



**ADJUDICATION ORDER IN TERMS OF SECTION 53  
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Ref: CSOS06276/KZN/22

In the matter between:

**LUDOVICO PACINI**

**APPLICANT**

and

**TRUSTEES OF KALBARRI BODY CORPORATE**

**RESPONDENT**

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**ADJUDICATION ORDER**

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**EXECUTIVE SUMMARY**

- Relief applied for in terms of the CSOS Act:

***Section 39(1)(b):** (1) In respect of financial issues - (b) an order requiring the association to take action under an insurance policy to recover an amount.*

- Date Adjudication conducted:

26 DECEMBER 2022.

- Name of the Adjudicator:

HOWARD FELIX.

- Order:

The application is dismissed in terms of Section 53(1) of the CSOS Act.

The adjudicator considers the application misconceived.

No order as to costs.

### **INTRODUCTION**

1. The applicant is **LUDOVICO PACINI**, the registered owner of unit 7 Kalbarri, Bradley Road, Umgeni Park, Durban North, KwaZulu-Natal.
2. The respondent is the **TRUSTEES OF KALBARRI BODY CORPORATE**, a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011 (also referred to as the “STSMA”), which is situated at 7 Bradley Road, Umgeni Park, Durban North, KwaZulu Natal 4051.
3. The community scheme is the **KALBARRI BODY CORPORATE** which is duly constituted in terms of section 2 of the Sectional Titles Schemes Management Act No. 8 of 2011 (“STSMA”) for a sectional title scheme at 7 Bradley Road, Umgeni Park, Durban North, KwaZulu Natal 4051.
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).

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

*“Section 39(1)(b): (1) In respect of financial issues –  
(b) an order requiring the association to take action  
under an insurance policy to recover an amount.”*

6. On the 9<sup>th</sup> of November 2022, a Section 43 notice was served on the respondent. The respondent or affected person failed to provide a response to the CSOS notice in terms of section 43.
7. On the 17<sup>th</sup> of November 2022, the dispute was referred directly to Adjudication in terms of section 48 of the CSOS Act read with Clause 21.5.7 of the Practice Directive on Dispute Resolution.
8. On the 22<sup>nd</sup> of November 2022, the notice requesting final written submissions was served on the 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 27<sup>th</sup> of November 2022. The adjudication was conducted on 26<sup>th</sup> of December 2022 and an order is now determined.

### **PRELIMINARY ISSUES**

10. The adjudicator notes that the applicant indicated in the application form that he is the owner of unit 7 and in the various emails attached to the application indicates that he is acting on behalf of the Pacini Family Trust. The adjudicator submits that in the event the Pacini Family Trust is the registered owner of unit 7 the applicant would need to obtain authority to lodge this application. The

adjudicator finds that the applicant can obtain the request authority form the trust retrospectively to cure this oversight on the applicant's part in the event the trust is the registered owner and the adjudicator will consider the merits of the application to bring finality to the parties.

### **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. In terms of Section 50 of the CSOS Act -
- “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. LUDOVICO PACINI brought this application, in his personal capacity as the owner of unit 7 Kalbarri, Bradley Road, Umgeni Park, Durban North, KwaZulu-Natal.

19. The applicant submits that his unit suffered damage during the storm on the 11<sup>th</sup> of April 2022, a claim was made to the insurance company to have the damage repaired.
20. It is submitted that the Trustees of the Body Corporate have not submitted documentation requested by the insurance company in time and the claim has now been rejected.
21. It is submitted that an e-mail was sent to the trustees to advise how to resolve the matter, however, there was no response from the respondent.
22. The applicant thus wants the damage to unit 7 repaired, either by the insurance company or by the Trustees.

**Relief sought by the Applicant:**

23. The applicant seeks an order in terms of section 39(1)(b) of the CSOS Act requiring the respondent to take action under an insurance policy to recover an amount.

**Respondents' Submissions**

24. None.

**Relief sought by the Respondent**

25. None.

**EVALUATION & FINDING**

26. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
27. 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.
28. The applicant seeks an order in terms of section 39(1)(b) of the CSOS Act requiring the respondent to take action under an insurance policy to recover an amount alternatively for the respondent to repair unit 7.
29. Section 39(1)(b) of the CSOS Act, is in respect of:
- “(1) In respect of financial issues –  
(b) an order requiring the association to take action  
under an insurance policy to recover an amount.”*
30. The applicant seeks an order in terms of section 39(1)(b) because on the 12 April 2022 his unit sustained damage in a storm and he subsequently informed the respondent, the body corporate who submitted an insurance claim, the applicant submits that because the respondent failed to provide information that resulted in his claim being rejected on the 29 September 2022. The applicant therefore seeks to hold the trustees of respondent responsible for the repairs to his unit which still need to be done.
31. The adjudicator refers to the email by Rubayne Gannie on the 3 October 2022 @6:40 which informed the Claim No: 113425, Kalbarri, CP, Storm Damages, DOL: 11/4/2022 had been rejected by CIA Insurance Company because the

signed AOL and repairs invoices were not forthcoming. The adjudicator brings the following paragraphs to the party's attention:

*"Kindly be advised that the Insurers protect a client against "sudden and unforeseen events" which excluded any damages that may have occurred over a period of time/ or due to defective workmanship*

*CIA Insurance Company confirmed that after careful consideration of the facts the damages were not due to a sudden and unforeseen event that occurred, bearing in mind that the insurers cover the client against "sudden and unforeseen events" which excluded any damages that may have occurred over a period of time.*

*As you are aware in accordance with the Insurers Policy wording they will not cover the following:*

