IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 3643/2016

In the matter between:

MALCOLM HENRY LYONS Applicant

And

THE BODY CORPORATE OF SKYWAYS Respondent

SECTIONAL TITLE SCHEME, NO. SS110/1984

JUDGMENT DELIVERED ON 26 MAY 2016

MAHOMED, AJ

Introduction

[1] This is an urgent application for a final interdict compelling the respondent to take steps to ensure that all elevators situated in and serving the various buildings that comprise a sectional title scheme under the control of the respondent, are repaired and rendered operational forthwith.

[2] The applicant became the owner of unit 1 S (also known as Flat 4 S) in one of ten (10) buildings under the Skyways Sectional Title Scheme No SS, situated at C Street, Z, Cape Town. The respondent is the Body Corporate of the Skyways Scheme ("the Skyways Body Corporate"), which consists of various sectional title units in terms of the Sectional Titles Act 95 of 1986, with its place of business c/o L and V Property Services CC (the managing agent) at 8 Percival Road, Tijgerhof, Milnerton, Cape Town.

[3] The salient facts are common cause. The Sectional Title Scheme includes the following six (6) buildings: Shannon; Schipol; Orly; Maribel; Arlanda and Gatwick, each having its own elevator. The elevators have not been operational for approximately two years, with only one exception being the elevator located in the Orly building that was repaired as recently as February 2016. It is necessary that the elevators be repaired or replaced because the buildings are 4 floors in height making it difficult, and in some instances virtually impossible, to have access to the upper floors without the elevator.

[4] The applicant did not dispute the following steps taken by the respondent, evidenced from the minutes of the trustee meetings, to ensure the elevators are operational:

4.1. On 10 December 2013 the respondent's trustees resolved to approve a quotation from Thyssenkrupp Elevator SA (Pty) Ltd ("Thyssenkrupp"), *"to repair the lifts and to service them thereafter"*. When they failed to perform in terms of the contract, the respondent terminated that contract during or about November 2014.

4.2. After the Thyssenkrupp contract was terminated for non-performance, the respondent obtained six (6) quotes from Kone Elevators South Africa (Pty) Ltd ("Kone"), dated 28 April 2015, to repair the elevators at Shannon (R17, 930.00), Schipol (R29, 215.25), Orley (R7, 680.00), Maribel (R17, 730.00), Arlanda (R28, 235.25), and Gatwick (R19, 445.28).

4.3. The respondent's trustees resolved at the meeting held on 19 June 2015 to instruct Kone, *"to attend to the repairs of the other lifts in preferred order of Orly, Shannon, Schipol, Gatwick, Arlanda and Mirabel"*.

4.4. On 7 October 2015 the respondent's trustees discussed the status of the elevator repairs or replacement. At this meeting, Kone's failure to respond to correspondence was also discussed and it was resolved that Mr. Bobby Renda (the respondent's managing agent) would contact the managing director of Kone again and offer him *"another opportunity to assist"* in obtaining a response from Kone's Regional Manager, *"failing which the matter would be handed to the Body Corporate attorneys for action"*.

4.5. On 7 December 2015, the applicant's attorneys sent a letter to the regional manager of Kone *via* email, and complained of the long delays (i.e. it was 5 months at that stage) demanding that Kone perform in terms of the contract and provide urgent feedback.

4.6. When no response was received from Kone, on 11 January 2016 Mr. Renda sent another email to Kone on behalf of the trustees requesting a response as to when and how the repairs of the elevators would be effected.

4.7. Kone's lack of responsiveness was again discussed at the meeting of the respondent's trustees on 19 January 2016. It was resolved that one of the trustees, Mr. T Alberts, would contact Kone to demand a resolution to the issue, failing which the matter would be handed over to the respondent's attorney and the elevator Inspector, Mr. Piet Smith, be asked to recommend a new contractor.

4.8. Between 14 and 17 February 2016, the respondent sent further emails to Kone demanding a suitable response to earlier correspondence, failing which the matter would be handed over to its attorneys.

4.9. On 26 February 2016, Mr. Render finally contacted the respondent's attorneys requesting assistance with Kone's failure to perform in terms of the agreement.

