



**ADJUDICATION ORDER IN TERMS OF SECTION 53
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Ref: CSOS00800/KZN/20

IN THE MATTER BETWEEN

AL RICHARD STANFORD SMYTHE

Applicant

and

TRUSTEES OF STRANELBERG BODY CORPORATE

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:
Section 39(1)(c) **In respect of financial issues.**
Section 39(2)(a) **In respect of behavioural issues.**
Section 39(4)(a);(b);(c)&(e) **In respect of meetings.**
Section 39(5)(a);(b) **In respect of management services.**
Section 39(6)(a);(b) **In respect of work pertaining to private areas and common areas** and
Section 39(7)(a)&(b) **In respect of general and other issues.**
- Date Adjudication conducted: 19 September 2021.
- Name of the Adjudicator: MISS ASHA SEWPERSAD.
- Order: The applicant's claim is dismissed.

- No order as to costs.

INTRODUCTION

1. The Applicant is Al Richard Stanford Smythe, a tenant at Unit 3A Patron House, Wartski Drive ,Margate, Kwazulu-Natal.
2. The Respondent is the Trustees of the Stralenberg Body Corporate, a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011(STSMA) of Wartski Drive, Margate, Kwazulu-Natal.
3. This is an application for dispute resolution in terms of section 38 of the Community Schemes Ombud Service Act 9 of 2011 (“the CSOS Act”). The application was made in the prescribed form and lodged with the Community Schemes Ombud Service (CSOS) by way of email.
4. The applicant is seeking relief in terms of:
Section 39(1) In respect of financial issues
 - (c) An order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way.
 - (d) An order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order.
Section 39(2) In respect of behavioural issues
 - (a) An order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way.
 - (b) ...
 - (c) ...
 - (d) An order for the removal of all articles placed on or attached illegally to of a common area or a private area.

Section 39(4) In respect of meetings

- (a) An order requiring the association to call a general meeting of its members to deal with specified business;
- (b) An order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened;
- (c) An order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association-
 - (i) Was void ; or
 - (ii) Is invalid ;
- (d) ...
- (e) An order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.

Section 39(5) In respect of Management Issues

- (a) An order requiring a managing agent to comply with the terms of a persons contract of appointment and any applicable code of conduct or authorisation; or
- (b) An order declaring that the association does or does not have the right to terminate the appointment of a managing agent; and that the appointment is or is not terminated.

Section 39(6) In respect of works pertaining to private areas and common areas

- (a) An order requiring the association to have repairs and maintenance carried out;
- (b) And order requiring the relevant person-
 - (i) To carry out specified repairs, or have specified repairs made; or
 - (ii) To pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property of the applicant;
- (c) an order requiring the association –

(i) to carry out within a specified time, specified works to or on the common areas for the use, convenience or safety of owners or occupiers; or

(d)...

(e)an order requiring the association-

(iii)to dispose of specified property within a specified time.

Section 39(7)In respect of general and other Issues

(a) an order declaring that the applicant has been wrongfully denied access to information or documents and requiring the association to make such information or documents available within a specified time; or

(b) any other order proposed by the chief ombud.

6. The dispute was investigated by the adjudicator. In terms of section 53 the Adjudicator may make an order dismissing the application if, after investigation-

“(1)(a) the adjudicator considers that the application is frivolous, vexatious, misconceived or without substance; or

(b) the applicant fails to comply with a requirement in terms of section 51.

(2) If the adjudicator makes an order in terms of subsection (1)(a), the adjudicator-

(a) may order costs against the applicant to compensate the affected person for loss resulting from the application; and

(b) in considering the costs, must have regard to any previous applications made by the applicant.

(3)The amount of costs ordered in terms of subsection (2) must not be more than the maximum amount prescribed.”

RELEVANT STATUTORY PROVISIONS

7. Section 1 of the CSOS Act defines-

- "community scheme" as "any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a

property development, a housing scheme for retired persons, and a housing cooperative and "scheme" has the same meaning."

- "dispute" as "a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly"

8. Section 38 of the CSOS Act provides-

"Any person may make an application if such person is a party to or affected materially by a dispute".

9. Section 45(1) provides-

"The Ombud has a discretion to grant or deny permission to amend the application or to grant permission subject to specified conditions at any time before the Ombud refers the application to an adjudicator."

10. Section 47(1) provides-

"On acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the Ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the application, the Ombud must refer the matter to conciliation."

11. Section 48(1) provides-

"If the conciliation contemplated in section 47 fails, the Ombud must refer the application together with any submissions and responses thereto to an adjudicator."

12. In terms of Section 50-

"The adjudicator must investigate an application to decide whether it would be appropriate to make an order."

