

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No :10576/2014

In the matter between :

Balraj Goordayal

First Applicant

Shomina Goordayal

Second Applicant

and

The Body Corporate of Riverside Mews

First Respondent

Sanjay Singh

Second Respondent

EThekweni Municipality

Third Respondent

Judgment

Lopes J

[1] The applicants, who are married in community of property, are the sectional title owners of Unit 5 of a sectional title development described as Riverside Mews. The first respondent is the Body Corporate of Riverside Mews and the second respondent is the current chairman of the body corporate. The third respondent, the eThekweni Municipality was joined by the other respondents. No relief was sought against it.

[2] The history of the matter may be summarised as follows :

- (a) There are eight units in Riverside Mews.
- (b) On the 25th January 2014 a meeting was held by the trustees of the Body Corporate on the premises of Unit 5.
- (c) At the meeting Mr Goordayal tabled plans which he had drawn for the extension of Unit 5. These plans, copies of which were annexures 'A' and 'B' to Mr Goordayal's founding affidavit, had, apparently, previously been signed by Mr Singh, as 'Chairman, Riverside Mews'. The purpose of the meeting was, inter alia, to revisit the plans. The minutes of the meeting (although referred to as a meeting held on the 5th March 2014), are disputed.
- (d) Certain of the trustees had queries with regard to the extensions envisaged, and Mr Goordayal took them outside the unit and explained the extensions to them. According to the respondents, Mr Goordayal explained that the intended alterations to his unit consisted an extension of an open-deck similar to the sun-deck on the adjoining Unit 6, repairs to his swimming pool and the construction of a 'privacy' wall between Units 5 and 6.
- (e) It is clear from the copies of annexures 'A' and 'B', that the extensions envisaged are an open deck on the first floor of Unit 5, together with the enclosure of a sun room below it. The effect of the alterations is to extend the living area of Unit 5, in addition to creating the open deck.
- (f) When the applicants' plans were submitted for approval by the eThekweni Municipality, one of the Municipality's requirements was that a letter be

provided on the letterhead of the Body Corporate addressed to the Head, Development Planning, Environment and Management Unit in a form complying with a pro forma letter provided by the Municipality.

- (g) Mr Singh, as chairperson of the Body Corporate, had on the 1st April 2014 signed a letter confirming that the Body Corporate had no objection to the development of a boundary wall construction and swimming pool renovation to Unit 5. In addition, on the 25th January 2015, he had signed a letter confirming that the Body Corporate had no objection to 'the development depicting additions and alterations to Unit number 5...', and recorded that 'all submission plans have been signed'.
- (h) When the Mr Goordayal then approached Mr Singh to obtain the letter sought by the Municipality, Mr Singh refused to sign it.
- (i) Mr Singh's stance is that he and the other members of the Body Corporate were misled by Mr Goordayal at the meeting of the 25th January 2014. They had been misled inasmuch as Mr Goordayal had told them that the only alterations which he wished to pursue were the construction of the first floor open deck and the repairs to the swimming pool. Mr Singh concedes that Mr Goordayal also wanted the construction of a small wall between Units 5 and 6 in order to create privacy for the owners. The Body Corporate had had no objection to the construction of the open deck, the small wall and the swimming pool renovations.
- (j) Despite the fact that the applicants did not have building plans which were passed by the eThekweni Municipality, they engaged the services of DDSS Consulting who notified the Body Corporate on the 10th February 2014 of their

intention to commence construction of the building works. The letter from DDSS Consulting indicates that the Body Corporate's consent had been granted in October 2013.

- (k) Building construction duly commenced and it was only at that stage, according to Mr Singh, that the Body Corporate became aware of the full nature and extent of the anticipated extensions.
- (l) This precipitated a flurry of correspondence between the attorneys acting for the applicants and the attorneys acting for the body corporate. Complaints were made by the Body Corporate about the manner in which the building operations were being carried out, and in particular the storage of building materials on the site in a parking space provided for the applicants, as a result of which they had begun to use a visitor's parking space for themselves. Mr Goordayal's attorneys recorded that 'Our client categorically denies that he is extending his lounge and diningroom area ...'.
- (m) As the parties were unable to resolve their differences, on the 9th September 2014 the applicants delivered this application, seeking an order compelling Mr Singh to sign the municipality's pro forma letter of consent on behalf of the Body Corporate, in order to allow the building alterations to go ahead in accordance with the plans which had been signed by Mr Singh. In the alternative the applicants sought an order that the Deputy Sheriff of Durban North sign the necessary documents in the event that Mr Singh refused or failed to do so.
- (n) The respondents opposed the application and have launched a counter-application for an order directing the applicants to demolish the building works

which have been pursued without approved building plans, and to remove all building rubble from the precincts of Unit 5 and the surrounding area, together with an order interdicting the applicants from effecting building alterations to Unit 5 without approval and the proper plans passed by the eThekweni Municipality. The Body Corporate also sought to interdict the first applicant from parking his motor vehicle in an obstructive manner in the complex. Each party sought costs against the other on a punitive scale.

[3] A number of issues arise from the affidavits delivered by the parties. They include, inter alia :

- (a) whether the members of the Body Corporate were misled by Mr Goordayal with regard to the nature and extent of the alterations he intended to effect to Unit 5 ;
- (b) whether the Body Corporate was authorised to oppose the application and seek the relief set out in the counter-application;
- (c) whether the building work already undertaken by the applicants was lawfully carried out, and whether and to what extent they may fall to be demolished;
- (d) whether the Body Corporate is entitled to interdict the applicants from effecting further building alterations.

[4] Mr *Maharaj* who appeared for the applicants submitted that if I were to find that an irresolvable dispute of fact existed on the papers, I should refer the matter for the hearing of oral evidence and reserve the question of costs.

[5] I do not believe that it is possible for me to resolve these issues on the papers before me. I am not persuaded that a referral to oral evidence would be helpful, because of the issues which arise on the papers. There are contradictions in the founding papers of the applicants, and improbabilities on both versions. I am concerned that the issues are too wide-ranging for a court hearing oral evidence to resolve them. Such a referral would require that the parties define the issues, which they have not done with any, or any sufficient clarity, which would have enabled me to draft an appropriate order. I have decided to refer the matter to trial. As the applicants do not have passed building plans they cannot complain of being interdicted against continuing building operations pending the resolution of the matter. The requisites for an interim interdict have, in any event, been satisfied.

[6] I accordingly make the following order :

- (a) the application is referred to trial;
- (b) the first applicant's founding affidavit shall stand as a simple summons, and the second respondent's answering affidavit shall stand as a notice of intention to defend;
- (c) the applicants are directed to deliver a declaration within fifteen days of the date of this order, and the respondents are to deliver a plea thereto and claim-in-reconvention within twenty days of the date of the service upon their attorneys of the declaration;

- (d) the provisions of the Rules of this Court shall apply to the further conduct of the matter;
- (e) pending the resolution of the trial, the applicants are interdicted and restrained from carrying out any further building alterations to Unit 5, Riverside Mews, without approved building plans and any necessary consent from the Body Corporate of Riverside Mews;
- (f) all questions of costs are reserved for decision by the trial court.

Date of hearing : 9th October 2015

Date of judgment : 6th November 2015

Counsel for the Applicants : M Maharaj (instructed by Azgar Ally Khan and Associates)

Counsel for the Respondents : S Khan (instructed by Ramdass & Associates)