

SOUTH AFRICA / JUDGMENT

Drakenberg Body Corporate and Others v Trafalgar Property Management and Others (14470/2021) [2021] ZAGPPHC 682 (29 April 2021) [2021] ZAGPPHC 682

COURT

North Gauteng High Court, Pretoria

BEFORE

MJ Mosopa

CASE / FILE NUMBER

14470/2021

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IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER

JUDGES: YES/NO

(3)

REVISED: YES/NO

29/04/2021

Case number:

14470/2021

In the matter

between:

DRAKENSBERG BODY
CORPORATE 1st
Applicant
NEILOPAHR
CASSIM
2nd Applicant
SHEREEN
CASSIM
3rd Applicant
v
TRAFALGAR
PROPERTY MANAGEMENT
1st
Respondent
MARTHA
MATJIE
2nd Respondent
KABELO
NKWANA
3rd Respondent
MALETETSANE PAUL
MOKOENA
4th Respondent
SIPHO ETWELL
MAHLANGU
5th Respondent
BICPROP (PTY)
LTD
6th Respondent
MAJOME ELVIS
MONYELA
7th Respondent
EDWIN NKHANGWENI
MATAMELA
8th Respondent
JOHANNA FIHLA
MAROGA
9th Respondent
MULINGONI JOMO
LAMBANI
10th Respondent
RICHARD
RIKHOTSO
11th Respondent
NONHLANHLA
KHABONINA SIBANYONI
12th Respondent
MASHAA MICHAEL
MATLALA
13th Respondent
GOLDEN BLESSINGS

MANGANDA
14th Respondent
TKC
PROPERTIES
15th Respondent
HLENGANI FAMILY
TRUST
16th Respondent
MOTLATJIE ANNE
LETSEBE
17th Respondent
RENATE
GARLIPP
18th Respondent
LUCKY MASHOBANE
SIBANDA
19th Respondent

JUDGEMENT

MOSOPA, J

This application for the termination of the first respondent as a managing agent of the sectional title scheme known as 55 Drakensberg

(first applicant), situated at 195 Nana Sita Street, Pretoria, was brought by the applicants on urgent basis in terms Rule 6(12) of the Uniform Rules of Court. The applicants also sought an order for the first respondent to hand over all books of account, documents relating to its management of the first applicant, audited financial statements for the past three (3) financial years, monies, reserved funds and keys to the water pump and storeroom and, ancillary relief.

URGENCY

2. It is not in dispute that the managing agreement between the first applicant and the first respondent lapsed by effluxion of time. Further, that in the Annual General Meeting (AGM) of the first applicant on 15 December 2020, it was resolved that the first respondent's management of first applicant is terminated. Following that meeting, a formal letter dated 20 January 2021 was addressed to the first respondent, informing it of the intent to terminate the first respondent as managing agent. Another AGM was held on 21 January 2021, during which it was further resolved that a formal letter of termination be sent to the first respondent.
3. In the meeting of 15 December 2020, it was resolved that the first respondent be given three (3) months' notice. The first respondent was already informed on 15 December 2020 through its representative, Jessica, of the resolution to terminate its managing agent agreement with the first applicant. The first respondent, in a letter dated 20 January 2021, was further requested to make all bank statements available for inspection by the trustees on 5 February

2021. Also, in the meeting of 15 December 2020, it was resolved that Midcity be appointed as the new managing agent of the first applicant with effect from 15 March 2021 and the first respondent was informed of this fact in the letter of 20 January 2021.

4. The first respondent contends that despite a lapse in time of the agreement, there are still some unfinished duties as managing agent of the first applicant, which the first respondent must finalise before they can opt out of the managing agreement.
5. There are serious allegations made against the first respondent relating to its managing duties of the first applicant – that there is currently no water or electricity at the premises of the first applicant and that the lifts have not been operational for over twelve (12) years. It is for this reason that I found that the matter is urgent, as it affects the constitutional rights to water and electricity of the residents and it needed to be heard on an urgent basis.

LEGAL PRINCIPLE

6. Regulation 1 of the Sectional Titles Schemes Management Regulations, 2016 (under the Sectional Titles Schemes Management Act 8 of 2011 (“the Act”)), defines a managing agent as follows:

“any person who provides scheme management services to a body corporate for reward, whether monetary or otherwise, including any person who is employed to render such services.”

7. From the above, it becomes apparent that the relationship between the first applicant and the first respondent is governed by the Act and its Regulations.

