



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

Ref: CSOS006218/GP/21

IN THE MATTER BETWEEN

FA KOFFI

APPLICANT

and

SAN BERNADO BODY CORPORATE

RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

Relief applied for in terms of the CSOS Act:

Section 39(1)(e) (1) In respect of financial issues— (e) an order for the payment or re-payment of a contribution or any other amount.

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.

Date Adjudication conducted:

4 APRIL 2022

Name of the Adjudicator:

AJ ANDREAS

Order:

The relief sought by the Applicant against the Respondent is upheld.

The Applicant seeks an order in the following terms;

- (a) That the Respondent be directed to reconcile and update the Respondent's levy statement;
- (b) That the charges relating to debt collection and penalties be reversed.

The relief sought by the Applicant against the Respondent is upheld.

The Respondent is hereby directed to remove the charges from the Applicant's statement of account relating to debt collection and penalties in the amount of R4487.79 within fourteen (14) days upon receipt of this order.

The Respondent is further directed to furnish the Applicant with a reconciled levy statement for his unit within fourteen (14) days upon receipt of this order.

No order is made as to costs.

INTRODUCTION

1. The Applicant is **FA KOFFI**, the registered owner of unit number 203, San Bernado, San Bernado Street, Berea, Johannesburg, Gauteng Province.
2. The Respondent is **SAN BERNADO BODY CORPORATE**, a community scheme as defined in the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act), and to which it would be convenient to refer to as the "Body Corporate".
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 Section 39(1) in respect of financial issues.

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

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. The adjudication was conducted on the 4th of April 2022 and an order is now determined.

PRELIMINARY ISSUES

6. No preliminary issues were raised.

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 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 arrangement”.

14. The dispute could not be resolved through conciliation the matter was 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 the 31st of January 2022.

SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

15. The Applicant submitted that his challenge with the management company of the Respondent began in May 2020, when he received incorrect billing for a flat he owns at the body corporate.

16. According to the Applicant he had sent numerous emails together with the proof of payments to the Respondent's managing agent as well as making telephonic contract with them, but the problem relating to the billing still remains.
17. The Applicant submitted that the managing agent had in this time allocated three different portfolio managers to the scheme, but all of them have failed to resolve the issue relating to his billing problem.
18. The Applicant further submitted that the managing agent appears to lay the blame at the migration from an old to a new system, for the billing problem.
19. According to the Applicant, the Respondent had undertaken to refer his account to the accounts department to be rectified, but to no avail.

Relief sought by the Applicant:

- (a) That the Respondent be directed to reconcile and update the Respondent's levy statement;
- (b) That the charges relating to debt collection and penalties be reversed.

Respondent's Submissions

WAYNE SIMPSON (MANAGING AGENT)

20. The abovementioned representative of the Respondent's managing agent submitted through email correspondence to the Applicant and the Compliance Investigator dated the 10th of February 2022, that the debt collection charges have been reversed.

Relief sought by the Respondent.

- (a) None submitted.

EVALUATION & FINDING

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

22. 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.
23. The relief sought by the Applicant is for an order that the penalty imposed by the Respondent be reversed.
24. The Applicant's case in essence is that the Respondent should reconcile his levy statement, and that the charges relating to debt collection and penalties be reversed.
25. Notwithstanding the email correspondence sent to both the Applicant and the Compliance Investigator stating that the debt collection charges have been reversed, the matter according to the Applicant remained unresolved.
26. Since according to the Applicant, the figures identified by him as debt collection charges as well as the penalties imposed by the Respondent differed materially.
27. From the submission made by the Applicant the total charges that should have been reversed amounted to R4487.79, but that the managing agent only reversed charges in the amount of R3049.35.
28. The submission made by the Applicant, was not disputed by the Respondent at any stage of these proceedings.
29. I refer parties to the matter of **Maitland and Kensington Bus Co (Pty) Ltd v Jennings 1940 CPD 489 at 492** Davis J held, "For judgement to be given for the plaintiff the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one".
30. Accordingly, I am persuaded on the evidence before me that the Applicant has made out a case and proven the Applicant's case on a balance of probabilities in respect of his prayers for relief.
31. Further, when imposing fines sectional title schemes must adhere to the common law and members rights to natural justice. The member who has allegedly violated a rule

must be notified in writing and be provided with an opportunity to make representations to Trustees so as to remedy the alleged breach.

32. There is no evidence or record that the aforementioned opportunity was afforded to the Applicant.
33. The written notice that must be sent to the transgressor, must further contain details such as the nature of the conduct in question as well as the rule which was allegedly violated.
34. It is further worth noting that a fine may not be imposed notwithstanding the violation if due process is not followed. Warning letters and a hearing should be the first step before a penalty may be imposed.
35. In instances where decisions taken by schemes are not public in nature, they are subject to review by the courts under the principles of legality, reasonableness, and lawfulness.
36. In the matter of **LAGUNA RIDGE SCHEME, NO 152/1978 V DORSE 1992 (2) SA 512 D**, which was decided prior to the promulgation of PAJA, the court held, that in the absence of contentions to the contrary from the parties, that the decision of a body corporate affecting a member was potentially reviewable under the common law".
37. In **NORTH GLOBAL PROPERTIES (PTY) LTD V BODY CORPORATE OF SUNRISE BEACH SCHEME AND OTHERS [2013] JOL 30400 (KZD)**, Pillay J held as follows at para (9), "Trustees decisions must be objectively reasonable when they are not, they are reviewable under the common law read consistently with, in my respectful opinion, the STA, Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").
38. Prescribed Management Rule 25 (5) further provides as follows, "**The body corporate must not debit a member's account with any amount that is not a contribution, or a charge levied in terms of the Act or these rules without the member's consent or the authority of a judgment or order by a judge, adjudicator or arbitrator**". (writer's emphasis)

39. It is common cause that the Respondent did not have the Applicant's consent to debit the Applicant's levy account with a penalty, nor did they meet the other requirements of the above provision.
40. It is the Adjudicator's finding that the charges imposed by the Respondent on the Applicant's levy statement relating to debt collection and penalty charges amounting to the R4487.79 be removed from the Applicant's statement of account within fourteen (14) days upon receipt of this order.
41. Regarding the relief sought by the Applicant relating to a reconciled levy statement, it is the Adjudicator's finding that the Applicant is lawfully entitled to the information requested, as provided for in Section 39(7)(a) of the CSOS Act.
42. The Respondent is further directed to furnish the Applicant with a reconciled levy statement for his unit within fourteen (14) days upon receipt of this order.
43. The reconciled levy statement will be provided to the Applicant by the Respondent at no cost to the Applicant.

COSTS

44. No order as to costs.

ADJUDICATION ORDER

45. In the circumstances, the following order is made:
- (a) The relief sought by the Applicant against the Respondent is upheld.
 - (b) The Respondent is hereby directed to remove the charges from the Applicant's statement of account relating to debt collection and penalties in the amount of R4487.79 within fourteen (14) days upon receipt of this order.
 - (c) The Respondent is further directed to furnish the Applicant with a reconciled levy statement for his unit within fourteen (14) days upon receipt of this order.
 - (d) No order is made as to costs.

RIGHT OF APPEAL

46. 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 ON THIS 21st DAY OF APRIL 2022.



AJ ANDREAS
ADJUDICATOR