In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 2907/13

In the matter between :

The Body Corporate of Fascadale Heights — Applicant

and

David Leslie Graham Bayne — First Respondent

Michael Jurgen Radmer — Second Respondent

Gisela Rita Dill — Third Respondent

Judgment

Lopes J

[1] The applicant in this matter is the body corporate of Fascadale Heights, a sectional title building situated in Ramsgate, KwaZulu-Natal. The first respondent is

the owner of unit 10 in the development, and the second and third respondents are the co-owners of unit 15.On the 18th March 2013 and at 2.30pm the applicant sought and obtained an urgent order in the form of a rule with interim relief directing the respondents to remove security gates, positioned in the corridor in front of their respective units.

[2] The gates were removed pursuant to the order and the respondents have undertaken not to re-erect them without the consent of the applicant. Accordingly, all that remains to be decided is the question of costs.

[3] The following are common cause :

(a) in respect of the first respondent, the security gate in front of his unit had been erected by a previous chairman of the applicant approximately ten years ago;

(b) on the 29th January 2013 the first respondent received an email from the applicant informing him that the insurance company which underwrote the insurance over the development required that the security gates be removed, failing which the insurance cover would be withdrawn;

(c) on the 5th February 2013, the first respondent requested a copy of the insurance policy. That was never provided to him;

(d) on the 19thFebruary 2013 the first respondent indicated that he would obtain quotes to remove the security gate and requested to know the precise municipal law and wording of the bylaw which it was alleged he had contravened in having the gate where it was situated;

(e) on the 24th February 2013 the first respondent notified the applicant by way of an email that he regarded it in the interests of the development that the security gate be removed, and he enquiried as to the costs of a handyman to do so. On the 26th February 2013 the first respondent sent a handyman to remove the gate. The handyman was turned away, apparently by the chairman of the applicant, because he did not have consent from the first respondent in writing to remove the gate;

(f) a decision was made by the applicant on the 15th March 2013 to proceed with an urgent application in this court. On Saturday the 16thMarch, notice was given to the respondents. On the 18thMarch, the day before the application, the first respondent's attorney notified the applicant's attorneys that they would oppose the grant of any urgent relief and that the seeking of such relief would be premature. This was in the light of the first respondent's undertaking to remove the security gate which was done on the 18th March 2013, although the surrounding framework was not removed until after the interim order was granted;

(g) with regard to the second and third respondents, the second respondent lives abroad and the third respondent resides in Johannesburg. The security gate in front of their unit had also been in existence for a number of years;

(h) the third respondent was in occupation of unit 15 from approximately the 8th February to the 20th February 2013. Pursuant to a conversation which she had with the chairman of the applicant on or about the 8th February 2013 it is clear that she had received a similar email to that sent to the first respondent, and that she was aware of the need to remove the security gate. She indicated in correspondence that she needed time to remove the gate and put

in a new gate on the door of her unit, together with burglar guards on the windows. Her responses to the applicant's demands were somewhat variable in that she asked for an extension of time within which to remove the offending gate until the 7th March 2013, which was shortly thereafter replaced with a notification that she could only do so by the middle of April. Those letters were sent on the 26th and 27th February 2013 respectively and not responded to by the applicant until, on the 16th March 2013, notice was given to her of the urgent application to be heard on the Tuesday. The notice was also given to her erstwhile attorneys who no longer acted on her behalf. On the 18th March 2013 (on her version) she contacted the caretaker and asked him to attend to the removal of the security gate. He requested a short SMS confirming his authority to do so, which the third respondent provided. On the morning of the 19th March 2013 at 10.00am the supervisor Mr de Bruin confirmed that he had removed the security gate, but had not been able to remove the frame because he did not have the correct equipment to do so.

[4] It is a sad indictment on the legal profession in general, and the attorneys in this matter in particular, that the order in this matter was sought on an urgent basis, with such little notice to the respondents. Notwithstanding that the order was complied with within a day of its granting, the parties nevertheless saw fit to file in excess of 250 pages of affidavits and annexures, the only purpose of which, at that stage, was to deal with the question of costs.

[5] It is difficult to understand why the attorneys for the respective parties could not have put their heads together and saved themselves considerable time, and their clients considerable costs, by agreeing an appropriate order with regard to the costs. Instead answering and replying affidavits were filed and the matter was set down on the opposed roll to be heard in argument for over an hour.

[6] Having considered the conduct of the parties in this matter, and in the exercise of my discretion with regard to the award of costs, I take the view that the applicant should not have brought the application out of normal court times, and on such short notice to the respondents. If it had wished to bring such an application it should have afforded the respondents more notice. The reasons for not doing so are but poor excuses for not having given proper notice.

[7] The respondents are not, however, blameless. They reacted slowly to the request by the body corporate that they remove the gates within seven days, failing which the insurance policy on the building would be jeopardised. In addition, once the order had been granted, they filed affidavits which do not entirely excuse their delay in not having had the gates removed timeously.It was clear that the gates had to be removed, something which was eventually accepted by the respondents.

[8] In all the circumstances I do not consider it necessary for me to indulge in a detailed analysis of all the parties' respective contentions regarding the conduct. Suffice it to say that both parties were at fault in their conduct, when in the

circumstances common sense should have prevailed, and the matter should have been disposed of without the resort to expensive and protracted litigation.

[9] In the circumstances I make the following order :

The rule is discharged with each party ordered to pay their own costs of the application.

Date of hearing : 26th August 2013

Date of judgment : 28th August 2013

Counsel for the Applicant : M E Stewart (instructed by BiccariBollo Mariano Inc)

Counsel for the Respondents : J F Nicholson (instructed by Shepstone & Wylie)