



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

Ref: CSOS 2650/GP/23

IN THE MATTER BETWEEN

TRUSTEES OF BENONI CITY BODY CORPORATE

APPLICANT

and

AR & J NAIDOO

RESPONDENTS

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:
Section 39(1)(e) In respect of financial issues— (e) an order for the payment or re-payment of a contribution or any other amount.
- Date Adjudication conducted:
18 JULY 2023
- Name of the Adjudicator:
AJ ANDREAS
- Order:

The relief sought in terms of section 39(1) of the CSOS Act is partially upheld.

The Respondent is held to be indebted to the Applicant in the amount of R5460.72 in respect of arrear levies.

The Respondent is ordered to pay R2000.00 monthly from the end of August 2023, until the outstanding levies is settled in full.

The Applicant is hereby ordered to remove the charges (R4910.72) imposed by the Applicant on the Respondents levy statement within fourteen (14) days upon receipt of this order.

No order as to costs.

INTRODUCTION

1. The Applicant are the **TRUSTEE OF BENONI CITY BODY CORPORATE**, a community scheme as defined in the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act), and to which it would be convenient to refer to as the "Body Corporate". The mandate to represent is on file.
2. The Respondents are **AR & J NAIDOO** the registered co-owners of section 207, Corner Harrison and Ampthill Avenue, Benoni, Gauteng Province.
3. A letter requesting final submissions was sent to the parties on the 4th of July 2023.
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 application seeking relief in terms of section 39 of the CSOS Act, is in respect of- Section 39(1)(e): **In respect of financial issues.**

6. 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. The adjudication was conducted on the 18th of July 2023 and an order is now determined.

PRELIMINARY ISSUES

7. No preliminary issues were raised.

RELEVANT STATUTORY PROVISIONS

8. 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”.

9. 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”.

10. 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”.

11. 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”.

12. 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”.

13. In terms of Section 50-

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

14. 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”.

15. Accordingly, a certificate of non-resolution was issued in terms of Section 48(1) of the CSOS Act. The Ombud referred the application together with any submissions and responses thereto to an adjudicator on the 30th of June 2023.

SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

16. The Applicant submitted that the Respondents are indebted to the Applicant in the amount of R9505.33 (as at 7/7/2023) in respect of arrear levies. This balance relates to accrued debt from the period of the 1st of December 2022 to the 7th of July 2023.

17. According to the Applicant no arrangements for the settlement of this debt has been negotiated or concluded.
18. The Applicant submitted that they have exhausted all attempts to resolve the situation with the Respondents, which attempts included emailed communication, SMS notifications, phone calls and or hand-delivered communication to the registered domicile address of the owner in terms of the Credit Control Policy agreed by the members at the Annual General Meeting held on the 10th of October 2022. A final demand for the settlement of the outstanding amount as prescribed in terms of Prescribed Management Rule 25(2) was sent to the Respondent, but to no avail.
19. The Applicant further submitted that as per the provisions of clause 32 of the Body Corporate Conduct Rules, levies and electricity are due on the 1st of every month and must be paid to the Managing Agent by no later than the 7th of each month. Any arrear accounts will attract interest at a rate of 2% per month.
20. According to the levy statement submitted by the Applicant, the Respondent's monthly levy is in the amount of R1049.18, which excludes other ancillary charges.
21. A statement of account relating to the Respondent's indebtedness to the Applicant was submitted as proof thereof.
22. And as a result, the Applicant is seeking an order that the full amount be paid immediately to the scheme.

Relief sought by the Applicant:

23. Applicant seeks an order that the adjudicator finds that the Respondents are indebted to the Applicant in the amount of R9505.33.

Respondents' Submissions

STEPHANIE NAIDOO

24. The Respondents addressed email correspondence to the Compliance Investigator dated the 10th of July 2023, in which the following was highlighted, " Mrs Naidoo recently had a stroke and was admitted to hospital and then a rehabilitation centre. Mr Naidoo has been caring for Mrs Naidoo since she was discharged from hospital.

