



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

Ref: CSOS 6733/KZN/22

IN THE MATTER BETWEEN

TRUSTEES OF MONTE CARLO BODY CORPORATE

Applicant

and

G P KHANYILE

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

Relief applied for in terms of the CSOS Act: Section 39(1)(e)- in respect of an order for the payment or repayment of a contribution or any other amount.

Date Adjudication conducted

18 DECEMBER 2022.

Name of the Adjudicator

S GOORDEEN.

Order

The relief sought by the Applicant is refused.

INTRODUCTION

1. The Applicants are the **TRUSTEES OF MONTE CARLO BODY CORPORATE**, situated at 31 Bedford Avenue, Bellair, Durban South, KwaZulu-Natal, a community scheme as defined in the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act), and which is duly constituted in terms of section 2 of the Sectional Title Schemes Management Act 8 of 2011 (the STSMA). The Applicant is represented herein by their Managing Agents, Statio Properties (Managing Agents), duly authorised.
2. The Respondent is **G P KHANYILE**, the registered owner of Unit 39, Monte Carlo, 31 Bedford Avenue, Bellair, Durban South, 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(1)(e) of the CSOS Act, is in respect of financial issues for an order for the payment or re-payment of any contribution or any other amount.
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 matter was referred to adjudication on 18 November 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. 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.

SUMMARY OF RELEVANT EVIDENCE

Applicant's Submissions

15. The Applicants Managing Agents have submitted that the Respondent has failed to settle substantial levy arrears which are overdue and outstanding. On 28 February 2022 all owners were provided an opportunity to enter into a payment arrangement. After evaluating the situation, the trustees extended this opportunity to 30th June 2022. Owners were clearly provided with an opportunity to approach the body corporate and to find a solution whilst avoiding any potential legal expenditure. On the 05th July 2022 a final 14 day written notice was sent advising that balances outstanding would be collected. The Respondent has failed to settle the balance outstanding due and payable to the body corporate.

16. According to the Applicants managing agent the scheme currently has no insurance, as the majority of owners are not paying the monthly levy contributions resulting in a lack of maintenance. The managing agent advises that it is unable to attend to the general maintenance/ upkeep/ repairs on the common property as there are limited funds available; and is unable to reinstate insurance coverage. Some owners have been attempting to sell their properties, but this is difficult due to the condition of the scheme. The trustees have been trying to assist all owners as well as maintain the scheme, and require owners to start paying their levies on a regular basis.
17. The Applicants would like the Respondent to settle the levies as per the statement dated 01 November 2022, reflecting a balance outstanding of R115 580-46.

Relief sought by the Applicant

18. The Applicant would like the Respondent to settle the levies, and charges as per the statement.

Respondent's Submissions

19. The Respondent did not respond to the request for written submissions.

Relief sought by the Respondent

20. None.

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 weighed up and determined whether the applicant's

version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

23. I have perused the Applicant's written submissions.
24. The STSMA requires section owners to pay their monthly contributions to the body corporate for the sectional scheme to operate and function in fulfilling its responsibilities. The failure of section owners to contribute to the monthly expenses of the Applicant appears to be having serious implications for the financial wellbeing of the Applicant.
25. One of the primary functions of the body corporate is to collect levies and other charges from members such as are necessary for the preservation, maintenance, and upkeep of the scheme. Every member is liable for the payment of levies and contributions.
26. In terms of section 2(1) of the Sectional Titles Schemes Management Act 8 of 2011:

"With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and any person who thereafter becomes an owner of a unit in that scheme is a member of that body corporate"
27. Section 3(1) of the aforesaid Act further provides as follows:

"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);
 - (ii) for the payment of rates and taxes and other local municipality charges for the supply of electricity, gas, water, fuel and sanitary or other services to the building or land;
 - (iii) for the payment of any insurance premiums relating to the building and land; and
 - (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; and
 - (c) to require the owners whenever necessary to make contributions to such funds . . .".

28. Accordingly, section owners who default on their levy payments, or who do not pay their levy payment in full and up to date every month are effectively being subsidised by other members of the body corporate who pay their levies and ancillary contributions responsibly every month. The body corporate cannot perform its functions and duties in the absence of funds from unit owners.
29. It is noted that interest has been charged to the Applicant's levy account, in terms of Prescribed Management Rule 21(3)(c) which provides that the body corporate may, on the authority of a written trustee Resolution charge interest on any overdue amount payable by a member to the body corporate provided that the interest rate must not exceed the maximum rate of interest payable per annum under the National Credit Act (2005) Act No 34 of 2005, compounded monthly in arrears. The written trustee resolution which provides for interest to be debited to the Respondents account was requested in terms of S51. In the absence of such a resolution the interest debited is unauthorised by the trustees.
30. According to Prescribed Management Rule 25 (5) which 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". In the absence of a resolution authorising the levying of interest on the Respondents levy account, it is not clear what the actual arrear amount is. The Applicants submit an amount of R115 580-46, is owing and this is based on the current statement provided in support of their claim.
31. The Applicant was requested to provide full and detailed statements to show how this amount was arrived at, and to indicate what steps have already been taken to contact the Respondents. This is to determine whether any portion of the debt has prescribed or if the in duplum rule has been contravened. No response was received from the Applicants in respect of the information requested to adjudicate this claim. In the absence of certainty regarding these various issues, it is not possible to grant an order that the Respondent is liable in the sum of R115 580-46 as claimed.
32. As the amount claimed is extremely high, with interest being charged at almost five times the amount of the monthly levy debited-(Monthly Levy being R 934-28 and

interest of R2290-14 approximately compounded monthly debited monthly), and in the absence of the Respondent providing any responses, or there being any interaction between the parties to achieve a resolution or settlement to pay the arrear levies, or an analysis of the entire levy arrears, could lead to an inaccurate amount due.

33. It is also unclear as to whether any action was taken against the Respondent when the arrear amount was lower, nor has any explanation been provided as to how the Applicants, in the exercise of their fiduciary duty on behalf of the body corporate allowed the arrear levies to reach such an exorbitant amount. Details were requested from the Applicant, and a historical statement, and a resolution authorising the debiting of interest against the Respondents levy account. The request was made in terms of S51 of the CSOS Act and no response was received.

34. In terms of 5.3 of the CSOS Practise Directive on Dispute Resolution, the 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, which includes the attachment of any documents pertinent to the claim.

35. The Applicant has not provided sufficient supporting documentation, information and statements as requested above, to prove that the Respondent is liable for the payment of levies, interest, and other charges in the amount as claimed. Consequently, based on the limited information provided, an order for payment of R115 580-46 cannot be granted.

COSTS

36. No order as to costs.

ADJUDICATION ORDER

37. The relief sought by the Applicant in respect of arrear levy contributions under Section 39(1)(e) of the CSOS Act is refused.

RIGHT OF APPEAL

38. 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 DAY 18th DECEMBER 2022.



S GOORDEEN
ADJUDICATOR