Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 22991/2017

Before: The Hon. Mr Justice Binns-Ward
Hearing: 23 May 2019
Judgment: 23 May 2019

In the matter between:

CORAL ISLAND BODY CORPORATE Applicant

and

BELINDA IRIS HOGE Respondent

JUDGMENT

BINNS-WARD J:

[1] In this matter, the applicant, which is the body corporate of a residential property sectional title scheme, sought certain declaratory and interdictory relief against one of its members. The matters in issue arose out of certain minor alterations effected by the respondent to her section. The alterations were in material part directed at making provision for any overflow from the geyser installed in the garage that was attached to, and formed part of, the respondent's unit. They involved the installation of certain piping outside the section for that purpose. The trustees of the body corporate took issue with the respondent because (i) she had failed to obtain their written permission to undertake the alterations, as she was required by the applicable rules to have done, (ii) the piping, some of which is visible in the underground parking garage of the complex, was made of white plastic material, whereas the trustees favoured copper piping of the sort used in the other visible piping in the garage area and (iii) the overflow pipe that had been installed was liable to

disgorge into the garage area, rather than into an exterior drain in the common area, as the trustees would be willing to allow. They were also concerned that the respondent had previously adapted the garage that formed part of her section for use for different purposes and, in her endeavours to sell or rent out the unit, had advertised could be adapted for other uses. This, so the trustees contended, was in contravention of s 13(1)(g) of the Sectional Titles Schemes Management Act 8 of 2011, which came into operation on 7 October 2016. [1]

[2] A full complement of affidavits was exchanged between the parties in the motion proceedings. The respondent, in opposing the relief sought, disputed that the institution of the proceedings had been validly authorised, and also averred amongst other things that the alterations had been effected several years previously with the orally given permission of the then chairperson of the board of trustees. She furthermore denied that she was using her garage in contravention of s 13(1)(g) of the Sectional Titles Schemes Management Act.

[3] However, about two weeks before the hearing, the respondent delivered an open and unconditional offer of settlement in which she essentially conceded the relief sought in the application, save for costs. She explained her concession, pointing out that she had determined that the cost of complying with the trustees' requirements would be less than R10 000, and that she was unable, in the context of the value of what was in issue in the case, to afford the cost of litigating the dispute in the High Court. The respondent nevertheless maintained that she should not be mulcted in costs because the trustees should not have proceeded against her in this court, but should instead have sought the adjudication of the dispute under the auspices of the Community Schemes Ombud Service Act 9 of 2011 ('the Ombud Act').

[4] The Ombud Act came into operation on the same date as the aforementioned Sectional Titles Schemes Management Act. It was part of the substantial legislative

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[1] Section 13(1)(g) provides: '*An owner must when the purpose for which a section or exclusive use area is intended to be used is shown expressly or by implication on or by a registered sectional plan, not use nor permit such section or exclusive use area to be used for any other purpose: Provided that with the written consent of all owners such section or exclusive use area may be used for that purpose as consented to*.' It falls to be read with s 13(2), which provides: '*Any owner who is of the opinion that any refusal of consent of another owner in terms of the proviso to subsection (1) (g) is unfairly prejudicial, unjust or inequitable to him or her, may, within six weeks after the date of such a refusal, make an application in terms of this subsection to an ombud.*' The ombud contemplated by s 13(2) is an 'ombud' within the definition of the word in s 1 of the Community Schemes Ombud Service Act 9 of 2011.

overhaul of the regulatory regime previously laid down exclusively in the Sectional Titles Act 95 of 1986. Indeed, the respondent had in her answering affidavit already pressed the inappropriateness of the trustees' resort to litigating the dispute in the High Court. The chairperson of the board of trustees did not engage meaningfully with this contention in reply. He simply responded that the applicant had been at liberty to proceed either under the Ombud Act or through the courts.

