



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

Ref: CSOS06969/KZN/22

In the matter between:

THULELENI RUTH MBATHA

Applicant

and

SIBUSISO MTHABELA

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:
Section 39(6)(b)(i): (6) In respect of work pertaining to private and common property-
(b) an order requiring the relevant person—
(i) to carry out specified repairs or have specified repairs made.
- Date Adjudication conducted:
25 DECEMBER 2022.
- Name of the Adjudicator:
HOWARD FELIX.

- Order:

The adjudicator grants an ancillary order in terms of Section 54(3) of the CSOS Act.

The body corporate to appoint a leak detector to investigate and provide a full report establishing where the leak emanates from, and effect repairs accordingly.

The body corporate to recover the reasonable cost of effecting the repairs from the responsible owner in terms of PMR 31(2).

No order as to costs.

INTRODUCTION

1. The applicant is **THULELENI RUTH MBATHA**, the registered owner of unit 70 at Lamichelle, Pitchemwood Street, Arboretum, Richards Bay, KwaZulu-Natal.
2. The respondent is **SIBUSISO MTHABELA**, the registered owner of unit 74 at Lamichelle, Pitchemwood Street, Arboretum, Richards Bay, KwaZulu-Natal.
3. The community scheme is the Body Corporate of Lamichelle which is duly constituted in terms of Section 2 of the Sectional Titles Schemes Management Act No.8 of 2011 ("ST SMA") for a sectional scheme known as Lamichelle, which is situated at Pitchemwood Street, Arboretum, Richards Bay, 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"). 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)(b)(i): (6) *In respect of work pertaining to private and common property-*

(b) an order requiring the relevant person—

(i) to carry out specified repairs or have specified repairs made.”

6. On the 17th of November 2022, the notice in terms of Section 43 was served on the respondent. The respondent or affected person failed to provide a response to the CSOS notice in terms of section 43 of the Act.
7. On the 28th of November 2022, the CSOS referred the dispute directly to adjudication in terms of section 48 of the CSOS Act read with the Practice Directive on Dispute Resolution, 2019.
8. On the 28th of November 2022, the requests for any final written submissions was served on parties.
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 by the 3rd of December 2022. The adjudication was conducted on the 25th 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 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 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 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 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 application was lodged on the 15th of November 2022, by the applicant on her personal capacity as the owner of unit number 70 in the scheme which is Lamichelle Body Corporate, against the respondent who owns the unit number 74, the unit which is just above hers.

19. The applicant submits that her unit is severely damaged due to a water leak from the respondent's unit, as a result on the 10th of May 2022, three affected owners had a meeting, namely, owners of units 70, 74, and 76, and made an agreement that a plumber will be called in to fix the leaks.
20. The applicant submits that the scheme's managing agents, Remax Managing Agent was informed of the proposal who subsequently forwarded the agreement to all owners.
21. The applicant submits that on the 22nd of May 2022, she accompanied the plumber to unit 74, the applicant with the plumber could not gain access to the respondent's unit, and from that day the respondent did not comply with the agreement.
22. The applicant submits that she sent e-mails to the parties to the agreement, but the owner of unit 74 never responded and the applicant's unit now has water running down the wall in her bathroom and the damp smell is unbearable.
23. The applicant submits that her tenant has moved out already due to the condition caused by the water leak emanating from the respondent's unit and she is losing income, she therefore, wants the issue to be resolved as soon as possible.
24. The applicant submits that the respondent has failed to cooperate with her, despite telephone call, WhatsApp messages, and the managing agent sending numerous letters.

Relief sought by the Applicant

25. The applicant seeks an order requiring the respondent to fix the water leaks, repair the damages occurred resulting from the leak, and paint the entire affected areas in the bathroom including walls and ceiling.

Respondent's Submissions

26. None.

Relief sought by the Respondent

27. None.

EVALUATION & FINDING

28. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
29. 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.
30. The applicant seeks an order in terms of Section 39(6)(b)(i) of the CSOS Act, directing the respondent to repair the water leaks and resultant damage caused to her unit.
31. Section 39(6)(b)(i) of the CSOS Act states:

“(6) In respect of work pertaining to private and common property-
(b) an order requiring the relevant person—
(i) to carry out specified repairs, or have specified repairs made.”

