



**ADJUDICATION ORDER IN TERMS OF SECTION 53 AND 54
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Ref: CSOS002982/WC/23

IN THE MATTER BETWEEN

BASIL COURT BODY COROPRATE

APPLICANT

and

NS MAGADLELA

RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:

Section 39(1) In respect of financial issues—(e) an order for the payment or re-payment of a contribution or any other amount.

Section 39(7) in respect of general and other matters - (b) any other order proposed by the Chief Ombud.

Section 39(1) (f) In respect of financial issues — an order requiring a specified tenant in a community scheme to pay to the association and not his or her landlord, all or part of the rental payable under a lease agreement, from a specified date and until a specified amount due by the landlord to the association has been paid: Provided that in terms of such an order-

- (i) The tenant must make the payments specified and may not rely on any right of deduction, set-off or counterclaim that he or she has against the landlord to reduce the amount to be paid to the association;
- (ii) Payments made by the tenant to the association discharge the tenant's liability to the landlord in terms of the lease; and
- (iii) The association must credit the amounts received from the tenant to the account of the landlord.

Date Adjudication conducted: 25 August 2023.

Name of the Adjudicator: Fezile Sithole.

Order: Granted in part.

INTRODUCTION

1. The Applicant is **BASIL COURT BODY COROPRATE**, a juristic person in terms of the Section Titles Schemes Management Act No. 8 of 2011 ("STSMA"), herein represented by Liliam Waldeck in terms of the Trustees resolution dated 06 June 2022.
2. The Respondent is **NS MAGADLELA**, registered owner of unit 1014 Cayenne Close, 7 Zach crescent, Blue Downs, Western Cape Province.
3. 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.
4. The parties were given 5 (five) business days to make final submissions.
5. The application seeking relief in terms of section 39 of the CSOS Act, is in respect of-
 - a.) Section 39(1)(e) -In respect of financial issues;

- b.) Section 39(7) (b)- any other order proposed by the Chief Ombud; and
- c.) Section 39(1)(f) -In respect of financial issues.

6. This matter is adjudicated in terms of the CSOS Act; Practice Directive on Dispute Resolution, 2019 (as amended) and 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 08 August 2023 by no later than 14 August 2023.
7. The matter was referred to adjudication on 23 August 2023 and adjudication was conducted on the 25th day of August 2023 and an order is now determined.

PRELIMINARY ISSUES

8. No preliminary issues were raised.

RELEVANT STATUTORY PROVISIONS

9. 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 titles 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".

10. 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”.

11. 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”.

12. 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”.

13. 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”.

14. Section 50 provides-

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

15. 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.”

16. A conciliation hearing was not held in the matter, and the matter was referred

directly to adjudication in terms of section 48 of the CSOS Act.

SUMMARY OF RELEVANT EVIDENCE

Applicant's Submissions

17. The Applicant submitted that the Applicant is in arrears with the levies.

Relief sought by the Applicant:

18. That the Respondent pays the arrear and current levies;
19. Rental income to be paid directly to the Applicant; and
20. If the Respondent defaults in payment of levies, the property be attached and sold.

Respondent's Submissions

21. The Respondent has failed to make submissions despite being invited to do so.

Relief sought by the Respondent

22. None submitted.

EVALUATION & FINDING

23. I have perused the Applicant's written submissions.
24. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the filed witness statements must be considered.
25. The general rule is that only evidence, which is relevant, should be considered.
26. Relevance is determined with reference to the issues in dispute; the degree or extent of the proof that is required is a 'preponderance of probabilities.
27. This means that once all the evidence has been tendered, it must be weighed

up by the Adjudicator in order to determine whether the Applicant has discharged the burden of proving its case on a balance of probabilities.

28. It involves findings of facts based on an assessment of credibility and probabilities.
29. Dealing with the prayers in terms of section 39(1)(e) of the CSOS Act:

It is noted that: -

In terms of section 2(1) of the Sectional Titles Schemes Management Act 8 of 2011:

“With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and **any person who thereafter becomes an owner of a unit in that scheme is a member of that body corporate**”

(My emphasis)

- Section 3(1) of the aforesaid Act further provides as follows:

“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; . . . and

(c) to require the owners whenever necessary to make contributions to such funds . . .”

30. It follows that unit-owners who default on their levy payments, or who do not

pay their levy payment in full and up to date every month, are effectively being subsidised by other members of the body corporate who pay their levies and ancillary contributions conscientiously every month.

