

SOUTH AFRICA / JUDGMENT

Bila and Others v Monterey Body Corporate and Others (2021/5060) [2021] ZAGPJHC 882 (24 November 2021) [2021] ZAGPJHC 882

COURT

South Gauteng High Court, Johannesburg

BEFORE

A Friedman

CASE / FILE NUMBER

2021/5060

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2021/5060

REPORTABLE:

YES/NO

OF

INTEREST OF OTHER JUDGES: YES/NO

REVISED

24

November 2021

In

the matter between:

ANANIAS

BILA &

OTHERS

Applicants

and

MONTEREY

BODY CORPORATE

First Respondent

PAL

MANAGEMENT

COMPANY

Second Respondent

VAN

DEN BOS,

JAN
Third Respondent
NEIVA,
ANTONIO
CARLOS
Fourth Respondent
COMMUNITY
SCHEME OMBUDSMAN SERVICE
Fifth Respondent

JUDGMENT

Friedman AJ:

1 On 26 October 2018, this Court (Makume J) made an order which is in issue in the present application. It is lengthy, and I shall not reproduce it all, but in essence it provided for the following (in addition to certain ancillary matters which need not be discussed here):

1.1 The third respondent (“Mr van den Bos”) was appointed the administrator of the first respondent (“the Monterey Body Corporate”) for a period of 180 days.

1.2 Mr van den Bos was authorised to approach the court to shorten the period described in paragraph 1.1 above.

1.3 Mr van den Bos was required to call an Annual General Meeting within 90 days for the Monterey Body Corporate to, amongst other things, decide how many Trustees ought to be elected and, thereafter, to appoint them.

1.4 Mr van den Bos was vested with the powers set out in section 16 of the Sectional Titles Schemes Management Act 8 of 2011.

2 After this order was granted, an agenda was circulated by Mr van den Bos on 9 January 2019, informing the registered owners of units in the Monterey Body Corporate that an AGM would be held on 25 January 2019. According to the minutes of the AGM, which were annexed to the answering affidavit filed by the first to fourth respondents (who collectively were represented by Mr Köhn at the hearing of this matter), 55% of the owners at the meeting voted in favour of appointing the second respondent (“PAL Property Management”) as an executive managing agent of the body corporate. In doing so, the members exercised an election available to them in terms of rule 28 of the Management Rules annexed to the Sectional Titles Schemes Management Regulations made under the Sectional Titles Schemes Management Act to choose to be governed by an executive management agent rather than trustees. Whether they exercised this election validly, is something to which I return below.

3 Mr Ananias Bila and several other persons (the identification of whom is not a straightforward matter – an issue to which I also return below) have brought an application in which they seek an order declaring Mr van den Bos to be in contempt of Makume J’s order. They also seek further relief as follows:

3.1 An order that the management agreement dated 1 March 2019 concluded between PAL Property Management and Mr van den Bos be declared invalid and set aside.

3.2 An order that the conduct of PAL Property Management in opening the bank account of the body corporate “in the name of the second respondent be declared illegal”.

3.3 The conduct of the fourth respondent of collecting levies “from some first respondent homeowners be declared illegal”.

3.4 An order that the bank account of PAL Property Management and the fourth respondent be “vested to the fifth respondent who shall close it and transfer all the monies remaining as balance to the to be [sic] newly opened first respondent bank account.”

3.5 An order that the fifth respondent (being the Community Scheme Ombudsman Service) must hold a Special General Meeting within 30 days of this Court’s order to deal with the election of trustees.

3.6 An order that “[PAL Property Management] hand over the accounts for all the period that it has been operating as the management company and [Mr van den Bos] hand over accounts for all the period that it [sic] has acted as the administrator of the first respondent”.

3.7 An order that the Special General Meeting be chaired by an independent third party appointed by the Community Scheme Ombudsman Service “with all the respondents except the fifth respondent bearing the costs incurred thereby with one paying absolving the others”.

3.8 An order that all of the respondents except the Ombudsman should pay the costs of this application.

4 Some of this relief is self-evidently incompetent, simply on its own terms as formulated in the notice of motion (and paraphrased above). For example, how I could order PAL Property Management and the fourth respondent (an individual who owns units in the body corporate) to be divested of their bank accounts, escapes me.

