniformity have been established for the exterior appearance of the building and must be adhered to by all residents."*
>
> *"No structural alterations, which may affect the stability of the building or any other units, or the common property, shall be effected to the interior of any unit by any owner, without the prior written approval of the trustees."*

[19] Facts that were almost similar to the instant case albeit in the context of a Homeowners Association confronted the Court in *Khyber Rock Estate East Home Owners Association v 09 Erf 823 Woodmead Ext 13 CC* (7689/2006) [2007] ZAGPHC 137 (14 August 2007). The owner also carried out building without obtaining authorisation from the trustees of the homeowners association concerned. The owner was advised of the illegal nature of the conduct but chose to proceed with the construction in breach of the memorandum of association nonetheless.

[20] It was held that for the homeowners association to succeed, it only had to allege and prove that the homeowner contravened the rule

governing the inter-relationship between the members as determined by the Memorandum of Association and that the decision it had taken was one it could competently make. Upon establishment of the two requirements, the Court granted judgment against the homeowner and ordered him to demolish the structure as it defaced the aesthetics of the entire building.

ANALYSIS

[21] Strictly speaking, this Court should not be considering the issue concerning demolition of the interior walls of the Respondents. The Applicant stated that it had to mention it solely for the purpose of establishing that there was a trend of disregard of the provisions of the governing legislation and Conduct Rules by the Respondents. In view of the Applicant having ratified the Respondents' actions albeit *ex post facto, I regard the matter as resolved. That said, I note the manner in which the matter became settled insofar as it may demonstrate the trend referred to above by the Applicant.*

EXTENSION OF THE UNIT

[22] On 17 October 2017, the Respondents confirmed in a letter that they intended to extend their unit to which the Applicant answered on 20 October 2017 stating that it hoped that such extension would be in compliance with the provisions of the Sectional Titles Act. Again on 2 November 2017, the Respondents sought permission to combine 2 adjacent windows that were initially positioned next to each other.

[23] On 16 November 2017 and prior to obtaining consent, the Applicant learnt that the Respondents had carried out their plan. They had brought down an exterior common property wall. Upon receipt of the news, the Applicant delivered a letter demanding a cessation of all exterior alterations, structural or otherwise, in the unit to which the Respondents replied on 17 November confirming that they have suspended all structural changes to their unit.

[24] The demolition of the exterior wall is a flagrant violation of the conduct rules of the body corporate where they provide: "*Changes to the external appearance of a unit with building alterations or painting is not permitted without the written approval from the Trustees...*" In addition, the Respondents disregarded the provisions of Section 24(1) and (2) of the Sectional Titles Act and Sections 4(1) and (4) of the NATIONAL BUILDING REGULATIONS AND BUILDING STANDARDS ACT NO. 103 OF 1977, both of which I have quoted in paragraphs 14, 15 and 16 *supra respectively*.

[25] Moreover, on 20 October 2017 the Respondents were advised that they needed to obtain permission for the extension in line with the provisions of Section 24 of the Sectional Titles Act. It follows that the demolition of the exterior wall was not authorised and that it cannot proceed for as long as there is no compliance with the relevant legislation and the Respondents have not sought and obtained permission.

ALTERATIONS TO THE EXTERNAL APPEARANCE OF THE UNIT

[26] On 2 November 2017, the Respondents made a request to substitute two adjacent windows for one. In violation of their letter of 17 November 2017 wherein they stated that all structural changes have stopped, on 21 November 2017 the Applicant discovered that the two windows have been replaced by one window before permission has been granted as required by the Conduct Rules.

[27] As though the above was not enough, on 22 November 2017, the Applicant discovered further that the Respondents had removed other external windows and have as such, changed the features of their glass door leading out onto the patio from their lounge. Like in the case of the replacement of the two windows by one window, the alteration of these features were not authorised insofar as no permission was granted by the trustees.

[28] The Conduct Rules prohibit changes to the external appearance of the unit without permission from the trustees. The argument of the Respondents that the external alterations are not exposed to the public must be rejected because the conduct rules do not qualify the exposure. I find the Second Respondent's contention that in her expert opinion, the external renovations were in keeping with the style of the scheme unacceptable. The Applicant has trustees to which it has entrusted that duty and it is their decision that is critical. Besides, the Second Respondent did not file any expert report.

[29] However, it would be understandable if the Respondents were to put forward the 'exposure argument' in the instance where an application to effect changes to the external appearance had unreasonably been refused. The determination of the transgression is simply that changes to the external appearance have been made without authorisation.

[30] I understand the exigent nature of the circumstances attendant upon the Respondents taking occupation of the unit. However, it cannot assist the Respondents to say that the Applicant delayed in granting approval. The Respondents had alternative remedies with which they could have ensured that the Applicant came to the party. It was therefore illegal to effect the changes and then seek the Applicant to ratify the wrongful act. The Conduct Rules and the various statutory provisions to which I have referred *supra* have been enacted for a reason and all members ought to respect them lest chaos in the scheme will flare up. The external changes were not sanctioned by the relevant legislation and Conduct Rules. Any disregard of those instruments governing the relationship of the parties cannot be countenanced.

