IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 13422/2014
CASE NO: 5146/2016

In the matter between:

Kreban Govender	First Applicant
Kovini Govender	Second Applicant
and	
Strini Naidoo	First Respondent
Siva Moodley	Second Respondent
Cyril Moonsamy	Third Respondent
Avesh Brijlal	Fourth Respondent
Naresh Theeruth	Fifth Respondent
Vinesh Ruthilal	Sixth Respondent
Vasu Narismulu	Seventh Respondent
Kuben Pillay	Eighth Respondent
Barry Budree	Ninth Respondent
Kiruben Govender	Tenth Respondent

Judgment

Lopes, J

[1] Two applications came before me on the 8th March 2018. The second application is an extension of the first, and it makes sense to deal with both of them in one judgment. The applicants in both applications are Mr and Mrs Govender and the respondents in both applications are the trustees of the Body Corporate of

RiverClub Mews, a Sectional Title Development situated at 15 Leeway Road, Queensburg, KwaZulu-Natal. The applications concern the efforts of Mr and Mrs Govender to obtain permission from the trustees to be allowed to keep in their section as pets, an African Grey parrot and a small Jack Russel dog.

[2] The first application under case number 13422/2014 sought an order directing four trustees to furnish their response to the Govenders' application for written consent to keep their pets in their section. That application was opposed and answering and replying affidavits were delivered. The sectional title development consisted of phase one and phase two. They are separate entities in the sense that they stand apart from one another, have different entrances and phase two is fully enclosed by its own boundary. The first application was brought against the persons whom the Govenders believed were the trustees of the body corporate, of phase two. However, it was accepted during the course of the application that in fact there could be only one body corporate which governed both phase one and phase two. A consolidated body corporate was formed, and the necessary additions to the trustees initially cited were then made and the correct respondents brought into the first application. The first application was not finally determined because the new body corporate made a decision in writing refusing permission for the Govenders to keep their pets in their section.

[3] After permission was declined, the Govenders instituted the second application under case number 5146/2016 seeking an order reviewing the decision of the trustees, setting it aside and replacing it with an order that the Govenders are entitled to keep the pets in their section. Both the applications were set down for hearing together. In the first application only the issue of costs remained to be decided by me.

[4] The following aspects were common cause:

(a) The Govenders took transfer of their section in February 2014.

(b) Because of the refusal of the trustees to allow the Govenders to keep their pets in their section, the Govenders have not as yet moved into it.

(c) In the first application the Govenders cited only four respondents as trustees of the body corporate of phase two. When their attention was drawn to the fact that the four trustees were not the only trustees, and that phases one and two constituted one sectional title scheme with one body corporate, the Govenders joined the fifth to tenth respondents.

(d) The fact that there should have been only one body corporate only came to light when the trustees sought legal advice. It was also the reason why the trustees did not timeously respond to the Govenders' request to keep their pets as they should have done.

(e) All that remains of the initial application is the question of costs.

(f) In addition, and at some stage between the two applications, the parties attempted to refer the dispute to arbitration. That referral was ultimately unsuccessful as the parties were unable to agree on the powers of the arbitrator.

(g) It also emerged during the first application that the rules governing the conduct of the section owners in the development had not been registered. The parties were agreed that the management and the conduct rules applicable are those contained in the schedule to the Sectional Titles Regulations to the Sectional Titles Schemes Management Act, 2011.

(h) Regulation one of the conduct rules provides:

'**1. Keeping of animals, reptiles and birds. –** (1) The owner or occupier of a section must not, without the trustees' written consent, which must not be unreasonably withheld, keep an animal, reptile or bird in a section or on the common property.

….

3) The trustees may provide for any reasonable condition in regard to the keeping of an animal, reptile or bird in a section or on the common property.

(4) The trustees may withdraw any consent if the owner or occupier of a section breaches any condition imposed in terms of sub-rule (3).'

(i) The applicants applied to keep their pets in their section on the 11th June 2014. Permission was declined by the trustees on the 13th April 2015.