[5] It emerged in the papers that the applicant's trustees are subject to a limitation on their powers of discretionary expenditure in the amount of R25 000, and that they had not obtained authority from the members of the body corporate to incur expenditure in excess of that amount for the purpose of the current litigation. I think that I am able to take judicial notice that the attorney and own client costs of any applicant in opposed litigation in the High Court, even in a relatively straightforward matter not involving voluminous papers nor meriting the engagement of counsel of more than junior or middle-ranking stuff gown status, would easily exceed R25 000. And such estimate leaves out of account altogether the contingency of the postulated applicant having to pay the other side's costs on a party and party basis should there be an adverse judgment. Whether the factual circumstances just described could impel a finding that the institution by the trustees of the current proceedings was not properly authorised because they did not have the authority to expose the body corporate to the incurrence of the costs involved or attendant financial risk is an arguable question. I do not have to decide it, however, because the respondent's open concession of the substantive relief sought in the application is inconsistent with any persistence in her challenge to the trustees' authority.

[6] As I intend to make an order in the applicant's favour in accordance with the substantive components of the respondent's open offer, which the applicant's counsel indicated would be acceptable, the only matter in real contention that I have to determine is liability for costs.

[7] The chairperson is technically correct in his assertion that the institution of the application in the High Court rather than under the auspices of the Ombud Act was legally competent. But whether the trustees' decision to proceed in this forum was well-advised, and whether such decisions should be discouraged by the courts in cases in which body corporates should more appropriately have proceeded in the less expensive fora that have been specially devised for the purpose by the legislature are

quite different questions. And they bear pertinently when the incidence of the costs of court-related litigation in such matters falls to be determined.

[8] The disputes that lay at the heart of the current litigation, namely the appearance and utility of plumbing appurtenances and the permitted usage of designated areas, are of the sort that commonly arise in the context of the shared ownership and close neighbour interaction that are inherently part and parcel of membership of the body corporate of any sectional title scheme. They are essentially of a domestic character and involve issues that fall to be determined with reference not only to statutory law and rules and regulations, but also the common law principles of private nuisance or neighbour law; in the context of which, as one judge sagely observed, '[t]he homely phrases "give and take" and "live and let live" are much nearer the truth than the Latin maxim *sic utere tuo ut alienum non laedas*'.[2]

[9] It was no doubt because of their common occurrence, the desirability that they be determined as informally and cheaply as possible, and the fact that the cost of litigating such disputes in the courts is beyond the reach of the vast majority of individual owners of sectional title units that the Ombud Act was enacted as part of the tranche of sectional title-related reform measures adopted by the legislature nearly a decade ago. The Ombud Act provided for the establishment of a service to provide for a dispute resolution mechanism in community schemes.[3] All community schemes are required to raise a levy on their members to contribute to the funding requirements of the Ombud Service.[4] The Act's provisions allow for the adjudication of disputes such as those that presented in the current litigation[5] by a suitably qualified adjudicator who will deal with the matter on an inquisitorial basis[6] and, save in especially indicated circumstances, without the involvement of legal representation on

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[2] Per Warner AJ (as he then was) in *Assagay Quarries (Pty) Ltd v Hobbs and Another* 1960 (4) SA 237 (N) at 240H (also reported at [1960] 2 All SA 558 (N)); referred to with approval in *Allaclas Investments (Pty) Ltd and another v Milnerton Golf Club and others* [2007] ZASCA 167, [2008] 2 All SA 1 (SCA), 2008 (3) SA 134, at para. 21.

[3] See the long title of the Act and s 2. '*Community schemes*' are defined in terms of s 1 of the Ombud Act to include sectional titles development schemes, share block companies and home or property owners' associations.

[4] Sections 22(1)(b) and 29(1)(b) read with the 'Community Schemes Ombud Service Regulations: Levies and fees' GNR.1232 of 7 October 2016.

[5] Sections 38 and 39.

