



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

Ref: CSOS-1136/GP/23

In the matter between

**DIRECTORS OF BLUE SADDLE RANCHES EQUESTRIAN ESTATE
HOMEOWNERS ASSOCIATION**

APPLICANT

AND

PT METSING

1ST RESPONDENT

KL METSING

2ND RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act: Section 39(1)(e)- in respect of financial issues.
- Date referred to Adjudication: 19 July 2023.
- Date Adjudication conducted: 24 July 2023.
- Name of the Adjudicator: TS Lekokotla.
- Order: The relief sought in terms of s39(1)(e) is granted.

INTRODUCTION

1. The applicant is the Directors of Blue Saddle Ranches Equestrian Estate homeowners' association, a 'community scheme' as defined in section 1 of the CSOS Act situated at Elizabeth Street Drumblade, Nooitgedacht Farm, Nooitgedacht, Gauteng.

2. The respondents are Phanel Thabo Metsing and Khomotso Leah Metsing, the owners of portion 103 at the applicant's community scheme.
3. A letter under cover of an email was sent to the parties on the 03rd of July 2023 informing the parties that this matter will be adjudicated on the papers in the file without any attendance by the parties in terms of section 48, 50, 51 read with section 53 & 54 of the CSOS Act 9 of 2011.
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 applicant is seeking relief in terms of section 39 of the CSOS Act, in respect of-

S39(1)(e): In respect of financial issues
i.e., An order that the respondent settle the outstanding levies.
5. 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 24 July 2023 and an order is now determined.

PRELIMINARY ISSUES

6. No preliminary issues were raised.

RELEVANT STATUTORY PROVISIONS

7. 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."

8. 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."

9. 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."

10. 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."

11. 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."

12. In terms of Section 50-

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

13. 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.”

14. In terms of clause 21 of the Practice Directive on Dispute resolution, 2019 as amended, the Ombud considered the dispute as not being appropriate for conciliation. The Ombud referred the application together with any submissions and responses thereto to an adjudicator on 19 July 2023.

SUMMARY OF RELEVANT EVIDENCE

Applicant's submissions

15. The application form for dispute resolution was signed and the dispute lodged on 01 May 2023.
16. The applicant submitted that the respondents are the registered owners of portion 103 Saddle Ranches Equestrian Estate and are responsible for the payment of levies and costs as per the levy statement attached to the application form.
17. That the levies and costs were due and payable from 01 November 2022, which statement balance at the time was R15 322,60. That the levies and costs are payable up to 08 April 2023 which statement balance is R27 515,75, which is the full balance owing to the scheme.
18. That the respondents have been made aware of their obligations by text message and email. That the managing agent sent a text message advising the respondents of the amount in arrears after 30 days, and a further text message and an email after 60 days.
19. That the respondents are in receipt of their monthly levy statement. That in addition to advising them of the status of the account, they were informed by email that failure to make payment would result in legal action being taken.
20. That the applicant specifically requires that interest be included in the relief sought, both in arrears amounts stated and in the balance of any future outstanding amount. That CSOS does not have jurisdiction to pend or exclude interest. That the association may on the authority of a written trustee resolution, in terms of paragraph 6.7 of the MOI, charge interest on any overdue amount payable by the member to the HOA. That by waiving interest, although it appears to assist the respondent, it has the contra effect on the financial well being of the scheme and owners who pay their levies. That this could lead to additional

levies being applied which will again not be paid by the respondent and other non-payers. That payers are prejudiced and non-payers remain a burden to the association.

Relief sought by applicant

21. The applicant sought the following relief:
- (1) An order that in terms of the registered MOI, owners become members of the HOA on registration of the unit into their names as it is the position with the respondent;
 - (2) An order for payment of the outstanding amount as detailed in the levy statement into the complex trust account with Whitfields;
 - (3) An order for payment of the future required levies and charges on a monthly basis into the complex trust account;
 - (4) An order that payment in prayer (1) be made within 30 days of the CSOS proceedings being concluded;
 - (5) An order that payments must continue until all outstanding amounts have been settled in full.