[5] Ms *Mills* who appeared for the Govenders, indicated at the outset of her argument that she would not request a referral to oral evidence in order to resolve any disputes of fact which appear on the papers. She submitted that the test for the resolution of disputes of fact in applications as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A) does not apply in review applications. Ms *Mills* submitted that in review applications what must be considered is whether the decision-maker may have been taken into account considerations which were irrelevant, or did not take into account relevant considerations. I do not agree with the submission that the *Plascon-Evans* test does not apply where disputes of facts are raised in review applications. Decisions may be reviewed by way of action as well as application. If one follows the application route, the approach to disputes of fact in application proceedings applies.

[6] It is clear from the papers that the erstwhile members of the body corporate which was believed to operate in respect of phase two only, were of the view that a decision had previously been taken by the section owners of phase two that no pets

would be allowed in phase two. Those rules were, however, inapplicable because they had never been registered. The members originally believed separate body corporates should govern phases one and two, because they appear to be separate and distinct developments, even though they are part of the same scheme. Phase one consists only of duplexes with small garden areas, whilst phase two comprises simplexes and duplexes, with some sections being completely self-standing. The whole of phase two is enclosed. The point is made in the founding affidavits that pets were always permitted in phase one of the scheme, and as there should be only one body corporate for both phases, the same rules should apply to both phases. It was accepted, however, by the Govenders that the rule set out above vests the trustees with the discretion to refuse their consent for pets to be kept in any section. That discretion must be exercised reasonably.

[7] The Govenders maintained that they were informed by the person who sold them their section that pets were also allowed in the phase two of the scheme. They only realised that that was not the case after the registration of transfer of the section into their names. There is a dispute of fact on this issue, but in my view it is not necessary to determine that dispute because Ms *Mills* conceded in argument (correctly, in my view) that the Govenders were bound to have established the applicable rules from the then body corporate of phase two, prior to signing a purchase agreement. That they did not do so is their fault. It is common cause that at the time the trustees took the decision not to allow the Govenders to have their pets in their section, the single body corporate had been established and the trustees were aware of the discretion which they were obliged to exercise.

[8] Ms *Mills* submitted that the sole issue in this application is whether the trustees properly applied their minds in reaching their decision. In this regard she referred to *Body Corporate of the Laguna Ridge Scheme No 152/1987 v Dorse* 1999 (2) SA 512 (D) at 517G-J, where McCall J referred to the judgment of Corbett JA in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152A-D, including the following:

'Such failure may be shown by proof*, inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated…'

[9] Ms *Mills*, and Mr *Hoar* who appeared for the respondents, were in agreement that one good reason to refuse the application of the Govenders was sufficient to carry the day. Ms *Mills* submitted, however, that all the reasons put forward by the body corporate were bad ones.

[10] In their letter of the 13th April 2015 the trustees recorded that they were guided in making their decision by the following factors:

'1. It is a longstanding principle that pets have not been permitted to be kept at / in sections in Phase 2 of RiverClub Mews;

2. The sections in RiverClub Mews Phase 2 differ significantly to those in Phase one and were determined as not being suitable for the keeping of pets;

3.1 The two phases have since inception been incorrectly managed as if separate schemes;

3.2 The new, properly appointed Board of Trustees was appointed on 24th January 2015 and have been involved in the complex tasks of preparing draft Management Rules and Conduct Rules for consideration by the members in due course, which Rules would have the effect of legally separating the management of the two phases, in so far as is permissible in terms of the Sectional Titles Act 1995 of 1986;

3.3 The draft Conduct Rules which will be proposed to and considered by the members will provide for different rules to be applicable to those owning and residing in sections in Phase 1 to those owning and residing in sections in

Phase 2, and are principally intended to properly implement the rules which have historically been applied in each phase;

3.4 In the circumstances the Conduct Rules which will be proposed by the Trustees to apply to owners and residents of sections in Phase 2 will include a prohibition on the keeping of any pets;

3.5 It would therefore be remiss of the Trustees to grant consent for the keeping of a pet in a section in Phase 2 during this interim period when, in all likelihood, Conduct Rules will, in the near future be adopted in terms of which pets are prohibited in Phase 2;

3.6 It shall be unfairly discriminately to grant consent to you, when owners and residents have previously not been permitted to keep pets in Phase 2 and were also not be so permitted in the future (if the proposed Conduct Rules are adopted, which the trustees believe is probable).

