



**ADJUDICATION ORDER IN TERMS OF SECTION 53 AND 54
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Reference Number: CSOS 00770/KZN/17

IN THE MATTER BETWEEN

KUNAL JUGDEO

Applicant

and

THE DIRECTORS OF WESTBROOK BEACH ESTATE CLUB

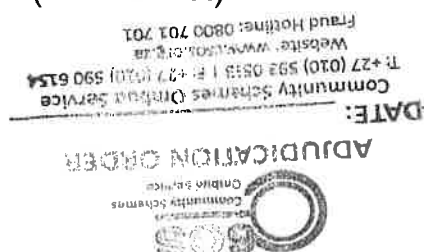
Respondent

ADJUDICATION ORDER



THE PARTIES

1. The applicant is Mr Kunal Jugdeo who with his wife are the owners of unit 39 in the Westbrook Beach Estate Club community scheme (scheme). The property is situated at 35 Malcolm Welfare Circle, Westbrook, Tongaat. The scheme being a Home Owners Association, is covered by the Community Schemes Ombud Services Act 9 of 2011 (CSOS Act) and the Sectional Titles Schemes Management Act, No.8/2011 (STSM Act).



2. The respondents, who oppose the application, are the Board of directors of the Westbrook Beach Club Homeowners' Association (WBCHOA).

INTRODUCTION

3. This is an application for dispute resolution in terms of Section 38 of the Act. The application was made in the prescribed form and lodged with the office of the Kwazulu-Natal Provincial Ombud (CSOS). The application includes a statement of case which sets out the relief the applicant seeks.
4. The adjudication hearing, in terms of section 48 of the Act, took place on 19 July 2018 at the Kwazulu-Natal provincial offices of CSOS.
5. Mr Jugdeo appeared in person. The respondent was represented by its chairman, Mr P Govender, and directors, Mrs K Naidu and Mr N Naidoo.
6. The dispute relates to penalties and interest which the Board of directors (BOD) of WBCHOA had imposed on Mr Jugdeo for his failure to complete the construction of his property within the extended period allowed.

BACKGROUND

7. According to the Construction Site Management and Contractor Protocol which Mr Jugdeo signed and accepted on 24 March 2015:



- “iii. Construction Time to Completion as specified in the Estate Rules and Architectural Guidelines is 12 months from site handover to construction completion including landscaping and commencement of property maintenance. Any extensions in time will only be considered on receipt of written application specifying valid and material reasons for any delays incurred for up to a maximum period of 3 (three) months thereafter the Owner and Contractor acknowledge joint and several liability for the payment of Penalties for the breach of the estate rule specifying completion within the prescribed period equal to the amount of R250.00 per day. The Penalty shall be applied in terms of the Estate House Rules clause P5 wherein every 24 hours lapsed that the breach has not been remedied shall constitute a separate offence committed and continue until such time as the breach has been remedied to the satisfaction of the WBCHOA.” (sic)
8. On 13 April 2016, Mr Jugdeo was informed that his application dated 9 March 2016 for a 3-month extension had been successful. He was further informed that the new completion date for the construction was to be 24 June 2016.
9. On 4 July 2016, he was notified that the WBCHOA had declined his second application made on 13 June 2016, for a further extension of the completion date.
10. In a letter addressed to the Estate Manager of WBCHOA dated 25 November 2016, Mr Jugdeo outlined progress on the construction of the building and requested that he not be issued “with a non-completion Fine for the Month of December.” The letter further



stated that “Fine/s already issued by your offices will be promptly settled before closing for the Holidays.”



APPLICANT'S SUBMISSIONS

11. Commencing the proceedings, Mr Jugdeo submitted that it was not “humanly” possible to comply with the construction time period of 12 months. He and his wife had made every effort to do so. However along the way, they had experienced personal challenges when his wife who was the designated architect and project manager, suffered a health set-back. They had also experienced several difficulties with sub-contractors.
12. Furthermore, he had had to repair damages to his property as a result of a burst pipe for which the WBCHOA is liable. The repairs had cost him in excess of R45 000,00. In this regard he had submitted the quotation to the WBCHOA for attention.
13. Mr Jugdeo contended that the penalty of approximately R60 000,00 including interest which the WBCHOA had imposed as a result of his failure to complete the building in the extended period, is unfair in view of the challenges he and his wife had faced during the duration of the building construction. In a subsequent and recent appeal to the WBCHOA against its final decision, he had outlined the hurdles they had had to overcome as mitigating factors. His appeal had however been unsuccessful.
14. According to Mr Jugdeo, he had proposed a set-off of the fines and penalties against the amount of R47 300,00 which he had allegedly

had to pay to repair the damages caused by the burst fire hydrant pipes. He had also made several requests to the Estate Manager for the estate's contractor to evaluate the scope of the work undertaken to repair the damage caused by the fire hydrant. However, he had not received any response to these requests.