5 But stripping away some of the clutter, it seems to me that the core complaints of the applicants are the following:

5.1 Makume J’s order provided for the election of trustees and not an executive management agent. Therefore, Mr van den Bos is in contempt of the order made by Makume J because he convened a meeting which was designed to circumvent the court order by procuring a decision to appoint an executive managing agent rather than trustees.

5.2 There is a conflict of interest arising from the appointment of PAL Property Management, of which Mr van den Bos is a director, as executive managing agent.

5.3 There is a pattern of Annual General Meetings not being called.

5.4 There is insufficient information on how levies are calculated.

5.5 The physical condition of the building continues to deteriorate, and it is overcrowded.

6 One answering affidavit has been filed in this matter; on behalf of all of the respondents (who I shall describe below collectively simply as “the respondents” for convenience) except the Community Ombudsman. The respondents deny that Mr van den Bos was in contempt of Makume J’s order. They say that he complied with the requirement of convening an AGM. At the AGM, there were no nominees to serve as trustees and the members instead voted to appoint PAL Property Management as the executive managing agent. They argue that, since the applicable regulatory framework permits bodies corporate to adopt this course of events, they were acting lawfully and not in contempt of the court order. In response to this Mr Poyo, an attorney with right of appearance who appeared for the applicants, responded that the wording of the Court order is clear: the AGM envisaged by paragraph 3 of Makume J’s order required trustees to be elected and appointed, and that is what had to be done. When I asked Mr Poyo what the body corporate ought to have done in the face of a lack of nominees to serve as trustees, his response was that an application

ought to have been made to this Court to vary the terms of Makume J’s order.

7 I have doubts as to whether Mr Poyo’s interpretation of the order is correct. It seems to me that, if the order is read as a whole, its intention is to ensure a proper transition from the previous position in which Mr van den Bos was the administrator, to a position in which the body corporate is governed properly in terms of the Sectional Titles Schemes Management Act, Regulations and Management Rules. Interpreted in that way, the order was not designed to prevent the body corporate from adopting any approach to governance permitted by the Management Rules – it did not mean to be prescriptive, as long as the transition away from administration was lawfully achieved.

8 Since the applicants do not seek the committal of Mr van den Bos, they need to show civil contempt on a balance of probabilities, rather than beyond a reasonable doubt.[1] This requires me to make a finding, on the balance of probabilities, that Mr van den Bos intended to disregard Makume J’s order. Even if, on a proper interpretation of the order, Mr van den Bos’s conduct did not comply with it (an issue in respect of which I have already expressed my doubts), I cannot find on the papers before me that Mr van den Bos intentionally disregarded Makume J’s order. The evidence, understood through the prism of Plascon-Evans,[2] suggests that the AGM was called in order to comply with Makume J’s order and that the members voted for a course of action that they considered themselves entitled to follow.

9 So, the application for a declarator that Mr van den Bos is in contempt of court of Makume J's order must fail.

10 But what about the remaining prayers for relief? As I have already mentioned, some of them, on their face, are simply incompetent. But, there are issues raised on the papers which concern me. In terms of rule 28 of the Management Rules, the decision of a body corporate to appoint an executive managing agent, rather than trustees, must be selected by special resolution. In terms of section 1 of the Sectional Titles Schemes Management Act, a special resolution is a resolution "passed by at least 75% calculated

both in value and in number, of the votes of the members of a body corporate who are represented at a general meeting." It is not clear to me on what basis the AGM could have validly decided to appoint an executive managing agent, when only 55% of members voted in favour of the resolution.

11 But, because the applicants did not squarely raise this issue in the founding papers, and focused instead on a rather formulaic insistence that only trustees could be elected, the respondents have not been given a proper opportunity to explain the procedure. I would not wish to attempt to make any firm findings on the legality of the process. I simply note that there is sufficient basis for me to be concerned that some aspects of the process followed in the appointment of the executive managing agent might not have complied fully with the regulatory framework. The papers suggest that there might also be cause to be concerned about the state of the building and the body corporate. Who is to blame for these problems is far from clear to me.

