



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

Ref: CSOS4765/KZN/22

IN THE MATTER BETWEEN

**TRUSTEES OF VILLA TEREZINA BODY CORPORATE      APPLICANT**

and

**TRUSTEES OF THE MARCO GIUSEPPE GIANOGLIO  
FAMILY TRUST      RESPONDENT  
(IT 125/2014)**

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**ADJUDICATION ORDER**

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**EXECUTIVE SUMMARY**

- Relief applied for in terms of the CSOS Act:  
Section 39(1)(e) - in respect of financial issues.
- Date Adjudication conducted: 7 December 2022.
- Name of the Adjudicator: MISS ASHA SEWPERSAD.  
Order: Relief in terms of Section 39(1)(e) is granted.
- The Respondent is ordered to pay the sum of R71 907-30(seventy-one thousand nine hundred and seven rands and thirty cents) within 30 days of delivery of this Order.

- Relief in terms of Section 39(7)(b) is refused.
- No order as to costs.

## **INTRODUCTION**

1. The Applicant is The Trustees of the Villa Terezina Body Corporate, a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011("the STSMA") which is situated at 23 Newlands Drive, Umhlanga, Durban, Kwazulu-Natal.
2. The Respondent is the Marco Giuseppe Gianoglio Family Trust: IT 125/2014, duly represented herein by trustees Vasilos Pavlakis N.O, Elsie Pritchard N.O and Hendrik Jonannes Roets N.O. and who is the registered owner of unit 11 Villa Terezina, 23 Newlands Drive, Umhlanga, Durban, Kwazulu-Natal.
3. The community scheme is the Villa Terezina Body Corporate, which is duly constituted in terms of Section 2 of the Sectional Titles Schemes Management Act 8 of 2011("the STSMA") for a sectional scheme known as Villa Terezina, which is located at 23 Newlands Drive, Durban, Kwazulu-Natal. The scheme is wholly residential
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 seeking relief in terms of section 39 of the CSOS Act, is in respect of-
  - s39(1) **In respect of financial issues**
    - (e) an order for the payment or e-payment of a contribution or any other amount.
  - S39(7) **In respect of general and other issues**
    - (b) any other order proposed by the chief ombud.

6. The 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 virtually or on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator." The parties were invited to submit final written submissions prior to the determination of this order. The adjudication was conducted on 7 December 2022 and an order is now determined.

### **PRELIMINARY ISSUES**

7. No preliminary issues were raised/ "(legal representation, points in limine)."

### **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. 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 on 9 November 2022.

## **SUMMARY OF RELEVANT EVIDENCE**

### **16. Applicant's submissions**

- 16.1. The Respondents are in breach of their statutory obligations to the Applicant in that they have failed and/or refused and/or neglected to make payments of levies, contributions and/or other charges as they become due, owing, and payable.
- 16.2. As at date of this application the Respondent's arrear levies, contributions and/or other charges are in the sum of R81 252-05, which amount is computed in accordance with schedule **VT7** from September 2020 (when the Respondent's levy statement last reflected a favourable balance) up to and including September 2022.
- 16.3. In so far as the levy account reflects debits of legal fees and other charges which may offend PMR 25(5), the Applicant submits that:
- 16.3.1. In conjunction with the managing agent and its attorneys, all potentially offending debits have been rectified by crediting the owner with an amount equal to each debit in the general journal immediately after the said debit reflects.
- 16.3.2. By crediting the owner with such amount in the general journal immediately after the amount was debited, the Applicant has ensured that interest did not accrue on any potentially offending debits.
- 16.3.3. Due to the managing agent's accounting system, once debited the amount cannot be removed, and therefore, the only option available to the Applicant was to rectify the debits as mentioned above.
- 16.4. Notwithstanding due and lawful demand the Respondents have failed and/or refused and/or neglected to pay the Applicant, and the Respondents remain in arrears in the sum of R81 252-02.
- 16.5. The Applicant has confirmed that it has notified and reminded the Respondents on numerous occasions of the arrear levies, contributions and/or charges. Notwithstanding such notifications and reminders, to date the Respondents have failed and/or refused to pay the amount owing to the Applicant.
- 16.6. The Respondents have previously agreed to sign an acknowledgement of debt (AOD) and attorneys were duly instructed to prepare same. However, the Respondents failed and/or refused to properly sign the AOD and/or to adhere to the payment terms embodied therein.

16.7. Applicant submits that it has exhausted all internal remedies at its disposal to resolve the matter in an amicable fashion, however, the Respondents have failed and/or refused to adhere to their statutory legal obligations and undertakings.

### **17. Relief sought by the Applicant**

17.1. An order in terms of Section 39(1)(e) of the CSOS Act, whereby the Respondents, in their capacities as Trustees of the Marco Giuseppe Gianoglio Family Trust (IT No. 125/2014), are ordered to pay the outstanding levies, contributions and/or charges, and arear interest thereon, in the sum of R81 252-02.

17.2. Further and/or alternatively to the above, the Applicant seeks, in terms of section 39(7)(b), any other order which may be proposed by the Chief Ombud.