In considering the proposed new Conduct Rules, should the members resolve to adopt rules which do in fact allow for pets to be kept at / in a section in Phase 2, you shall be welcome to re-apply for consent.'

[11] Ms *Mills* submitted that rules relating to pets in sectional title schemes generally revolve around aspects of nuisance. It is an unwarranted adherence to a rule to adopt the attitude that, because no pets were previously allowed, no pets whatsoever will be allowed. She submitted that that approach is in fact in contradiction to the rules which are applicable. She submitted that that was the attitude of the body corporate as contained in their decision, and they were not prepared to look beyond the aspect of 'no animals'.

[12] Ms *Mills* also submitted that to allow the Govenders their pets would not open the flood-gates to everyone else being able to do so, because reasonableness would always be a consideration. The rules as they stand entitle the trustees to impose conditions, and further entitles them to withdraw their consent should the conditions not be adhered to by section owners. The trustees were not entitled to adopt the

approach that the rules which are likely to come into force, will constitute a complete ban on animals in units in phase two. As the standard rules provided for in the schedule to the Rules to the Act are applicable, the trustees could not make decisions on any likely changes to those rules, until they have been passed by the members.

[13] Ms *Mills* submitted that in the circumstances, the decision of the trustees falls to be reviewed and set aside, and should either be referred back to them to make a further considered decision, or this court could substitute its own decision for the decision of the body corporate.

[14] With regard to costs Ms *Mills* submitted that the first to fourth respondents should bear the costs of the first application, which was issued on the 19th November, 2014. This is because from June 2014 the respondents were being advised by attorneys who had told them that there could not be two governing bodies, but only one for the entire development. Ms *Mills* submitted that the inaction of the trustees in this regard was unreasonable, and the trustees did nothing for approximately seven months, when a joinder application was brought by the Govenders, and the newly constituted governing body was asked to respond to the application within 30 days. No response was received within the 30 days' provided, and the Govenders had to wait a further five weeks after the joinder application until the 13th April 2015, when the decision was ultimately made. The approach of the trustees is further contained in a letter dated the 9th February 2015 when they sought to deflect the Govenders' application for a decision, by suggesting that the Govenders wait until the new body corporate was regularised and the new rules brought into affect. Ms *Mills* submitted that in the circumstances the trustees had left the matter in abeyance for approximately ten months and they should pay the costs of the both applications.

[15] Mr *Hoar* accepted that the 2011 'no pets policy' adopted by the then body corporate of phase two was never registered, and accordingly does not feature in this application. He submitted that the policy that pets would not be allowed was confirmed at a meeting of the body corporate on the 10th May 2014. The minutes of that meeting were an annexure in the trustees' answering affidavits and disclosed that the meeting decided, following upon a request by the Govenders, that no pets should be allowed 'as per conduct rules'. The meeting was made aware that the conduct rules were not registered, and confirmed that the conduct rules which were given to purchasers of sections at the time they purchased them, reflected that no pets would be allowed.

[16] A dispute of fact arises in relation to the accuracy of these minutes, and Ms *Mills* submitted that the members present at the body corporate meeting did not really understand the problems facing them. In this regard the trustees and their attorneys had not disclosed that the trustees were not properly authorised until the application by the Govenders was launched, and this is why the Govenders went ahead with the first application. Ms *Mills* alluded to the fact that the trustees could have called a special general meeting and changed special conduct rule one, but chose not to do so.

[17] Mr *Hoar* pointed out that the minutes of the body corporate meeting reflected the need for the trustees to start the process of amalgamating the two body corporates, and bring the scheme into compliance with the Act. He submitted that the minutes reflected that all those present at the meeting agreed that no pets are allowed in phase two.

