



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

Ref: CSOS5316/KZN/22

IN THE MATTER BETWEEN

SOMAGANTHIE GOVENDER

Applicant

and

MRS SHIVON M. SINGH

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:
Section 39(6)(b)(i)-in respect of works pertaining to private areas and common areas
- Date Adjudication conducted: 22 December 2022.
- Name of the Adjudicator: MISS ASHA SEWPERSAD.
Order: Relief in terms of Section 39(6)(b)(i) is refused.
- No order as to costs.

INTRODUCTION

1. The Applicant is Mr Melusi Patrick Mthembu, a shareholder in unit 1704 Yarningdale Share block Scheme, (Pty) Ltd, which is situated at 199 O.R. Tambo Parade, North Beach, Durban, Kwazulu-Natal.
2. The Respondent is Mrs Shivon M. Singh a shareholder in unit 1803 Yarningdale Share block Scheme, (Pty) Ltd, which is situated at 199 O.R. Tambo Parade, North Beach, Durban, Kwazulu-Natal.
3. The community scheme is the Yarningdale Share block Scheme (Pty) Ltd which is duly constituted in terms of the Share block Control Act 59 of 1980, for a share block scheme known as Yarningdale. The scheme is residential and commercial.
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(6) **In respect of works pertaining to private areas and common areas**
 - (b) an order requiring the relevant person-
 - (i) to carry out specified repairs or have specified repairs made.
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 22 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 title's 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 EVIDENCE

16. Applicant’s submissions

It was submitted on behalf of the Applicant as follows:

- 16.1. There was water damage to her flat which occurred from either flat 1804 or 1803 during late 2018 or early 2019.
- 16.2. She complained to the building supervisor, Mr Koen who inspected the place and at that stage no one knew where the water was coming from. She

- complained to the owners of both flats 1804 and 1803 and opted to attend to the repair as no one was aware of where the water came from.
- 16.3. This occurred again in early 2020 and she brought it to the attention of the supervisor and the owners of flat 1803 and 1804. After numerous verbal complaints, the owner of flat 1804 decided to refurbish his flat and was prepared to paint her flat, which did not materialise as she had covid and she refused to accept the paint to have the painting done herself and at the time the damage to the flat was not serious.
 - 16.4. During 2021 the water damage started again and was much bigger with the dust from the paint falling on the kitchen unit tops. The building supervisor arranged for the handyman to scrape off the paint to expose the water damage to prevent the debris from falling.
 - 16.5. She called Mrs Singh to inspect the damage and she agreed that the damage was bad and she (Applicant) suspected that every time she complained to Mrs Singh, she put silicone in her bathroom and that is why the problem was “coming and going.”
 - 16.6. Mrs Singh had a plumber to inspect the problem and he indicated that if the bathroom was more than 8 to 10 years old it had to be redone as it was an ongoing problem in the flats.
 - 16.7. She asked the supervisor to request Mrs Singh to have a dye test done which she did after patching the area in her flat with silicone. This was not correct as the dye test ought to have been done before the silicone was applied and the test ought to have been supervised by the building supervisor or his staff.
 - 16.8. She approached Mrs Singh to remove the silicone as it was a temporary measure and then run the dye test and offered to pay for the dye test if money was an issue and she updated the supervisor of the problem and suggested that he speak to Mrs Singh about redoing the dye test. He indicated that there was nothing which he could do as Mrs Singh refused to co-operate.
 - 16.9. She received an email from the managing agents on 10 August 2022 informing her that where there is a leak between two units, the body corporate’s responsibility is to merely notify the relevant parties and for the matter to be resolved internally and it was up to the affected owner to lodge

the dispute against the person causing the damages to have this permanently repaired.

Relief sought by the Applicant

17. The Applicant sought the following relief:

“I suggest that 1803 Mrs Singh remove the silicone and re-run the dye test as I am prepared to pay for it as I want to know the root cause of the problem and if it is coming from Mrs Singh’s flat, she needs to re her bathroom and not patch it up with silicone when there is a problem of this nature as silicone is just a temporary measure. She has the problem for the past three years and was patient enough and now wants it to be resolved as she cannot handle the dust in her kitchen and once the problem is resolved she will attend to her flat at her own cost.”

18. Respondent’s submissions

It was submitted on behalf of the Respondent as follows:

- 18.1. It was confirmed by three registered plumbing companies’ assessments and two negative dye tests that there was no water leaking into flat 1702.
- 18.2. It is the Applicant’s theory that if the water leaks through the ceiling of flat 1704, it originates from flat 1803 and since the tests have failed to confirm her theory, she is demanding that the shareholder of flat 1803 remove functional waterproofing and create a water leak and this is viewed as an infringement on the rights of the Respondent. Water leaks from flat 1703 which is directly above flat 1703 will result in damage to flat 1703 and the Applicant is demanding that CSOS instruct the shareholder of 1803 to carry out her demands and therefore the Applicant’s demands do not fit into any of the categories of relief set out in section 39 of the CSOS Act.
- 18.3. During mid-January 2022 she was advised by the building supervisor about the Applicant’s complaint relating to the water leak into flat 1704 which she believed was emanating from flat 1804. This was very unlikely as flat 1804 is directly above flat 1704 and they shared a common supply and drainage system and flat 1803 is adjacent to flat 1804 and did not share a common space with flat 1704. In fairness to the Applicant, she engaged the services of Angel Plumbers who regouted and resiliconed the junction between the solid shower tub and the wall tiles and subsequently conducted a dye test and no water leak was detected, and the supervisor and handyman confirmed that that ceiling of flat 1704 was dry and unstained by the dye.