ADJUDICATION ORDER
 DATE: 24/07/2018
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RESPONDENT'S SUBMISSIONS

15. Mr Govender, the chairman, argued that all homeowners are bound by the rules of the WBCHOA. In this regard, Mr Jugdeo had in his application for membership of the WBCHOA agreed on 3 October 2013, "to be bound by all the terms and conditions of the aforesaid ASSOCIATION'S registered Articles of Association, House Rules, Architectural and Landscaping Guidelines, Landscaping and Environmental Guidelines, Construction Site Management and Contractor Protocol and Regulations." Furthermore, the Memorandum of Incorporation is binding on all members of the WBCHOA.
16. In regard to the damage caused by the burst fire hydrant, Mr Govender was adamant that this was a separate issue. And, since Mr Jugdeo's admission of liability on 25 November 2016, no further fines or penalty had been imposed. The amount has since December 2016, remained unchanged.
17. It was not disputed that the water pipe attached to a fire hydrant near Mr Jugdeo's property had burst and that damage had been caused. This had occurred sometime during March 2017. However even Mr Jugdeo's own water pipe on the opposite side of his property had burst and caused damage. The Estate Manager had,

with a team of the scheme's maintenance employees, attended to clear the damage by levelling the ground and cleaning up the sand which had been washed down into Mr Jugdeo's storeroom. They had also filled sand in the gaping hole which had been created by the water. The clearing-up work had been attended to within a period of approximately one week from the date of Mr Jugdeo's complaint to the WBCHOA, and at a cost of R2 750,00 to the scheme.

18. Following a meeting on 28 March 2017 between the WBCHOA, the Estate Manager and Mr Jugdeo at which he proposed the set-off as described in paragraph 14 above, the WBCHOA rejected the proposal. It was agreed that the Estate Manager would inspect the damages and obtain quotations for the necessary repairs from independent contractors.



19. According to Mr Govender, the quotation for R47 300,00 submitted by Mr Jugdeo had been prepared by his own contractors, La Contractors. However, the two independent contractors commissioned by the Estate Manager had quoted R9 000,00 and R13 000,00 respectively for all repairs of the damage caused by the burst pipe from the fire hydrant. The independent contractors' quotations were forwarded to Mr Jugdeo on 22 April 2017. At the time, the outstanding penalties and interest amounted to R42 064,00 being the amount Mr Jugdeo owed the WBCHOA.

20. At a meeting of the BOD on 17 May 2017, the decision to reject Mr Jugdeo's proposal for a set-off of the claims was ratified. It was also agreed that he would be reimbursed for damages to his property caused by the burst fire hydrant. However, in the opinion of the

Estate Manager and the BOD, the damage was not as extensive as to warrant repairs as quoted by La Contractors.

21. During May 2017 at a time when the WBCHOA was in the process of finalising BOD resolutions in respect of the penalties and damages, Mr Jugdeo went ahead with his own repair work without either reverting to the Estate Manager or to the WBCHOA and before it had reached a decision on the matter.
22. Also at the meeting referred to in paragraph 20 above, the BOD had in good faith resolved to reimburse Mr Jugdeo for the damage to his property in the sum of R10 000,00 being the average of the two independent contractors' quotations.
23. Responding to questions from the adjudicator, Mr Govender stated that according to the scheme's rules, three quotations were required before an owner could proceed to repair damage to his property for which the WBCHOA was ultimately responsible. And, of these, the normal business practice of selecting the average quoted cost would apply. Furthermore, he disputed that the WBCHOA had delayed in responding to the damage to Mr Jugdeo's property – the staff immediately within the same week had levelled the sand, filled the hole with two truckloads of sand, and had also cleared the sand that had settled in the storeroom. Mr Govender added that from this period being March 2017, no further communication had been received from Mr Jugdeo until the most recent negotiations when a possible set-off was raised. When this was rejected and the BOD's counter-offer of a reduction of R10 000,00 on the amount Mr Jugdeo owes was also rejected, the BOD has decided to reinstate the original amount of R66 321,00 which includes outstanding

levies, interest on overdue amounts, legal fees, architect's fees and the fines/penalties of R38 450,00.

