

Republic of South Africa



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

Case No: 14651/2017

Before: The Hon. Mr Justice Binns-Ward

Hearing: 27 May 2019

Judgment: 29 May 2019

In the matter between:

**RED ANT RELOCATION AND EVICTION
SERVICES (PTY) LTD
ABRAHAM JOHANNES BOSCH
LIZET MERLE BOSCH
ABIGAIL CHRISTY LOUBSER**

First Applicant
Second Applicant
Third Applicant
Fourth Applicant

and

**BENITA CROUSE
ANDRÉ BOSCH
HARBOUR ISLAND HOME OWNERS' ASSOCIATION
THE CITY OF CAPE TOWN**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicants sought the following relief in their notice of motion:

... an order in the following terms:

1. That the first and/or second respondent and/or any person occupying with them and/or visiting them be interdicted from using the outside braai, wooden deck and pergola on the property situated at no. [...] Road, Harbour Island, Gordon's Bay.

2. That it be declared that the outside braai, wooden deck and pergola on no. [...] Road, Harbour Island, Gordon's Bay, are not compliant with the approved plans for the property.
3. That the first and/or second respondents as owner(s), alternatively bona fide possessors of the property situated at no. [...] Road, Harbour Island, Gordon's Bay, be ordered to demolish on the said property within 14 days:-
 - a. the outside braai (next to the property situated at 3 [...] Road);
 - b. the wooden deck; and
 - c. the pergola.

And, should the first and/or second respondents fail to adhere to the above within 14 days, that the sheriff or his duly appointed agent or subcontractor be authorised to demolish the structures.

4. That the first and/or second respondents and/or anyone occupying with them and/or visiting them be interdicted from making any remarks towards occupiers at 3 [...] Road, Harbour Island, Gordon's Bay.
5. That the first and/or second respondents and/or anyone occupying with them and/or visiting them be interdicted from entering the property situated at 3 [...] Road, Harbour Island, Gordon's Bay.
6. That the first and/or second respondents and/or anyone occupying with them and/or visiting them be interdicted from intimidating and/or interfering with the builder and/or building works at 3 [...] Road, Harbour Island, Gordon's Bay.
7. That, in respect of the dividing wall between the properties situated at no. 1 and no. 3 [...] Road, Harbour Island, Gordon's Bay –
 - a. the first applicant be authorised to raise the dividing wall between the properties to 1,80 metres.
 - b. That the first and second respondents jointly and severally contribute to 50% of the costs incurred by the raising of the wall to be payable within 30 days from such costs submitted (sic).
8. Costs on the attorney and client scale against the first and second respondents jointly and severally, the other to be absolved.
9. Costs against the third respondent only in the event that such respondent opposes the application. In such event that such respondent opposes the application. In such event, costs are to be payable jointly and severally with the first and/or second respondents.
10. Further and/or alternative relief.

[2] The first applicant company is the registered owner of the property at 3 [...] Road, Harbour Island, Gordon's Bay. The second to fourth applicants are all members of the family that I infer enjoys the use of the first applicant's property as its holiday home. Harbour Island is a communal housing development that is

administered by the third respondent homeowners' association, to which all the property owners in the development are required to belong. The first respondent is the owner of the property at [...] Road. The first respondent's property is immediately adjacent to that of the first applicant. The two properties are separated from each other by a boundary wall. The homeowners' association's development rules prescribe that the wall may not exceed 1,2 metres in height. And that, indeed, appears to be the height of the existing boundary wall.

[3] The relief sought in terms of paragraphs 1-3 of the notice of motion relates to issues arising from the erection on the first respondent's property of certain structures for which there were no approved building plans as required in terms of the National Building Regulations and Building Standards Act 103 of 1977 ('the Building Act'), and which, to a greater or lesser extent, also infringe the lateral building line restrictions imposed to regulate the proximity of building development between the properties. It was by virtue of the implication of the Building Act that the City of Cape Town, which is the relevant local authority, was joined as a party to the proceedings at the insistence of the first respondent, and against the (to my mind, justified) contention by the applicants in interlocutory proceedings before Thulare AJ that it was not a necessary party.

[4] Neither the City, nor the homeowners' association played an active part in the proceedings. Both abided the judgment of the court. The homeowners' association, however, filed an affidavit explaining its inability, by virtue of the constraints imposed by the development rules, to accede to the first applicant's objective of raising the height of the dividing wall between the properties to 1,8 metres in height, as prayed in terms of paragraph 7 of the notice of motion.