[31] The question whether or not the Applicant was justified to bring an application to interdict the Respondents from proceeding with any further additions or alterations to the common property at the scheme that increase the living area of their section without complying with the provisions of the relevant legislation including the National Building

Regulations must be answered in the affirmative. How else could the Applicant have ensured that the Respondents are forced to comply with the different pieces of legislation and the Conduct Rules if not by this interdictory relief?

[32] In fact, the Applicant has a duty to take all reasonable steps to ensure that an owner of a section does not use a section so as to cause a nuisance, in breach of his duties as envisaged in Section 13(1)(e) of the Management Act; nor make alterations to a section or an exclusive use area that are likely to impair the stability of the building or interfere with the use and enjoyment of other sections, of the common property, or an exclusive use area, nor do anything to a section that has a material negative affect on the value or utility of any other section or exclusive use area.

COUNTERCLAIM

[33] It is now appropriate to consider whether or not there is merit in the counter application of the Respondents. The Respondents assert that against the background of the facts of the Applicant delaying to grant them permission to effect the changes, this Court is entitled to substitute the decision of the Applicant for its own. For this Court to usurp powers that ordinarily vest in a body corporate, it must first make a finding that the body corporate was *mala fide* or acted unreasonably in refusing to grant permission.

[34] The issue is accordingly whether or not the Applicant acted *mala fide* or unreasonably in withholding permission. This question cannot be entertained at this juncture. The Applicant has not made a decision whether to allow or refuse permission. The Respondents went ahead well before the Applicant had reverted to them with an answer. This prompted the Applicant to approach this Court for a relief stopping them to carry on with the alterations until permission is granted. In the circumstances, the Court has no decision of the Applicant to substitute for its own. Similarly, the Applicant cannot be said to have acted mala fide or unreasonably in circumstances where it has made no decision one way or the other.

[35] Regarding an order compelling the Applicant to call a special general meeting, there is no proof suggesting that the Applicant has refused to call such a meeting. Evidence before this Court in fact demonstrates the contrary to be true. Annexure Z8 to the founding affidavit is an e-mail message dated 26 October 2017 in which the Applicant describes the procedure to the Respondents to adopt should they wish to call a special general meeting.

[36] In the e-mail message, the Applicant specifically put forward the 30th of November 2017 as a possible date on which to hold such a meeting. In reply, the Respondents requested the format that they should use for the calling of the special general meeting to which the Applicant responded on 15 November 2017 providing them with the required

information. The Respondents gave the Applicant the impression that they would convene the meeting and now want to blame their failure to convene it on the Applicant. Accordingly, the request of the Respondents cannot, under these circumstances, find favour with this Court.

[37] Against that background, the Respondents are ordered, jointly and severally the one paying the other to be absolved, to:

1. **Reinstate the exterior common property appearance, facade and eatures of section 1 (door number 7) in the Le Chene D'Or sectional scheme to its original condition prior to any alterations having been effected by them, alternatively their builders on their instructions, which include but is not limited to the:**
   1.1. **Reinstatement of the two original windows adjacent to the front door of the section, which have been joined to form one large window;**

   1.2. **Restoration of the two external windows on the wall facing the park behind the scheme, which lead from the lounge of section 1 onto the patio, and reinstating the features of the glass door to that which it was prior to the alteration;**

   1.3. **Making good of any damage to the common property exterior of the section that may have been caused by the alterations and restore it to the condition that it was prior to the alterations having been carried out.**

2. **Interdicting and barring the Respondents from:**

   2.1. **Effecting any building alterations and extensions, which have the effect of increasing the living area or varying the participation quota of the section in the Applicant scheme, without the Respondents obtaining prior approval of the members of the Applicant by special resolution in terms of the provisions of section 5 of the Sectional Titles Schemes Management Act 8 of 2011 and the further peremptory requirements as set out in section 24 of the Sectional Titles Act 95 of 1986 (as amended; and**

   2.2. **With the exception of interior alterations that do not affect or compromise the structure of the scheme; Proceeding with any other proposed additions or alterations to the common property at the Applicant scheme, without strict compliance with the provisions of the Sectional Titles Schemes Management Act 8 of 2011 and the Sectional Titles Act 95 of 1986, insofar as it is applicable;**

3. **The counterclaim is dismissed; and**

4. **The respondents are directed to pay the costs of both the main and the counter applications.**

B MASHILE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

Counsel for applicant: **W.C. Carstens**

Instructed by: Karen Bleijs Attorneys

Counsel for first & second respondent: **M. Desai**

Instructed by: Vally Attorneys

Date of hearing: 23 September 2018

Date of judgment: 01 February 2019