



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

Ref: CSOS 5844/KZN/22

IN THE MATTER BETWEEN

**SUGENDRAN MOODALIYAR**

**Applicant**

and

**TRUSTEES OF AVONDALE BODY CORPORATE**

**Respondent**

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**ADJUDICATION ORDER**

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**EXECUTIVE SUMMARY**

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

Section 39(6) In respect of works pertaining to private areas and common areas-  
(a) an order requiring the association to have repairs and maintenance carried out.

Date Adjudication conducted

20 DECEMBER 2022.

Name of the Adjudicator

S GOORDEEN

Order:

The relief sought by the Applicant is granted.

Costs

No order as to costs.

**INTRODUCTION**

1. The Applicant is **SUGENDRAN MOODALIYAR**, the owner of Unit 31, Avondale, 18 Boom Street, Glen Park, Pinetown, Kwa-Zulu Natal.
2. The Respondents are the **TRUSTEES OF AVONDALE BODY CORPORATE**. Representations have been made on behalf of the Respondents by their managing agents Infinity Property Management.
3. The community scheme of Avondale Body Corporate 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 Titles Schemes Management Act 8 of 2011, (STSMA).
4. 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.
5. The application seeks relief in terms of section 39 of the CSOS Act under Section 39(6)(a) in respect of works pertaining to private areas and common areas for an order requiring the association to have repairs and maintenance carried out.
6. A letter requesting final submissions was sent to the parties confirming that the CSOS is taking the appropriate precautions against the further spread of COVID-19 and is adjudicating disputes on documents submitted, without the need to meet parties face to face.

7. The parties were given 5 days to make further submissions.
8. 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 20<sup>th</sup> December 2022, and an order is now determined.

### **PRELIMINARY ISSUES**

9. No preliminary issues were raised.

### **RELEVANT STATUTORY PROVISIONS**

10. 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"

11. 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".

12. 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".

13. 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.”

14. 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.”

15. In terms of Section 50-

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

16. 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.

17. 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 an Adjudicator on 16 August 2022.

## **SUMMARY OF RELEVANT EVIDENCE**

### **Applicant's Submissions**

18. The Applicant indicated that he had moved in over three years ago, and experienced several instances of flooding behind his home. There is a bank (common property) behind his home and the water rushes from this bank and collects behind his home. There is a 100mm drain however, it is incapable of draining the water away fast enough during heavy rains. Furthermore, there have been numerous instances where it was identified that the sand filling in into the drain with the water, blocks off the flow of water thereby preventing even normal rainwater drainage.
19. On three occasions, the Applicants home was flooded, two of these instances were severe, leading to damages and severe losses. The Body Corporate was advised of these issues over the last three years, and nothing was done to resolve this problem, and this was partially due to certain owners refusing/preventing trustees from acting. Engineers were called but no action was taken on their proposal to resolve. The Applicant submits that he and his family live in fear of the next heavy rain or storm, and the consequence of recurring flooding.
20. The heavy rains in April 2022 saw excessive sand wash down behind our home from the bank, thereby worsening the flooding as the sand filled up the stormwater drain and waste drainages. Sink holes had formed on the bank. A Special General Meeting (SGM) was held recently, following a more recent proposal from an Engineer, indicating that a retaining wall needs to be erected behind the Applicants unit to stop the bank from washing down, and V channel drains be installed to safely channel the storm water from the common property bank, away from unit 31 and 32. The proposal was rejected by four owners by vote. The Respondent was informed further that these owners were adamant that they were not going to pay for this to be resolved.
21. The Applicant submits that he and his family can no longer work in the storm as they did previously between 12.30 and 5 in the morning in instances, trying to force water away manually, to reduce the amount of water flowing into their home. The Applicant tried to insure his home contents following the first flooding and was told that damage caused by flooding will be excluded due to the high risk, or that he will have to pay a much higher

premium. The insurance assessor for the Respondents insurer had come through recently to look at the issues, and the Applicant was advised that containing the bank and channelling the storm water was the Body Corporates responsibility. The assessor advised that the insurer will not be insuring the property for flood related damages until the problem has been resolved. The Applicant has dug channels for the water to run to the side of the building and down the front bank however, the fast-flowing water washed away part of the foundation of the retaining wall at the front of the house, that now needs to be repaired as well.

