



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

Ref: CSOS 5370/KZN/22

IN THE MATTER BETWEEN

VAGANATHAN PILLAY

Applicant

and

EWART HADEBE

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

Relief applied for by the Applicant in terms of the CSOS Act:

Section 39 (2)(a) -In respect of behavioural issues- for an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way; and,

Section 39(4) In respect of meetings—

- (b) an order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened;
- (d) an order declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable

under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed; or

- (e) 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; or,

Section 39(7) In respect of general and other issues—

- (b) any other order proposed by the chief ombud.

Date Adjudication conducted

20 DECEMBER 2022.

Name of the Adjudicator

S GOORDEEN

Order:

The relief sought by the Applicant in terms of Section 39(2)(a) is refused.

The application for relief under Section 39(4)(b), (d) or (e) and Section 39(7)(b) is dismissed under Section 53(1)(a) as misconceived.

Costs

No order as to costs.

INTRODUCTION

1. The Applicant is **VAGANATHAN PILLAY**, the registered owner of C305, Casa Fortuna, 30B Centre Street, Suryaville, Newcastle, KwaZulu-Natal.
2. The Respondent is **EWART HADEBE**, the registered owner of Unit D424, Casa Fortuna, 30B Centre Street, Suryaville, Newcastle, KwaZulu Natal.
3. The community scheme of Casa Fortuna referred to above is a community scheme as defined in the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act), and is duly constituted in terms of section 2 of the Sectional Title Schemes Management Act 8 of 2011 (the STSMA).

4. 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.

5. The application seeks relief in terms of section 39 of the CSOS Act, in respect of-
Section 39(2): In respect of behavioural issues-
(a) an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way; and;
Section 39(4) In respect of meetings—
(b) an order declaring that a purported meeting of the executive committee, or purported general meeting of the association, was not validly convened;
(d) an order declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed; or
(e) 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; or,
Section 39 (7) In respect of general and other issues—
(b) any other order proposed by the chief ombud.

6. 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 20 December 2022, and an order is now determined.

PRELIMINARY ISSUES

7. No preliminary issues were raised.

RELEVANT STATUTORY PROVISIONS

8. 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"

9. 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".

10. 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".

11. 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.

12. 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.

13. In terms of Section 50-

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

14. 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.

15. The dispute has not been resolved through conciliation and was referred to an adjudicator. 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 adjudication on 17 November 2022.

SUMMARY OF RELEVANT EVIDENCE

Applicant's Submissions

16. The Applicant submits that on the 10 September 2022 at a General Meeting, the Respondent who is a trustee sided with the chairperson, Thomas Hadebe to illegally postpone the meeting. The meeting comprised of a quorum in terms of Section 19(2)(b) of the Regulations on the STSMA and the Applicant submits that by simply adjourning the meeting and stating that there was no quorum when in fact a quorum existed is a clear violation of the STSMA.

17. The Applicant appealed to the Respondent who as a previous chair should know better. The Respondent cited a flawed example that an owner with 30 units out of 40 will not be

able to make decisions alone in a general meeting. The Respondent agreed with the postponement of the meeting by the chair. On 17 September 2022 during the meeting, the Applicant submits that the Respondent raised matters from the previous financials with the sole purpose of derailing the Applicants input in breach of PMR 17(5) and denying the Applicants right to a meeting according to PMR 17(4)(a). The Applicants immediate protest was again silenced by the chair Thomas Hadebe.

18. The Applicant submits that it must be known that no actions regarding the matters raised by the Respondent were taken against him nor the trustees during the periods in question.
19. The minutes of the SGM held on the 17 September 2022 were provided, and are unsigned.
20. According to the Applicant, the Respondent sided and supported the chair to postpone the meeting of 10 September 2022 despite the clear existence of a quorum. On 17 September 2022, during the time for the Applicants motion for the removal of the trustees to be discussed, the Respondent used irrelevant matters to stop the Applicants motion being heard. This was a clear breach of PMR Section 17(5), thus denying the Applicants rights' according to PMR Section 17(4)(a).
21. During the conciliation hearing, the Respondent failed to admit the existence of a quorum on 10 September 2022 whilst over 57 percent in value attended the meeting.