25. The owners were not advised telephonically of the arrears as stated by the applicant.
26. The owners are also not occupying the unit, as stated by the applicant, hence, the water usage of 0 units.
27. The applicant states that confirmation was received that the owners are residing in the unit.
28. This information is not correct and we would like to request that the applicant discloses the source and relevance of the confirmation stated in the application for relief submission.
29. The final demand email and SMS was sent multiple times, with the charges of the correspondence being added to the levy arrears in each instance. Selection Estate Accounts was in agreement that I would not pay costs for the duplicate final demand INV03026 (2023-02-16).
30. The total arrears of R4587.08 was paid.
31. However, the cost of the duplicate correspondence was charged to the levy account.
32. The same has been done in respect of previous and subsequent demands (INV02868 - INV03321).
33. These amounts have been included in the invoice and levies arrears. We will not pay for the duplicate correspondence charges amounting to R550 as was acknowledged by Accounts that we will not be liable for the duplicate correspondence charge.
34. We will pay the arrears due for the period March, April and May per the application for relief (R5460.72) excluding the above charges (R4910.72) by 28 July 2023.
35. We will pay the applicable arrears for June, July and August (which are not referred to in the application for relief) excluding duplicate correspondence charges by 7 August 2023.
36. After which, the arrears will be settled, and the monthly levy account will be settled by the 7th of September 2023 and subsequent months”.

Relief sought by the Respondents.

37. None submitted.

EVALUATION & FINDING

38. I have perused the parties' written submissions.

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

40. 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 weighed up and determined whether the Applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

41. The relief sought by the Applicant is for an order that the Respondents are indebted to the Applicant in the amount of R9905.33, for arrear levies.

42. It is evident based on submissions made by the Respondents, that they dispute liability for the charges that has been charged to their levy statements, without their consent.

43. The Respondent's submission in essence is that the Applicant should remove the charges from his levy statement, in the amount of (R4910.72).

44. The Applicant has not submitted any evidence nor is there any evidence on record that Selection Estates are Registered Debt Collectors and that the charges be awarded as per the provisions of the Debt Collector's Act.

45. Prescribed Management Rule 25(5) provides as follows, "**The body corporate must not debit a member's account with any amount that is not a contribution, or a charge levied in terms of the Act or these rules without the member's consent or the authority of a judgment or order by a judge, adjudicator or arbitrator**".
(writer's emphasis)

46. It is common cause that the Respondent did not have the Applicant's consent to debit the Applicant's levy account with costs not specified in the aforementioned prescribed rule.

47. Nor does the minutes of the First Trustees meeting referenced by the Applicant in their submissions, held on the 10th of October 2022, comply with the provisions of PMR 21(3)(c).
48. There is further no record of a Trustees resolution on file which would ordinarily make provision for the calculation of interest on arrear levies as provided for in Prescribed Management Rule 21(3)(c).
49. **Prescribed Management Rule 21 (3) (c) Financial year, functions and powers** states that; (3) The Body Corporate may, **on the authority of a written trustee resolution** - *“charge interest on any overdue amount payable by any member to the Body Corporate, provided that the interest rate must not exceed the maximum rate of interest payable per annum under the National Credit Act (2005) Act No 34 of 2005, compounded monthly in arrear”*. **(writer’s emphasis)**
50. It is clear from the above prescribed management rule that Trustees must pass a resolution as to the interest rate that will be charged on overdue contributions. The determination of the applicable interest rate is a discretion reserved for Trustees.
51. It is the Adjudicator’s finding that interest charged to the Applicant’s levy account must be removed in the absence of a Trustees resolution as provided for in PMR 21(3)(c).
52. In instances where decisions taken by schemes are not public in nature, they are subject to review by the courts under the principles of legality, reasonableness and lawfulness.
53. Parties are referred in this regard to the North Gauteng High Court decision of **Minister of Water and Sanitation v The Public Protector of the Republic of South Africa and Others (27609/2019) [2019] ZAGPPHC 193 (31 May 2019)**, where the court held that, *“the audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party.”*

54. At paragraph [26] the court determined that, “The requirement that in certain circumstances decision-makers must act in accordance with the principles of natural justice or procedural fairness has ancient origins. [27] In general terms, the principles of natural justice consist of two component parts, *to wit*, the first is the hearing rule, which requires decision-makers to hear a person before adverse decisions against them are taken. [28] The principles of natural justice are founded upon fundamental ideas of fairness and the inter-related concept of good administration. Natural justice contributes to the accuracy of the decision on the substance of the case.