[5] Despite the resolutions by the respondent's trustees, the change in service providers from Thyssenkrupp to Kone, and the various steps referred to above, the *status quo* remains. Currently there are five (5) of the elevators that are still inoperable, including the elevator in Shannon where the applicant owns a unit.

[6] It is common cause that in circumstances the elderly and infirm owners, residents and visitors to the buildings are forced to use the stairs. While the dispute remains unresolved, the situation has become untenable and continues to impact adversely upon the elderly and infirm in terms of their freedom of movement as well as on their health and wellbeing.

[7] The respondent, unsurprisingly, conceded in its papers that in the circumstances the applicant has established a clear right and that a so-called injury is actually being committed or reasonably apprehended with the resultant prejudice to the applicant. The owners of the units in the respondent body corporate are entitled to expect it to maintain the elevators and to keep them in a state of good and serviceable repair. In other words, the applicant has established a clear right not to be prejudiced by the inoperable lifts in the buildings. Moreover, the applicant suffered an injury or has a reasonable apprehension that his right will continue to be violated by the respondent. It is

therefore common cause that the first two requisites for the grant of a final interdict have been met.

Issue in Dispute

[8] In *casu*, the issue in dispute is whether or not there is an alternative legal remedy available to the applicant that is adequate in the circumstances for the grant of a final interdict. If the applicant succeeds in establishing all the legal requirements, the court is enjoined to consider whether there is a basis for refusing a final interdict.

[9] Counsel for the respondent, Mr. Quixley, argued that the applicant is faced with two alternative remedies and therefore did not meet all the requisites of a final interdict: firstly, it may call for a Special General Meeting in terms of Rule 53 of the Management Rules, issued in terms of the Sectional Titles Act 95 of 1986, in order to address the issue of the elevator repairs with the Body Corporate and the Trustees; and secondly, it could change the composition of the board of trustees. He suggested that it was premature for the applicant to come to court seeking relief while the respondent is still taking steps to repair the elevators. He argued that the resolutions that were adopted by the trustees needed to be decided by the members themselves in a general meeting. If the trustees were dilatory, then the general meeting has the power to boot them out and to get new ones to replace them. He argued that

matters considered and resolved at a general meeting may extend considerably further than simply another broad resolution resolving to repair the elevators. For instance, the Special General Meeting could resolve that the trustees take steps within a defined timeline.

[10] Counsel for the applicant, Mr. Harrington, argued that there was nothing to suggest that the proposed Special General Meeting to be held in terms of Rule 53 of the Management Rules or a change in the composition of the board of trustees, were viable or adequate alternative remedies in the circumstances. The Special General Meeting would serve no purpose. Having regard to the respondents' ongoing failure to fulfill its statutory obligations over a period of 2 years, there was a reasonable likelihood that this would continue in the future. There was also nothing in the respondents conduct to suggest that the resolution already taken in June 2015 to have the lifts replaced or repaired would be implemented with any greater degree of urgency with a new board of trustees. Accordingly, there was no alternative remedy available to the applicant, except to approach this court and seek relief on an urgent basis.

[11] Mr. Quixley argued that the relief that the applicant seeks is vague and impossible to perform because the respondent cannot ensure that the elevators are operational at all times, except for routine maintenance. In support of his contention, Mr. Quixley invoked the maxims *lex non cogit ad impossibilia* (the law does not compel the doing of impossibilities) and *nemo tenetur ad impossibilia*. (nobody is held to the impossible). He argued that the

respondent is dependent on third party service providers and could not ensure that the elevators were operational *"forthwith"*. Any accidental elevator interruption, whatever the cause, outside routine maintenance operations, would render the respondent in breach of the order granted in terms of the relief sought. Consequently, the relief is incompetent in the sense that the respondent is asked to *"take steps"* without specifying what steps need to be taken or when they should be taken. The effect of this is that the respondent will have no way of knowing whether it is complying with the order sought by the applicant or under what circumstances it will be in breach of the order. The respondent had taken and continues to take steps to ensure that the lifts are operational, and the difficulties it encountered in repairing the elevators promptly were not of its own making. The respondent would need to raise additional funds and/or special levies from the members to fund the replacement of defective elevators and this would be addressed at the next general meeting. The respondent therefore cannot be ordered by this court to take steps to repair the elevators forthwith as it was impossible for the respondent to perform, except for routine maintenance.