- \* Lack of maintenance,*
- \* Wear & tear, gradual deterioration,*
- \* Defective design, defective materials and defective workmanship*

*Should you not be satisfied with the above mentioned outcome of this claim, you may also lodge a formal complaint with the Ombudsman for Short Term Insurers, who will investigate the matter and make a final ruling which the Insurers would need to comply with."*

32. The adjudicator refers to the email by Kalbarri trustees dated 2 December 2022 @ 10:45:50 Am in which the new trustees indicate that they have resubmitted the insurance claim through the new managing agents

*"After liaising with our managing agent, it has been noted that the insurance claim was made before both the new board of trustees and the new portfolio manager were elected/assigned. Our portfolio manager, Perrine (also cc'ed in this email), has since resubmitted the insurance claim, and we now await feedback once more."*



33. The adjudicator refers to Sections 14(1) and (2) of the STSMA which states:

*“14(1) Notwithstanding the existence of a valid insurance policy effected by the body corporate pursuant to the provisions of section 3(1)(h), an owner may obtain an insurance policy in respect of any damage to his or her section arising from risks not covered by the policy effected by the body corporate.”*

*“(2) This section does not limit the rights of an owner to insure against risks other than damage to his or her section.”*

34. The adjudicator refers to Prescribed Management Rule 23 which states:

*“23(1) The insurance policies of the body corporate in terms of sections 3(1)(h) and (i) of the Act —*

*(a) must provide cover against —*

- (i) risks referred to in regulation 3,*
- (ii) risks that members resolve must be covered by insurance; and*
- (iii) risks that holder of registered first mortgage bonds over not less than 25 per cent in number of the primary sections by written notice to the body corporate may require to be covered by insurance,*

*(b) must specify a replacement value for each unit and exclusive use area, excluding the member's interest in the land included in the scheme, provided that any member may at any time by written notice to the body corporate require that the replacement value specified for that member's unit or exclusive use area be increased.”*

35. The adjudicator refers to section 3(1)(h) of the STSMA which stipulates that:

*“3(1) A body corporate must perform the functions entrusted to it by or under this Act—*

*(h) to insure the building or buildings and keep it or them insured to the replacement value thereof against fire and such other risks as may be prescribed;”*

36. The adjudicator refers to the decision of **Prag N.O & Another v Trustees For The Time Being of The Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body Corporate & Others 2021 ZAWCHC 132** at 19 held:

*“As to the scope of duties imposed by STSMA, ss 3(1)(h) and (k) – While the body corporate had a statutory duty to insure all buildings belonging to the scheme, which necessarily included individually owned sections and those parts of the building(s) owned by all members of the scheme in common undivided shares, as common property, it was not intended that an individual owner would have a right to sue it for any damages which may have been sustained in respect of the owner's individual section only.”*

37. The adjudicator notes the 3 October 2022 email advising that a formal claim must be lodged with the Ombudsman for short term insurance.

*“Should you not be satisfied with the above-mentioned outcome of this claim, you may also lodge a formal complaint with the Ombudsman for Short Term Insurers, who will investigate the matter and make a final ruling which the Insurers would need to comply with.”*

38. The adjudicator notes further that the respondent a new board of trustees has resubmitted the insurance claim as indicated in the email of the 2 December 2022.

39. The adjudicator refers to section 38(3)(a) of the CSOS Act:

*“(3) The application must include statements setting out-  
(a) the relief sought by the applicant, which relief must be within the scope of one or more of the prayers of the relief contemplated in Section 39.”*

40. The adjudicator refers to the case of **In Trustees for the Time Being of the Avenues**

**Body Corporate v Alain Shmaryahu**, in which the Court stated that:

“An applicant for relief in terms of the Act is required to identify in its application which of the orders particularised in s39 it seeks and the character of the various types of substantive relief that an Adjudicator is empowered to grant in terms of the Act appears from the provisions of s39”.

41. The Court in **Evergreen Investment (Pty) Ltd v Messerschmidt2** quoting from the **Road Accident Appeal Tribunal v Gouws 2018 (3) SA 413 (SCA)** held that:

“Repositories of power can only exercise such power as had been conferred upon them by law.”

42. The adjudicator finds that the relief the applicant seeks is in respect of the rejection of an insurance claim lodged by the body corporate, and the adjudicator finds that the relief sought not available under section 39(1)(b) of the CSOS Act or any other contemplated order in section 39.
43. The adjudicator finds that the applicant has been informed that the Ombudsman for short term insurance is the correct forum to bring formal complaint in the event that he disputes the outcome of the insurance claim.
44. The adjudicator finds that the CSOS has no jurisdiction in this issue.
45. The adjudicator finds that the CSOS is a creature of statute, and the adjudicator is bound to make orders that are competent and enforceable in terms of the Act.
46. The adjudicator finds that because the respondent has resubmitted the insurance claim and the insurance claim is subject to the ombudsman for short term insurance it would be premature to consider the applicants relief that the respondent attend to the repairs of unit 7.

47. 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.”*

48. The adjudicator submit that the applicant bears the onus of proof, and in this present application, the adjudicator finds that the CSOS has no jurisdiction and therefore the adjudicator cannot grant an order in terms of Section 39(1)(b) of the CSOS Act.
49. The application is dismissed.

### **COSTS**

50. No order as to costs.

### **ADJUDICATION ORDER**

51. The application is dismissed in terms of Section 53(1) of the CSOS Act. The adjudicator considers the application misconceived.

### **RIGHT OF APPEAL**

46. 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 THE 26 DECEMBER 2022**

*Howard Felix*

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**HOWARD FELIX**