24. Despite the BOD's offer to reduce Mr Jugdeo's indebtedness in consideration for his damages, it is firmly of the opinion that Mr Jugdeo is entitled to raise a separate dispute for the damage to his property caused by the burst fire hydrant.
25. Mrs Naidu added that all members of the WBCHOA who had breached the rule in respect of completion of building constructions had had to pay appropriate fines. The rules, she stated, applied to all without exception.
26. Mr Govender explained that the purpose of the rule was that building construction when delayed, became a nuisance to other owners, with the constant movement of heavy vehicles on the estate, and much dust and sand caused to neighbouring properties.
27. In response, Mr Jugdeo stated that other estates in the surrounding areas operated on longer periods for completion of building construction. He also referred to changes made to the architectural guidelines, the turn-over of Estate Managers, and inconsistency regarding down pipes, all of which he stated was proof of how badly-run the scheme was.
28. It was Mr Naidoo who responded to each alleged example of poor management of the scheme, with input from Mr Govender. However, as this issue is of no relevance to the dispute, no attention will be given to whether the scheme is properly administered or not. More importantly, Mr Naidoo pointed out that of the 85 original sites laid out in the scheme, only 16 remained vacant. And, of those that



have been developed, several owners had been fined for their failure to complete building construction within the stipulated period and had paid accordingly. To have to make exception in this case and allow Mr Jugdeo's fines to be written off or even set-off would amount to a travesty of justice in relation to all other affected homeowners.

ANALYSIS



29. In addition to oral submissions made at the adjudication hearing, consideration has also been given to the parties' various written submissions, supporting documents, copies of relevant correspondence between them and other comprehensive statements of case and replying statement. All of these form part of the record of evidence.

30. Having applied for membership of what must surely rate as one of the province's more exclusive schemes, fully aware of and agreeing to be bound by the rules, Mr Jugdeo's claim of unfairness in the application of the rules cannot be sustained. The purpose of the particular rule of which he fell foul, was not disputed. Moreover, his circumstances, namely the personal and financial difficulties experienced by him and his wife, have not been shown to be any worse than others who have had to pay similar fines. In fact all the respondent's representatives had at some stage suffered the same fate; evidence that the rule was applied without fear, favour or prejudice as would be required in any properly managed scheme.

31. Furthermore, Mr Jugdeo had as far back as November 2016, undertaken to settle the fines then outstanding before the commencement of the holiday season, presumably around mid-December of that year. It is common cause that no payment was made. The evidence is that no further communication had been received by him until the episode with the burst fire hydrant pipe during March 2017. At that stage, the money he had undertaken to pay by December 2016 was still outstanding. Moreover, he had not informed the BOD of any problems he may have been experiencing in regard to completion of the building.



32. Turning now to the water damage to Mr Jugdeo's property during March 2017, the respondent was at pains to acknowledge his right to pursue a claim for damages arising from the incident. And, given the difference in Mr Jugdeo's quotation and those of the scheme, and the fact that the BOD is not convinced of the extent of the damage, it is clear that any claim by Mr Jugdeo must follow due process. More significantly, Mr Jugdeo had not obtained three quotations for repairs to the damage, before proceeding with the repairs. This is a further reason for the respondent's refusal to entertain his proposal of a set-off. As the process of claiming his damages has to date not been initiated, Mr Jugdeo cannot claim for a set-off of the amount owed to the WBCHOA against the amount allegedly due to him. Neither is his request for the scheme's Estate Manager to evaluate the scope of the repairs which he had undertaken to his property, competent relief. The two claims are

separate issues that cannot be combined. Mr Jugdeo remains indebted to the WBCHOA for the full amount of its claim against him.

ADJUDICATION ORDER

33. In the circumstances, Mr Jugdeo's claim is dismissed.

DATED AT DURBAN on 19 July 2018.



**S PATHER
ADJUDICATOR**

