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

Ref: CSOS06447/KZN/22

In the matter between

CHANTAL MULLER **APPLICANT**

and

TRUSTEES OF BERAUD FLATS BODY CORPORATE **RESPONDENT**

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:
  Section 39(6)(a): (6) In respect of works pertaining to private and common property-
  (a) an order requiring the association to have repairs and maintenance carried out.

- Date Adjudication conducted:
  22 DECEMBER 2022.

- Name of the Adjudicator:
  Howard Felix.

- Order:

The application is granted in terms of section 39(6)(a) of the CSOS Act

The respondent is directed in terms of section 54(2) of CSOS Act, to attend to the necessary repairs to the roof including but not limited to the following:

(a) Repair of roof sheeting broken/missing/rotted
(b) Repair of roof support rotten
(c) Repair of storm water drainage
(d) Repair of passage support bar rusted as a result of roof leak

All necessary repairs must be effected within 60 (sixty) business days of delivery of this order.

No order as to costs.

INTRODUCTION

1. The applicant is **CHANTAL MULLER,** the registered owner of unit 12 Beraud Flats, Klipspringer Street, Hutten Heights, Newcastle, KwaZulu-Natal.

2. The respondent is the **TRUSTEES OF BERAUD FLATS BODY CORPORATE**, a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011(hereinafter referred to as the "STSMA"), which is situated at Klipspringer Street, Hutten Heights, Newcastle, KwaZulu-Natal.

3. The community scheme is the **Beraud Flats Body Corporate,** which is duly constituted in terms of the provisions of Section 2 of the Sectional Titles Schemes Management Act No.8 of 2011 ("STSMA") in particular section 2, for a sectional scheme known as Beraud Flats, located at Klipspringer Street, Hutten Heights, Newcastle, KwaZulu-Natal.

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 also referred to as the Act"'). The application was made in the prescribed form and lodged with the Community Schemes Ombud Service (CSOS) by way of email.

5. The applicant seeks the following relief in terms of Section 39 of the CSOS Act:

> ***"Section 39(6)(a):*** *(6) In respect of works pertaining to private and common property-*
> *(a) an order requiring the association to have repairs and maintenance carried out"*

6. On the 3rd of November 2022, the section 43 notice was served on the respondent. The respondent or affected person failed to reply in terms of the section 44 of CSOS Act.

7. On the 21st of November 2022, CSOS referred the application directly to the Adjudication in terms of section 48 of the CSOS Act read with Clause 21.5.7 of the Practice Directive on Dispute Resolution.

8. The requests for any final written submissions were severed on parties on the 21st of November 2022.

9. 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 on the 26th of November 2022. The adjudication was conducted on the 22nd of December 2022, and an order is now determined.

PRELIMINARY ISSUES

10. No preliminary issues were raised.

RELEVANT STATUTORY PROVISIONS

11. 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."

12. 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."

13. Section 45(1) of the CSOS Act 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."

14. Section 47 of the CSOS Act 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."

15. Section 48 (1) of the CSOS Act 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".

16. Section 50 of the CSOS Act provides-

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

17. 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."

SUMMARY OF RELEVANT EVIDENCE

Applicant's Submissions

18. The applicant lodged the application with CSOS on the 1st of August 2022, against the respondent alleging the following.

19. The applicant submits that on the 3rd of June 2021, she purchased the flat/unit 12, and was made aware of the material defects to the property, and that the defects fell under the maintenance of the body corporate ("the respondent").

20. The applicant submits that she was advised by the seller/ previous owner that the respondent will repair the defects upon receiving the arrear levies owed by unit 12 owner.

21. The applicant submit that the previous owner also advised her that he has on numerous occasions informed the Body Corporate of these defects and no action/assistance was received. The previous owner also informed her that there was a pending insurance claim, and his levies were in arrears.

22. The applicant submits that during the sale process, both the purchaser and

the seller/ previous owner met at ERA Newcastle to discuss the defects, and a resolution was adopted stating that "the outstanding levies will be paid from the proceeds of the sale and the previous owner will instruct the Body Corporate to repair the defects as per discussion.

23. The applicant submit that a confirmatory meeting was held at the managing agency's offices on the 6th of October 2021, and after the entry inspection was conducted before the applicant took occupational rent on the 27th of July 2021 at 15:57.

24. The applicant submits that after the arears levy was paid from the proceeds of the sale the Body Corporate refused to attend to the necessary repairs, stating that the damage falls under the previous owner's responsibility.

25. The applicant submits that the defects are as follows:
    25.1. Roof sheeting broken/missing/rotted
    25.2. Roof support rotten
    25.3. No storm water drainage
    25.4. Passage support bar rusted as a result of roof leak

26. The applicant submits that the respondent had not done repairs to her unit because the previous owner was in arrears with levy, however, once the arrears payment was made through proceeds of the sale, the body corporate did not rectify the structural damages thus causing further damage to the applicant's property.

27. The applicant submits that she has exhausted all internal remedies by contacting the respondent to no avail, contacting the insurance company to no avail. It has been extremely emotionally draining for her and time consuming to constantly be turned down for assistance, hence, applying to CSOS, to assists in resolving this matter, as she is not in financial position to remedy these repairs at her own expense.

Relief sought by the Applicant

28. The applicant seeks an order requiring the respondent to conduct and /or effect repairs in the applicant's unit number 12 in terms of section 39(6)(a) of CSOS Act.

Respondent's Submissions

29. The respondent submits that the previous owner of unit 12 has never paid levies for many years and due to non-payment, he could not make use of the insurance facility, nor could he sell his unit.

