IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 46178/2014

10/9/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

04/09/2015
DATE

SIGNATURE

In the matter between:

RUITERS KG	**APPLICANT**
and	
THE BODY CORORATE OF VIERHOF	**FIRST RESPONDENT**
KROG R	**SECOND RESPONDENT**
JRL PROPERTY MANAGEMENT CC	**THIRD RESPONDENT**
THE REGISTRAR OF DEEDS	**FOURTH RESPONDENT**

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] In this application the applicant seeks an order declaring the Annual General Meetings held on the 9th July 2012 and 29 July 2013 *null* and *void.* The applicant further seeks an order directing the first respondent to convene an extra ordinary general meeting within 30 days, of the grant of the order, for the purpose of considering and voting by special resolution to allow for the election of three (3) new trustees.

[2] Pursuant to the application, the first respondent launched a counter application, seeking orders compelling the applicant to restore certain common property areas to their original condition.

BACKGROUND

[3] The applicant is the owner of Unit 2 in the complex known as Vierhof situated at 188 Erasmus Street, Meyerspark, Pretoria. The complex consists of four (4) units in total and is respectively owned by Mr and Mrs Hendricks (Unit 1), Mr Brink (Unit 3) and Ms Meyer (Unit 4). The complex is governed by the Sectional Titles Act.[1]

[4] The first respondent, the Body Corporate of Vierhof, is a body corporate duly constituted in terms of the Sectional Title Act. The second respondent is the chairman of the first respondent and the third respondent the complex's managing agent.

[1] Sectional Titles Act No 95 of 1986

2012 AGM

[5] In her founding affidavit and in relation to the 2012 AGM, the applicant sets out the following:

5.1 During June 2012, the third respondent gave notice of the AGM to be held on 9 July 2012.[2] As she and Ms Hendriks (co-owner of unit 1) could not attend the said meeting they requested the third respondent to have the meeting postponed to 16 July 2012. This request was however rejected by Mr Vosloo, an employee of the management agent, who intimated to them that the meeting would proceed.

5.2 The applicant alleges that this AGM was flawed in two respects. Firstly, in that the proxy votes held by Mr Vosloo on behalf of Ms Meyer (owner of unit 4) and Mr Brink (owner of unit 3), constituted a violation of Rule 67(3) of the Prescribed Management Rules which is contained in Annexure A of the Sectional Title Act Regulations, as Mr Vosloo at the time was an employee of the third respondent and thus disqualified from holding such proxy vote. Rule 67(3) provides that *"a proxy need not be an owner, but shall not be the management agent or any of his or her employees, or an employee of the body corporate."*

5.3 Secondly, in that no proper notification was subsequently given to her regarding the new date to which the AGM had been postponed (i.e. 16 July 2012) and accordingly she as a trustee was not present on the 16th July 2012.

[2] See in this regard Founding Affidavit Annexure D.

[6] It is for the above reasons that she contends that any decisions taken during the AGM scheduled for 9 July 2012 and further held on 16 July 2012 should be declared *null* and *void.*

RESPONDENT'S GROUNDS AS TO WHY THE 2012 AGM WAS PROPERLY HELD

[7] The 2012 AGM was held in the absence of the applicant notwithstanding the fact that the applicant requested the AGM to be postponed as the date did not suit her. The respondents averred that the AGM scheduled for 9 July 2012, could not merely be postponed by virtue of the scheduled date not suiting a single member of the body corporate. It is precisely for this reason that the management rules and Act makes provision for members who are unable to attend the AGM to nominate another person to act on his or her behalf through proxy. This, the applicant elected not to do.

[8] The respondents averred further that the meeting stood adjourned in terms of Management Rule 58[3] for a week at the same day, venue and time, as the proxies held by Mr Vosloo was in contravention of Management Rule 67(3). As a result no quorum was present at the meeting scheduled for 9 July 2012.

[9] The respondents contend that it was not necessary to give further notice of the adjourned Annual General Meeting if regard be had to the wording of Management Rule 58, and consequently the meeting was proceeded on the 16 July 2012.

[3] Management Rule 58 reads as follows:
'If within half an hour from the time appointed for a general meeting a quorum is not present, the meeting shall stand adjourned to the same day in the next week at the same place and time, and if at the adjourned meeting quorum is not present within half an hour of the time appointed for the meeting, the owners present in person or by proxy and entitle to vote shall form a quorum.'

[10] The applicant as per paragraph 6.9 alleges that she only received confirmation that the AGM scheduled for 9 July 2012, was indeed postponed to 16 July 2012, sometime after 16 July 2012. What is glaringly omitted from her affidavit is whether she had taken any steps pursuant to the meeting, to ascertain the outcome of such meeting. If the applicant had been prudent she would have been able to establish that the meeting scheduled for 9 July 2012, was not proceeded with due to the lack of a quorum and indeed that same was adjourned to the following week. This she clearly did not do and as such she is the author of her own misfortune.

[11] As for the meeting scheduled for 16 July 2012, the applicant's main complaint centres around the appointment of the second respondent (Mr Krog), as chairperson of the body corporate. The applicant took issue with what she calls the sudden involvement of Mr Krog, the second respondent, in the affairs of the complex, who was an outsider and unknown to the applicant.

[12] The applicant with reference to the meeting scheduled for 16 July 2012, does not attack the validity of how the meeting was constituted. Her affidavit is also silent as to the disqualification, if any, of Mr Krog to have been elected chairperson of the body corporate, but for her own superfluous misgivings.

