



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

Ref: CSOS06817/KZN/22

In the matter between:

SANDRA PAULA ANTUNES TEODOSIO

Applicant

and

TRUSTEES OF ARBORDALE BODY CORPORATE

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:
*Section 39(6)(a): (6) In respect of work pertaining to private and common property-
(a) an order requiring the association to have repairs and maintenance carried out.*
- Date Adjudication conducted:
26 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 ordered in terms of Section 54(2) of the CSOS Act to repair the roof including the water damage to the applicant's unit caused by the water leak including but not limited to the wall and ceiling of the applicant's unit within 30 (thirty) business days upon delivery of this order.

No order as to costs.

INTRODUCTION

1. The applicant is **SANDRA PAULA ANTUNES**, the occupier and sister of the registered owner of unit 1 Arbordale, 338 Roland Chapman Drive, Montclair, Durban, KwaZulu-Natal.
2. The respondent is the **TRUSTEES OF ARBORDALE 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 "ST SMA"), which is situated at 338 Roland Chapman Drive, Montclair, Durban, KwaZulu-Natal.
3. The community scheme is the Body Corporate 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 Arbordale, which is situated at 338 Roland Chapman Drive, Montclair, Durban, 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)(a): (6) In respect of work pertaining to private and common property-
(a) an order requiring the association to have repairs and maintenance carried out.”*

6. On the 11th 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 21st 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 21st 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 26th of November 2022. The adjudication was conducted on the 26th of December 2022, and an order is now determined.

PRELIMINARY ISSUES

10. The adjudicator notes that the application is not submitted by the registered owner of the unit but by her sister. There is no written resolution authorizing the applicant to lodge the application on behalf of the registered owner provided. Thus, the applicant has breached Section 38(1) of the CSOS Act however, the adjudicator will consider the merits of the application to provide 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 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 10th of November 2022, by the sister of the owner of unit 1, against the body corporate (respondent).
19. The applicant submits that on the 29th of July 2022, she notified the respondent about the water damage to her small bedroom ceiling. On the 31st of July 2022, the applicant sent a WhatsApp message enclosing picture of damages, to which feedback was given back stating that the contractor suggested broken or damaged roof to be replaced, then repair and paint the ceiling as a costs saver and monitor the ceiling.
20. The applicant submits that on the 19th of August 2022, Mr Moolman one of the trustees sent a WhatsApp text asking if the body corporate would reimburse the applicant for repairing the ceiling. Thereafter, on the 21st of August 2022, Mr. Moolman suggested to the applicant to email the respondent about reimbursement, which the applicant did.
21. The applicant submits that the respondent in their reply, stated that the applicant should lodge a claim with the body corporate's insurance to fix the ceiling, and the applicant followed the respondent's instructions to obtain the quote from a body corporate's contractor who inspected the roof in the presence of Mr. Moolman.
22. The applicant submits that 21st of October 2022, she received a letter from the body corporate's insurance, rejecting the claim, thereafter, on the 26th of October 2022, the applicant sent an email to the respondent and its managing agent (Wakefield's) stating that the respondent needs to repair the damaged roof and ceiling enclosing the rejection letter.

23. The applicant submits that to date, she has not received any responses despite numerous emails sent to the respondent.

Relief sought by the Applicant

24. The applicant seeks an order requiring the respondent to fix the applicant's roof and ceiling.

Respondent's Submissions

25. The respondent has not made any written submissions.

Relief sought by the Respondent

26. None.

EVALUATION & FINDING

27. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
28. 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.
29. The applicant seeks an order in terms of Section 39(6)(a) of the CSOS Act, directing the respondent to fix the applicant's roof and ceiling.

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

*“(6) In respect of work pertaining to private and common property-
(a) an order requiring the association to have repairs and
maintenance carried out.”*

31. The applicant submits that on the 29th of July 2022, she notified the respondent about the water damage to her small bedroom ceiling. She was asked to claim from the body corporate insurance which was rejected and now she seeks an order compelling the respondent, the body corporate to repair the roof and ceiling.
32. The applicant submits that there is damage to the applicant’s unit caused by water that is allegedly egressing through broken roof tiles, and the applicant seeks an order compelling the respondent to repair the underlying water leak and the damage it has caused to her ceiling.
33. The adjudicator submits that the applicant will need to prove that the respondent is obligated to repair the underlining water leak and the applicants damaged ceiling, and that the respondent has neglected to repair the water leak and damage to obtain an order in terms of Section 39(6)(a) of the CSOS Act.
34. The adjudicator submits that the court set out the requirements for a CSOS application in the case of **Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another** at para 14:

“[14] In terms of the Practice Directive, the applicant bears the onus of ensuring that all the relevant information necessary to “make their case” is set out in the Application for Dispute Resolution Form, which includes the attachment of any documents pertinent to the claim. In other words, the applicant must set out the grounds to meet the legislative requirements of the relief sought.”

35. The adjudicator refers to section 3 of the STSMA dealing with functions of bodies corporate, which states that:

“3. (1) A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include—

(a) to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs—

(i) for the repair, maintenance, management, and administration of the common property (including reasonable provision for future maintenance and repairs),

(ii) for the payment of rates and taxes and other local municipality charges for the supply of electricity, gas, water, fuel and sanitary or other services to the building or land,

(iii) for the payment of any insurance premiums relating to the building or land; and

(iv) for the discharge of any duty or fulfilment of any other obligation of the body corporate,

(b) to establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister,

(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,

(k) to pay the premiums on any insurance policy effected by it,

(l) to maintain all the common property and to keep it in a state of good and serviceable repair,

(m) to comply with any notice or order by any competent authority requiring any repairs to or work in respect of the

relevant land or building,

(p) to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property,

(r) subject to the rights of the local municipality concerned, to maintain and repair including renewal were reasonably necessary, pipes, wires, cables, and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property.”

35. 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—

(a) permit any person authorised in writing by the body corporate, during reasonable hours and on notice (except in case of emergency, when no notice is required), to enter his or her section or exclusive use area for the purposes of inspecting it and maintaining, repairing or renewing pipes, wires, cables, and ducts existing in the section and capable of being used in connection with the enjoyment of any other section or common property, or for the purpose of ensuring that this Act and the rules are being observed,

(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.”

36. The adjudicator finds that section 3 of the STSMA, obligates the respondent to effect maintenance and repairs to the common property and section 13 of the STSMA obligates the owner to maintain, repair and keep his/her unit in a clean state.
37. The adjudicator finds that the roof is the common property of the scheme and the respondent is obligated to repair and maintain the common property in terms of Section 3 of the STSMA.

38. The adjudicator notes that the respondent erred in advising the applicant to lodge a claim with the body corporate's insurance for the repair of the roof which is common property. The respondent has a fiduciary duty to maintain the common property for the benefits of the members of the body corporate, and in the circumstances, the respondent does not seem to exercise that duty, which is also not justifiable.

39. 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.”*

40. 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.”

41. The adjudicator submit that the applicant bears the onus of proof, and in this present application, the adjudicator finds that the applicant has proven on a balance of probabilities that the respondent is liable to undertake the repairs and therefore the adjudicator grants an order in terms of Section 39(6)(a) compelling the respondent to undertake the repairs.

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

COSTS

43. No order as to costs.

ADJUDICATION ORDER

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

The respondent is ordered in terms of Section 54(2) of the CSOS Act to repair the roof including the water damage to the applicant's unit caused by the water leak including but not limited to the wall and ceiling of the applicant's unit within 30 (thirty) business days upon delivery of this order.

RIGHT OF APPEAL

45. 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 26 DECEMBER 2022.

Howard Felix

HOWARD FELIX