



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

Ref: CSOS6012/KZN/21

IN THE MATTER BETWEEN

DEVOTED CONTAINER LINES (PTY) LTD

Applicant

And

TRUSTEES OF HARBOURVIEW BODY CORPORATE

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act: Section 39(1)(b),39(1)(d)& 39(4)(e)
- in respect of financial and meetings issues.
- Date Adjudication conducted: 05 April 2022.
- Name of the Adjudicator: T Khambule.
- Order: Dismissed/Refused.

INTRODUCTION

1. The applicant is Devoted Container Lines (Pty) Ltd a company registered in terms of the Companies Act No. 71 of 2008 as amended and which is the owner of unit 5 at Harbourview Body Corporate, which is situated at 47 Victoria Embankment Street, Durban, KwaZulu-Natal. The applicant is represented by Daniel Naidoo, although there is no allegation to this effect, I infer this from the papers.
2. The respondent is the trustees of Harbourview Body Corporate a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011("ST SMA") read in conjunction with the STA, which is situated at 47 Victoria Embankment Street, Durban, 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 application seeking relief in terms of section 39 of the CSOS Act, is in respect of-

s39(1)(b),39(1)(d),39(4)(e): **In respect of financial, meetings & issues**

- *i.e., an order requiring the association to take action under an insurance policy to recover an amount;*
- *an order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order;*
- *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.*

5. This matter is adjudicated in terms of the CSOS Act and Practice Directive on Dispute Resolution, 2019 as amended and more specifically the amended Practice Directive dated 23 June 2020 which provides under paragraph 8.2:- “Adjudications will be conducted on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator.” The parties were requested to make written submissions on 16 February 2022. The adjudication was conducted on 05 April 2022 and an order is now determined.

PRELIMINARY ISSUES

6. The respondent has raised a point in *limine* and states that he confirms that on or about 12 March 2020, the applicant lodged an application for dispute resolution with CSOS under case number CSOS4094/KZN/19, and on 15 April 2021 an adjudication order was delivered by the adjudicator. The respondent alleges that the copies of the aforesaid application for dispute resolution together with the adjudication order form part of the record of this dispute.
7. The respondent avers that page 2 of the abovementioned order, sets out the relief sought by the applicant i.e., section 39(1)(b), 39(4)(e) & 39(7)(b). The respondent submits that as can be noted from items 1 to 3 of page 2 of the order, the identical relief is being sought by the applicant in the present application under case number CSOS 6012 KZN.
8. The respondent states he confirms that items 1 to 3 of the relief sought by the applicant have been dispensed with by CSOS and accordingly cannot be repeated in the present application. The respondent submits that if the applicant was dissatisfied with the adjudication order, it ought to have exercised its right of appeal in accordance with Section 57 of the CSOS Act. The respondent further submits that the applicant failed to lodge its appeal, and accordingly cannot seek relief in respect of issues which have already been adjudicated upon.

9. The applicant alleges that he confirms that at the time within which the aforesaid adjudication order was granted, the matter was pending before the Durban High Court. The respondent states that on 29 April 2021 , an order was granted by the Durban High Court under case number DI 329/2020, wherein the applicant was ordered to make payment to the respondent in the sum of R313 727.34, together with interest thereon at a rate of 18% compounded per annum, and attorney client costs. The respondent avers that due to the volume of the aforesaid High Court Application, he has not annexed a copy of the indexed pleadings; however same can be made available should the adjudicator require a copy. The respondent states that a copy of the aforesaid order granted by the Durban High Court form part of the record of this dispute.
10. The respondent submits that too date, the applicant has failed to comply with the Durban High Court Order, which resulted in the respondent making an attachment and removal of the applicant's motor vehicle, and which attachment is currently still in place.

RELEVANT STATUTORY PROVISIONS

11. 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."
12. 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."

13. 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.”
14. Section 47 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.”
15. 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.”
16. In terms of Section 50-
- “The adjudicator must investigate an application to decide whether it would be appropriate to make an order.”
17. 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 arrangement.”
18. 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 14 February 2022.

SUMMARY OF RELEVANT EVIDENCE

Applicant's Submissions

19. The applicant states that there is no maintenance carried out for several years on the commercial property which is section 5 situated on the 3rd of the complex. The applicant alleges that an incorrect PQ is used, and the levy differ. The applicant avers that the insurance premiums were raised via levy, but the property is not insured with the insurance company. The applicant states that the Exclusive Use Parking (EUP) was fraudulently sold to the third party and the there is no record of funds on the financials.
20. The applicant submits that he lodged a dispute with CSOS in 2019. The applicant alleges that body corporate (respondents) refused to attend and hold a Special General Meeting (SGM). The applicant avers that he lodged a dispute with an insurance ombudsman and was advised to issue summons against the respondent for collecting premiums and not cover the 3rd floor of the complex. The applicant submits that the ombudsman ruled in his favour for the amount that he was defrauded by the trustees
21. The applicant states that section 5 is a commercial property and is in a sectional title complex. The applicant submits that they feel that the addition of the residential rules should not be forced violation of the following STSMA rules.
 - (a) rule 23(1)(b) which deals with insurance;
 - (b) rule 2(1)(c) of Auditing Profession Act 2005;
 - (c) rule 21(3)(b) &(c) charge levy over maximum of 10%;
 - (d) rule 24(5)(b)(i),(ii),(iii),(iv) which deals with administrative fund
 - (e) rule 25(5) which deals with contributions and charges.