[13] The fact that Mr Krog was not her preferred candidate as chairperson is not a basis to contend that the meeting, properly constituted in terms of the management rules, was marred with irregularities and thus had to be declared *null and void.*

2013 AGM

[14] In relation to the AGM scheduled for 29 July 2013, the applicant registered two complaints. The first relates to the failure by Mr Krog to produce the proxies he allegedly held on behalf of Mr Brink and Ms Meyer. The second issue relates to her disqualification to exercise her right to vote, due to her levy account having been in arrears, albeit that she was able to produce proof that she had paid up all her arrears by the date of the scheduled meeting. The meeting as a result did not proceed and stood adjourned to 5 August 2013.

[15] On this day the meeting proceeded with the business of the day.

RESPONDENT'S GROUNDS AS TO WHY THE 2013 AGM WAS PROPERLY HELD

[16] The respondents contend[4] that it is correct that the meeting scheduled for 29 July 2013 did not proceed due to lack of a quorum. Further, on the date of the meeting, the applicant was disqualified from voting, as she was in arrears with her levy account and even though she had proof of having made payments, same could not be verified by the administrative staff dealing with the accounts. As for Ms Hendricks she was disqualified from voting on her own as she is not the sole owner of unit 1, but co-owns the said unit.

[17] In her replying affidavit, the applicant does not deny the factual allegations set out by the respondent in relation to the ineligibility of Ms Hendricks to cast a vote on her own. She furthermore, does not deny that indeed she had fallen into arrears with

[4] See in this regard Answering Affidavit paragraph 17

her levy account and that she had only brought same up to date, on the date of the scheduled meeting,[5] which resulted that payment could not be verified by the time of the meeting.

[18] In the circumstances, I cannot conclude that the 2013 AGM was marred with irregularities for it to be declared *null* and *void*.

COUNTER APPLICATION

[19] As previously mentioned the first respondent launched a counter application for an order that the applicant should demolish or break down the carport erected in front of unit 2 in the sectional title scheme of Vierhof. Furthermore, that the applicant be ordered to restore the former garage which forms part of common property of Vierhof, to the condition that it was in before it was converted into living quarters as part of unit 2.

[20] The deponent to the first respondent's affidavit in support of the counter application sets out that the applicant converted the garage forming part of the common property as per the Sectional Plan into living quarters without first registering an exclusive use right in her favour. Furthermore, that this action resulted in an addition to her section, which addition was not passed by a unanimous resolution by the remaining members. In addition the applicant erected a permanent structure in the form of a carport in front of her garage without the permission of the first respondent.

[5] See in this regard Replying Affidavit para 8.1.2 (pg. 137) & para 8.1.2.1.7.2 (pg. 140)

THE APPLICANT'S GROUNDS IN OPPOSITION TO THE COUNTER APPLICATION

[21] In opposition to the counter application, the applicant sets out[6] that upon being served with a notice of compliance, she immediately had building plans prepared and submitted same to the local municipality and to the first respondent and to date she had not received a response from either of the parties. She further sets out that she had been living with the alterations and additions for at least six years and that no issue was previously taken by the first respondent, until she had launched the present application against it.

[22] The first responded concedes that it had served the applicant with a compliance notice and does not deny that a decision on her application in respect of her plans remains outstanding. The first respondent however contends that even if a decision on her request had been taken in her favour, the applicant would still have to register such addition with the Registrar of Deeds and non-compliance with this requirement cannot be waived by it. It is for this reason that it persists with its relief.

[23] In order for the first respondent to succeed with obtaining a final interdict, the first respondent has to show:

(a) that it has a clear right;

(b) an injury; and

(c) that it has no other legal remedy available to it.[7]

[6] See in this regard Applicant's Answering Affidavit to Counter Application para 11 page 143
[7] Setlogelo v Setlogelo 1914 AD 221

[24] On what has been conceded in the first respondent's affidavit, i.e. that a compliance notice was served on the applicant, it does appear that another legal remedy is available and as such I cannot but conclude that the last requirement has not been met by the first respondent. It is for this reason that the counter application cannot succeed.

FAILURE ON THE PART OF THE APPLICANT TO HAVE COMPLIED WITH ACT NO 3 of 2000.

[25] The respondents had raised non-compliance with the Promotion of Administrative Justice Act, No 3 of 2000 for the first time in the heads of argument. In light of my findings above, it is unnecessary to express a view on this point.

COSTS

[26] In respect of costs Counsel on behalf of the respondent had argued strongly that in the event of the applicant being unsuccessful, she should be ordered to pay the costs on an Attorney and Client scale as provided for in Management Rule 31(5) in Annexure 8 to the Sectional Title Act. I could find no basis to reject this argument.

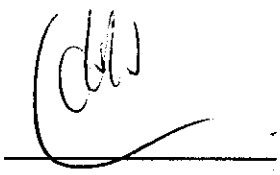
[27] As to the costs to be awarded in respect of the counter application, the first respondent, I believe should not be ordered to pay such costs even where the application is unsuccessful. This I say, as the need to have launched the said application would not have arisen had the applicant complied with the Management Rules applicable. It is for this reason that I conclude the most prudent costs order should be to order no order as to costs.

ORDER

[28] In the result the following order is made:

28.1 The application is dismissed with costs on an Attorney and Client scale.

28.2 The counter application is dismissed, with no order as to costs.



C. J. COLLIS

ACTING JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPLICANTS: ADV H. MARAIS

INSTRUCTED BY: JACOBUS ATTORNEYS

FOR RESPONDENT: ADV POTGIETER

INSTRUCTED BY: EY STUART INC. ATTORNEYS

DATE OF HEARING: 4 JUNE 2015

DATE OF JUDGMENT: 4 SEPTEMBER 2015