



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

Case Number: CSOS01979/KZN/18

**IN THE MATTER BETWEEN
TRUSTEES OF 1 PALM LAKES FISH EAGLE BODY CORPORATE
(APPLICANT)**

And

**THE BOARD OF DIRECTORS OF PALM LAKES HOMEOWNERS ASSOCIATION
(RESPONDENT)**

ADJUDICATION ORDER

EXECUTIVE SUMMARY

Category of dispute S39(3): in respect of scheme governance issues and 39(1) financial issues.

1. The Applicant seeks an order:

39(3)- In respect of scheme governance issues— (a) an order requiring the association to record a new scheme governance provision consistent with a provision approved by the association; (b) an order requiring the association to approve and record a new scheme governance provision; (c) an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision; or (d) an order declaring that a scheme governance provision, having regard to the interests of all owners and

occupiers in the community scheme, is unreasonable, and requiring the association to approve and record a new scheme governance provision— (i) to remove the provision; (ii) if appropriate, to restore an earlier provision; (iii) to amend the provision; or (iv) to substitute a new provision

39(1) an order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order;

INTRODUCTION

2. The Applicant is the Trustees of 1 Palm Lakes Fish Eagle Body Corporate a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011 (“ST SMA”) which is situated at Tinley Manor, duly represented by Mr Naidu.

3. The Respondent is the Board of Directors of Palm Lakes Homeowners Association which was formed as a common law association and is situated at Tinley Manor.

4. The application was brought in terms of s 39 of the Community Schemes Ombud Service Act No 9 of 2011 (“the CSOS Act”) which provides that:

“An application made in terms of section 39 must include one or more of the following orders:

39(3) In respect of scheme governance issues and 39(1) financial issues –

An order requiring the association to record a new scheme governance provision consistent with a provision approved by the association and an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision. An order for the payment or repayment of a contribution or any other amount.

5. This is an application for dispute resolution in terms of the CSOS Act. The application was made in the prescribed form and lodged with CSOS.
6. The adjudication hearing took place on 19 November 2019. Both parties attended the hearing. The parties were duly represented.

RELEVANT STATUTORY PROVISION

7. The hearing was conducted in terms of section 38 of the CSOS Act which provides that –

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

8. Section 45(1) provides that –

“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”

9. Section 47 provides that –

“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.”

10. Section 48 provides that –

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



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11. Accordingly, a certificate of Non- Resolution was issued in terms of Section 48(1) of the CSOS Act. The Ombud therefore, referred the matter to adjudication, in terms of Section 48.

12. SUMMARY OF RELEVANT EVIDENCE (That relating to the issues in dispute)

Applicant's Submissions

12.1 The Applicant indicated that as per the application there were several issues that were in dispute. With the lapse in time most of the issues that were in dispute have received positive attention. The issues that remains in dispute is the issue of maintenance of the common property within the scheme and compensation of R 178 014.05 for the repairs conducted with the plumbing work which was not completed correctly by the developer including and not limited to the storm water works. I have not captured information that is not relevant to the dispute. I wish to point out that it was discussed during the proceedings that the Applicant seems to have captured the relief sought, incorrect. This was established during the presentation of the case. The applicant indicated that the relief they are seeking is in terms of section 39 (1) (e).

12.2 The submission by the Applicant is that the Palm Lakes Homeowners Association(PLHOA) was attending to maintenance within the Body Corporate for years until three (3) years ago and the maintenance included the landscaping and this is why the Applicant is concerned about the change without consultation with the people concerned after 15 years. Clarity is

therefore required on what the responsibilities of the Body Corporate and that of the PLHOA are.

12.3 The Body Corporate incurred the costs for maintaining Erf 41, special levy was raised to attend to the maintenance of the plumbing which included the storm water, it is the applicant's submission that the repairs done were as a result of latent defects. An offer of reimbursement of R80 000 was made by the developer to the Body Corporate but the offer was rejected as it was to be paid by a third party.