22. The Applicants are therefore in sincere need of assistance to resolve this as in the event of severe weather they are terrified of the consequences. As per the engineers view, the common property bank needs to be retained and a drainage system needs to be installed to channel the storm water.

**Relief sought by the Applicant:**

23. The relief claimed by the Applicant in the application form is for the containment of the sand flowing from inside the common property bank to the back and into the Applicants home. The Applicant requests that proper drainage be installed to channel the rain water away from the bank and away from the back of the Applicants home so the Applicant no longer has flooding in his home. The relief sought is in terms of Section 39(6)(a).

**Respondents' Submissions**

24. The Respondents submit, that after receiving professional advice, they agree with the need to have the embankment behind the owner's unit retained as well as the installation of a suitable drainage system. This unit has had several incidents in the past of water entering the unit during heavy rains and this due to the excessive amount of water running from the common property into the owner's exclusive use area. The Respondents started engaging with civil contractors and engineers during the beginning of 2021 but had to stop due to the ongoing lock down restrictions caused by Covid 19.
25. The trustees eventually called a special general meeting on the 22 Sept 2022 and proposed at this meeting that a dry stack wall with drainage be installed but could not

achieve unanimous agreement from all the owners as per (PMR29(1) and since this was considered an improvement to common property, the trustees could not proceed without approval from all the owners. Most owners at the meeting approved the proposal. An engineer has been appointed under a special resolution that was approved at the same meeting and this engineer is currently busy with a proper design and specification for the wall.

26. The trustees do not have any objections regarding the need to have this work completed, however the trustees believe that they will never be able to achieve 100% owners approval as required by the act.

**Relief sought by the Respondent.**

27. None indicated.

**EVALUATION & FINDING**

28. I have perused the parties' written submissions.
29. 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.
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 weighed up and determined whether the Applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.
31. Section 39 (6)(a) of the CSOS Act makes provision for the following competent order to be handed down by an Adjudicator, in respect of works pertaining to private areas and common areas—an order requiring the association to have repairs made or carried out.

32. 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.
33. It is unclear on what rational basis the Respondents adopted the view that preventative measures to prevent the sand bank behind the Applicants home, and the clearing and reinstallation of a drain, both actions which would prevent flooding of the Applicants home and loss life or property, constitutes an alteration or improvement to common property which is not reasonably necessary. Will it be reasonably necessary when the Applicants home washes away, or when the Applicants and their family lose their lives, standing in heavy rain trying to clear out sand and a stormwater drain?
34. Maintaining and keeping clean a stormwater drain on common property does not amount to an alteration or improvement. Effecting repairs to a sand bank directly behind the units of a complex does not constitute an alteration or improvement in these circumstances, but is more essential and necessary repairs. This bank is not the Applicants property. This is common property, which is the responsibility of the Trustees to maintain on behalf of the body corporate. It is trite that any damage sustained by the Applicant as a consequence of this water flowing into his property due to the Respondents failure to erect some form of retaining wall and maintain the stormwater drain behind the common property can be attributed to the Respondents failure to maintain the common property.
35. The Respondents managing agent advised that PMR 29(1) applies in these circumstances. This rule states as follows:  
“Improvements to common property  
29. (1) *The body corporate may on the authority of a unanimous resolution make alterations or improvements to the common property that is not reasonably necessary.*”
36. There is no rational basis for the Respondents applying the provisions of the above PMR, nor have any reasons been advanced to explain why the Respondents consider the construction of a wall and the cleaning or replacement of a stormwater drain to be an alteration or improvement to the common property that is not reasonably necessary. The use of a SGM to pass a special resolution in this regard is not the correct process to deal with this issue.