(f) rule 21(4)(a) &(b).

Relief sought

22. The Applicant seeks orders in terms of section 39(1)(b), 39(1)(d) & 39(4)(e).

Respondent's Submissions

23. The respondent states that it will now deal with the remaining grounds of the relief sought by the Applicant:

INCORRECT LEVY CALCULATIONS AND HIGH LEVY CHARGES

24. The respondent avers that this allegation is unfounded and without merit. The respondent alleges that on 03 November 2021, a resolution was passed by the respondent whereby it was resolved to increase levies payable by its members. The respondent states that a copy of the aforesaid resolution together with a copy of the respondent's proposed budget for 2022, form part of the record of this dispute. The respondent submits that the applicant cannot lodge a dispute with CSOS merely because it was of the view that that the levy increase was too high.
25. The respondent alleges that all levy calculations are conducted in accordance with the section's participation quota. The respondent avers that a copy of the levy calculation schedule which depicts the square meterage of the sections, including the applicant's two sections and the monthly levy due form part of the record of this dispute. The respondent states that he pauses at this juncture to mention that the applicant has not made a single levy payment since 2017 and cannot continue to avoid its statutory obligation to make payment of its monthly levies by lodging frivolous applications for dispute resolutions. The respondent submits that the applicant is the registered owner of two sections within the respondent's scheme and remains liable to make payment of the monthly levies due in respect of each section. The respondent states that copies of the respondent's levy statement which reflect its historical culture of non-payment of its levies forms part of the record of this dispute.

RESPONDENT'S INSURANCE COVER

26. The respondent alleges that he confirms that the respondent is at present insured with Old Mutual, and a copy of the insurance policy confirming same form part of the record of this dispute. The respondent avers that as can be noted , there are no existing restrictions on the insurance cover. The respondent submits that in the event that the Applicant seeks to lodge a claim with the respondent's insurer, then it must proceed to lodge such claim in the ordinary process and cannot seek such relief through CSOS.

CONCLUSION

27. The respondent submits that it is apparent from the aforesaid that the applicant is abusing the process by reloading disputes which have been adjudicated on in order to avoid its statutory liability to make payment of the monthly levies due to the respondent.

Relief sought by the Respondent

28. The respondent submit that he humbly requests that the application for dispute resolution be dismissed, and that the applicant pay the costs incurred by the respondent in opposing the present application.

EVALUATION & FINDING

29. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
30. 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 determined

whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

POINT IN LIMINE

31. The parties in this dispute have a history which dates back to 2014 in respect of the issues in dispute. It must be noted that there was an adjudication order that was issued under case number: CSOS4094/KZN/19. I note that the applicant has raised similar issues or allegations in the present application that he had raised under case number: CSOS4094/KZN/19. This can be noted from paragraph 24 of the said order to paragraph 29.
32. I observe that an order was granted by the Durban High Court under case number DI 329/2020, wherein the applicant was ordered to make payment to the respondent in the sum of R313 727.34, together with interest thereon at a rate of 18% compounded per annum, and attorney client costs.
33. I further observe that the only different in so as the reliefs sought are concerned is that in the present applicant the applicant seeks an order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order (s39(1)(d)). Whereas under CSOS4094/KZN/19 there was an order in terms of s39(7)(b) i.e., any other order proposed by the Chief Ombud. Other than the allegations are similar in every material respect. I see no reason why I must regurgitate the allegation of the applicant as outlined under case number: CSOS4094/KZN/19.

PRINCIPLE OF RES JUDICATA

34. The doctrine of res judicata is a method of preventing injustice to the parties of a case supposedly finished but perhaps also or mostly a way of avoiding unnecessary waste of judicial resources. Res judicata does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments, and confusion.

35. Having considered the above discussion I am persuaded that in so far as reliefs sought in terms of s39(1)(b), 39(4)(e) are *res judicata*. Consequently, the respondent's point in *limine* in so far as these two reliefs are concerned is upheld. I shall now deal with s39(1)(d) reliefs and the rest of the allegations raised by the applicant.
36. I now want to deal with the relief sought by the applicant in terms of s39(1)(d). I observe that the applicant did not provide the specific period for which the accounts of the association must be audited. This becomes very difficult because it is overbroad. The applicant should have provided the specific period e.g., accounts for financial year ending 2020. It is therefore my considered view that the effect of issuing an order is to bring the matter to its finality. As things stands it is impossible to make such order. Consequently, the applicant's application in terms of s39(1)(d) is hereby refused.