### **18. Respondent's submissions**

18.1. According to an email received by CSOS from Ms Liza Roets on 2 November 2022, the matter was resolved as an agreement had been reached and she would be paying the current month levies and an additional amount to settle the arrears.

### **Relief sought by the Respondent**

19. None

### **EVALUATION & FINDING**

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

21. The general rule is that only evidence, which is relevant, should be considered. Relevance is determined with reference to the issues in dispute. 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.

22. Section 2(1) of the STSMA states that,” 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.”
23. In law therefore every owner in a sectional title scheme, such as the Respondent is a member of the body corporate.
24. Section 3 of the STSMA states that,” A Body Corporate must perform the functions entrusted to it in terms of the Act, including the function to establish and maintain and administrative fund which is reasonably sufficient to cover the estimated annual operating costs for amongst other things repairs, maintenance, management, and administration of the common property.”
25. A body corporate can therefore only function in the best interests of all the members if all the members pay what is due by them to the scheme. Any section owner who defaults on their levy payments, or who do not make payment in full are effectively being subsidized by other members of the body corporate who pay their levies and contributions diligently every month. The body corporate cannot perform its statutory functions and duties for the benefit of all unit owners in the absence of funds from **all** unit owners.
26. Section 3 (2) of the STSMA states that, “liability for contributions levied under any provision of subsection (1); save for special contributions contemplated in subsection (4), accrues from the passing of the resolution to that effect by the trustee of the body corporate, and may be recovered by the body corporate by an application to an Ombud from the persons who were owners of units at the time when such resolution was passed: Provided that upon the change in ownership of a unit, the successor in title becomes liable for the pro-rata payment of such contributions from the date of change of ownership.”
27. In terms of section 3(2) and (3) of the STSMA, “contributions and special contributions are due and payable on the passing of a resolution to that effect by the trustees of the body corporate and may be recovered from the persons who were owners of the unit at the time when the resolution making the contributions due and payable was passed by application to the Ombud.”

## 28. PMR (21(3) states as follows:

“The body corporate may on the authority of a written trustee resolution-

- (c) charge interest on any overdue amount payable by a member to the body corporate, provided 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 trustees in accordance with a written resolution resolved to charge interest at the maximum rate of 2% (24% per annum), compounded monthly, calculated from the due date until date of payment in full, both days inclusive.

29 Management rule 25 provides that once a budget has been approved, it is required to give notice to each owner of the contributions that will become due and payable. Where such contributions or levies have not been paid, the body corporate in pursuing any claims is entitled to receive from such owner any charges and interest due on any overdue contributions. Provision for this is contained in Management rule 25(2) which reads:

“(2) If money owing is not paid on the dates specified in the notice referred to in sub-rule (1), the body corporate must send a final notice to the member, which notice must state—

- (a) that the member has an obligation to pay the overdue contributions and charges and any applicable interest immediately; and
- (b) if applicable—
  - (i) the interest that is payable in respect of the overdue contributions and charges at the date of the final notice; and
  - (ii) the amount of interest that will accrue daily until the payment of the overdue contributions and charges; and
- (c) that the body corporate intends to take action to recover the amount due if the overdue contributions and charges and interest owing are not paid within 14 days after the date the final notice is given.”<sup>1</sup>

## 30. PMR 25(4) states as follows.

“A member is liable for and must pay to the body corporate all reasonable legal costs and disbursements, as taxed or agreed by the member, incurred by the body corporate in the collection of arrear contributions or any other arrear amounts, due and owing by such member to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.”

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<sup>1</sup> (AR255/2020) [2021] ZAKPHC 81 23 September 2021



The Applicant is not entitled to any legal costs incurred in the collection of the outstanding amounts, unless taxed or agreed upon by a member. These amounts have been correctly removed from the Respondent's invoice.

31. In terms of the STSMA section owners are required to pay their monthly contributions to the body corporate for the body corporate to operate and fulfil its duties and responsibilities effectively and in the interests of all the owners of the scheme.
32. The primary function of the body corporate is the collection of levies, special levies and other charges from all members as is necessary for the preservation, maintenance and upkeep of the scheme and **every** member is liable for the payment of levies and other contributions.
33. It is common cause that the Respondent is in arrears with the levy payments, contributions, and charges. The Adjudicator in terms of Section 51(1)(a) of the CSOS Act requested the Applicant on 9 December 2022 to submit the latest invoice which was outstanding as of 9 December 2022.
34. An amended invoice was received wherein the Applicant claimed the sum of R83 843-06 as of 1 January 2023. Upon further investigation by the Adjudicator, it appeared that payments in the sum of R2689-26 and R6311-50 made on 17 July 2022 and 2 July 2022 respectively was not reflected on the latest invoice. In addition, the Adjudicator is unable to grant an order for the January 2023 levies and charges as they are not yet due.  
The total of R9000-76 being the amount which was not accounted for in the invoice as well as the sum of R2935-00 being the levies for January 2023 have been deducted from the claimed amount of R83 843-06.
35. In the circumstances the amount due to the Applicant is the sum of R71 907-30 as of 9 December 2022.
36. In **Zikhalala v Selma Court**<sup>2</sup> the court held as follows:  
 “[20] Management rule 25 expressly grants to the body corporate the power to impose levies and contributions from owners. Where an owner fails in the obligation to pay such amounts, the body corporate is empowered to take action to recover such amounts, including interest