32. The applicant submits that the respondent's unit is leaking water which runs

through her unit's bathroom and damaged the paint on the walls and ceiling and the smell is so bad that the applicant's tenant vacated her unit.

33. The adjudicator submits that the applicant has not provided a leak detection report as proof that the water leak is from the respondent's unit. The adjudicator notes that the body corporate and its managing agent are not party to this application.
34. The adjudicator refers to section 13(1)(a) & (c) of the STSMA, deals with Duties of owners, which stipulates that:

*“13. (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.”*
35. The adjudicator finds that section 13 of the STSMA obligates the respondent to repair his/her unit.
36. The adjudicator finds that the applicant's papers without a leak detection report or similar objective assessment does not establish that the water leak is from the respondent's unit and therefore the applicant has failed to prove on a balance of probabilities that the respondent is liable to undertake the repairs and the adjudicator therefore cannot grant an order in terms of Section 39(6)(b) compelling the respondent to undertake the repairs.
37. The adjudicator notes that in the circumstance the adjudicator cannot grant an order in terms of Section 39(6)(b) of the CSOS Act and the water leak issue still needs to be dealt with and therefore the body corporate would need to intervene as it is entrusted with the management of the community scheme and the water leak prejudices the interest of the body corporate.
38. The adjudicator refers to the Prescribed Management Rule 31(2) which

states:

“Obligation to maintain

31. (1)

*(2) If despite written demand by the body corporate,
a member refuses or fails to —*

*(a) carry out work in respect of that member's section
ordered by a competent authority as required by
section 13(1)(b) of the Act; or*

*(b) repair or maintain a section owned by that member
in a state of good repair as required by section
13(1)(c) of the Act.*

*and that failure threatens the stability of the common
property, the safety of the building or otherwise materially
prejudices the interests of the body corporate, its members
or the occupiers of sections generally, the body corporate
must remedy the member's failure and recover the
reasonable cost of doing so from that member.
provided that in the case of an emergency, no demand
or notice need be given to the member concerned.”*

39. The adjudicator finds that in the present circumstance where the respondent refuses to allow the applicants plumber access to attend to the water leak which probably originates from the respondent's unit, the body corporate would need to give the respondent a written demand to repair the water leak in terms of PMR 31(2) alternatively in the event the body corporate determine the water leak to be an emergency it may attend to the repairs without demand or notice to the respondent.
40. The adjudicator notes that the applicant has not joined the body corporate and the adjudicator should not make an order against a party that is not a party to this application. The adjudicator finds that the applicant should not be prejudiced by failing to join the body corporate when the water leak prejudices the interest of the body corporate, and the body corporate is the only party who can attend to the repairs in terms of PMR31(2).

41. The adjudicator submits that the body corporate is obligated to act in the circumstance, and in light of the respondent's failure to repair the water leaks, the applicant can obtain relief in terms of PMR 31(2) as the body corporate can attend to the water leak since it prejudices the interest of the body corporate and recover the reasonable costs of repairs in the event the water leak is the responsibility of the respondent.

42. The adjudicator refers to section 38(3)(c) of the CSOS Act:

*“(3) The application must include statements setting out-
(c) the grounds on which the relief is sought.”*

43. 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.”

44. The adjudicator submit that the applicant bears the onus of proof, and in this present application, the adjudicator finds that the applicant has failed to prove on a balance of probabilities that the respondent is liable to undertake the repairs and therefore the applicant cannot be granted an order in terms of Section 39(6)(b) of the CSOS Act, however, the adjudicator grants an ancillary order in terms of section 54(3) of the CSOS Act.

COSTS

45. No order as to costs.

ADJUDICATION ORDER

46. In the circumstances, the following order is made:

The adjudicator grants an ancillary order in terms of Section 54(3) of the CSOS Act.

The body corporate to appoint a leak detector to investigate and provide a full report establishing where the leak emanates from, and effect repairs accordingly.

The body corporate to recover the reasonable cost of effecting the repairs from the responsible owner in terms of PMR 31(2).

RIGHT OF APPEAL

47. 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 25 DECEMBER 2022.

Howard Felix

HOWARD FELIX