



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

Ref: CSOS 4684/GP/21

IN THE MATTER BETWEEN

HILLEBRAND SALEHA

Applicant

and

CLAMP JASON

First Respondent

ROSSLY-SMITH WESLEY

Second Respondent

TRUSTEES OF EMERALD TERRACE BODY CORPORATE

Third Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

Relief applied for in terms of the Community Schemes Ombud Services Act (“**the CSOS Act**”):

Section 39 (2) In respect of behavioural issues- **(d)** an order for the removal of all articles placed on or attached illegally to parts of a common area or a private area.

Date Adjudication conducted:

11 APRIL 2022

Name of the Adjudicator:

KAMOGELO MAPUTLA

Order:

- (a) The Application is dismissed for reasons set out in paragraph 56 to 61.
- (b) No order is made as to costs.

INTRODUCTION

1. The Applicant is **MR. FRANCOIS HILLEBRAND**, the registered owner of unit number 29, Emerald Terrace Body Corporate, situated at 118 Brampton Street, Lynwood Manor, Pretoria, Gauteng Province.
2. The First and Second Respondents are **MR. JASON CLAMP AND MS. WESLEY ROSSLYN-SMITH**, co-owners of unit number 30, Emerald Terrace Body Corporate situated at 118 Brampton Street, Lynwood Manor, Pretoria, Gauteng Province.
3. The Third Respondent is **TRUSTEES OF EMERALD TERRACE BODY CORPORATE**. The Third Respondent is a community scheme within the definitional meaning of the CSOS Act and the Sectional Titles Schemes Management Act 8 of 2011, situated at 118 Brampton Street, Lynwood Manor, Pretoria, Gauteng Province.
4. On **24 February 2022**, Conciliation in terms of 47 of the CSOS Act has failed. On even date the Ombud was of the view that there is no reasonable prospect of a negotiated settlement of the disputes set out in the application.
5. A letter requesting final submissions was sent to the parties on the **9 March 2022**, confirming that due to the current situation regarding the Covid-19 pandemic, the CSOS is taking the appropriate precautions against the further spread of COVID-19 (Coronavirus) and is adjudicating disputes on documents submitted, without the need to meet parties face to face and such submissions are due on **15 March 2022**. Submissions were forthcoming as at the deadline indicated above. The Adjudication and determination of the order took place on **11 April 2022**.

6. This is an application for dispute resolution in terms of section 38 of the CSOS Act. The application was made in the prescribed form and lodged with the Community Schemes Ombud Service (CSOS) by way of email on **1 November 2021**.
7. The prescribed fee for adjudication was not paid owing to clause 3 of the amended practice directive dated **2 December 2021**.
8. The Applicant seeking relief is in terms of section 39(2)(d) of the CSOS Act.

PRELIMINARY ISSUES

9. None.

RELEVANT STATUTORY PROVISIONS

10. Section 1 of the Sectional Titles Schemes Management Act 8 of 2011 ("**the STSMA**") defines-
 - "**body corporate**" as "in relation to building and the land in a sectional title scheme, means the body corporate of that building referred to in section 2(1);"
11. Regulation 1 of the Sectional Titles Schemes Management Regulations ("**the STSM Regulations**") defines-
 - "**managing agent**" as "any person who provides scheme management services to a body corporate for reward, whether monetary or otherwise, including any person who is employed to render such services"
 - "**scheme management service**" as "any financial secretarial, administrative or other service relating to the administration of a scheme"
12. 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".
- "**owner**" as "a person who has a legally secured right to possession and occupation of a private area, including but not limited to the owner of a sectional title unit, the holder of shares in a share block company and the holder of an occupation right in a housing scheme for retired persons."
- "**practice directive**" as "a practice directive issued in terms of section 36".

13. Section 13(1)(a) of the STSMA provides that-

"An owner must permit any person authorised in writing by the body corporate, during reasonable hours and on notice (except in case of emergency, when no notice is required), to enter his or her section or exclusive use area for the purposes of inspecting it and maintaining, repairing or renewing pipes, wires, cables and ducts existing in the section and capable of being used in connection with the enjoyment of any other section or common property, or for the purpose of ensuring that this Act and rules are observed".

14. Section 38 of the CSOS Act provides that-

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

15. 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".

16. 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".

17. 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".

18. In terms of Section 50-

"The adjudicator must investigate an application to decide whether it would be appropriate to make an order."

19. 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”.

SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

20. The Applicants averred that Clamp and Wesley Rosslyn-Smith (current, joint-owners of unit 30 and trustees of Emerald Terrace) contacted Keith Wakeford (previous owner of unit 30, professional assistant attorney at the time) to set out the legal process of installing a deck to their unit. In a subsequent meeting dated **9 October 2017**, Wesley verbally stated that they had made a conditional deal with Keith Wakeford upon purchasing the unit from him –that Keith would make sure they are able to install a deck.
21. On **30 March 2016**, an email was sent by Keith Wakeford to the trustees indicating the legal process of extending sections and allowing improvements to exclusive use areas. In the documents, it is clearly stated that “to extend the boundaries or floor area of his or her section”... approval from the body corporate is required, authorized by a special resolution. Also, if improvements to special use areas are to be made, the provisions of section 24 and 25 should not be contravened. The email further emphasis that consent should not be unreasonably withheld and Keith thus advised the trustees to send a letter to all the owners so they may arrange a meeting, regarding the construction of the deck.

22. However, intension and consent were withheld by the Applicant as the owner of the above unit, unit 29 and the Body Corporate and only the trustees were made aware of the email.
23. On **14 June 2016**, an email regarding the construction of the deck, was sent from Jason to the trustees. The email indicated and proposed that a “non-permanent” deck was to be build extending their units floor plan significantly. The document further outlines; the deck “cannot be seen by the neighbouring residents, does not obstruct or intrude any residences view or privacy and the deck would be hidden and not seen from any residences' residence”. However, all of these statements were either untrue or misleading. Again, this document was knowingly and intentionally withheld from the Applicant and the Body Corporate.
24. On **26 July 2016**, Timberman was contracted to build the deck at number 30. However, no building plans were filed, title sections amended nor proper authority gained by a special resolution. On the day of construction, the Applicant’s tenants (Mark Vrdoljak and Melissa) witnessed the process and informed Talitha Hillenbrand (the Applicant’s mother and manager of his unit at the time, as he was working in different province). She contacted Neels Pienaar (portfolio manager for emerald terrace) who immediately emailed the trustees requesting that the construction be stopped without delay. However, the trustees claimed they gave “permission” and ignored the emails. Furthermore, the Applicant’s tenants claimed that, Jason had told them that they had permission from the Body Corporate and that the building plans were filed and approved.
25. On **26 July 2016**, the document presented from Timbermann upon the decks completion further falsely and misleadingly indicates that the deck is a “non-permanent garden or landscaping feature”, and not an extension of a dwelling. However the deck is very clearly bolted and permanently fixed to the dwelling (see photo 3) and is in no way a “garden feature”. The document further clearly indicates that approval from the body corporate was required for construction. It thus became very clear that Jason and Wesley (and the

trustees at the time) were knowingly in clear violation of the sections title act and the rules of the complex.

26. On **26 July 2016** to 2017: The following couple of months there were several complains from the Applicant's tenants, Mark and Melissa. They felt the deck, now having a clear view inside of the living and bedroom, impeded on their privacy. In the attached email, they further sighted: increased noise, harassment, and nuisances such as smoke, all pertaining to the deck and its use. They had no complaints before the decks construction. The Applicant's tenants subsequently cancelled their lease, citing the deck to be their only reason. Subsequent tenants have, in due time, also confirmed and echoed all of their concerns.
27. During 2017, upon returning to Gauteng and taking up residency in the unit with another tenant. It was clear that the view was impeded, privacy and security of the Applicant's unit had been compromised and noise from use of the deck was substantial. It also became clear that the deck was used as "private property" and not "common property" as promised by the trustees in the meeting dated **9 October 2017**. It is thus unclear, but highly probable, that all subsequent tenants of no.30 were not made aware of the decks "common use" status and believed it to be part of the rented property. However, no additional levies were added nor section title plans updated with regards to unit 30.
28. Furthermore, since the Applicant's return, he has witnessed and documented the deck being used as; a camp site, gym, clothes line, covered storage area and party area/ashtray amongst other things. All of these breaking the rules for common property of the complex. For months, the Applicant was consistently bothered and woken up between 22h00 and 04h00 with tenants going out onto the deck smoking, drinking, yelling and talking on the deck right in front of his unit's bedroom. This was subsequently followed by several more complaints leading up to this day.
29. On **6 October 2017**, in an attempt to find out how was permission for the deck granted, the Applicant sent an email to the trustees, requesting the minutes of

meetings and other documentation related to the deck. The Applicant further requested proof of the special resolution which he already knew never existed, municipal approved plans and amended sectional title plan. However, the trustees could not provide any of these and requested a meeting instead.

Relief sought by the Applicant:

- (a) The removal of the deck with immediate effect.