Relief sought by the Applicant

22. The Applicant would like the following relief:
 - Section 39 (2)(a)** -In respect of behavioural issues- for an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way; and,
 - Section 39(2):** In respect of behavioural issues-
 - (b) an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way; and;
 - Section 39(4)** In respect of meetings—
 - (b) an order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened;

- (d) an order declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed; or
 - (e) 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; or,
- Section 39(7)** In respect of general and other issues—
- (b) any other order proposed by the chief ombud.

Respondents' Submissions

- 23. The Respondent stated that the Applicant *“made allegations without providing any shred of evidence that the respondent had sided with the chairman of the meeting regarding the decision(s) taken on whether the meeting was quorating or not”*.
- 24. The Respondent submits that the Applicant during 2018 was a trustee and also the managing agent, and despite request has not handed over the records and documentation relating to the body corporate for the period of his tenure to the new managing agent.
- 25. The Respondent submits that even though the Applicant owns about 33% of the units in the body corporate he is not qualified to vote at meetings, given that he has failed to honour his financial liabilities to the body corporate; which resulted in a court judgment against him.
- 26. The decision to proceed or not to proceed with the meeting was not given to the meeting to decide or vote on. Therefore, it is irrational for the Applicant to accuse the Respondent for the judgment made by the chairman. There were other individuals who also participated in the discussions which culminated in the chairman calling off the meeting.
- 27. According to the Respondent the refusal of the Applicant to sign and return the attendance register to the chairman so that he could evaluate on whether the meeting was quorating, resulted in some heated exchanges between the two; and further contaminated the atmosphere for a cordial meeting. The chairman may have realised that the atmosphere

was no longer conducive to having a healthy meeting and thus he opted to call off the meeting. This was his own decision.

28. The Respondent stated that the trustees, stand ready to embrace and work with the Applicant as equals and he must just resolve the issues of law which remain hanging over his head.

Relief sought by the Respondent

29. None

EVALUATION & FINDING

30. I have perused the parties' written submissions.
31. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses (if any) must be considered.
32. 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 determined whether the Applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.
33. Should any of the relief fall outside of the scope of the prayers of the relief as set out in section 39 of the Act as aforesaid, then the Adjudicator is not empowered to grant an order in terms of the Act.

Relief sought in terms of Section 39(2)(a)

34. Nuisance is generally regarded as a person or thing causing inconvenience or annoyance. Nuisance is regularly cited as a source of conflict and resentment between neighbours. The obstruction of access to parking space, parking in common property, loud noise, improper conduct, or consumption of alcohol and drugs on the common property are common examples of nuisance in a sectional scheme.

35. The Respondent also advised that the Applicant kept the attendance register and did not return/provide the register to the meeting chair and trustee chairperson or the managing agent, to enable them to finalise the calculations to determine if the meeting achieved the target of 1/3 of owners present in person or by proxy. The Applicant seeks to have the Respondent declared a nuisance on the basis that he supported the Chairperson at a Special General Meeting in the motion that the meeting be postponed as it was not quorate. This is not conduct that justifies being declared a nuisance.
36. The Respondent as a member of the Body Corporate and a trustee, is entitled to make his views known in respect of a discussion to determine if the meeting is quorate and should commence. This is not conduct that satisfies the test for being a nuisance as provided below, and does not justify being declared a nuisance. The Applicant did not provide the register in support of this application and his view that the meeting was quorate and should continue.
37. The appropriate test as recognised by the Supreme Court of Appeal in *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk*; where the court stated: *“An interference with the property rights of another is not actionable as a nuisance unless it is unreasonable. An interference will be unreasonable when it ceases to be a “to-be-expected-in-the-circumstances” interference and is of a type which does not have to be tolerated under the principle of “give and take, live and let live”. The determination of when an interference so exceeds the limits of expected toleration is achieved by invoking the test of what, in the given circumstances, is reasonable. The criterion used is not that of the reasonable man but rather involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred. The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm. This is achieved, in essence, by comparing the gravity of the harm caused with the utility of the conduct which has caused the harm.”*
38. Annexure A to the Regulations to the STSMA contains the Prescribed Management Rules which reinforce the position in relation to nuisance, and its existence in a sectional title schemes context.

