



ADJUDICATION ORDER

DATE: 15/07/2020

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

**Case Number: CSOS0001235/GP/19**

IN THE MATTER BETWEEN

**NADINE ORKIN**

**(APPLICANT)**

and

**BELLISIMO HOMEOWNERS ASSOCIATION**

**(FIRST RESPONDENT)**

**GOLDLEAF INVESTMENTS**

**(SECOND RESPONDENT)**

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**ADJUDICATION ORDER**

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**EXECUTIVE SUMMARY**

This is an application for dispute resolution in terms of the following section of the Community Schemes Ombud Service Act:

- Section 39 (7) in respect of general and other issues;

Applicant seeks an order in the following terms:

- (a) That the Bellissimo HOA and/or the Developer (Goldleaf Investments) pay five sixth of the cost for the 24-hour guard service employed at the complex since the 23<sup>rd</sup> of February to date, and future costs relating to such service;
- (b) That the HOA be instructed to appoint a fixed date for the Annual General Meeting, more specifically the AGM held on the 19<sup>th</sup> of March 2019;
- (c) To define and validate the proceedings relating to the AGM meeting held on the 19<sup>th</sup> of March 2019;
- (d) Direction be given as to the ability of the appointed managing agent and Eran Michaeli;

- (e) To order the incorporation of the minutes of the 1<sup>st</sup> AGM meeting held on the 9<sup>th</sup> of July 2018;
- (f) To allow Nadine and Ivan Orkin to be directors of the HOA;
- (g) To allow Ivan and Nadine to present their proposals as to the suggested camera security system and that a final decision should be taken by the unit holders;
- (h) To order that the two trees be planted outside the guard house as agreed.

The order is in line with Section 39 (7) of the CSOS Act No.9 of 2011 (the CSOS Act).

## FINDINGS

The Applicant's application is denied.



## INTRODUCTION

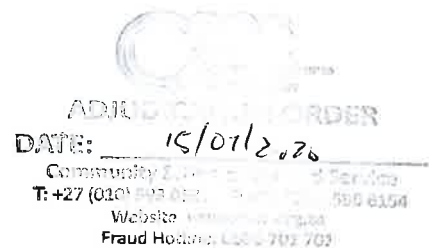
1. The Applicant is the registered owner of Unit 1, Bellissimo, 5 Adolf Street, Sandown Extension 24, Sandton, GAUTENG PROVINCE. The Applicant made written submissions.
2. The First Respondent is the Bellissimo Homeowners Association a community scheme as defined in the CSOS Act No. 9 of 2011 and to which it would be convenient to refer to as the "HOA". The First Respondent made written submissions.
3. The Second Respondent is the developer of the First Respondent. The Second Respondent failed to make written submissions.
4. This is an application for dispute resolution in terms of Section 38 of the Community Ombud Services Act No.9 of 2011. The application was made in the prescribed form and lodged with the Gauteng Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.
5. This application is before me because of a referral sent by the Gauteng Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.
6. The parties entered an appearance in terms of the Notice of Set Down as contemplated in Section 48(4) of the Community Schemes Ombud Service Act No.9 of 2011.

## APPLICABLE PROVISIONS OF THE ACT

7. 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”*
8. 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’.*
9. 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”.*
10. Accordingly, a certificate of Non- Resolution was issued in terms of Section 48(4) of the CSOS Act No.9 of 2011. The Ombud therefore, referred the matter to adjudication, in terms of Section 47 of the Act.

## SUMMARY OF EVIDENCE

### Applicant’s Submissions



11. The Applicant submitted that the HOA, is made up of six units in various stages of completion, her unit is the only one that is occupied at this stage. The Applicant confirmed that she took occupation of the unit in February 2018.
12. According to the Applicant she was made to understand that a 24-hour guard service would be provided by the HOA, from date of occupation. The Applicant was however later informed by the legal representative of the HOA, that the guard service would only be made available after the sale of 5 units.
13. The Applicant further submitted despite an undertaking by the Director of the HOA at an AGM held on the 19<sup>th</sup> of March 2019, a security camera system was installed without the Applicant being consulted.
14. The AGM referred to above, was abandoned after 6:30 pm because of insufficient light in unit 6.