[5] The relief sought in paragraphs 1 – 3 of the notice of motion became moot by the time of the hearing because the first respondent caused the offending structures to be demolished a fortnight or so before the matter was argued. The first respondent had, however, offered to settle the litigation a year earlier on the basis that she would demolish the structures in issue and apply for permission to erect replacements that would be amenable to approval by the local authority in terms of the Building Act and also compliant with the homeowners' association's building rules. The offer of settlement had been refused by the applicants, who indicated that they were willing to

settle only if the first and second respondents conceded all of the substantive relief sought in the notice of motion and paid the applicants' costs of suit.

[6] The relief sought in terms of paragraphs 4 and 5 of the notice of motion was personal to the second to fourth applicants. It was based on their allegations about the conduct towards them of the first and second respondents and unidentified visitors to the first respondent's property when the second to fourth applicants were in residence at the first applicant's property. The allegations were denied and - as the applicants' counsel advisedly conceded when the matter was argued - the second to fourth applicants consequently could not hope to obtain the relief sought in terms of those paragraphs without a reference of the disputed facts for determination on oral evidence. Whether they would have succeeded in obtaining a ruling referring the issues to oral evidence had they sought one is doubtful having regard to the eminent foreseeability of factual dispute arising in matters of the character in issue; cf. *Standard Bank of SA Ltd v Neugarten and Others* 1987 (3) SA 695 (W) at 699A-B.

[7] The factual foundation for the relief sought in terms of paragraph 6 of the notice of motion was also the subject of dispute. For the same reasons as those described in respect of the relief sought in terms of paragraphs 4 and 5 of the notice of motion, the first applicant could not obtain the relief sought in terms of paragraph 6 on the papers; oral evidence would be required.

[8] It was not evident to me how the first applicant could on any approach hope to succeed in obtaining the relief claimed in terms of paragraph 7 of the notice of motion. The maximum height of boundary walls between properties in the Harbour Island development had been determined at 1.2 metres in terms of the applicable development rules. As between the owners of property in the development, the development rules have the same effect as the provisions of the constitution of an unincorporated association do as between the association's members. Their character is contractual. The applicant should have appreciated that the court has no jurisdiction to make a new contract for the parties by altering the terms of their subsisting arrangement. In the circumstances the question of who should be liable to contribute to paying for the heightening of the wall would not be reached. But it is impossible to conceive why the second respondent, who had no demonstrated proprietary interest in either of the properties, should have been expected to do so.

[9] Appreciating that the applicants could not succeed on paper on the relief sought in terms of paragraphs 4 to 7 of the notice of motion, and acknowledging that the only matter that fell to be determined in respect of that sought in paragraphs 1 to 3 of the notice of motion was costs, the applicants' counsel sought to characterise the former as merely 'ancillary' to the latter. Implicit in the argument advanced by Mr *Wijnbeek* in this regard was the contention that if the applicants had been entitled to obtain the relief that the first respondent had effectively conceded by demolishing the offending structures, they should consequently be regarded as having achieved substantial success and awarded their costs of suit accordingly.

[10] The first respondent's counsel resisted the contention on costs advanced on the applicants' behalf. He made two principal submissions in this regard.

[11] The first was that the applicants had by the date of the hearing stood to obtain no more substantive relief than that which had been offered to them by the first respondent a year before. He contended that in the circumstances the only reason the matter had had to come to court was because the applicants had persisted until the hearing in demanding the remainder of the relief sought in the notice of motion, which they should have realised they could not hope to obtain on paper, or at all in some respects. Mr *de Waal* SC argued that that the relief sought in terms of paragraphs 4 to 7 of the notice of motion that the applicants chose not to persist in asking for at the hearing was in point of fact in no way 'ancillary' to that sought in terms of paragraphs 1 to 3.

[12] The second was that the applicants should in any event have sought adjudication of their disputes with the first respondent under the auspices of the Community Schemes Ombud Service Act 9 of 2011 ('the Ombud Act') instead of resorting to the costlier option of High Court litigation. It bears noting in that regard that a homeowners' association is a community scheme as defined in s 1 of the Ombud Act. Mr *de Waal* sought support for the argument in the judgment I handed down just last week in *Coral Island Body Corporate v Hoge* [2019] ZAWCHC 58.