INCORRECT LEVY CALCULATIONS AND HIGH LEVY CHARGES

37. The applicant alleges that the levies are calculated incorrectly, and they are high. I note that the respondent has provided a resolution dated 03 November 2021 recording the following, "It is hereby recorded that the Trustees of Harbour View Body Corporate have passed the following resolution:
- 1 . At the Annual General meeting held on 03 November 2021 it was decided that the admin fund levies be increased from R 163 434.51 to R 166 950.39 per month with effect from 1 December 2021 and the reserve funds levies will increase from R 25 550.84 to R 34 997.67 with effect from 1 December 2021 per month for the financial year of the Body Corporate ending 31March 2022.
 - It is hereby further resolved that levies will be payable in advance for each month on or before the 1st of each month
 - It was resolved that the overdue levies would attract interest at a rate of 18% p.a compounded monthly

In accordance with the Sectional Titles Schemes Management Act, Act 8 of 2011, it is also noted that the monthly levy amount will be apportioned pro rata to the participation quota of each section.

Attached a schedule showing the levy amounts per section per month.
 2. All owners were informed of the dispute resolution processes available to them in terms of Section 38 of the Community Schemes Ombud Service Act, Act 9 of 2011, which detail will be given again in the levy increase circular to be sent."

38. I note that the resolution was taken on 03 November 2021 and the applicant did not challenge the said resolution. The respondent has further submitted that the levies are charged per PQ and also submitted documentary evidence in the form of a spread sheet showing various sections in the scheme with various PQ's and levies charged per PQ. I find it strange that it is only the applicant that is complaining about high levies and incorrectly determined PQ's.

RESPONDENT'S INSURANCE COVER

39. I have already dealt with this issue under preliminary issues above.
40. Lastly what I want to address is the applicant's allegations regarding its submission that they feel that the addition of the residential rules should not be forced violation of the following STSMA rules.
- (a) rule 23(1)(b) which deals with insurance;
 - (b) rule 2(1)(c) of Auditing Profession Act 2005;
 - (c) rule 21(3)(b) &(c) charge levy over maximum of 10%;
 - (d) rule 24(5)(b)(i),(ii),(iii),(iv) which deals with administrative fund
 - (e) rule 25(5) which deals with contributions and charges.
 - (f) rule 21(4)(a) &(b).
41. I am not sure what is the relevancy of rule 23(1)(b) as the applicant did not elaborate as to how was it violated except stating that it was violated, same applies to rule 2(1)(c) of Auditing Profession Act 2005, rule 24(5)(b)(i),(ii),(iii),(iv) which deals with administrative fund. In fact, all the issues above have been raised before under case number CSOS4094/KZN/19.
42. It is my observation that the applicant is juristic person who want to try all the tricks in the book to get its way. The applicant was aware that there were legal proceedings that were pending, but when asked whether there is legal proceeding in court or pending it replied through its representative Mr Daniel Naidoo that it is not sure, whereas it knew very well that there were matter pending. The issues raised by the applicant has been raised in Arbitration processes, seeing the outcome of the Arbitration did not go its way, the

application then came to CSOS to have I don't know whether I could say a second, third, fourth bite on the cherry as the applicant has been bombarding CSOS with numerous applications raising similar issues. I agree with the respondent that lodging frivolous applications for dispute resolutions has to come to an end.

COSTS

40. The respondent submit that he humbly requests that the application for dispute resolution be dismissed, and that the applicant pay the costs incurred by the respondent in opposing the present application.
41. Paragraph 29. of the Dispute Resolution Practice Directive dated 22 May 2019 deals with cost order. Further subparagraphs 29.1 stipulates that "The parties to a dispute resolution application are generally required to meet their own costs. This includes the application fee, the fee for inspecting or obtaining copies of any submission or reply, any personal costs incurred to attend a conciliation and adjudication session, and any legal costs incurred in making or responding to an application. 29.2 If an adjudicator dismisses an application for adjudication because it is frivolous, vexatious, misconceived or without substance, the adjudicator may in terms of section 53(2) (a) order costs against the applicant in favour of the respondent. The costs awarded must not be more than R5000,00."
42. It must be noted that the application was not dismissed as a whole as either frivolous, vexatious, misconceived or without substance. However, part of the application was dismissed because it is frivolous, and the other part was refused. In the circumstances it is my considered view that granting of costs is not justified.

ADJUDICATION ORDER

43. In the circumstances, the following order is made:
 - 43.1 The applicant's application in terms of sections 39(1)(b) and 39(4)(e) is hereby dismissed in terms of section 53(1)(a) as it is frivolous
 - 43.2 The applicant's application in terms of section 39(1)(d) is hereby refused.

RIGHT OF APPEAL

44. 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 12 APRIL 2022



ADJUDICATOR