[18] With regard to the decision by the trustees and the items as set out above constituting their reasons, Mr *Hoar* submitted:

(a) The present matter was distinguishable from the facts set out in *Laguna Ridge*, because phase two had been pet-free since 2011.

(b) Buyers were attracted to the sections in phase two because it was a pet-free zone.

(c) In order to arrive at a decision whether to review the decision of the trustees, the court should examine the whole decision by the trustees, and consider the fact that they were exercising their discretion. A further dispute of fact arises concerning the property adjoining the section which had been purchased by the Govenders. Mr *Hoar* submitted that in terms of the scheme, the property surrounding their section was not an exclusive use area.

(d) With regard to the nuisance aspects, this had not been addressed in any way by the trustees. It was a fact of life that dogs bark and parrots screech or squawk, and they could constitute a nuisance, particularly when the Govenders were absent from the unit during the day. In addition, the Govenders conceded that their dog does bark, just not excessively. It was precisely this nuisance aspect which the section owners in phase two sought to avoid.

[19] Mr *Hoar* submitted that in the circumstances it was necessary for the Govenders to show gross unreasonableness on the part of the trustees, and indicate either *mala fides*, ulterior motives or that the trustees did not apply their minds in making the decision. He submitted that if I found that the decision of the trustees should be set aside, the matter should be referred back to them for a final decision, because there was not enough information on the papers to enable me to make a considered decision. He submitted that the trustees are far better placed than I am to make decisions with regard to the development.

[20] Mr *Hoar* submitted that any adherence to a fixed principle must be unwarranted before it can be considered grossly unreasonable. The overriding consideration in favour of the decision of the trustees, was the wishes of the section owners in phase two, who did not wish to have pets present there. Nothing put forward by the Govenders demonstrated that their need to keep their pets was different from the reasons which any other section holder would have for keeping pets. There were no extraordinary circumstances which warranted the keeping of pets in their case ie medical reasons, etc. In those circumstances the unanimous will of the section owners of phase two should prevail, and the decision of the trustees be upheld.

[21] Ms *Mills* submitted that the suggestion that the section owners in phase two were unanimous in not wanting pets, was hearsay, and inadmissible. She submitted that if that was the case, the trustees should have put up affidavits by each section owner to indicate that they did not wish to have pets. It is, of course, significant, that Ms *Mills* was unable to point to any evidence that any individual owner of section two wanted to have pets. No affidavits have been submitted in this regard by the Govenders. Ms *Mills* submitted in addition that there were no reasons put forward why the section owners in phase two did not want to have pets on the property.

[22] In the decision of the trustees, there are only three reasons given which are relevant to a consideration of whether pets should be kept:

(a) The long standing principle that pets have not been permitted to be kept in phase two, based on the will and decision of the other section owners;

(b) The sections in phase two differs significantly from those in phase one and were determined as not being suitable for the keeping of pets; and

(c) That the body corporate was going to introduce new rules which would probably preclude the keeping of pets in phase two.

What then falls to be considered is whether any of these reasons are rational and reasonable.

[23] As the above three reasons were the only ones by which the trustees were guided in reaching their decision, they undoubtedly relied upon the precedent which had been established of not allowing pets. For the reasons set-out by McCall J at 520G-I of *Laguna Ridge*, the refusal to grant permission in a particular case because of the fear of creating a precedent is tantamount to a failure to consider and decide the application on its own merits. It is simply a refusal to depart from the general policy of not granting permission for the keeping of pets. I agree with the approach of Ms *Mills* in this regard.

[24] With regard to the history of the attitude of the section owners in phase two, and the differences between phase two and phase one, those differences do not emerge from the decision, nor entirely from the papers. The trustees have not explained in their decision why those differences would be applicable and the effect they would have on the keeping of pets in phase two. It would seem then, that as with the nuisance element, the trustees simply failed to consider this relevant factor.