[13] I think that there is force in the first of the aforementioned contentions by Mr *de Waal*. The first applicant has indeed obtained no more by way of substantive relief than it was offered a year ago. The applicants have not persisted with the remainder of the substantive relief sought in the notice of motion, and it is clear that

the first applicant could not have succeeded with that sought in terms of paragraph 7 thereof.

[14] It therefore seems to me that the first applicant would not have been entitled to its costs beyond the expiry of a reasonable *spatium deliberandi* after the date of the first respondent's offer of settlement. Had the matter proceeded to a hearing on the substantive relief it would probably have had to pay the first respondent's costs of suit in regard to the application for relief in terms of paragraph 7 of the notice of motion. As the second, third and fourth applicants could not have succeeded in obtaining relief against the first respondent on the papers, they faced the prospect of the dismissal of their application with a liability to pay the first respondent's costs had the matter proceeded to a hearing on the substantive relief that they had sought. Had the application fallen to be determined on the merits, the incidence of liability for costs would in all likelihood have gone both ways.

[15] It is correct that the second to fourth applicants' nuisance complaints arising from the alleged effects of smoke inhalation associated with the use of the unlawfully erected braai and chimney structure could in a sense be said to be 'ancillary' to the complaint about the very existence of the structure. But there does not seem to me to be sufficient connection between the existence of the offending structures on the first respondent's property and the subject matter of the relief sought by the second, third and fourth applicants in terms of paragraphs 4 and 5 of the notice of motion, or that sought by the first applicant in terms of paragraph 6 thereof to justify its characterisation as 'ancillary' to that sought in paragraphs 1 to 3.

[16] As to the second of the aforementioned principal contentions by Mr *de Waal*, only matters that qualify as 'disputes' within the meaning of that word as specially defined in the Ombud Act are amenable to adjudication by the Community Schemes Ombud Service; cf. *Trustees for the time being of the Avenues Body Corporate v Shmaryahu and Another* [2018] ZAWCHC 54; 2018 (4) SA 566 (WCC) at para. 16. The word 'dispute' is defined in s 1 of the Act to mean '*a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly*'.

[17] I am not persuaded that the relief sought against the first respondent arising out of non-compliance with the Building Act qualifies as a matter concerning a dispute '*in regard to the administration of a community scheme*'. The consideration and determination by local authorities of building plan applications involves the administration of the Building Act and the enforcement of land use scheme regulations, which are matters of generally applicable public law administration. Furthermore, it was not clear on the papers whether the lateral building line infringement involved a breach of the homeowners' association development rules, which would engage the administration of the community scheme, or a breach of the applicable land use scheme under the Spatial Planning and Land Use Management Act 16 of 2013, which would not.

[18] In circumstances in which it is not clear that all of the relief sought by the applicants arose in the context of a dispute as defined in the Ombud Act, I do not think that they fell to be penalised for not proceeding for relief under the auspices of that Act.

[19] Having regard to all the aforementioned considerations, and noting that the applicants chose to act together in compositely seeking quite discrete heads of relief in proceedings that did not altogether justify consolidation for convenience of hearing, and further that they acted jointly in rejecting the first respondent's offer to accede to all of the substantive relief to which the first respondent was entitled, I have concluded that justice would be served if no order were made as to costs, with the result that each party will bear its own costs. I can only imagine that in directing that the costs of the aforementioned joinder application stand over, rather than awarding them to the successful party in the interlocutory proceedings, Thulare AJ intended to signify that they should be costs in the cause. And so they will be.

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

1. No order is made in respect of the relief sought in terms of paragraphs 1 to 3 of the notice of motion by reason of it having been rendered moot upon the demolition of the outside braai, wooden deck and pergola therein referred to.
2. It is recorded that the applicants did not persist at the hearing in seeking the relief set forth in paragraphs 4 to 7 of the notice of motion.
3. There shall be no order as to costs.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES**Applicant's counsel:****D.H. Wijnbeek****Applicants' attorneys:****Allen & Associates****Braamfontein****Bailey Haynes Inc.****Cape Town****First Respondent's counsel:****H.J. De Waal SC****First Respondent's attorneys:****BDP Attorneys****Tygervalley****MacRobert Attorneys****Gardens, Cape Town**