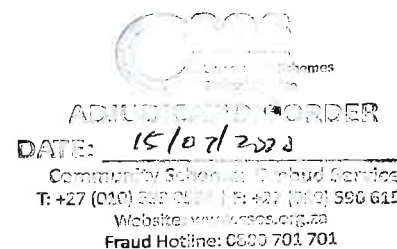
15. According to the Applicant the fountain, signage, electric fence and screening off of the vacant stands are defective.
16. The Respondent submitted that the minutes of the 1<sup>st</sup> AGM meeting held on the 9<sup>th</sup> of July 2018 could not be incorporated at the meeting of the 19<sup>th</sup> of March 2019 and dealt with because the meeting was abandoned.
17. The Applicant further submitted that it was agreed with the developer that two trees would be planted in the driveway outside the guards house. The two trees according to the Applicant have not yet been planted.

#### **APPLICANT'S PRAYERS**

- (a) That the Bellissimo HOA and/or the Developer (Goldleaf Investments) pay five sixth of the cost for the 24-hour guard service employed at the complex since the 23<sup>rd</sup> of February to date, and future costs relating to such service;
- (b) That the HOA be instructed to appoint a fixed date for the Annual General Meeting, more specifically the AGM held on the 19<sup>th</sup> of March 2019;
- (c) To define and validate the proceedings relating to the AGM meeting held on the 19<sup>th</sup> of March 2019;
- (d) Direction be given as to the ability of the appointed managing agent and Eran Michaeli;
- (e) To order the incorporation of the minutes of the 1<sup>st</sup> AGM meeting held on the 9<sup>th</sup> of July 2018;
- (f) To allow Nadine and Ivan Orkin to be directors of the HOA;
- (g) To allow Ivan and Nadine to present their proposals as to the suggested camera security system and that a final decision should be taken by the unit holders;
- (h) To order that the two trees be planted outside the guard house as agreed.

#### **Respondent's Submissions**

18. While the Respondent failed to respond to the writer's request for final submissions, the legal representative of the HOA, had in an earlier email dated the 30<sup>th</sup> of August 2019 to the CSOS case manager, made the following submissions.
19. That the parties are involved in litigation in South Gauteng High court under case number 22321/18, where the Applicant is the Plaintiff and Golf Leaf the Defendant with a counterclaim.



20. According to the Respondent's attorney the bulk of the complaints arise from the fact that the Applicant is entitled to 1 vote as per the MOI of the HOA and has been outvoted on suggestions and proposals made by her.
21. The Respondent further submitted that an AGM was held and there were valid and binding minutes which were approved by the Board who at this stage make up the majority in terms of voting rights.
22. The Applicant according to the Respondent was similarly outvoted with regard to them wanting to be appointed as Directors.
23. According to the Respondent's attorney there is no merit, in the Applicant's complaint lodged with the CSOS.
24. The Director of the HOA Eran Michaeli further made submissions to the Case Manager on the 13<sup>th</sup> of September 2019, in which he disputed the Applicant's version of events.
25. According to the Respondent, the lawyer representing the Applicant's who attended the AGM on their behalf requested the meeting to be postponed as provided for in clause 21.2 of the MOI.
26. Regarding the request by the Applicant to be reimbursed for the legal fees occasioned by their attorney attending the AGM. The Respondent submitted none of the members of the HOA nor the managing agent are liable for the decisions and actions of other members.
27. According to the Respondent the husband of the Applicant would insult the Director of the HOA and the managing agent when they responded to questions that he did not agree with.
28. The Respondent submitted that the security system was voted on and installed after the majority voted in favour of such installation.
29. According to the Respondent only 1 out of 5-unit holders voted in favour of appointing the Applicant and her husband as Directors. While 4 of the 5 voted in favour of C Michaeli, B Michaeli and E Michaeli.

#### RESPONDENT'S PRAYERS

None submitted.