Respondent's Submissions

- 30. The Respondents averred that the section/s directly in front of each ground floor unit is deemed an exclusive use area as per the attached Conduct Rules (submitted 23 October 2018, CSOS Ref: GP--001397), Annexure 2 – Schedule B – Exclusive Use Area.
- 31. On **5 July 2018** the First and Second Respondent were favoured with a letter granting them permission. The letter was submitted to MidCity Property Services containing all 6 registered trustees of Emerald Terrace for the approval of the installation of the deck on the exclusive use area of Unit 30, area 30e.
- 32. The matter of the deck construction has been settled with above points 1 & 2 in mid-2018. It is noteworthy to mention that this CSOS dispute application by Unit 29 in **November 2021** was filed shortly before an alleged noise complaint was received by Managing Agent MidCity Property services from the owner of Unit 29 against tenants of Unit 30.
- 33. Only Trustee permission is required from any resident to erect a deck structure on an exclusive use area as per point 1 & 2. Justification for the deck is listed below under points 5-7. A deck is not an extension of a dwelling as it contains no supporting walls and has no roof structure.
- 34. Unit 30 is the only ground floor Unit in Emerald Terrance that does not have direct access to the area in front of the Unit as the bank was not built up with

retaining wall blocks like Units 3 & 4 next door (see appendix Photos-Images 1 – 4 attached).

35. All other ground floor Units in Emerald Terrace have the advantage of being able to use the area directly in front of their Units.
36. The view from the deck of Unit 30 into Unit 27 does not differ from the view from the lower-level Units, and the inside of the unit cannot be seen from the deck, only the door.

Relief sought by the Respondents.

- (a) None.

EVALUATION & FINDING

37. In the absence of further documents, and in the interest of time and progress the adjudicator adjudicates on this application on the undisputed facts.
38. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
39. 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.
40. This means that once all the evidence has been tendered, it must be weighed up and determined whether the Applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.
41. The CSOS Act was promulgated on the very same day as the STSMA and the 2016 Regulations, namely 7 October 2016. Section 38 of the CSOS Act empowers any person to may make an application to the Ombud, if such person is "a party to" or "affected materially" by a dispute, subject to the requisite compliance with the CSOS practice directives. In *Durdoc Centre Body*

Corporate v Singh,¹ a Full Court of the KZP division of the High Court has interpreted this to mean that the right to lodge a dispute “was prescribed by legislation as a right that accrued to owners of units who were materially affected by a community scheme related matter.

42. From the facts, the Applicant has complied with its duty to exhaust all internal remedies to no avail from the Respondent. The Adjudicator is satisfied that there has been compliance with clause 9.2 of the CSOS dispute resolution practice directive dated **1 August 2018**, dealing with exhausting internal dispute resolution.
43. As regards the Applicant’s section 39(2)(d) of the CSOS Act case the following remarks are made. The inescapable truth is that Third Respondent has a duty to discharge any duty or fulfilment of any other obligation of the Body Corporate in terms of STMA section 3(1)(a)(iv).
44. Section (3)(l) and (t) of the STSMA under the heading Functions of Bodies Corporate, provides as follows, (l) “*to maintain all the common property and to keep it in a state of good and serviceable repair*”, and (t) states that: “*in general, to control, manage and administer the common property for the benefit of all owners*”.
45. Common property is defined in the CSOS Act as the land included in the scheme as shown on a sectional plan, such parts of the building or buildings as are not included in a section as shown on a sectional plan as well as any land bought to extend the common property.
46. Examples of common property shall include amongst others the driveway, parking area, swimming pool, electric fence, balcony etc.
47. An owner’s duty to maintain is confined to a large extent to his or her section in terms of section 13(1) of the STSMA.
48. Pertinently, section 13(1)(b) of the STSMA under the heading Duties of owner’s which provides as follows, “*forthwith carry out all work that may be ordered by any competent authority in respect of his or her section, other than*

¹ Durdoc Centre Body Corporate v Singh 2019 (6) SA 45 (KZP) para 16.

such work as may be required for the benefit of the building generally, and pay all charges, expenses and assessment that may be payable in respect of his or her section”.

49. Regulation 30(a) of the STSM Regulations provides that: *“The body corporate must take all reasonable steps to ensure that a member or any other occupier of a section or exclusive use area does not- (a) use the common property so as to unreasonably interfere with other persons lawfully on the premises, in breach of section 13(1)(d) of the Act.”*
50. Regulation 30(g) of the STSM Regulations provides that: *“The body corporate must take all reasonable steps to ensure that a member or any other occupier of a section or exclusive use area does not- (g) construct or place any structure or building improvement on an exclusive use area which in practice constitutes a section or an extension of the boundaries or floor area of a section without complying with the requirements of the Act and the Sectional Titles Act; provided that the body corporate may by ordinary resolution -*
(i) give consent for such a structure or building improvement, if they are satisfied that it does not require compliance with such requirements;
(ii) prescribe any reasonable condition in regard to the use or appearance of the structure or building improvement; and
(iii) withdraw any consent if the member or other occupier of a section breaches any such condition.”
51. Conduct Rule 4 read thus: **“DAMAGES ALTERATIONS OR ADDITIONS TO THE COMMON PROPERTY** (1) *An owner or occupier of a section shall not mark, paint, drive nails or screws or the like into, or otherwise damage or alter any part of the common property without first obtaining the written consent of the Trustees.*
(2) Notwithstanding sub-rule (1), an owner or person authorised by hi may install: a. any locking device, safety gate, burglar bars, or other safety device for the protection of his section; or b. any screen or other device to prevent the entry of any animals or insects. Provided that the Trustees have first approved in writing the nature and design of the device and manner of its installation.
(3) Should any damage of whatsoever nature be caused to the common property by an owner or occupier of a section or any of their visitors,

contractors or workers employed by them such owner or occupier will be held liable to reimburse Emerald Terrace Body Corporate for the cost of repairing such damage.