[12] Mr. Harrington responded that the measure of the relief sought and compliance with the respondent's statutory obligations is simply to establish whether the lifts are operational or not. But if this is too onerous then the court can prescribe further and/or alternative relief, with objectively verifiable steps that are time-bound, within which the respondent shall ensure that the lifts are operational.

Applicable Law

[13] The applicant relied on section 37(1)(j), (o) and (r) of the Sectional Titles Act 95 of 1986 in order to establish a so-called *"clear right"* that the owners enjoy and the corresponding obligation of the respondent body corporate to maintain the elevators and keep them in a state of good and serviceable repair.

"37. ***Functions of bodies corporate.*** *– (1) A body corporate referred to in section 36 shall perform the functions entrusted to it by or under the Act or the rules, and such functions shall include –*

…

(j) properly to maintain the common property (including elevators) and to keep it in a good and serviceable repair;

(o) to keep in a state of good and serviceable repair and properly maintain the plant, machinery, fixtures and fittings used in connection with the common property and sections;

…

(r) in general, to control, manage and administer the common property for the benefit of all owners."

[14] The applicant seeks a final interdict in this matter. The three requisites[1] for the granting of a final interdict are:

[1] Erasmus, Superior Court Practice, 2nd Edition, Vol. 2, D6-12 and D16.

(a) A clear right on the part of the applicant.

(b) An injury actually committed or reasonably apprehended.

(c) The absence of any other satisfactory remedy available to the applicant.

[15] All of the requisites must be present for the court to grant a final interdict. In other words the court has no discretion to grant the final interdict, if the applicant fails to meet all the requisites.

[16] The discretion of the court is limited. If the applicant shows on a balance of probability that he has no alternative legal remedy, the court then exercises its discretion whether or not to refuse an interdict.

[17] Bar any dispute of fact, which will be resolved by applying the *Plascon-Evans*[2] test to the matter, the applicant carries the heavier onus to show that his case is stronger than the respondent's case.

Analysis

[18] I examined the steps that the respondent took since the concerns about the inoperable elevators were brought to its attention, and whether the delays in repairing or replacing the elevators were reasonable.

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[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd (1984) ZASCA 51; 1984 (3) SA 623 (A) at 634E-F*. In terms of the *Plascon-Evans* test, the court will be bound to deal with the matter on the basis of the applicant's version coupled with the admitted facts in the respondent's papers.

[19] The respondent trustees' adoption of the resolution on 10 December 2013, *"to repair the lifts and to service them thereafter"* is noteworthy, for it was the first time that the respondent formally acknowledged and took steps to address the problem of the inoperable elevators in the six (6) buildings.

[20] Notwithstanding the fact that there was already an existing resolution authorizing the respondent to repair the lifts and service them thereafter, the trustees deemed it necessary to adopt a second resolution on 19 June 2015 for *"BR to instruct Kone to attend to the repairs of the other lifts…"* albeit in a particular order of the buildings agreed upon i.e. Orly, Shannon, Schipol, Gatwick, Arlanda and Mirabel. The first elevator in Orly building was only repaired in February 2016, some two (2) years and two (2) months after the first resolution, and more than seven (7) months after the second resolution was adopted.

[21] It is common cause that from December 2013 to November 2014, ThyssenKrupp failed to perform in terms of the contract. Another five (5) months elapsed after the ThyssenKrupp contract was terminated before the respondent obtained quotations from Kone. It is also common cause that from July 2015 to February 2016, Kone also failed to perform in terms of the contract. The above delays seem unreasonably long and naturally begs the question as to why the respondent, through its managing agent, did not intervene in the appropriate manner and implement the trustees' resolutions within a reasonable period of time, with due regard to the rights of the applicant and the other vulnerable people making use of the buildings.

[22] Mr. Quixley argued that the respondent faced *"real difficulties"* not of its own making in repairing the lifts promptly. He also argued that additional funds and/or special levies would need to be raised from its members to fund the replacement of defective lifts. However he failed to substantiate what these difficulties were and any financial constraints that the respondent was facing. By all accounts the respondent was aware of the practical and financial implications of the resolutions taken to repair the elevators. There were no submissions made regarding practical impediments or funding constraints, and a perusal of the relevant minutes of the trustees meetings do not reflect any financial difficulties of the Skyways Body Corporate in relation to the cost of the repairs to the elevators. Having regard to the quotations from Kone in April 2015, the cost of the repairs seem nominal considering the length of time and trouble that the respondent went through without the resultant redress for the applicant.