12 But the failure of the applicants to plead these and related issues (such as questions to do with the levies) clearly – and thus their failure to give the respondents a proper opportunity to respond – is not the only obstacle to me granting this application. If one leaves the contempt aspect aside – and I have already held that no case for contempt has been made out – the core complaints of the applicants all relate to issues which may be the subject of an application to an ombud in terms of sections 38 and 39 of the Community Schemes Ombud Service Act 9 of 2011 ("the CSOS Act"). The CSOS Act contains detailed provisions which enable an ombud to resolve disputes in bodies corporate. The ombud has more flexibility than a court. For instance, on receiving an application, an ombud may ask the applicant to provide further information and documentation under section 40(a) of the CSOS Act. And, where he or she considers there to be a reasonable prospect of a negotiated settlement, he or she must refer the matter to conciliation.

13 Most importantly, for our purposes, is the range of disputes which may be referred to an ombud for determination. Section 39 contains a comprehensive list of the types of prayers which may be sought from an ombud. I would not wish to burden this judgment by listing them all. But some examples, relevant to the issues arising in this case, would be helpful.

13.1 In terms of section 39(1)(c), an applicant may seek an order that levies have been incorrectly determined or are unreasonable.

13.2 In terms of section 39(3), an owner may bring an application requiring the “association” (which is a reference to the relevant governance structure of the body corporate, such as the trustees) to adopt particular scheme governance provisions – for example, if properly motivated, an owner could apply for the adoption of rules requiring the election of trustees as opposed to the appointment of executive management agents (bearing in mind that a body corporate may elect to depart from the Management Rules attached to the Regulations).

13.3 Another important form of intervention that may be sought on application is an order requiring the association to call a general meeting (section 39(4)(a)) or an order that a particular meeting was not validly convened (section 39(4)(b)) or even an order that a particular resolution is void or invalid (section 39(4)(c)).

13.4 In terms of section 39(5), an owner may apply for an order that the association has the right to terminate the appointment of a managing agent.

14 It may be seen from what I have summarised above that, again leaving aside the contempt prayer, the issues that, in substance, the applicants have raised in their founding papers concern topics falling under the CSOS Act. If, for example, the levies are unreasonable, then section 39 gives them a remedy.

15 In *Heathrow Property Holdings No 3 v Manhattan Place Body Corporate* 2021 JDR 1017 (WCC), Sher J considered the relevant provisions of the CSOS Act as part of considering the following question: does the High court have concurrent jurisdiction to determine the issues falling within the ombuds’ jurisdiction under section 39? In other words, would it be competent for an owner to apply to the High Court for the same relief as what may be the subject of an application under section 39 of the CSOC Act? Sher J took into account that the Sectional Titles Schemes Management Act expressly confers a right to appeal to the High Court against a finding by an ombud in a section 38/section 39 application, but only on questions of law (implying that the legislature did not intend the High Court to become embroiled in questions of fact in disputes of this nature), and also that the whole purpose of the CSOS Act would be undermined if owners could simply bypass the Act and approach the High Court directly. Sher J therefore concluded that the correct interpretation of the Act is that the High Court does not have concurrent jurisdiction to entertain disputes on the issues covered by section 39. Its jurisdiction is limited to entertaining appeals on questions of law.[3] Sher J put it as follows:

“To my mind, considering the sections referred to in the context of the CSOS Act as a whole and adopting a purposive and sensible

interpretation thereto ie one which has regard for the language of the provisions concerned, the context in which they are to be found, and the apparent purpose to which they are directed it is apparent that the legislature intended that the primary forum for adjudication of disputes in terms of the Act is to be the Ombud service and the adjudicators appointed by it, who are required to have suitable qualifications and the necessary experience (not only in relation to the adjudication of disputes, but also in relation to community scheme governance). The High Court is intended to be a

secondary, supervisory forum which is to exercise review and appellate jurisdiction (i.e oversight over the discharge by the Ombud

and its adjudicators of their duties and powers), and not an adjudicatory jurisdiction.”[4]

16 I am in respectful agreement with Sher J. I cannot add to his comprehensive and persuasive analysis and his conclusion which I have reproduced in paragraph 15 above. In the circumstances, it seems to me that, if the applicants have genuine complaints about the governance of Monterey Body Corporate, their correct course of action is to apply to the Ombud Service for appropriate relief.