(4) For any violation regarding damages, alterations, or additions to the common property a fine as per Schedule A – Fines & Penalties, attached to the Conduct Rules of Emerald Terrace Body Corporate will be levied. The mentioned fine will exclude the cost of any repairs to the original state of the common property.

(5) An owner shall not be entitled to claim or receive any refund or compensation whatsoever from the Body Corporate for any additions or improvements effected by him/ her to any part of the common property unless at the express consent in writing of the Body Corporate or at the unanimous decision of the Trustees.”

52. Conduct Rule 5(1) provides that: “**APPEARANCE FROM THE OUTSIDE (1)** *The owner or occupier of a section, used for residential purposes, shall not install anything on any part of the common property, including balconies, patios, stoeps, corridors, common property gardens, awnings or canopies of any description, which in the discretion of the Trustees are aesthetically displeasing or undesirable when viewed from the outside of the section.”*
53. Considering what Conduct Rule 4 and 5 state, it is clear what is acceptable and what is not. The First and Second Respondent’s though permission was granted by the trustees, still have another hurdle to clear. This is predicated by the fact that their journey doesn’t end there, for they have to be fully compliant with the provisions of the National Building Regulations and Building Standards Act² (“**the NBRBSA**”) dealing with bylaws the Third Respondent has to comply with.
54. The Applicant was at large to bring a CSOS application under section 39(7)(a) to request the production of specific documents from the Respondent’s but has neglected to do so which is an Achilles heel for his case. Such an application would have given the Applicant the requisite tools to press on with the quest to have the demolition of the deck, should it be noncompliant with

² Act 103 of 1977.

the bylaws. There is a lack of certainty regarding the absence or presence of the deck being okayed by the Municipality on top of the trustees approval.

55. It is trite that a fact is the event that has led to litigation, whilst the law refers to actual rules that decide how the facts will be viewed by the trier of facts. If the facts of a case fall within the law or regulation, it is a question of fact that calls for determination. However, interpretation and the scope of the law on the other hand will be a question of law that calls for determination.
56. Notwithstanding the noble cause that the Applicant seeks to traverse, the Adjudicator is unfortunately unable to come to his aid, simply because the relief he seeks falls outside the scope of the Adjudicator's power. The relief has implications of a bylaw being floated, which only the Municipality alternatively the Applicant citing the Municipality, through motion proceedings which will trigger a Court order to have the demolition carried out at the Respondents cost should there be an infraction notice.
57. In *Gordon v Department of Health, Kwazulu-Natal*³ it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. Should any of the relief fall outside of the scope of the prayers of the relief as set out in section 39 of the CSOS Act, then the Adjudicator is not empowered to grant an order in terms of the Act.
58. The Western Cape High Court in the case of *Trustees for the Time Being of the Avenues Body Corporate vs Shmaryahu and Another*⁴, held that "the character of the various types of substantive relief that an Adjudicator is empowered to grant in terms of the Act appears from the provisions of Section 39".
59. The court further held at paragraph [18] that: "*It provides for the possibility of a number of different types of orders being made in respect of seven expressly specified categories of issues; viz (i) financial issues, (ii) behavioural issues, (iii) scheme governance issues, (iv) issues in respect of meetings, (v) in*

³ [2008] ZASCA 99; 2008 (6) SA 522 (SCA).

⁴ (A31/2018) [2018] ZAWCHC 54 2018 (4) SA 566 (WCC) (10 May 2018) at paragraph [17]

respect of management services, (vi) in respect of works pertaining to private and common areas and (vii) in respect of general and other issues. It is evident from the character of each of the categories of issues that they pertain primarily to matters germane to the community schemes, and only incidentally to related personal or individual interests or rights”.

60. Accordingly, the Applicant’s complaint against the Respondents is dismissed.

COSTS

61. No order is made as to costs.

ADJUDICATION ORDER

62. In the circumstances, the following order is made:

- (a) The Application is dismissed for reasons set out in paragraph 56 to 61.
- (b) No order is made as to costs.

RIGHT OF APPEAL

63. 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 11TH DAY OF APRIL 2022.

KAMOGELO MAPUTLA
ADJUDICATOR

(Not signed due to electronic transmission)