[23] Mr. Quixley conceded in argument that there were indeed gaps in the correspondence that demonstrates the fact that the respondents did not move as quickly as the applicant would have liked. While I accept that the respondent was not sitting completely idle at all times and that it was dealing with problematic service providers, there were no substantive reasons offered for the respondent's own dilatory conduct at crucial times when a reasonable intervention was required. In particular, no adequate reasons were provided for its failure to properly implement the trustee's resolutions within a reasonable period of time. The inescapable conclusion is that there was gross

incompetence in the management and implementation of the resolutions adopted by the respondent's trustees. In the result, the steps taken by the respondent through its managing agent were wholly inadequate, resulting in unreasonable delays in repairing or replacing the elevators in the buildings.

[24] I now turn to assess whether there is an alternative legal remedy available to the applicant that is adequate in the circumstances for the grant of a final interdict. Mr. Quixley suggested that the two internal remedies regulated by the body corporate itself are available to the applicant: the first is to hold a Special General Meeting of the members in order to obtain a directional mandate for the trustees to take specific steps with clear timeframes; and the second, involves changing the composition of the board of trustees i.e. disposing of the trustees and replacing them with new trustees who could do what is necessary in the circumstances.

[25] The internal remedies suggested will not provide adequate redress in the sense that, neither of these are legal remedies that engender prompt enforceable action, both are dependent upon a range of factors before an outcome emerges possibly with no clear timeframes, the outcome may not necessarily result in any tangible relief for the applicant and other vulnerable people using the buildings, and importantly they will not grant similar protection to the applicant.

[26] It is also reasonably conceivable that further delays will ensue from these internal remedies, compounding the pattern of delayed interventions that have

already been established and causing the continued violation of the clear right and ongoing injury to the applicant. This court is particularly mindful of the fact that the applicant is an elderly gentleman with very good reason to bring this application on an urgent basis. The applicant's right must be fulfilled and the injury needs to end, forthwith.

[27] The class of people impacted upon by the *status quo* is much broader than the elderly and infirm, in the sense that the upper floors in the buildings are rendered inaccessible to people using wheelchairs and other mobility assistance units or devices. They constitute the most vulnerable in our society and the inoperable elevators serve to create an unsustainable, undignified and intolerable situation for them. To ignore the applicant's cries for urgent relief would render the vulnerable invisible and continually marginalized in these circumstances.

[28] The Skyways Body Corporate's purported internal remedial processes, involving Special General Meetings and a change in the composition of trustees, do not constitute alternative remedies available to the applicant that are remotely adequate in the circumstances. They do not provide adequate redress or offer an ordinary or reasonable remedy for the persistent marginalization of the rights of the applicant and vulnerable people. The respondent's internal regulatory mechanisms have thus far failed the applicant and the law must therefore be the instrument that protects the rights of the vulnerable and marginalized. The elderly, infirm and disabled all enjoy the right to equal protection and benefit of the law as provided for in section 9(1) of the Constitution:

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

[29] I am therefore satisfied that the applicant has established on a balance of probabilities that he has exhausted other remedies at his disposal and made out a case for a final interdict.

[30] This court enjoys a limited discretion in terms of the relief sought. While it is mindful of the practical implications of an order compelling the respondent to comply with its duties, the refusal of the interdict would in my view lead to an unjust result, impacting adversely on the applicant and other vulnerable people using the buildings.

ORDER

I therefore make the following order:

1. **The applicant's non-compliance with the Rules relating to time limits and service is condoned.**
2. **The application for a final interdict is granted and the respondent is ordered to take the steps necessary to ensure that the elevators in and serving all the buildings under its control within the Skyways Sectional Title Scheme No. SS110/1984, are repaired and rendered fully operational within three (3) months from the date of this order.**

3. **The respondent to pay the costs on a scale as between attorney and own client.**

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MAHOMED, AJ