- 18.4. Several weeks later the Applicant complained again to the supervisor about the water leak, and she was again approached by the supervisor and requested to see the ceiling that was leaking. At the time, the paint of the ceiling had been stripped and the underlying plaster was exposed and was dry. However, the Applicant disregarded the previous negative dye test and insisted that another dye test be done and on the recommendation of the supervisor, Taptile Leak Detection Services (Mr Larry) was engaged to investigate the problem and at the site where the handyman and the supervisor were present, Mr Larry did not find any obvious leaks and stated that leak detection tests were unwarranted and he left and the Applicant was provided with feedback by the supervisor and the handyman.
- 18.5. In February 2022, the Applicant once again insisted that a dye test be done, and Unicity recommended by the supervisor was requested to do an inspection and a dye test and on 22 February 2022 a second dye test was done, and it proved to be negative.

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. This 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. According to the Spatial Relations of Flats 1704, 1804 & 1803 Yarningdale Share block (Pty) Ltd, Flat 1803 is situated adjacent to Flat 1804 which is directly above the Applicant's flat.
23. According to the report submitted by Metro Plumbers dated 21 February 2022 a dye test was conducted, and it proved that there was no leak, which the

Applicant has refused to accept based on her own theory of what is causing the leak in her unit.

24. It is quite evident from the Applicant's submissions that she believes that the water is emanating from the Respondent's unit, based on a suspicion. It is interesting to note that the Applicant refers to an incident in 2020 which was reported to both the owners of unit 1803 and 1804 and after many verbal complaints the owner of unit 1804 decided to refurbish his flat and offered to paint her flat. She makes no mention of flat 1804 which is situated directly above her unit and which shares a common supply and drainage system. There is no logical basis to hold the Respondent whose unit is not directly above her unit and whose unit does not share a common supply and drainage system with flat 1704.
25. The relief which the Applicant seeks does not fall within the scope of the prayer for relief contemplated in Section 39 of the CSOS Act. CSOS is a creature of statute, and the Adjudicator is bound to make orders that are competent and enforceable in terms of the Act.
26. The dispute lodged by the Applicant does not fall within the definition of a dispute as contemplated by the CSOS Act. "Dispute" is defined in the CSOS Act 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."
27. In **Harjevan Prag N.O and Another**,¹ the court stated as follows:
- "In my view it was never intended that such a claim could be adjudicated upon by the Ombud in terms of the CSOS Act, which is aimed² at resolving disputes in regard to the administration of a community scheme between persons (which by definition³ include not only individual members of a scheme but also any association i.e. any structure which is responsible for its administration), who have a material interest therein.⁴
- If one considers the terms of the CSOS Act as a whole, and the kinds of matters in respect of which an adjudicator can make orders in terms of s 39 of the Act, they either concern regulatory/governance issues⁵ pertaining to the administration of a sectional title scheme, or behavioural issues⁶ pertaining to the conduct of members of the scheme *inter se* (which commonly would cover so-called nuisance or neighbour disputes). It was clearly not intended that the Ombud would have the power to adjudicate on delictual claims for damages, which

¹ A260/2020 WCD

² As per s 2(c) of the CSOS Act, read together with the definition of a 'dispute' in s 1.

³ *Vide* the definition of 'dispute', 'person' and 'association' in s 1 of the Act.

⁴ S 38(1).

⁵ As per ss 39 (1)(a)-(f), (3)(a)-(d), (4)(a)-(e), (5)(a)-(b) and (6)(a)-(g).

⁶ S 39(2)(a)-(d).

involve weighty considerations pertaining to wrongfulness (which depend on prevailing societal norms and public policy) and fault, and the quantification and determination of the quantum of any damages which may have been sustained pursuant thereto, which are matters which are best left for judicial officers and Courts.”

26. CSOS lacks jurisdiction to issue an order compelling the Respondent to accede to the Applicant’s demands and in the circumstances the relief sought in terms of Section 39(6)(b)(i) is refused.

COSTS

27. I make no order as to costs.

ADJUDICATION ORDER

28. Relief sought in terms of Section 39(6)(b)(i) is refused.

RIGHT OF APPEAL

29. 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 22ND DAY OF DECEMBER 2022



ADJUDICATOR

ASHA SEWPERSAD