[6] Section 50.

behalf of any of the parties.[7] The Ombud Act also provides for the adjudicator to refer disputes for conciliation in suitable cases.[8] Conciliation is undertaken by appropriately trained and qualified conciliators employed by the Community Schemes Ombud Service.[9] The adjudicators' determinations are amenable to being made orders of court by means of an inexpensive administrative process,[10] and are subject to appeal to the High Court.[11]

[10] Compelling constitutional and social policy considerations informed the introduction of the legislation that is manifest in the Ombud Act. The promotion of access to justice by those not easily able to afford to litigate in the civil courts was but one of those considerations. Another was the social utility to be achieved by the provision of a relatively cheap and informal dispute resolution mechanism for the disposal of community scheme related issues. It requires little insight to appreciate that those commendable policy considerations would be liable to be undermined if the courts were indiscriminately to entertain and dispose of matters that should rather have been brought under the Ombud Act. Whilst judges and magistrates may not have the power to refuse to hear such cases,[12] they should, in my view, nonetheless use their judicial discretion in respect of costs to discourage the inappropriate resort to the courts in respect of matters that could, and more appropriately should, have been taken to the Community Schemes Ombud Service.[13]

[11] In my judgment, it was undoubtedly inappropriate for the trustees to have proceeded for the relief that they sought in the current matter in the High Court rather than through the Community Schemes Ombud Service. Furthermore, nothing about

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[7] Section 52.

[8] Section 47.

[9] Section 21(2)(c).

[10] Section 56.

[11] Section 57; and see *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another* [2018] ZAWCHC 54; 2018 (4) SA 566 (WCC) in respect of the indicated procedure for such appeals.

[12] Cf. *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 815-819 (also reported at [1987] 3 All SA 96), endorsed in *Agri Wire (Pty) Ltd and another v Commissioner of the Competition Commission, and Others* [2012] ZASCA 134; [2012] 4 All SA 365 (SCA); 2013 (5) SA 484, at para. 19 (in note 9) and in this Division in *Marth NO v Collier and Another* [1996] 3 All SA 506 (C); *sed contra In re: Nedbank Limited v Thobejane and related matters* [2018] ZAGPPHC 692, [2018] 4 All SA 694 (GP), 2019 (1) SA 594.

[13] Cf. *Derero v Derero* 1934 WLD 19 at 21-22 and *Goldberg v Goldberg* 1938 WLD 83 at 85-86, both of which judgments are mentioned in discussion in *Standard Credit Corporation v Bester* supra.

the matter suggests to me that it would have been necessary or appropriate for them to prosecute the matter there with legal representation. Had I thought otherwise, I might have been persuaded to allow the applicant costs on the tariff applicable in respect of proceedings under the auspices of the Ombud Service. But in the context of my assessment of the simple and uncomplicated character of the matters in dispute, I have concluded that the appropriate course is to make no order as to costs, which means that each party will bear its own expenses in the litigation.

[12] An order will issue in the following terms:

(a) The respondent is directed within 10 days of the date of this order to make application to the trustees of the applicant body corporate for permission to replace the existing plastic pipes installed by her through the basement parking area with copper piping.

(b) The respondent is directed to effect the replacement of the pipes adumbrated in the application provided for in terms of paragraph (a) of this order, and also to redirect the geyser overflow pipe in the manner directed by the trustees, within 30 days of the date upon which she is informed by the trustees, in writing, of the approval of her aforementioned application

(c) The respondent is interdicted and restrained from utilising the area of the section registered in her name in terms of Deed of Transfer ST 3296/2012 that was designated on the related approved ground floor site plan as a garage for any other purpose than the usages ordinarily applicable in respect of a garage.

(d) There shall be no order as to costs.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Applicant's counsel:	**S. Fergus**
Applicant's attorneys:	**Russell Knight and Associates**
Respondent's counsel:	**K. Felix**
Respondent's attorneys:	**Miltons Matsemela**