

**IN THE HIGH COURT OF SOUTH AFRICA
DURBAN & COAST LOCAL DIVISION**

CASE NO. 6292/2008

In the matter between:

OSMAN ESSA N.O.

FIRST APPLICANT

ABDOOL KADER ESSA N.O.

SECOND APPLICANT

and

**BODY CORPORATE OF
KINGSWAY HOUSE**

FIRST RESPONDENT

OUTDOOR NETWORK LIMITED

SECOND RESPONDENT

AND

CASE NO. 9931/2008

In the matter between

**BODY CORPORATE OF KINGSWAY HOUSE
APPLICANT**

and

OSMAN ESSA N.O.

FIRST RESPONDENT

ABDOOL KADER ESSA N.O.

SECOND RESPONDENT

JUDGMENT

Delivered on 20 February 2009

SWAIN J

[1] There are two linked applications before me involving the same parties. In the first application (Case No. 6292/2008) the owners of a sectional title unit in a sectional title scheme, seek an interim order against the body corporate of that scheme, to interdict the body corporate from interfering with their right to erect advertising signs on the exterior of the building. The order sought is interim, pending an action to rectify the notarial cession of right to exclusive use of portion of the common property of the scheme, to reflect the owners' right to erect such advertising signs.

[2] The response of the body corporate is not only to oppose the application, but to seek by way of a counter-application an order against the owners effectively preventing them from exercising exclusive use over common property not allocated for their exclusive use. Further complaints are that the owners allow the office on the ground floor to be used for residential purposes, are obliged to restore the name sign of the building which it is alleged the owners removed, are unjustly refusing to pay current levies, have subjected certain individuals associated with the body corporate to threatening and abusive language and that a certain roof should be removed by the owners. Interdictory relief is sought against the owners for the resolution of these complaints. In order to prevent confusion, I will refer to the applicants as the Owners and the first respondent as the Body Corporate where appropriate. There is no need to refer to the second respondent again, an advertising company which has concluded a contract with the Owners, and is joined simply as an

interested party.

[3] In the second application (Case 9931/2008) the Body Corporate seeks an order directing the Owners to make payment of certain special levies, payment of levies undercharged for certain specified periods, as well as an interdict restraining the Owners from refusing to pay ordinary and special levies in the future.

[4] A third application (Case No.13965/2008) in which the papers are not yet complete, waits in the wings in which the owners seek an order appointing an administrator in terms of Section 46 of the Sectional Titles Act of the Sectional Title Scheme, for a period of twelve months.

[5] At the hearing of this matter, Mr. Jeffrey, S.C. who appeared for the Owners, submitted that:

[5.1] The first application should be referred for the hearing of oral evidence and

[5.2] The second application should be adjourned, until the third application for an appointment of an administrator, has been determined.

[6] Mr. Goddard, who appeared for the Body Corporate, resisted this, submitting that in certain respects the first application could be determined on the papers, and that in the second application, the

Owners had disclosed no defence to the claim for payment of special and general levies.

[7] As regards the relief claimed by the Owners in the first application, Mr. Goddard submits that no case has been made out for the rectification of the notarial deed of cession, and consequently the application for an interim order should be dismissed, for this reason alone.

[8] The Owners allege that the omission was caused by an oversight on the part of the conveyancing attorney, who registered the notarial cession. The Body Corporate's response to this was that it is highly unlikely that the owners would have overlooked the omission of any real rights pertaining to advertising, which they may have had, which are regulated by Rule 73 (7) of the Rules of the Body Corporate. In addition, it is alleged that the conveyancer would have registered the notarial cession in accordance with a power of attorney, which would have reflected a resolution of the Body Corporate.

[9] No power of attorney, nor any such resolution has been placed before me, but it is significant that in terms of the use agreement applicable to the preceding share block scheme, the Owners were afforded the right to erect advertising signs on the exterior of the building.

[10] Whether the conveyancer failed in error to record this right, can only be determined by oral evidence, setting out the circumstances surrounding the drafting and registration of the notarial deed of cession. In addition, it would be an exercise in futility for the Owners, having sought a referral of the matter to oral evidence, to persist in the claim for interim relief. In the event of the claim for rectification being successful what would be sought, if necessary, would be a claim for enforcement of the real right contained in the amended notarial cession. This issue therefore falls to be resolved by the hearing of oral evidence.

[11] A referral to oral evidence of the relief sought by the Owners in the first application, although not linked to the relief sought by the Body Corporate in the counter-application, nevertheless has a bearing upon the exercise of my discretion whether to refer the counter-relief to the hearing of oral evidence.

[12] Mr. Goddard concedes that there is a dispute of fact as to whether the applicants allow the office on the ground floor of building 2, to be used for residential purposes. The Body Corporate tenders to withdraw this relief, if the Owners undertake not to use the office for residential purposes in future, and do not seek costs against the Body Corporate in respect of this issue. No such undertaking has been given by the Owners, and consequently this issue will have to be resolved by the hearing of oral evidence.

[13] As regards the issue of the restoration of the name sign of the building. Mr. Goddard submits that the Owners have not raised a *bona fide* dispute of fact. This is because they produced no evidence to substantiate their claim that the Body Corporate decided to and did itself, plaster over the sign. In order to make such a finding, I would have to be satisfied that the Owners' allegations are so vague and insubstantial, as not to raise a genuine dispute of fact. The Owners allege that it was the Body Corporate that plastered over the sign because it was in such a state of disrepair. The response of the Body Corporate is that the Owners were Trustees of the Body Corporate at the time, but do not give details of how the decision to remove the sign was taken, and how its removal was effected. Although there is some force to this argument, I cannot reject the Owners' assertions simply on this basis. This issue will also have to be referred for the hearing of oral evidence.