31. The body corporate cannot perform its functions and duties in the absence of funds from unit owners.
32. The purpose of this order is to bring closure to the case brought by the Applicant to the CSOS, whilst taking into account the rights, as well as the duties of the Respondent. In the absence of a signed settlement between the parties, I will proceed to finalise the matter and make an order to accommodate the parties.
33. The Applicant provided the latest levy statement for the period of April 2022 to August 2023 in the amount of R12 813.65 (twelve thousand eight hundred and thirteen rand and sixty-five cents). As a result, I will therefore accept the aforesaid amount to be the amount owing by the Respondent in respect of levies.
34. In the circumstances I am satisfied that the Applicant has discharged the onus of proving, on a balance of probabilities, that the Respondent is indebted and owes the arrears amount to the Applicant as claimed.
35. The Applicant's prayer in terms of section 39(1)(e) of the CSOS Act is hereby granted.
36. In respect of The Applicant's prayers relating to attachment and sale of the Respondent's property, should there be default in payment- In terms of the CSOS Act, it is paramount that the relief sought must be within the ambit of the provisions of Section 39 of the CSOS Act 9 of 2011.
37. The Western Cape High Court in the case of **Trustees for the Time Being of the Avenues Body Corporate vs Shmaryahu and Another (A31/2018) [2018] ZAWCHC 54 2018 (4) SA 566 (WCC) (10 May 2018) add paragraph [17]**, held that "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 Section 39".

38. The court further held add paragraph [18] that “It provides for the possibility of a number of different types of orders being made in respect of seven expressly specified categories of issues; viz (i) financial issues, (ii) behavioural issues, (iii) scheme governance issues, (iv) issues in respect of meetings, (v) in respect of management services, (vi) in respect of works pertaining to private and common areas and (vii) in respect of general and other issues. It is evident from the character of each of the categories of issues that they pertain primarily to matters germane to the community schemes, and only incidentally to related personal or individual interests or rights”.
39. The Court in ***Evergreen Investment (Pty) Ltd v Messerschmidt 2019 (3) SA 481 (GP)*** 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*”.
40. The Adjudicator is not empowered in terms of the applicable legislative framework to make an order as per the relief sought by the Applicant.
41. CSOS is a creature of statute, and the Adjudicator is bound to make orders that are competent and enforceable in terms of the Act.
42. In the premises, the Applicant’s prayers in terms of Sections 39(7)(b) of the CSOS Act is dismissed for the reasons mentioned above.
43. Further, the Applicant, in its written submissions has prayed from an order in terms of section 39(1)(f), for rental income to be directed to the body corporate.
44. The CSOS Act confers powers to the Adjudicator in terms of Sec 39(1) (f)- i.e., granted where an owner who is receiving regular rental payments, but fails to pay the association the contributions. In essence, an association can make application for an order that obliges the tenant to pay the rental to the association, rather than to the landlord owner.

45. The issue that is experienced herein is that the relief sought by the Applicant is against a party (tenant/s) who has not been cited in the dispute, in this case being the occupant of the unit owned by the Respondents, which makes them a non-party to these proceedings.
46. This cannot be allowed, as it will be in violation of the audi alterum partem rule of natural justice.
47. The Adjudicator cannot make an order regarding a tenant or person who is not cited as a party to these proceedings. The tenant/s must firstly be properly identified and secondly be cited as party to these proceedings.
48. As a result, the Adjudicator cannot make a ruling affecting tenants who are not described and cited herein.
49. In the premises, the Applicant's prayers in terms of Sections 39(1)(f) of the CSOS Act is dismissed for the reasons mentioned above.

COSTS

50. There is no order as to costs.

ADJUDICATION ORDER

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

I find for the Applicant:

- 51.1 The relief sought by the Applicant against the Respondent in terms of section 39 (1) (e) of the CSOS Act, is granted.
- 51.2 Consequently, the Respondent owes to the Applicant the amount of **R12 813.65** (twelve thousand eight hundred and thirteen rand and sixty-five cents).

- 51.3 The Respondent shall pay to the Applicant the amount of **R12 813.65** (twelve thousand eight hundred and thirteen rand and sixty-five cents) in six **(6)** equal monthly instalments of **R2 135.61** (two thousand one hundred and thirty-five rand and sixty-one cents).
- 51.4 The first payment shall commence within 30 (thirty days) from receipt of this adjudication order.
- 51.5 Thereafter, payment of the further 5 (five) outstanding instalments must be made on the 1st day of each succeeding month.
- 56.1 No interest shall accrue to the outstanding amount within the period allowed for the payment.
- 51.6 ***The above order does not affect the usual regular monthly levies and ancillary payments required to be made by the Respondent.***
- 51.7 In the event of the Respondent defaulting on any 1(one) payment as ordered above, the full amount due to the Applicant shall become immediately due and payable, with interest, by the Respondent.
- 51.8 The Applicant's prayer in terms of section 39(7)(b) of the CSOS Act is refused.
- 51.9 The Applicant's prayer in terms of section 39(1)(f) of the CSOS Act is dismissed

RIGHT OF APPEAL

52. 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 JOHANNESBURG ON THIS 29th DAY OF AUGUST 2023.



FEZILE SITHOLE

ADJUDICATOR