

Monday Contemplation No 29

Can I vape or smoke in a sectional title scheme?

We all know that sectional title living requires compromises. The interesting question is to what extent should one expect to compromise.

A recent ruling from a CSOS matter in the Western Cape is quite interesting in this regard.

The facts of the CSOS ruling in the matter between **Brenda Gay Elisha (Applicant) and Linda, Theo and Zeanat Papdakis (Respondent) CSOS2052/WC/22** are as follows:

1. The Applicant submitted that the Respondents smoke vapor (vape), either on their patio or in one of their upstairs rooms. The Applicant also submitted evidence from recent medical literature that indicated the dangers to respiratory health associated with exposure to second hand vape aerosol.
2. The Applicant concluded that the smoke and aerosol pollution from C02 had impacted on the enjoyment of his home, since all too frequently, he had to move inside his house, close windows and doors, in order to avoid the pollution. The Applicant contended that his health had been abused for long enough.
3. The Applicant furthermore submitted that trustees of the body corporate had been approached to deal with the tenants (Respondents), and numerous letters were sent to the owner of the unit but with no success.
4. The relief sought by the Applicant was for the tenants (Respondents) to be ordered to make use of the allocated smoking area on the common property.
5. The Respondent said that he used vaping as a smoking method as he suffered from bipolar disorder, panic disorder and depersonalisation disorder for which he was under medication. Almost every day he battled with both depression and anxiety for which vaping is one way that he tried to deal with it.
6. The Respondent also submitted that they were used to the Applicant's complaints. It had happened that the Applicant used to shout outside the Respondent's window that the Respondent's child should be asleep at a certain time.
7. The Respondent's said that the Applicant also used to complain when the Respondent's friends came for a visit, where they would sit outside in the garden chatting, while the Applicant alleged that they were talking loudly.
8. According to the Respondent, the smoking area the Applicant referred to was not just a hop, skip and a jump away from their flat. It was on the other side of the communal garden and was not accessible when it rained. Additionally, it was not feasible to sit there in the freezing cold.
9. The Adjudicator did not deal with the merits of the application in detail, but rather focused on a technicality.
10. The Adjudicator referred to Section 38(1) of the Community Ombud's Service Act which provides that "any person may make an application if such person is a party to or affected materially by the dispute".

11. The Adjudicator went on to say that Section 38(3) further provides that “ the application must include statements setting out: the name and address of each person the application considers to be affected materially by the application.

12. The Adjudicator made reference to the case of the Body Corporate of Caroline Court, where the Court, in that case, held that “The Appellant's notice of motion is addressed only to the registrar of the court and was not served to any other person. It is a principle of our law that interested parties should be afforded an opportunity to be heard in matters which they have a direct and substantial interest”.

13. In applying the principles of the Caroline Court case, the Adjudicator then ruled that the provisions of CSOS Act together with the Caroline Court case, clearly provides that any person that may be affected materially or have a direct and substantial interest in the application, must be joined as a party in the proceeding.

14. **The Adjudicator held that the Respondents were tenants and not owners** and members of the Body Corporate. The Respondent's landlord was not cited as a party to the CSOS application made by the Applicant. Moreover, the Body Corporate who previously issued warning letters for contravening the rules of the Body Corporate, was also not cited as a Respondent.

15. On this basis, the Adjudicator ruled that the Applicant's application was to be dismissed for failure to comply with Section 38 of the CSOS Act.

In simple terms, the Applicant's application was dismissed on the grounds on non-compliance with Section 38 of the CSOS Act and not because of the actual merits of the application.

Two important issues arise here.

Firstly, community living requires people to be mindful of their neighbours. If you don't like rules, don't live in a sectional title scheme.

Secondly, when bringing an application before CSOS, it is important for all applicants and respondents to ensure that they comply with the provisions of the CSOS Act.

We still have not answered the question as to whether or not one can vape in a sectional title scheme.

The answer to this question is to be found in the judgement of the Supreme Court of Appeal in **PGB Boerdery Investments (Pty) Ltd and Another v Sommerville 62 (Pty)**, where the Court said, “The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference or whether the perpetrator should be compelled to terminate the activities giving rise to the harm. This is achieved, in essence, by comparing the gravity of the harm caused with the utility of the conduct which has caused the harm”.

In other words, be mindful of your neighbours, but we also need to be mindful of the fact that community living requires some “give and take, live and let live”.