[14] As regards the interdict which is sought restraining the Owners from refusing to pay levies, Mr. Goddard concedes that this issue would require the hearing of oral evidence, but in any event has been overtaken by the second application.

[15] In respect of the relief interdicting the subjection of individuals associated with the Body Corporate to threatening and abusive language, Mr. Goddard submits that the first applicant admits the statement of Kinnie, which details the first applicant's abusive conduct. The answering affidavit of the Body Corporate avers that a

statement by Kinnie describing the conduct of the first applicant is annexed as "LW". This annexure is a handwritten statement which is unsigned and has not been confirmed on oath by the said Kinnie. It seems to me quite clear that the first applicant did not admit the contents of this unsigned and unconfirmed statement, but only the contents of paragraph 120 of the answering affidavit of the Body Corporate. This is self-evident from the fact that the first applicant states that "I politely requested the keys from her (Kinnie)". This is contrary to what is alleged in the statement of Kinnie. This issue will accordingly also have to be referred for the hearing of oral evidence.

[16] As regards the relief sought that the Owners remove a certain roof Mr. Goddard submits that the Owners do not deny that the roof should be removed, nor do they deny that it is in their possession. Accordingly they should be ordered to remove it. The basis however for this relief sought by the Body Corporate, was an allegation that the roof in question had been erected by the Owners, without the consent of the trustees of the Body Corporate, which they had no right to do. The Owners, in response, deny that they ever erected the roof in question. To grant an order simply on the basis of possession of the roof by the Owners, when this was not the basis upon which relief was sought is not justifiable. There is a dispute of fact as to the basis upon which relief was sought, i.e. unauthorised erection of the roof and this should be resolved by oral evidence.

[17] The outstanding issues on the first application being

paragraphs 1 – 4 of the relief sought, all seek to interdict the Owners from exercising exclusive use over common property, not allocated for their exclusive use.

[18] Mr. Goddard submits that the Owners do not dispute that they exercise exclusive use over common property not allocated for their exclusive use.

[19] The allegation made by the Body Corporate that the plan annexed to the rules conflict with the registered sectional plan and also with the wording of Rule 73 (1) insofar as the areas of exclusive use are concerned, is noted by the Owners. However, the allegation that the plan is clearly incorrect, as the Owners' exclusive use areas are only the showroom in building 1 and the ground floor covered parking in building 2, are denied. In addition, the Owners deny that they at any stage appropriated to themselves exclusive use of the common property described as the driveway.

[20] In my view, it would be desirable, regard being had to the uncertainty over what may precisely be defined as common property and exclusive use areas, as well as the referral to oral evidence of the other disputes between the parties, that these issues also be referred to the hearing of oral evidence.

[21] Turning to the second application, the submissions of Mr.

Jeffrey, S.C. for the Owners are that:

[21.1] The present trustees of the Body Corporate are not *bona fide* in their conduct, in seeking judgment against the Owners for levies to fund their litigation against the Owners.

[21.2] The present trustees have failed to convene an annual general meeting, despite being called upon by the respondents to do so and it is alleged that the pursuit of the litigation against the Owners, does not have the support of the majority of the members of the Body Corporate.

[21.3] The Owners accordingly seek the appointment of an administrator, for a period of twelve months, *inter alia*, to reconsider this aspect.

[22] The Body Corporate admits that no annual general meeting has been held, but Mr. Goddard submits that regardless of this and whether or not an administrator is appointed, the issues raised in the first application have to be determined. He submits that there is no basis for contending that the opposition under the first application, nor the counter application, were not in the interests of the Body Corporate as a whole, or amounts to personal litigation by the trustees of the Body Corporate.

[23] I find the concept that the Owners are obliged to fund the

litigation against them, by the Body Corporate by way of the payment of special levies, as inherently unfair. Although it is correct that the only way in which the trustees may raise money to fund such litigation against the Owners, is by way of raising special levies, it seems to me that it is inherently a matter to be considered by all of the members of the Body Corporate at a general meeting. At such a meeting support for the resolution taken by the trustees can be voted upon, with the result that it can either be ratified, or rescinded. This should occur as a matter of urgency, for it may obviate the need for the appointment of an administrator.

[24] As regards the claim for payment of ordinary arrear levies, the Owners contend that the ordinary levies were correctly charged in accordance with certain resolutions. Mr. Goddard submits that these resolutions are invalid for various reasons. Even if this is so, the computation of these levies is not admitted by the Owners and is therefore disputed.

[25] In any event, it seems to me desirable that for the reasons I have set out above, this application should be adjourned until the application for an administrator has been determined.

The orders I therefore make are the following:

The first application Case 6292/2008

1. The matter is referred to trial.
 2. The notice of motion in the application stands as summons in the trial.
 3. The notice of opposition herein stands as an appearance to defend.
 4. The applicants are directed to file a declaration within ten days of this order.
 5. The first respondent is directed to deliver its plea and claim in reconvention within the time periods prescribed in the Uniform Rules of Court.
 6. The applicants are directed to file any further pleadings within the time periods prescribed in the Uniform Rules of Court.
 7. The costs of this application are reserved for decision by the court hearing the trial of the action.

The second application Case No. 9931/2008

1. The application is postponed until the application for the appointment of an administrator (Case No. 13965/2008) has

been determined.

2. The costs are reserved.

SWAIN J

Appearances .../

Appearances:

Counsel for the

Applicants/ Respondents:

Mr. A.G. Jeffrey, S. C.

Instructed by:

Hassan, Parsee & Poovalingam
Durban

Counsel for the First

Respondent/Applicant: Mr. G. Goddard

Instructed by: Lomas-Walker Attorneys
Durban

Date of Hearing : 09 February 2009

Date of Judgment : 20 February 2009