55. At paragraph [29] the court held that, “The rules of natural justice help to ensure objectivity and impartiality and facilitate the treatment of like cases alike. Natural justice broadly defined can also be seen as protecting human dignity by ensuring that the affected individual is made aware of the basis upon which he or she is being treated unfavourably, and by enabling the individual to participate in the decision-making process”.

56. Accordingly, it is the Adjudicator’s finding that the charges (R4910.72) imposed by the Applicant on the Respondents levy statement be removed from the Respondents levy statement within fourteen (14) days upon receipt of this order.

57. Section 2 of the of the Sectional Titles Scheme Management Act 8 of 2011 states as follows: *“with effect from any date upon which a person other than a developer becomes an owner of a unit in a scheme, there shall be deemed to have been 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.”*

58. In law therefore every owner in a sectional title scheme, such as the Respondents, are members of the body corporate.

59. Readers are referred to the North Gauteng High Court matter of the **Body Corporate of Central Park v Mosa**, where Judge Kathree-Setiloane held that the wording of section 3(2) of *the STSMA* eliminates any ambiguity in its meaning as it specifies that “liability ...accrues from the passing of a resolution to that effect by the trustees and may be recovered”. Properly construed this means that liability for normal levies/contributions accrues from date of the passing of a resolution to that effect by

the trustees and can be recovered by the body corporate. In other words, the body corporate's right to claim payment of contributions/normal levies vests on passing of a resolution by the trustees and becomes due and payable in each consecutive month thereafter".

60. Section 3 of the STSMA provides as follows: 3(1) A body corporate must perform the functions by or entrusted to it 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 and annual operating costs, (i) For the repair, maintenance of the common property, (ii) For the payment of rates and taxes and other local municipality charges for the supply of gas, water..., (iii) For the payment of any insurance premium., (iii) For the discharge of any duty or the fulfilment of any other obligation of the body corporate, (b) To establish and maintain a reserve fund, (c) To require the owners wherever necessary, to make such contributions to such funds...".

61. In such matters it is common to order the Respondents to settle the outstanding levies within a matter of weeks, so as not to prejudice the Applicant.

62. Without condoning the Respondent's non-payment as has been submitted by the Applicant, the circumstances persuade me that it is in the interests of justice and fairness to grant the Respondents additional time to settle the arrear levies.

63. It is the Adjudicator's finding that the Respondents are indebted to the Applicant in the amount of R5460.72, in respect of arrear levies.

COSTS

64. There is no order as to costs.

ADJUDICATION ORDER

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

(a) The Respondents are held to be jointly and severally liable and indebted to the Applicant in the amount of R5460.72 in respect of arrear levies.

- (b) The Respondents are ordered to pay R2000.00 monthly from the end of August 2023, until the outstanding levies is settled in full.
- (c) No interest shall accrue to the outstanding amount within this period allowed for the payment.
- (d) The above amount excludes the Respondents monthly levy.
- (e) Should the Respondents fail to pay any instalment due to the Applicant on the due date, the full outstanding balance of R5460.72 shall immediately become due and payable, and the Respondents must also pay the Applicant the applicable interest on the full outstanding balance of R5460.72 calculated from the date that the full outstanding balance becomes due and payable to date of payment.
- (f) The Applicant is hereby ordered to remove the charges of (R4910.72) imposed by the Applicant on the Respondents levy statement within fourteen (14) days upon receipt of this order.

RIGHT OF APPEAL

66. 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 26th DAY OF JULY 2023.



AJ ANDREAS
ADJUDICATOR