30. The respondent submits that even the lawyers who transferred the unit paid his levies in order for the respondent to issue the Levy certificate.

31. The respondent submits that the estate agent who sold the unit and the previous owner was aware of the leaking roof and sold the unit "as it", and that should the owner have been responsible and paid his levies as was requested from him numerous times, it is unfair for the Era estate agent to now hold the respondent liable, knowing what they were selling.

Relief sought by the Respondent

32. None.

<u>EVALUATION & FINDING</u>

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

34. 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 weighted up and determined whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

35. The applicant seeks an order requiring the respondent to conduct and /or effect repairs in the applicant's unit number 12 in terms of section 39(6)(a) of CSOS Act.

36. Section 39(6)(a) of the CSOS Act which states:

> ***"Section 39(6)(a):*** *(6) In respect of works pertaining to private and common property-*
> *(a) an order requiring the association to have repairs and maintenance carried out"*

37. The applicant submits that the respondent must repair the following defects:

> "Roof sheeting broken/missing/rotted,
> Roof support rotten,
> No storm water drainage, and
> Passage support bar rusted as a result of roof leak."

38. The applicant submit that she had a resolution with the previous owner that

> "*The outstanding levies will be paid from the proceeds of the sale, to which the previous owner will instruct the Body Corporate to repair the defects as discussion"*.

39. The applicant seeks to enforce the agreement she made with the previous owner that the respondent will repair the roof on her unit once the arrears levy is paid form the purchase price.

40. The respondent submits that the previous owner of unit 12 has never paid levies for many years and due to non-payment, he could not make use of the insurance facility, nor could he sell his unit and the lawyers who transferred the unit paid his levies in order for the respondent to issue the Levy certificate.

41. The respondent submits that the estate agent who sold the unit and the previous owner was aware of the leaking roof and sold the unit "as it", and that should the owner have been responsible and paid his levies as was requested from him numerous times, it is unfair for the Era estate agent to now hold the respondent liable, knowing what they were selling.

42. The adjudicator refers to Section 3(1) of the STSMA which provides that:

> *"A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include—*
> *(l) to maintain all the common property and to keep it in a state of good and serviceable repair."*

43. The adjudicator finds that in terms of Section 3(1) of the STSMA it is explicitly clear that the Body Corporate is responsible for the maintenance of all the exterior property which would include the external roof.

44. Section 5(4) and 5 of the Sectional Title Act (STA) provides,

> *"The common boundary between any section and another section or common property shall be the median line of the dividing floor, wall, or ceiling, as the case may be.*
> *(5) For the purposes of subsection (3)(d) the boundaries of*
> *(6) a section shall be defined—*

> *(a) by reference to the floors, walls, and ceilings thereof, or as may be prescribed: Provided that any window, door, or other structure which divides a section from another section or from common property, shall be considered to form part of such floor, wall, or ceiling."*

45. The adjudicator notes the applicant's list of defects namely, roof sheeting broken /missing/ rotted, roof support rotten, no storm water drainage, and passage support bar rusted as a result of the roof leak, in consideration of Section 3(1) of the STSMA read with Section 5(4) and (5) of the STA and finds that these damages/ defects are for the body corporate, as the listed defects falls within the common property and therefore the responsibility of the body corporate.

46. The adjudicator refers to Section13 of the STSMA provides that:

> *"(1) 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."*

47. The adjudicator finds that in terms of section 13 of the STSMA the unit owner is obligated to maintain and repair his or her unit, however.

48. The adjudicator finds that the repairs the applicant requested does not fall under section 13 of the STSMA because the roof sheeting, supports, gutters and column support are common property and not part of the applicant's unit.

49. The adjudicator submits that the mere fact that the owner is failing to maintain his or her unit does not mean that the body corporate must not repair common property like the roof.

50. The adjudicator finds that the respondent allegations that the sale was of unit

12 was *voetstoots* (as is) is no defence to undertaking its statuary obligation to repair and maintain the common property.

51. The adjudicator submits that the respondent concedes that the arrears levy was paid on transfer and finds the respondents contention that it is being prejudiced by the applicant requesting it affecting the repairs is without merit.

52. The adjudicator finds that because the arrear levies have been settled and the levy clearance certificate granted; the respondent's failed to prove prejudice by the applicant.

53. The adjudicator refers to the case of **Pillay v Krishna 1946 AD 946** at para 952- 955, the following was held:

> *"The standard of proof in a civil case is the well-known preponderance (balance) of probabilities. This requires of the party on whom the onus lies, in order to be successful, to satisfy the court that he is entitled to succeed on his claim or defence, as the case may be.*
>
> *Similarly, if evidence is led but the court cannot decide whether the cause of action has been established or not, the plaintiff again must fail because one of the facts essential to the cause of action would remain unproved."*

54. The adjudicator finds that the applicant has made out her case on a balance of probabilities as per the principle laid down in the case of Pillay **v Krishna**, the application is granted.

55. The application is granted in terms of section 39(6)(a) of CSOS Act.

<u>COSTS</u>

56. No order as to costs.

ADJUDICATION ORDER

57. The application is granted in terms of section 39(6)(a) of the CSOS Act

The respondent is directed in terms of section 54(2) of CSOS Act, to attend to the necessary repairs to the roof including but not limited to the following:

(a) Repair of roof sheeting broken/missing/rotted
(b) Repair of roof support rotten
(c) Repair of storm water drainage
(d) Repair of passage support bar rusted as a result of roof leak

All necessary repairs must be effected within 60 (sixty) business days of delivery of this order.

RIGHT OF APPEAL

58. 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 22 DECEMBER 2022.

Howard Felix

HOWARD FELIX