ADDITIONAL INFORMATION  
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## EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

30. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
31. 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 weighted up and determine whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

## DISCUSSION

32. I have perused all written submissions and taken into consideration all submissions made by the parties.

**(PRAYER A) That the Bellissimo HOA and/or the Developer (Goldleaf Investments) pay five sixth of the cost for the 24-hour guard service employed at the complex since the 23<sup>rd</sup> of February 2018 to date, and future costs relating to such service;**

33. In email correspondence from Eran Michaeli addressed to the Applicant dated the 25<sup>th</sup> of January 2018 at 10:38, the following is confirmed regarding the 254 hour guard house "There will not be 24 hour security for the Estate at this point, nor any security guard appointed therewith and you are not granted any permission whatsoever to appoint your own security and this issue will be addressed at the next AGM meeting".
34. The Applicant was informed prior to her taking occupation of her unit in February 2018, that no 24-hour security guard service will be provided.
35. The relief sought by the Applicant that the HOA/Developer pay five sixth of the cost for the 24-hour guard service from February 2018 to date, is consequently dismissed.

**(PRAYER B) That the HOA be instructed to appoint a fixed date for the Annual General Meeting, more specifically the AGM held on the 19<sup>th</sup> of March 2019;**

36. MOI of the HOA at clause 17 MEMBERS MEETINGS provides as follows, "The Board of Directors, or any prescribed officer of the Company authorised by the Board of Directors, is entitled to call a Member's meeting at any time".
37. "The Association shall hold a General Meeting in every calendar year as its Annual General Meeting".
38. "The Annual General Meeting shall initially be held 18 (eighteen) months of its date of incorporation, thereafter, once in every calendar year, but not later than 6 (six) months after the end of each financial year of the Association and not more than 15 (fifteen) months shall elapse after the holding of the last preceding annual general meeting".
39. The relief sought by the Applicant that the HOA be instructed to appoint a fixed date for the Annual Budget Meeting more specifically the AGM held on the 19<sup>th</sup> of March 2019, is dismissed, as the Applicant fails to specify which clause relating to AGM's the Respondent has breached or is in contravention of.

**(PRAYER C) To define and validate the proceedings relating to the AGM meeting held on the 19<sup>th</sup> of March 2019;**

30. It is common cause that one of the causes of the dispute that gave rise to the complaint before the adjudicator occurred on the 19<sup>th</sup> of March 2019. The Applicant lodged the complaint with CSOS on the 15<sup>th</sup> of July 2019, approximately 3 months after the cause of action arose.
31. Section 41(1) of the CSOS act 9 of 2011 states as follows: **"An application for an order declaring a 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."**
32. Section 41(2) states as follows:  
**"An ombud may, on good cause shown, condone the late submission of an application contemplated in sub section (1)."**
33. It is clear from the application that the dispute was lodged by the Applicant more than 60 days after decisions were taken as provided for in Section 41(1) of the Act, and that condonation for the late submission was not sought from the Chief Ombud.

34. The Application of the Applicant is therefore out of time and there is no evidence before the adjudicator that the Ombud has condoned the late submission of the Applicant's application.

**(PRAYER D) Direction be given as to the ability of the appointed managing agent and Eran Michaeli;**

35. Section 39 (5) (b) of the CSOS Act 9 of 2011, states that:

"In respect of Management Services (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".

36. The Management Agreement entered into between the HOA and Affiance provides as follows at clause (6) BREACH IN RESPECT OF MANAGEMENT, "If the Managing Agent is in breach of any of the terms of this agreement, or if the Managing Agent is guilty of conduct which at common law would justify the termination of a contract between master and servant, the Directors may, without notice, cancel this agreement, and the Managing Agent will have no claim whatsoever against the HOA or any of the owners as a result of such cancellation".

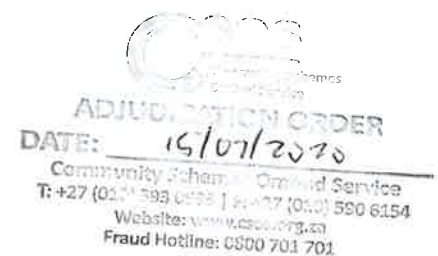
37. In so far as the Applicant's prayer to be given direction as to the ability of the appointed managing agent and Eran Michaeli, the Adjudicator is not empowered in terms of the applicable legislative framework to make an order in this regard.