13. Section 51 provides for the investigative powers of the Adjudicator:

" (1) When considering the application, the adjudicator may-

(a) require the applicant, managing agent or relevant person-

- (i) to give to the adjudicator further information or documentation;
- (ii) to give information in the form of an affidavit or statement; or
- (iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview;

(b) invite persons, whom the adjudicator considers able to assist in the resolution of issues raised in the application, to make written submissions to the adjudicator within a specified time; and

(c) enter and inspect-

- (i) an association asset, record or other document;
- (ii) any private area; and
- (iii) any common area, including a common area subject to an exclusive use agreement.”

14. If the dispute has not been resolved through conciliation, the matter may be referred to an Adjudicator. Accordingly, a certificate of Non-Resolution was issued in terms of Section 48(1) of the CSOS Act. The Ombud referred the application together with any submissions and responses thereto to an adjudicator on 29 June 2021.

INVESTIGATION BY ADJUDICATOR

15.1. The Applicant has referred the application in his personal capacity and seeks relief for other tenants, P.P. Mnguni, Deon Van Ede and P.Ntando.

15.2. The relief sought by the Applicant is as follows:

- a) An order for the payment of R30 000-00 against the Respondent for plumbing repairs to Flat 36 Stralenberg to be charged directly to the account of Mr Phillip Frost, the occupier of unit 46.
- b) An order to investigate possibly shady fraudulent deals for a period of not less than two years,
- c) An order against the gardener for urinating against the walls of the surrounding buildings in clear sight of children.
- d) An order against the previous members of the body corporate who insist on using Stralenberg's beautiful gardens as a dumping place for rubbish and building rubble.
- e) An order to deal with specified business totally ignored in previous meetings (AGM held on 30 November 2019 and 5 December 2020)
- f) An order for previous meetings not validly convened.
- g) An order for a resolution passed which was void or invalid.
- h) An order to appoint Manna Van Rensburg, a domestic violence proponent as new caretaker void as this decision interferes with the rights of a tenant or group of owners and tenants.

- i) An order to terminate the current abusive Management Team.
- j) An order against several outstanding maintenance repairs not completed and several incomplete maintenance repairs ignored and an order to dispose off rubbish and junk in garden area.
- k) An order for documents and information denied which pertains to the disappearance of old copper piping and possible other unauthorised commissions and unethical mark ups.
- l) An order insisting that the new Property Management Team operates a trust account for Stralenberg Financials, a legal requirement which is not currently adhered to.
- m) A discount or waiver of application fees based on the personal actions of the 'wrongdoers' taking the law into their own hands and taking advantage of elderly tenants and abusing them.

EVALUATION & FINDING

16. Section 38 of the CSOS Act states as follows:

- “(1) Any person may make an application if such person is a party to or affected materially by a dispute.
- (2) An application must be-
- (a) made in the prescribed manner and as may be required by practice directives;
 - (b) lodged with an ombud; and
 - (c) accompanied by the prescribed application fee.
- (3) The application must include statements setting out-
- (a) The relief sought by the applicant, which relief must be within the scope of one or more of the prayers for relief contemplated in section 39;**
 - (b) The name and address of each person the applicant considers to be affected materially by the application; and
 - (c) The grounds on which the relief is sought.”

17. The CSOS Practice Directive on Dispute Resolution states as follows:
- “5.3. The Applicant bears the onus of ensuring that all relevant information has been submitted to ‘ make their case’, in other words, to ensure their application form is correctly completed and meets legislative requirements.
 - 5.10. The application form must be signed by the applicant, unless the application form is signed by an applicant’s authorised representative , which must be indicated in the form.
 - 5.11. Where an applicant is represented, full particulars and contact details of the representative must be disclosed in the application form, including the capacity in which the representative acts(i.e. trustee, managing agent, etc.)
 - 7.1. ...the application must include the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39...”
 - 7.3. If the relief sought relates to an order declaring any decision of an association or an executive committee to be void, and 60 (sixty) days has lapsed since the decision was taken, the applicant must together with the application for dispute resolution apply for condonation for the late submission to the Ombud.
 - 13.7. The Chief Ombud may waive the applicant from paying the prescribed fee.An application for waiver must be lodged with the Chief Ombud in terms of the Waiver or Discount Directive.If the applicant is automatically waived from paying a fee as set in the Regulations for Fee and Waiver, such applicant must provide proof of income for the waiver to be effective. Applicants seeking a waiver of fees must complete CS3 Form .Completion of waiver application does not in itself mean the fee will be waived and the Chief Ombud may request the applicant to provide further evidence of financial hardship.The criteria as set out in the waiver directive will be considered in determining whether s the waiver application should be approved or not.”
19. The Western Cape High Court in the case of **Trustees for the Time Being of the Avenues Body Corporate vs Shmaryahu and Another** ¹ held ad para[19] “the character of the various types of substantive relief that an Adjudicator is empowered to grant in terms of the Act appears from the provisions of Section 39”.
20. The court further held ad paragraph [18] that “It provides for the possibility of a number of different types of orders being made in respect of seven expressly specified categories of issues; viz (i) financial issues, (ii) behavioural issues, (iii) scheme governance issues, (iv) issues in respect of meetings, (v) in respect of management services, (vi) in respect of works pertaining to private and common areas and (vii) in respect of general and other issues. It is evident from the character of each of the categories of issues that they pertain

¹ (A31/2018)[2018]ZAWCHC 54 (2018) 4SA 566 (WCC) 10 May 2018

primarily to matters germane to the community schemes, and only incidentally to related personal or individual interests or rights”.