17 In the circumstances, none of the relief sought in the notice of motion may be granted in this application.

COSTS

18 The costs order that I should make in this matter gives rise to some difficulties. The first difficult issue for me to determine is: is it even appropriate to grant a costs order in favour of the respondents at all? As I have noted above, there does seem to be some indication on the papers that all is not well in the Monterey Body Corporate. And the issues relating to alternative remedies under the CSOS Act cannot be described as finally settled. It could be argued in this context that the applicants cannot be blamed for bringing this application.

19 However, on balance, I do not think it appropriate to deny the respondents their costs. In the first place, this will mean in practical terms that the owners, as a collective, will bear the brunt of my failure to make a costs order. I do not consider this to be fair. Secondly, the contempt application – which was the main focus of the application – was clearly ill-conceived, and the body corporate should not have to pay for it. Mr Köhn argued that the application was hopelessly ill-conceived and urged me to make a punitive costs order so that the respondents – most notably, the body corporate – would not be out of pocket

at all. In the light of everything that I have said above, I am not minded to go that far.

20 Then there is the question of who to make the costs order against. When he launched this application, the main applicant (Mr Bila) purported to cite several other parties as co-applicants. In order to do so, he annexed a list to his founding affidavit in which the co-applicants were said to be listed. The list, however, is totally inadequate to serve the purpose of describing the applicants. The list simply records a series of ID numbers (and, as far as I can make out, one passport number), unit numbers and signatures. No names are given. No explanation is given as to the basis on which the applicants assert standing to bring the application.

21 In an apparent attempt to cure these defects, several confirmatory affidavits were filed by some of those appearing on the list. In some cases, these confirmatory affidavits were illegible too.

22 When it comes to the merits of this application, the inadequate citation of the further co-applicants is immaterial. Mr Bila could have, at least in principle (and had his case had any merit), succeeded without their assistance. And, of course, now that the application is to be dismissed, their inadequate citation is neither here nor there. But, I cannot make a costs order against parties not properly before court. I canvassed this with the representatives of the parties, and the consensus was that I should make a costs order only against those who may clearly be identified by their confirmatory affidavits.

23 Even adopting this approach requires some detective work. Mr Bila says in his founding affidavit that the co-applicants are the “homeowners” listed in the list that I have already described. The list does not identify their names, but it does identify their unit numbers. Then, in those of the confirmatory affidavits that are legible, the unit number is given (enabling me to match each of these confirmatory affidavits to a unit number given on the list) and the deponent confirms that he or she agrees with everything said in the founding affidavit “to the extent that they relate or refer to me”. With some trepidation,

it seems to me that I may conclude that those homeowners who signed confirmatory affidavits intended to make common cause with Mr Bila as co-applicants.

24 Ordinarily I would not be minded to undertake an investigative project of the type described above – indeed, the respondents initially invited me to disregard the participation of the co-applicants entirely. However, it seems to me unfair both to the respondents and Mr Bila for Mr Bila to be made solely liable for the costs of this application by virtue of the undesirable approach followed in respect of citation, in circumstances where the evidence suggests that the further co-applicants did intend to be joined.

25 In the circumstances, I intend to dismiss this application and make a costs order against all of the parties identified as applicants in this matter in terms of the process that I have described above. For the sake of certainty, I intend to make this clear in my order.

ORDER

26 I make the following order:

1. The application under case no 2021/5060 is dismissed.
2. The following parties, who have been cited as applicants in this matter, are jointly and severally liable to pay the costs of the first to fourth respondents:

2.1 Ananias Bila, the main cited applicant.

2.2 Hanganani Joyce Mensheke, owner of unit 32.

2.3 Mohlala Fako Thomas, owner of unit 141.

2.4 Hazel Jones, owner of unit 67.

2.5 Charlie Mofokeng, owner of unit 121.

ADRIAN FRIEDMAN

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 24 November 2021.

APPEARANCES:

Attorney for the applicants: Makhosi Poyo Inc

Counsel for the applicants: M Poyo (attorney with right of appearance)

Attorney for the first to fourth respondents: AM Ellis Attorney

Counsel for the first to fourth respondents: M Köhn

Date of hearing: 15 November 2021

Date of judgment: 24 November 2021

- [1] See *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) at paras 46 to 67 and in particular para 67
- [2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634-5
- [3] See *Heathrow Properties* (supra) at paras 47 to 56
- [4] *Heathrow Property* (supra) at para 56

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