37. There is no logical or legal justification for this response from the Respondents.
38. The role of the Respondents as trustees of this sectional scheme is a fiduciary one, and one in terms of which they are custodians of the funds of the members and are charged with acting in the best interests of the complex, in terms of the legislative framework which governs the sectional scheme, including but not limited to the STSMA, Regulations and Annexures 1 & 2 to the Regulations. The Respondents would be failing in their responsibilities as referred to in Section 3(1) of the STSMA, if they have not made provision to address the issue of maintaining the sand banks in the sectional scheme in their Maintenance and Repair Plan, and financially in the reserve fund. Further where the issue involves the collapsing of a sand bank repeatedly during heavy rain, the failure of the Respondents to act has led to the repeated flooding of the Applicants home, damages to the interior and loss of his home contents in the property, and damage to the foundations of the section.
39. The repeated collapsing of the sand bank, and ineffectiveness of the stormwater drain, water ingress and storm damage may lead to structural damage, as with the damage that has now also occurred to the foundations of the Applicants section, and raises concerns of safety for the occupants of the unit and the scheme as a whole. The Respondents are not in a legal position to contract out of liability, as the Body Corporate is responsible for the maintenance of common property.
40. An owner's duty to maintain is detailed in Section 13(1)(b) of the STSMA 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 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*". This provision is very clear that the Applicant is not liable for any work outside his section and where such may be required for the benefit of the building generally.
41. Section 13(1)(c) of the STSMA further provides as follows: "*An owner must – (c) Repair and maintain his or her section in a state of good repair and, in respect of an exclusive use area, keep it in a clean and neat condition.*"
42. Based on the photographs provided it does not appear that the Applicant has failed to repair and maintain his section.

43. The STSMA defines

*“common property”, in relation to a scheme, means—*

- (a) the land included in the scheme;*
- (b) such parts of the building or buildings as are not included in a section; and*
- (c) land referred to in section 5(1)(d).*

44. Section 2 (5) of the STSMA provides that the body corporate is, subject to the provisions of this Act, responsible for the enforcement of the rules and for the control, administration, and management of the common property for the benefit of all owners.

45. Functions of bodies corporate are provided for in the applicable sections of Section 3 as follows:

*Section 3 (1) provided that a body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include—*

- (a) to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs—*
  - (i) for the repair, maintenance, management and administration of the common property (including reasonable provision for future maintenance and repairs);*
  - (iv) for the discharge of any duty or fulfilment of any other obligation of the body corporate;*
- (b) to establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister;*
- (c) to require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs;*
  - l) to maintain all the common property and keep it in a state of good and serviceable repair;*
  - t) in general to control manage and administer the common property for the benefit of all owners.”*

46. The sections quoted above from the STSMA are clear in establishing responsibility for the maintenance of common property by the body corporate on behalf of all the owners.

The Act has not provided owners, the body corporate or trustees with a discretion to be selective as to which obligations or responsibilities they will comply with. Our law makes clear that the responsibility to maintain common property is the responsibility of the body corporate.

47. PMR 24 provides as follows:

4) Money may be paid out of the administrative fund in accordance with trustee resolutions and the approved budget for the administrative fund.

(5) Money may be paid out of the reserve fund —

(a) at any time in accordance with trustee resolutions and the approved maintenance, repair and replacement plan; or

(b) if the trustees resolve that such a payment is necessary for the purpose of an urgent maintenance, repair or replacement expense, which purpose includes, without limitation —

(i) to comply with an order of a court or an adjudicator;

(ii) to repair, maintain or replace any property for which the body corporate is responsible where there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage to persons or property;

(iii) to repair any property for which the body corporate is responsible where the need for the repairs could not have been reasonably foreseen in preparing the maintenance, repair and replacement plan;

or

(iv) to enable the body corporate to obtain adequate insurance for property that the body corporate is required to insure;

provided that the trustees must report to the members on any such expenditure as soon as possible after it is made.