21. An application for waiver or discount on adjudication fees **must** be lodged with the Chief Ombud on the prescribed CS3 form and is not an issue which the Adjudicator can determine.
22. In *The Rapallo Body Corporate v Thabisile Cylvia Dlamini N.O.*²the Court held as follows:

“Whilst an application in terms of the CSOS Act is not required to conform with the formality of a pleaded case before a court, it is nevertheless evident from the provisions of the Act that the nature and ambit of the relief claimed is meant to be objectively ascertainable with reasonable certainty from the content of the application. There is nothing arcane about that proposition. The rules of justice require that a party called upon to meet a claim should be informed with reasonable certainty what the claim is.”

The Applicant has stated that he acts for several concerned tenants who have not been identified as parties to this dispute and has listed a host of issues which relate to him and the other tenants and which issues have not been set out in a coherent manner.

- **Financial issues**

The Applicant has failed to substantiate a claim for R30 000-00 against the Body Corporate for plumbing repairs.

- **Behavioural issues**

The relief which the Applicant seeks in respect of an order against the gardener for urinating against the walls of the surrounding buildings does not fall within the scope of the relief for prayer contemplated in s39 of the CSOS Act. The disciplining of the gardener for his alleged conduct is a matter between the gardener and the Body corporate as his employer.

² (12572/2019) [2020] ZAWCHC 97

- **In respect of meetings**

The Applicant is seeking an order to set aside decisions taken at previous meetings in 2019 and 2020 which he believes were illegal.

Section 41 of the CSOS Act states as follows:

- “(1) An application for an order declaring any decision of an association or an executive committee to be void, may not be made later than 60 days after such a decision has been taken.
- (2) An Ombud may, on good cause shown, condone the late submission of an application contemplated in subsection (1).”

This application was lodged on 11 January 2021, therefore any application to declare any decision of the association to be void will have to be condoned by the Ombud in terms of Section 41(2) of the CSOS Act. The Applicant has failed to substantiate and set out in a coherent manner the details of the allegations levelled against the Respondent relating to the 2020 AGM.

- **In respect of Management services**

The relief sought in relation to termination of the current management agent does not fall within the scope of the prayers for relief contemplated in Section 39 of the CSOS Act.

- **In respect of Works pertaining to Private/Common Areas**

The Applicant's claim for maintenance is vague in that he has failed to identify the several outstanding maintenance and repairs not completed.

- **In respect of General and Other Issues**

The Applicant's request for documents is vague in that he has failed to identify the documents and information which he has been denied.

PMR 21(4) states that ,”The body corporate must ensure that all money received by the body corporate is deposited to the credit of an interest bearing account-(a)in the name of the body corporate ;or(b) that is a trust account opened in terms of either the Estate Agency Affairs Act, 1976 (Act No. 112 of 1976)...”

Matters of non compliance by Managing Agents must be referred to the Estate Agency Affairs Board.

23. The Applicant in his final submissions request CSOS to issue a '*mandate*' which prevents:
- a) Phillip Frost from ever serving/working/ or being elected in the future to serve as a member or Trustee of the Stralenberg Body Corporate.
 - b) Manna Van Rensburg from ever serving/working/or being elected in the future to serve as a member or Trustee of the Stralenberg Body Corporate.
 - c) Joan Korb from ever serving/working/or being elected in the future to serve as a member or Trustee of the Stralenberg Body Corporate.
 - d) Tersa Van Tonder from ever serving/working/or being elected in the future to serve as a member or Trustee of the Stralenberg Body Corporate
 - e) Rob Davis from ever serving/working/or being elected in the future to serve as a member or Trustee of the Stralenberg Body Corporate
24. In the circumstances I find that the Adjudicator is not empowered in terms of the CSOS Act to make an order as per the relief in paragraph 15.2. above for the reasons discussed above.
25. CSOS as a creature of statute, and the Adjudicator is bound to make orders that are competent and enforceable in terms of the Act.
26. Accordingly, the Applicant's complaint against the Respondent is hereby dismissed.

COSTS

27. I make no order as to costs.

ADJUDICATION ORDER

28. In the circumstances, the following order is made:
- 28.1. The Applicant's claim is dismissed.

RIGHT OF APPEAL

29. Section 57 of the CSOS Act, provides for the right of appeal-

(1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.

(2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.

(3) A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.

DATED AT DURBAN ON THIS 27TH DAY OF SEPTEMBER 2021

Unsigned due to electronic transmission

ADJUDICATOR

ASHA SEWPERSAD