8. Rule 26(1)(c) provides:

“[1] A body corporate must

- (c) prepare annual financial statements for presentation at the annual general meeting, which statements must include;

- (i) amounts due to the body corporate in respect of contributions, special contributions and other charges, classified by member and the periods for which such amounts were owed;

- (ii) amounts due by the body corporate to its creditors generally and prominently disclosing the amounts due to any public entity for services rendered including, without limitation, water, electricity, gas, sewerage and refuse removal, classified by creditor and time periods for which such amounts were owed;

- (iii) amounts advanced to the body corporate by way of levy finance, a loan, in terms of a guarantee, insurance policy or otherwise, setting out the actual or contingent liability of the body corporate and amounts paid by the body corporate and by any member in terms of such agreement;

- (iv) amounts in the reserve fund showing the amount available for maintenance, repair and replacement of each major capital item as a percentage of the accrued estimated costs and the rand value of any shortfall;
 - (v) previous and other amounts paid and payments received by the body corporate and any member in terms of the insurance policies of the body corporate and the expiry date of each policy; and
 - (vi) amounts due and payable to the Community Schemes Ombud Service.”
9. The regulations further provide the duties of the managing agent in terms of Rule 28(3)(a)-(f) as follows:

“[3] An executive managing agent –

- (a) is subject to all duties and obligations of a trustee under the Act and the rules of the scheme;
- (b) is obliged to manage the scheme with the required professional level of skill and care;
- (c) is liable for any loss suffered by the body corporate as a result of not applying such skill and care;
- (d) has a fiduciary obligation to every member of the body corporate;
- (e) must arrange for the inspection of the common property at least every six months; and
- (f) must report at least every four months to every member of the body corporate on the administration of the scheme.”

10. Most importantly, which is more relevant to this matter, is Rule 28(7) which provides:

“[7] A management agreement may not endure for a period longer than three years and may be cancelled, without liability or penalty, despite any provision of the management agreement or other agreement to the contrary;

- (a) by the body corporate on two months’ notice, if the cancellation is first approved by a special resolution passed at a general meeting, or
- (b) by the managing agent on two months’ notice.”

DISCUSSION

11. The managing agent agreement concluded by the first respondent and the first applicant was meant to endure for a period of three
- (3) years, having been concluded on 1 February 2018 and set to lapse on 1 February 2021. The managing agent agreement was concluded in compliance with the provisions of Rule 28(7) of the Regulations in terms of the Act. It is apparent that when this application was issued on 25 March 2021, the managing agent agreement had already lapsed by effluxion of time.

12. In the matter of Oregon Trust v BEADICA 231 CC (74/2018) [2019] ZASCA 29 (28 March 2019), Lewis ADP, when dealing with an agreement terminated by effluxion of time, observed:

“[46] In the circumstances I conclude that there are no considerations of public policy that render the renewal clause of the lease

unenforceable. The demand for compliance with their terms was not unconscionable. The lease terminated on 31 July 2016 through the effluxion of time. When the lessees brought their urgent application on 1 August 2016 the leases had expired. There was no basis on which to resuscitate them.”

13. Clause 3.3 of the management agreement between the first applicant and first respondent provides for cancellation of the agreement by the body corporate (first applicant). Clause 3.2 provides that, in the event that the cancellation of the agreement is at the instance of the first respondent, that the first applicant must be given two (2) calendar months’ written notice to that effect.
14. Apart from termination by effluxion of time as stated above, the first applicant resolved to terminate the management agreement at the AGM held on 15 December 2020.
15. Rule 28(7)(a) requires that, where the body corporate terminates the management agreement, it must first pass a special resolution at the AGM and then give the managing agent two (2) months’ notice.
16. In terms of the management agreement between the first applicant and the first respondent, the first applicant may cancel the agreement under the following circumstances;
- 16.1. by giving notice to the managing agent if a provisional or final liquidation order is made against the managing agent (first respondent);
- 16.2. by giving notice if the managing agent or its directors is convicted of an offence involving an element of fraud or dishonesty, but there must be a special resolution of the body corporate or the trustees; and
- 16.3. give two (2) months calendar written notice to the managing agent, after a special resolution passed at a general meeting of the body corporate, and that the body corporate can cancel the agreement in accordance with clause 3.3.3 as authorized by Management Rule 28(7)(a).
17. It is not disputed by the first respondent that the first applicant held an AGM on 15 December 2020. The circulation of the reconvened AGM minutes to undisclosed recipients is not disputed by the first respondent.
18. What the first respondent contests is the following;
- 18.1. That the members of the first applicant were not given 30 days written notice prior to the meeting of 15 December 2020, that a special resolution will be taken to terminate the services of the first respondent on contemplated by Rule 28(7)(a) and section 6(2) of the Act;

18.2. That the first applicant cannot terminate the services of the first respondent by adopting a unanimous resolution as opposed to a special resolution; and

18.3. The agenda of the AGM sent on 13 November 2020 makes no reference to a special resolution to terminate the services of the first respondent.