38. It is the Adjudicator's finding that the Applicant's prayer falls outside the ambit of Section 39 of the CSOS Act.

**(PRAYER E) To order the incorporation of the minutes of the 1<sup>st</sup> AGM meeting held on the 9<sup>th</sup> of July 2018;**

39. Refer to Adjudicator's finding in respect of prayer (C) above.

**(PRAYER F) To allow Nadine and Ivan Orkin to be directors of the HOA;**





40. Submissions were made by the Respondent, that only 1 out of 5-unit holders voted in favour of appointing the Applicant and her husband as Directors. While 4 of the 5 voted in favour of C Michaeli, B Michaeli and E Michaeli.
41. The Applicant has not made out a case to support a finding that the appointment of the current Directors of the HOA were unlawful and must be set aside.
42. Accordingly, the Adjudicator finds that a prima facie case has not been made against the appointment of the Directors of the HOA, and that their appointments are valid.

**(PRAYER G) To allow Ivan and Nadine to present their proposals as to the suggested camera security system and that a final decision should be taken by the unit holders;**

43. Evidence was led that the security system currently in place was voted on and installed after the majority voted in favour of such installation.
44. The North Gauteng High Court, in the matter of Wilhelm Schreck Croucamp and Others v Hazeldean Retreat Partnership and Another case no 15860/2018, held that it is a fundamental principle of corporate law that by becoming a shareholder, members undertake to be bound by the decisions of the majority. A minority shareholder cannot seek relief merely because it was outvoted on a certain issue.
45. There is consequently no justification to support a finding in favour of the Applicant, in so far as this particular prayer for relief is concerned.

**(PRAYER H) To order that the two trees be planted outside the guard house as agreed.**

46. According to the minutes of the First General Meeting of the HOA held at Unit 6 dated the 19<sup>th</sup> of March 2019, the following was captured under General Business.
47. "2 boxes were built to plant trees, but no trees were planted yet. It was agreed the unit 1 present a quote for the this to the Directors where after a decision will be made".
48. On the 24<sup>th</sup> of March 2019, the Applicant in email correspondence to the managing agent advises as follows, "Hi Dirk, I attach herewith quote for the trees outside guard house".

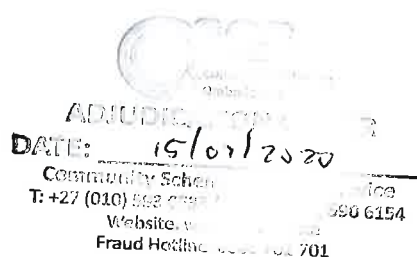
49. It is the Adjudicators finding that the Respondent give effect to the resolution of members at the AGM held on the 19<sup>th</sup> of March 2019, relating to the planting of trees outside the guardhouse.
40. There is nothing before the adjudicator to prove that the Respondents had not acted in the best interests of the HOA.
41. It follows that the Applicant has not succeeded in the Applicant's case against the Respondents and is not entitled to the relief sought.
42. For all the reasons which have been set out above, I can find no justification for the relief sought in respect of prayers (a), (b), (c), (d), (e), (f) and (g). Accordingly, the Applicant's complaint against the Respondent insofar as it relates to the aforementioned prayers is hereby dismissed.

#### POWERS AND JURISDICTION OF THE ADJUDICATOR

43. The Adjudicator is empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the Community Schemes Ombud Act. The CSOS Act enables residents of community schemes including sectional title schemes to take their disputes to a statutory dispute resolution service instead of a private arbitrator or the courts. The purpose of this order is to bring closure to the case brought by the applicant to the CSOS.

#### ADJUDICATION ORDER

44. Accordingly, the following order is made;
- (a) The relief sought by the Applicant against the Respondent in respect of prayers (a), (b), (c), (d), (e), (f) and (g) is dismissed.
- (b) The Respondent is directed to give effect to the resolution of members of the HOA at the Annual General Meeting relating to the planting of the two trees outside the guardhouse.
- (c) No order is made as to costs.



**RIGHT OF APPEAL**

45. The parties' attention is drawn to – Section 57(1) of the CSOS Act of 2011 refers – *“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”*

**SIGNED at SANDTON on this 17<sup>th</sup> day of July 2020.**



**AJ ANDREAS**

**ADJUDICATOR**



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