12.4 The constitution of Palm Lakes Homeowners' Association does not in any way differentiate between the common property belonging to HOA and Body Corporate and clause 10.1 of the constitution applies to both HOA and Body Corporate. This clause relates to levies payable by members.

13. Respondent's Submissions

13.1 The Respondent submitted that the HOA levy covers the maintenance that is common to all members and all the facilities thereon and related aspects but excluding common property areas within the Sectional Title Schemes and/or private erven.

13.2 The Audited Financial Statements (AFS) indicates what the HOA has budgeted for and this includes items that are their responsibility to maintain. The HOA does not own the sectional title scheme hence no reference is made to the property owned by the scheme in the budgets.

13.3 The Respondent further explained what the implication of holding the HOA responsible for all maintenance in a sectional title schemes would mean financially. It was further explained that the residential erf is owned by the body corporate and hence the maintenance of the common property of the sectional title is the responsibility of the body corporate.

14. EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

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- 14.1 In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
- 14.2 The general rule is that only evidence, which is relevant, should be considered. Relevance is determined with reference to the issues in dispute. The degree or extent of proof required is a balance of probabilities. This means that once all the evidence has been tendered, it must be weighed up and determine whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.
- 14.4 I will now deal with the matter at hand. A scheme is governed by the STSMA and defines common property in relation to a scheme means (a) the land included in the scheme ; (b) such parts of the buildings as are not included in a section; (c) and land referred to in section 5(1) (d).
- 14.4 The Palm Lakes Homeowners 'Association Constitution Version 8 defines common property as, "the private space, conservation erven and roads within the estate."
- 14.5 Levies are paid to the Body Corporate and to the Homeowners' Association and it is my view that this is the crux of the issue. The question would be what the levy is paid for in both instances.
- 14.6 We will begin with the levies paid to the HOA. The audited annual financial statement (AFS) breaks down the allocation of funds and what the association is responsible for. On page 21 of the AFS it is stated under paragraph 13, "The Association is responsible for the following assets which have been inherited from the developer as part of the completed development and clearly lists Roads including entrance portion, security fence, security equipment including access control, CCTV's control room, fibre optics, Clubhouse, dams, irrigation equipment and pump station, storm water works, sewerage works reservoirs' ..."

14.7 Section 3 of the STSMA lists the functions of the Body Corporate,3(1)

provides amongst other things that the body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include-

(a) to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs –

(i) for the repair, maintenance, management and administration of the common property (including reasonable provision for future maintenance and repairs) ...

14.8 The distinction of what common property is in an HOA and Body Corporate and the responsibility thereof is as follows:

14.8.1 in the HOA this is the common property facilities (clubhouse, gym...) including the maintenance of roads, lights, landscaped and security areas. Communal areas that all residents are entitled to use and enjoy is the responsibility of the HOA.

14.8.2 In a Sectional Title development scheme common property is the whole area that does not form part of any section. This includes the land, the corridors, parking areas, walls, gates, the area between the roof and the median line of the ceiling and outer skin of the building, including the roof and foundations. The common property is always controlled by the body corporate.

15. It stands to reason that the Body Corporate is responsible for the common property of the scheme. Whilst I note what the practice has been over the years regarding the maintenance of the scheme, the STSMA clearly stipulates what is the responsibility of the body corporate as set out above. It is important to note that the provisions of the HOA's governing document may not override or be in conflict with the provisions of Sectional Titles Act.

16. That being said, CSOS is a creature of statute and not even the flexibility of our processes and proceedings will allow me to circumvent the fact that the

relief sought was misplaced and presented in the application under the wrong provision of the Act. I trust however that that what is set out in the evaluation will cause the parties to take note and own up to and meet their respective obligations.

ADJUDICATION ORDER

17. The application is dismissed.

RIGHT OF APPEAL

18. The parties' attention is drawn to –
Section 57(1) of the CSOS Act of 2011 which provide 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 within 30 days from date of issuing of order.”

DATED AT DURBAN on 17th December 2019



ADJUDICATOR
MS T.P QWABE