(6) Expenditure under sub-rule (5)(b) —

(a) must not exceed—

(i) the amount necessary for the purpose for which it is expended; or

(ii) any limitation imposed by the body corporate on expenditure; and

(b) must comply with any restrictions imposed or directions given by members.

48. In the judgement of **Mobile Telephone Networks (Pty) Ltd and another v Spilhaus Property Holdings (Pty) Ltd** 2018 (3) SA 396 (SCA) at paragraph 1, the court held:

*“Sectional title ownership consists of three elements, namely individual ownership of a section, joint ownership of the common parts of the sectional title scheme and membership of a body corporate.*

*The registered title-holder of a unit is the owner of the section, joint owner of the common parts of the scheme and a member of the body corporate. Thus, a person, buying into a sectional title scheme, enters into a series of interlocking relationships. The STA [Sectional Titles Act] introduced several new concepts into our law. By providing for the division of land and buildings comprising a development scheme into sections and common property, it created an entirely new composite res, called a unit, which consists of a section and an undivided share in the common property. The section is considered the principal component, with the undivided share in the land and other common property inextricably linked thereto as an accessory.”*

49. The primary responsibility to maintain and repair common property rests with the body corporate. As with all other common property the body corporate is obliged to carry out the remedial and maintenance work, and is also liable to repair a section in the event of resultant damage emanating from a source in or part of the common property.

50. Section 3(1)(l) of the STSMA provides that a body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include to maintain all the common property and to keep it in a state of good and serviceable repair. A sand bank that regularly collapses during heaving rains, and a stormwater drain that floods and causes water to flood the Applicants unit, cannot be considered to be in a state of good and serviceable repair.

51. The Applicant is a member of the community scheme, and renders a monthly levy to the Respondent for the services and benefits which accrue to him as a sectional title owner. A portion of the levy contribution paid by the Applicant is in respect of a proportionate contribution to the insurer for cover in the event of loss or damages, amongst other

purposes, and a portion of the contribution paid by an owner is toward a maintenance and reserve fund to maintain the common property.

52. The severity of the situation and the dangers and risks faced by the Applicant has been brought to the attention of the Respondents, who have indicated that they agree that they should repair the sand bank but nothing further is suggested. The flooding of the Applicants unit happens whenever there is a heavy storm and rain. There appears to be a lack of recognition or acknowledgement of the destruction and devastation caused by the floods in our province this year and how this has impacted on the Applicants home, and the safety of his property and the lives of his family. Should another storm occur it may lead to further damage to the Applicants unit or loss or injury to his family or himself. The failure and delay in acting by the Respondents could also result in harm to other units.
53. The Applicant and the Respondents are bound by the legislative provisions of sectional schemes and the Respondents who have undertaken the position of trustees must be committed to conducting themselves in alignment with their lawful responsibilities, fiduciary capacity, and duty to act in the best interests of the scheme and the body corporate.

### **COSTS**

54. No order as to costs.

### **ADJUDICATION ORDER**

55. In the circumstances, the relief sought by the Applicant in terms of Section 39 (6) (a) requiring the Respondent to conduct repairs to the common property is granted. The repairs, as referred to in paragraphs 56-58, effected to the common property should be in alignment with the Engineers report and recommendations.
56. The Respondent is ordered to conduct the necessary repairs and maintenance to the common property, being the sand bank located behind the Applicants home and the stormwater drain running behind the applicants home within 30 days of date of delivery of this order.

57. The repairs and maintenance referred to in clause 56 above refers to the area behind the Applicants section and means that the common property bank needs to be retained and a drainage system needs to be installed to channel the storm water.

58. The Respondent is ordered to furnish the Body Corporate members including the Applicant with an engineers' certificate confirming the repairs to the retaining wall have been properly completed in accordance with the National Building Regulations and any other applicable legislation, within 60 days of date of delivery of this order.

### **RIGHT OF APPEAL**

59. 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.**



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**S GOORDEEN  
ADJUDICATOR**