PMR 30 states:

Use of sections and common property

30. *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;*
- (b) use a section or exclusive use area so as to cause a nuisance, in breach of section 13(1)(e) of the Act;*
- (c) contravene the provisions of any —*
 - (i) law or by-law relating to the use of a section or an exclusive use area; or*
 - (ii) conditions of a license relating to use of the building or the common property, or the carrying on of a business in the building; or*
 - (iii) conditions of title applicable to sections or exclusive use areas.*

Relief sought in terms of Section 39(4)(b), and (d) or (e)

39. The relief sought by the Applicant in respect of meetings under Section 39(4)(b) is for an order that a meeting of the trustees or a meeting of the association was not validly convened. Based on the submissions of the Respondent, and the content of the minutes it appears that the Applicant did not return the register to the Chairperson or the managing agent to determine if the meeting was quorate. The Applicant did not submit the register as part of this application either to support his contentions that the meeting was quorate. In the absence of the register and any other supporting evidence it is not possible to declare that the meeting was not validly convened.
40. The Applicant also seeks an order declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed; or (e) 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.
41. The Applicant has actually not identified which motion he is referring to and also not identified any reasons as to why the opposition to the motion was unreasonable under the circumstances. Based on the minutes provided, the motion appears to have been brought by the Applicant for the removal of the current trustees, and the minutes state that the Applicant in his request for the removal of the trustees has failed to give reasons why the

trustees should be removed. However, the chairperson opened the discussions to the members in order to test the support for the motion raised by the Applicant to remove the current trustees, determine the number of trustees, and thereafter proceed to nominate and elect new trustees.

42. According to the minutes the Respondent stated that the Applicant before 2018 was the Managing Agent; operated as a services contractor and at the same time served as the chairperson of the body corporate, which contributed to serious failure of corporate governance practices, and this was mentioned by the auditors in which they expressed their concerns about the blatant conflict of interests, which was taking place.
43. Further transgressions by the Applicant were cited by the Respondent, including that when the Applicant resigned as managing agent, he did not hand over the documentation and records of the scheme.
44. The minutes also referred to the Chairperson who read a letter that the Applicant sent to Cecilia Attorneys, following a demand to settle his outstanding levies, wherein he stated that he does not recognize the new board of trustees, and was keeping his levies in a special account. After the reading of that correspondence the Applicant became impatient and started accusing the chairperson of taking over his meeting, wasting his time and threatened him and further informed the members that he would make him pay for this, and left the meeting.
45. According to Clause 5.3 of the CSOS Practise Directive on Dispute Resolution the Applicant bears the onus of ensuring that all relevant information has been submitted to 'make their case', in other words, to ensure their application form is correctly completed and meets legislative requirements.
46. The Applicant seeks relief 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. The Applicant has not identified the resolution he refers to or identified any reasons or provided any substantiating submissions or documents in support of this relief, especially in relation to how the rights of an individual owner or group of owners are being unreasonably interfered with.

COSTS

47. There is no order as to costs.

ADJUDICATION ORDER:

48. In the circumstances, the relief sought by Applicant in respect of Section 39 (2) (a) of the CSOS Act is refused.

49. The application for relief sought by the Applicant in terms of Section 39(4)(b), and (d) or (e) is dismissed, in terms of Section 53(1)(a) of the CSOS Act as misconceived.

50. The relief sought in terms of Section 39 (7)(b) is not supported by statements or submissions by the Applicant, and without defining or supporting exactly what is required of the Chief Ombud, cannot be sustained.

RIGHT OF APPEAL

51. 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 20 DECEMBER 2022.



**S GOORDEEN
ADJUDICATOR**