19. For the sake of completeness, I find it prudent to refer to the provisions of section 6(2) of the Act, which provides;

“(6) –

(2) the body corporate must, at least 30 days prior to a meeting of the body corporate where a special resolution or unanimous resolution

will be taken, give all members of the body corporate written notice specifying the proposed resolution, except where the rules provide otherwise.”

20. Notice of the AGM of the first applicant sent on 13 November 2020, which was supposed to held on 8 December 2020, but was reconvened and held on 15 December 2020, is silent on the adoption of a special resolution or unanimous resolution to terminate the services of the first respondent.

21. The use of the word “must” in the provisions of section 6(2) of the Act is peremptory. Thus, the question is whether non-compliance with such statutory provisions is fatal. Any interpretation of the provisions of a statute must promote the spirit, purport and object of the Bill of Rights (see section 39(2) of the Constitution). It is trite that, even where formalities required by a statute are peremptory, not every deviation is fatal. The question however, remains whether the object of the statutory provision has been achieved. To answer this question, I am of the view that, that the object of the Act was not achieved by the first applicant as it failed to give 30 days’ notice of the adoption of the special resolution.

22. What remains to be determined now is the aspect pertaining to the termination of the management agreement by effluxion of time. I have already indicated elsewhere in this judgment that when the current application was issued, the management agreement had been terminated by effluxion of time.

23. The defense raised by the first respondent is, despite this fact, the first applicant instructed it to issue an urgent application against the City of Tshwane Metropolitan Municipality to compel the municipality to reconnect the water and electricity supply to the property of the first applicant, but the first respondent did not proceed with this urgent application because the first applicant did not have the funds to finance such an application. However, this averment is vehemently denied by the first applicant.

24. It is not clear in which manner this instruction was given to the first respondent and who the representative of the first applicant was who gave this instruction. Simply put, this averment lacks particularity and detail. Given the nature of the factual dispute pertaining to this aspect, I am of the view that it can be resolved on the papers as they stand. At the time of the AGM of 15 December 2020, the management agreement was still in place.
25. This application is only opposed by the first respondent, however there is a petition which was compiled by the second to nineteenth respondents (the alleged owners of units in the property of the first applicant), wishing to call to a special AGM to remove the board of trustees of the first applicant. The first applicant however, seeks an order to declare this petition and its demands invalid. A deed search was performed and it was found that some of the signatories of the petition were not owners of units in the first applicant's property – particularly the third, eleventh, fifteenth and nineteenth respondents.
26. I am of the view that the petition is flawed, even though it is signed by some of the actual owners of units in the first applicant's property, because not all the signatories are owners. This fact is not disputed by the first respondent. The only people who can remove the trustees of the first applicant are the home owners.
27. The first applicant further seeks and order that the first respondent furnish it with the books of account, audited financial statements for the past three (3) financial years as well as monies and reserve funds. What is apparent from the papers, is that the financial statements for the period ending on 30 September 2019 was discussed in the meeting of 15 December 2020, as it appears as an agenda item. What is not provided is the financial statements for the period ending on 30 September
2020. The first applicant averred that the keys to the water pump storeroom are in the possession of someone called Harry, who is in charge of this storeroom. This is the admission that indicates that the first respondent is not in control of the water pump storeroom and as such, it cannot be in possession of its keys. The first respondent neglected to make the accounting books and bank statements available for inspection by the first applicant.

COSTS

28. This matter was supposed to be heard by Khumalo J on 30 March 2021, remotely, but the court documents were not uploaded to Caselines and the matter was struck from the roll for non-appearance. No order as to costs was made when the matter was struck from the roll. I am called upon to make a determination pertaining to costs in respect of 30 March 2021, but I am not inclined to do so. Mainly because when the matter was before me, there was no court order by Khumalo J available in respect of 30 March 2021 and it was also not uploaded to Caselines.
29. However, I am inclined to make a cost order in respect of the matter before me. The normal principle applicable to costs will be applied in this matter.

ORDER

30. In the consequence, I make the following order;

1. The services of the first respondent as managing agent for the Sectional Title Scheme known as 55 Drakensberg with scheme number 74/1982, situated at 195 Nana Sita Street, Pretoria, is terminated;
2. The first respondent is ordered to hand over all books of account, audited financial statements for the period ending on 30 September 2020 relating to its management of the first applicant, including the monies and reserve funds in the credit of the first applicant within 15 days of this order;
3. The petition signed by the alleged owners of units in the property of the first applicant is declared defective, invalid and of no force and effect;
4. The first respondent is ordered to pay the costs of this application.

MJ MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

Appearances:

For the applicant: Sambo-Mlahleki Attorneys

Instructed by:

Adv N Erasmus

For the respondent: Jukes Malekjee & Associates

Instructed by:

Adv Y van der Laarse

Date of hearing: 8 April 2021

Date of judgment: Electronically transmitted

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Prepared on 14 October 2026 · Esheria