[25] As the remainder of their reasons were irrelevant to a consideration of the application to keep pets, the trustees have simply applied a hard and fast rule which they clearly intend to implement in all cases. Once the principle is regarded as a decisive factor, as set out by Human J in *Computer Investors Group Ink and another v The Minister of Finance* 1979 (1) SA 879 (T) then the trustees have not considered the matter, but have prejudged it without having regard to its merit. The trustees cannot rely on a possible future decision to change the current rule one to a ‘no pets’ rule. To do so is illogical because the current rule is different. It is noteworthy that notwithstanding their intention to propose new rules, they have not as yet (3 years’

later) done so! In the premises the decision of the trustees falls to be reviewed and set aside.

[26] The next question to be decided is whether this court should, in setting aside the decision of the trustees, substitute its own decision. I have considered the factors for so doing as set out by McCall J in *Laguna Ridge* at 523B-D. In the present circumstances the trustees did not in any way consider the question of nuisance, which they should have done. In addition, not having viewed the parrot and the dog, I am in no position to assess what possible nuisance they could constitute. Nor am I in any position to be able to assess what conditions could or should be imposed on any grant of permission to keep pets, assuming that was the decision of the trustees. In order to do so one would have to be familiar with the lay-out of the sections and the exclusive and the public use areas. I am not. Accordingly, I am of the view that the matter should be referred back to the trustees for them to reconsider their decision, taking into account all the relevant factors, and for them to make a decision.

[27] The question of costs is not straightforward. In the first application the Govenders sued only four of the trustees, and were eventually compelled to join the correct trustees when the proper body corporate was constituted. This may well have been due to the fact that the members of the body corporate mistakenly understood the legal position, and believed that they could constitute separate body corporates for phase one and phase two. Whether they can, or whether one body corporate can make separate decisions for one part of a development, is not before me. It seems, however, on the papers that the Govenders had no option but to bring the application to compel the trustees to make the decision, which they did. They are accordingly entitled to their costs of the first application.

[28] The conduct of the Govenders has not been beyond reproach. I say this because of the minutes of the meeting of the 10th May 2014 during which Mr

Govender threatened legal action against the body corporate and 'threatened to bankrupt the body corporate if his wishes were not acceded to'. By their conduct, the Govenders they have made it clear that had they properly enquired into the rules of the body corporate prior to purchasing their section, instead of merely relying on the say so of the seller (on their own version, but which is disputed by the trustees), they would have been alerted before purchasing the section to the fact that no pets were allowed. Given their attitude in remaining in alternative premises until the matter is resolved, it seems clear that they would not have purchased the section had they known that they would not be allowed to have pets. Their failure to make what was in the circumstances an eminently sensible enquiry - ie as to the conduct rules of the development - is partly to blame for the necessity for legal action. These facts are insufficient to deprive the Govenders of their costs.

[29] In my view the trustees have been advised by legal representatives almost throughout the dispute, and I do not believe that, as lay persons, they can be held to have been in breach of their fiduciary duties to the body corporate, and be personally liable for costs. The Govenders have, however, been successful in having the decision of the trustees set aside.

[30] I was also initially requested to decide the costs of the arbitration, but this was not pressed in argument by Ms *Mills* for the Govenders. I do not believe, in any case, that I could have been able to make such a decision.

[31] In all the circumstances I make the following order:

(a) The decision of the respondents, which was communicated in writing to the applicants on the 13th April 2015 refusing their consent for the applicants to house their pets in section 23 of the RiverClub Mews Sectional Title Scheme, is reviewed and set aside.

(b) The matter is referred back to the respondents to re-consider the application in all its relevant aspects and to make a decision, such decision to be made within 30 days of the date of this order.

(c) The respondents, in their capacity as trustees of the body corporate are directed to pay the applicants costs both in case number 13422/2014 and in case number 5146/2016.

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Graham Lopes J

Dates of hearing:	8th March 2018
Date of Judgment:	26th March 2018
Counsel for the Applicants:	Ms L M *Mills* (instructed by Lomas-Walker Attorneys)
Counsel for the Respondents:	Mr S *Hoar* (instructed by Northmore Montague Attorneys)