

SOUTH AFRICA / JUDGMENT

Riverlair Body Corporate and Another v Caris Brook Homeowners Association NPC and Others (016149/2022) [2024] ZAGPJHC 366 (27 March 2024)

[2024] ZAGPJHC 366

COURT

South Gauteng High Court, Johannesburg

BEFORE

Crutchfield

CASE / FILE NUMBER

016149/2022

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
DIVISION, JOHANNESBURG

CASE NO:

016149/2022

1. REPORTABLE: NO

2. OF INTEREST TO OTHER

JUDGES: NO

3. REVISED.

27 March 2024

In

the matter between:

RIVERLAIR

BODY CORPORATE

First

Applicant

THE

OWNERS OF UNITS IN THE RIVERLAIR SECTIONAL TITLE SCHEME

Second

Applicant

and

CARIS

BROOK HOMEOWNERS ASSOCIATION NPC

First

Respondent

KAREN

BLEIJS N.O.

Second
Respondent
COMMUNITY
SCHEMES OMBUD SERVICE
Third
Respondent

JUDGMENT

CRUTCHFIELD J:

- [1] This is a review application brought against paragraphs 41.6 to 41.7 of the adjudication order granted by the second respondent, Karen Bleijs N.O., dated 5 March 2022 ('the adjudication order'). In terms of the adjudication order:
- 1.1 The first applicant's prayer that the first respondent be ordered to reverse all levies charged to members of the first applicant with immediate effect was dismissed; and
- 1.2 Each and every member of the first applicant was declared liable to pay levies to the first respondent from 1 January 2020 to date of the adjudication order, alternatively, to make arrangements to effect such payments on or before 30 April 2022.
- [2] The first applicant is the Riverlair Body Corporate, a body corporate established pursuant to the provisions of section 38 of Act 95 of 1986, functioning in terms of the Sectional Titles Schemes Management Act, 8 of 2011 ('the STSMA') and a community scheme as defined in the Community Schemes Ombud Service Act, 9 of 2011 ('the CSOS Act'), situated at 59 Hornbill Road, Douglasdale, Gauteng.
- [3] The second applicant comprises the owners of units situated in the Riverlair Sectional Title Scheme identified in the founding affidavit.
- [4] The first respondent is Caris Brook Homeowners Association NPC (Registration No: 1996/017799/09), a non-profit company duly registered and incorporated under the company laws, a community scheme as defined in the CSOS Act.
- [5] The second respondent, Karen Bleijs N.O. is an adjudicator in the employ of the third respondent, appointed in terms of s 21(2)(b) of the CSOS Act.
- [6] The third respondent is the Community Schemes Ombud Service, a juristic entity established in terms of the provisions of s 3(1) of the CSOS Act.
- [7] The applicants sought the review in terms of s 53 of the CSOS Act. The applicants brought the application in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2002 ('PAJA') together with the principle of legality in accordance with the provisions of rule 53 of the uniform rules of court.

- [8] The first respondent opposed the application. The second and third respondents abided the order of this Court.
- [9] The applicants alleged that the second respondent's adjudication order granted in terms of the CSOS Act was a decision of a functionary of a juristic person exercising a public function and that the adjudication order fell, accordingly, within the meaning of "administrative action" in terms of s 1 of PAJA.
- [10] The impugned paragraphs of the adjudication order provided in effect that the second applicant, members of the first applicant, were liable for payment of certain levies to the first respondent.
- [11] The applicants alleged that there was no rational basis for the imposition of the levies by the first respondent on the second applicant and thus that the second respondent could not reasonably have granted such an order in favour of the first respondent.
- [12] The applicants alleged that the adjudication order was materially influenced by an error of law, that it was made pursuant to irrelevant considerations whilst relevant factors were not considered, and that the portion of the adjudication order under review was irrational.
- [13] Douglasdale Extension 97 ('the township') was established in terms of the Township Establishment Conditions proclaimed under local authority notice 2717 on 9 October 1996 ('the township').
- [14] The township comprises various erven, including:
- 14.1 Erf 1521 on which the Riverlair Sectional Title Scheme ('Riverlair') was developed, consisting of 56 sectional title units managed and maintained by the first applicant.
- 14.2 Erven 1522 to 1551 and 1553 to 1574 that are free standing, individually owned erven in the Caris Brook Estate ('Caris Brook'). The latter, Caris Brook, is managed and maintained by the first respondent.
- 14.3 Erf 1575, the subject of this application, on which the common entrance to both Riverlair and Caris Brook together with the guardhouse servicing both estates, is situated. Erf 1575 is registered in the name of the Home Owners Association of Caris Brook.
- [15] The two estates, the sectional title scheme administered by the first applicant and the first respondent's home owners' association are both situated within the township.
- [16] In terms of the Conditions for the Establishment of the Township ('the Conditions of Establishment'), erf 1575 was to be jointly owned by the first respondent and the first applicant. Notwithstanding, erf 1575 is registered in the name of the first respondent.