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<sup>2</sup> AR 255/2020 KZN Local Division

and costs. I am unable to find any power in the Management rules or the STSMA that permits the body corporate to compromise on its obligation to collect levies or contributions. To the extent that such amounts are owing, it is worth noting that the language employed in Management rule 21(2)(b) precludes a body corporate from 'refunding to any member a contribution lawfully levied and paid'. Although the rule speaks to the prohibition against excusing any owner from the obligation to pay levies, it may by implication be interpreted to prohibit a compromise on any sum lawfully due to the body corporate in terms of levies and contributions."

[24] In *Fish Eagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 (W)* the court took into account the duty to collect levies as contained in sections 37(2) and 39(1) of the STA read together with management rule 31(4) of Annexure 8 to the Sectional Titles Regulations, GN R664, GG 11245, 8 April 1988,<sup>3</sup> as constituting the legislative framework against which the powers and functions of the body corporate must be measured.<sup>4</sup> As noted in *Van der Merwe Sectional Titles, Share block and Timesharing*, section 37(1)(d) of the STA (re-enacted under section 3(1)(f) of the STSMA) requires as one of the functions of the body corporate to raise money by levying owners, in proportion to their respective participation quotas.<sup>5</sup> Section 39 of the STA (re-enacted in s 7(1) of the STSMA) requires this function to be performed by the trustees."

[26] The statutory obligation imposed on the body corporate is to collect the full amount of levies and contributions due, together with interest and legal costs. No latitude is afforded to trustees to deviate from this obligation. The fact that the trustees or their attorney may have 'failed to do their homework' before accepting the offer does not come to the assistance of the appellant in having his offer declared valid and enforceable. To do otherwise would be to foist an agreement on the body corporate in circumstances where an errant or non-compliant owner is allowed a reduction or compromise on the amount of his levies in circumstances where this is plainly not permitted or contemplated by the legislative framework governing the affairs of sectional title developments. It would undermine the uniformity for the common burden that must be shared by all sectional owners to pay their levies, based on their participation quota. This is an intrinsic component of communal living envisaged in the STA and the STSMA"

37. All members of the body corporate are liable to pay the monthly levies and contributions. The Respondent's failure to pay the levies and contributions is

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<sup>3</sup> Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 (W) para 7.

<sup>4</sup> Section 37 and 38 of the Sectional Titles Act have been repealed. The powers and functions of the body corporate referred to in those sections are now largely encompassed in sections 2 to 5 of the STSMA. It is worth noting that the functions of the body corporate under s 3 contains the word 'must' suggesting that they are mandatory whereas s 4 contains the word 'may' suggesting that they are discretionary. See *Van der Merwe Sectional Titles, Share Blocks and Timesharing Vol 1* at 14-38, and 14-53.

<sup>5</sup> *Ibid* at 14-65.

highly prejudicial to other property owners who timeously pay their levies as and when they become due. Subsidizing an errant member who fails and refuses to pay levies creates undue pressure and burden on the body corporate which relies on funds for the administration of the scheme. The Respondent has failed to pay his levy and contributions but has continued to receive the benefits of living in a sectional title scheme at the expense of the other members.

38. The Applicant also claimed for relief in terms of Section 39(7)(a) of the CSOS Act. In **Melusi Emmanuel Ncala and Park Avenue Body Corporate**,<sup>6</sup> the court held as follows:

“Section 39(7)(b) is also, strictly speaking, not a general order or power. It states that, apart from any other orders explicitly referenced in section 39, the Service may only make any other orders proposed by the Chief Ombud.”

The Adjudicator is accordingly not able to make any order in terms of Section 39(7)(b) of the CSOS Act.

39. Based on a balance of probabilities and in the absence of a version to the contrary, I find that the Applicant has succeeded in proving its claim against the Respondent, and the Respondent is accordingly liable to the Applicant in the sum of R 71 907-30 (seventy-one thousand nine hundred and seven rands and thirty cents)

### **COSTS**

40. I make no order as to costs.

### **ADJUDICATION ORDER**

41. In the circumstances, the following order is made: -

- 41.1. Relief in terms of Section 39(1)(e) is granted.
- 41.2. The Respondent is ordered to pay the sum of R71 907-30 (seventy-one thousand nine hundred and seven rands and thirty cents) within 30 days of delivery of this Order.

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<sup>6</sup> Case No: A3029/2019 Gauteng Division

**RIGHT OF APPEAL**

42. 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 THIS 7<sup>TH</sup> DAY OF DECEMBER 2022**



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**ADJUDICATOR**

**ASHA SEWPERSAD**