- [17] Access to both Caris Brook and Riverlair occurs using the single entrance situated on erf 1575. It comprises a guardhouse and an entrance gate and is manned 24-hours per day by a security company.
- [18] The applicants contend that the dispute between the parties arose from the Conditions of Establishment of the Township. In terms thereof, the 'Formation and Duties of the Residents Association' provide that the first respondent's sole responsibility is to provide 'for the functioning and proper maintenance of Erf 1575 and the essential services (excluding the sewer system) contained thereon.'
- [19] The applicants argue that by virtue of the Conditions of Establishment every owner of a sectional title unit in Riverlair was a member of the first respondent. Notwithstanding, Riverlair and Caris Brook have been managed and maintained historically as separate schemes by the first applicant and the first respondent, respectively.
- [20] The first applicant collects levies from owners in Riverlair that it utilises for the purpose of fulfilling its functions in terms of the STSMA, including management of the Riverlair estate and the common areas situated within Riverlair. Similarly, the first respondent fulfils essentially the same function in respect of Caris Brook, collecting levies from the owners for management of the Caris Brook estate and the common areas situated therein.
- [21] Other than erf 1575 comprising the common entrance and access road to and from both estates, Riverlair and Caris Brook are separately and independently managed and maintained and have always been so.
- [22] During 2017 and 2020, disputes erupted between the first respondent and the first applicant in respect of the common entrance to the two estates.
- [23] During October 2019 or thereabouts, the first applicant registered a caveat against the units in Riverlair to the effect that the owners of units in Riverlair ('the Riverlair owners'), were members of the first respondent. The latter, in turn, demanded that the second applicant pay levies to the first respondent retrospectively from 1 January 2020 ('the impugned levies'), being from the approximate date when the second applicant became members of the first respondent.
- [24] The caveat reflected the conditions of notarial deed K201/1997 and provided the following:

"Schedule A

Subject to the following conditions:

1. By virtue of a Notarial Deed of servitude K201/1997S the within mentioned is subject to the following conditions:

- (a) Every owner of the Erf, or any subdivision thereof, or any person who has an interest therein shall become and shall remain a member of the Home Owners Association and be subject to its constitution until he/she ceases to be an owner as aforesaid. Neither the Erf nor any subdivision thereof nor any interest therein shall be transferred to any person who is not bound himself/herself to the satisfaction of such Association to become a member of the Homeowners Association.
- (b) The owners of the Erf or any subdivision thereof, or any person who has an interest therein, shall not be entitled to transfer the Erf or any subdivision thereof, or any interest therein without a clearance certificate from the Homeowners Association that the provisions of the Articles of Association of the Homeowners Association have been complied with.
- (c) The term ‘Homeowners Association’ in the aforesaid conditions of title shall mean the Caris Brook Homeowners Association – No 96/17799/08, an Association incorporated in terms of Section 21 of the Companies Act, 61 of 1973 as amended.”
- [25] Accordingly, the caveat provided that every Riverlair unit is and shall remain a member of the Homeowners Association of Caris Brook.
- [26] The applicants contended that the impugned levies did not pertain to expenses incurred in respect of erf 1575 but arose from expenses related exclusively to the management of Caris Brook, in respect of which Riverlair owners were not liable.
- [27] Accordingly, the applicants alleged that no rational basis existed for the second applicant to have to pay the impugned levies that fell to be set aside.
- [28] The applicants contended that the purpose of registering the caveats was solely for the applicants to gain recognition in the process of decision-making pertaining to erf 1575, including the choice of the security company manning the entrance gate. This accorded with the applicants’ admitted obligation to make payment of 50% of the expenses incurred in respect of the security company, guardhouse, gate and road maintenance and repairs, being the costs of erf 1575.
- [29] As a result, during January 2021, the disputes regarding the management of erf 1575 and the impugned levies were referred to the third respondent in terms of s 38 of the CSOS Act. That process resulted in the adjudication order.
- [30] The applicants alleged that the second respondent correctly found that the Conditions of Establishment provided that erf 1575 be jointly owned by the first applicant and the owners of the first respondent but that erf 1575 was incorrectly registered in the name of the first respondent alone. Accordingly, the applicants sought orders in terms of s 39(1)(c) of the CSOS Act, that the first respondent’s decision to impose the impugned levies upon the second applicant was irrational, unfair, unreasonable and unlawful, and, that the first respondent be ordered to reverse all levies charged to the second applicant with immediate effect.

[31] The first respondent sought an order that every member of the first applicant, being the second applicant, be declared liable to pay the impugned levies from 1 January 2020, which the second respondent granted together with alternate relief.

[32] The grounds upon which the applicants claimed the review of the adjudication order were that the second respondent erred in holding that:

32.1 the first applicant failed to furnish proof of the way in which the impugned levy was calculated by the first respondent and that the first applicant failed to discharge the burden of proof in respect of that issue;

32.2 the first applicant failed to make out a case for the reversal of the impugned levies with immediate effect;

32.3 the members of the first applicant, being the second applicant, were not parties to the adjudication. As a result, the

applicants alleged that the adjudication order was irrational.

[33] The applicants contended that the only levies that the first respondent could impose justifiably upon the second applicant arose from the joint costs incurred in respect of Erf 1575, that the impugned levies did not relate rationally to Erf 1575 and were irrational, unreasonable and unfair as a result thereof. The applicants allegedly had no say in the imposition of the impugned levies, nor in the quantification thereof.

[34] The applicants argued correctly in my view, that they did not carry the burden of showing that the levies were incorrectly calculated as found by the second respondent. It was for the first respondent to demonstrate the quantification of the impugned levies.

[35] However, the first respondent demonstrated that the applicants had been invited on various occasions to participate and contribute to the quantification of the impugned levies but had failed to do so.

[36] In so far as the first respondent relied on its Memorandum of Incorporation, the MOI had not been registered and was accordingly not available for the first respondent to rely upon.

DISCUSSION

[37] It is common cause between the parties that:

37.1 Pursuant to the registration of the caveat, the Riverlair owners are members of the Homeowners Association of Caris Brook.

37.2 Two clearance certificates will be required in order to effect future transfers of Riverlair units, one from the first applicant in compliance with s 15B(3) and one from the first respondent in respect of the impugned levies.

37.3 The Riverlair owners are bound by and to the conditions imposed by the Caris Brook Homeowners Association.

37.4 The road, erf 1575, is owned by the first respondent and used by the residents of both estates.

[38] Section 1(4)(c) of the Conditions of Establishment provides that the first respondent is solely responsible for the functioning and proper maintenance of erf 1575 and the essential services (excluding the sewerage system) contained thereon.

[39] Section 1(4)(d) of the Conditions of Establishment provides that:

“The Residents Association shall have the legal power to levy from each and every member the costs incurred in fulfilling its function and shall have legal recourse to recover such fees in the event of default in payment by the member.”

[40] The first respondent’s functions include those arising from erf 1575.

[41] As a result of the registration of the caveat, the Riverlair owners are members of the first respondent and are bound by the first respondent’s Conditions of Establishment.

[42] Thus, the first respondent elected to exercise its responsibility under the Conditions of Establishment in respect of erf 1575 by imposing the impugned levies on its members, including the second applicant from January 2020, which the first respondent was entitled to do in terms of s 1(4)(d) of the Conditions of Establishment.

[43] The applicants contend that the first respondent being empowered to impose the impugned levies on the second applicant as members of the first respondent, was not a rational reason for the first respondent to do so. This was particularly given that the first respondent was independently managed and obliged to collect levies pertaining to Caris Brook from the Caris Brook owners.

[44] The impugned levies comprise a standard levy of R1 266.00 together with an additional levy of R195.00 totalling some R1 461.00 per month per Riverlair unit. The impugned levies are additional to those levies charged by the first applicant of its members, the second applicant, and, are also additional to the applicants’ existing monthly contributions towards the costs of the guardhouse, the security company and the maintenance and upkeep of the gate, guardhouse and road, of which the applicants pay fifty per centum (50%).

[45] The applicants alleged and the first respondent agreed that the costs involved in the functioning and maintenance of Erf 1575 and the essential services (excluding the sewerage), did not include costs pertaining to Caris Brooke.[1]

[46] The first respondent alleged that it owned and managed the road at its expense and that the costs incurred in doing so were not limited to the guardhouse, entrance gate and security services and included the expenses comprising the impugned levy.

- [47] According to the first respondent, the impugned levies comprised administration fees, audit fees, gardening services, insurances, legal fees, refuse removal, repairs and maintenance, salaries and wages, telephone and water charges in respect of Erf 1575.
- [48] Whilst the first applicant's intention in registering the caveat was to procure voting rights in decisions concerning the security company manning the joint entrance to the two estates, the consequences of the registration of the caveat were not limited thereto.
- [49] Those consequences included the Riverlair owners being members of the first respondent and being bound by the first respondent's Conditions of Establishment. Pursuant thereto, the second applicant is liable for the impugned levies imposed by the first respondent in respect of erf 1575.
- [50] Thus, the impugned levies relate to erf 1575, payment of which the second applicant is liable for pursuant to its membership of the first respondent.
- [51] The impugned levies follow on the second applicant's membership of the first respondent. It is important to note that the adjudication order includes provision that a pro rata levy is to be calculated and levied, and that only costs factually shared by the second applicant and the first respondent should be paid pro rata by the members of the first respondent including auditing fees of the homeowners association, management fees and legal costs inter alia. The first respondent has invited the applicants to engage on the calculation of the impugned levy.
- [52] The Conditions of Establishment permit the first respondent to impose and enforce the impugned levies against members of the first respondent.
- [53] It follows from the second applicant's membership of the first respondent that it is liable for payment of the impugned levies with effect from January 2020, pursuant to registration of the caveat.
- [54] In the circumstances, there is no basis upon which I can find that the adjudication order of the second respondent is irrational, unreasonable, unfair or stands to be set aside.
- [55] There is no reason why the costs of the application should not follow the order on the merits. However, this matter does not warrant a punitive costs order against the applicants as contended by the first respondent.
- [56] By reason of the above, the application is dismissed with costs.

I hand down the judgment.

CRUTCHFIELD J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected 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 of the judgment is deemed to be 27 March 2024.

FOR THE FIRST AND SECOND APPLICANTS: Mr F A Ferreira

INSTRUCTED BY: Cox

Yeats Attorneys

FOR THE FIRST RESPONDENT: Ms

R Andrews

INSTRUCTED BY: Hengst

& McMaster

DATE OF THE HEARING:

25 October 2023

DATE OF JUDGMENT:

27 March 2024

[1] Caselines 001-33 para 29; Caselines 006-13 para 41.

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Prepared on 11 October 2026 · Esheria