Respondents' submissions

22. The respondents did not file any submissions.

Relief sought by the respondents

23. None.

EVALUATION AND FINDING

24. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
25. 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.
26. Along with the application form, the applicant submitted a copy of the Memorandum of incorporation ('MOI') of the association, a copy of a directors' resolution mandating the

managing agent to lodge applications for dispute resolution and represent the association at the CSOS in any matter pertaining to levy and arrear collection,

Prayer (1)

27. The relief sought in prayer (1) seems to be a declaratory order declaring that owners in the scheme become members of the association upon registration of a unit in their names. In terms of clause 3.1 of the MOI of the association membership of the company shall be limited to any person who is reflected as the registered owner of the property as per the records of the Registrar of Deeds, and their spouses.
28. Even though the applicant is correct that the owners in the scheme become members of the association upon a unit being registered in their names, the CSOS Act does not empower an adjudicator to grant the type of declaratory order sought in prayer (1).
29. In terms of section 38(3)(a), the relief sought in an application must be within the scope of one or more of the prayers for relief contemplated in section 39 of the Act. Section 39 lists several possible reliefs that an applicant may seek. There is no provision in section 39 that provides for the type of declaratory order sought in prayer (1).
30. The High Court in the matter of *Kingshaven Homeowners' Association v Botha and Others (6220/2019) [2020] ZAWCHC 92 (4 September 2020)*, found that an adjudicator is empowered to refuse to grant relief that is not within the jurisdiction of the CSOS. The order sought by the applicant is not one provided for in s39 of the CSOS Act, and therefore not one within the jurisdiction of CSOS. As the court stated in the matter of *Road Accident Appeal Tribunal v Gouws 2018(3) SA 413 (SCA)*, at 424A "*Repositories of power can only exercise such power as had been conferred upon them by law. This is a description of the principle of legality.* "
31. Having found that the relief sought in prayer (1) is not within the jurisdiction of CSOS, prayer (1) must be refused for lack of jurisdiction.

Prayer (2)

32. The relief sought in prayer (2) is for an order that the respondents must pay the outstanding amount into the complex trust account with Whitfields.
33. In terms of clause 6.1 of the MOI of the association the directors may impose a levy annually upon the members for the purpose of meeting all expenses which the association has or will incur in pursuit of the association's aims and objectives, whereas clause 6.4 states as follows:

“The levies shall be payable in equal monthly instalments, due in advance on the first day of each month, or upon receipt by the members of a statement of account reflecting such levy amount from the company or its duly authorised managing agent, which statement shall constitute proof of the particular member’s indebtedness to the company.”

34. On the 04th of July 2023 the applicant submitted a copy of the respondents’ updated levy statement. According to the updated levy statement, the respondents have not been making levy payments as per clause 6.4 of the MOI of the association, and the current outstanding amount is R34 483,16.
35. In the matter of *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh & Others (323/2018) [2019] ZASCA (28 March 2019)* the court found that the relationship between the Homeowners association and its members is contractual in nature, and that members of the association agree to be bound by the rules of the association when they chose to purchase property within the estate. The same applies in this matter, the relationship between the applicant and the respondents is a contractual one, and in terms of clause 6.4 of the MOI, the respondents must pay levies monthly to the association.
36. In terms of clause 6.7 of the MOI interest on arrear levies shall be limited to the rate prescribed in terms of the National Credit Act 34 of 2005 and shall start to accrue from the date on which it became due. The applicant also submitted a copy of a directors’ resolution wherein it was resolved that interest charged by the association on all arrear amounts shall be 1% per month, compounded monthly and capitalised. It is, therefore, my finding that the association is entitled to the interest charged.
37. The claim amount also includes charges for legal costs. In terms of clause 6.9 of the MOI a member shall be liable for and pay all legal costs, including costs between attorney and client, collection commission, expenses and charges incurred by the company in obtaining recovery of arrear levies, or amounts due and owing by such member to the company, or in enforcing compliance with the MOI, the conduct rules or the Companies Act. Therefore, in terms of clause 6.9 the association is entitled to the legal costs charged.
38. In terms of section 39(1)(e) of the CSOS Act, a party is entitled to approach CSOS for an order for payment or repayment of a contribution or any other amount. An adjudicator is empowered to grant the relief prayed for in prayer (2).
39. It is, therefore, my finding that the relief sought in prayer (2) is granted in the amount of R34 483,16.

Prayer (3)

40. The relief sought in prayer (3) is for an order for payment of the future required levies and charges on a monthly basis into the trust account of the complex.
41. The type of order the applicant seeks would be an order for a debt that has not accrued yet. As stated in paragraph 29 and 30 above, an adjudicator is only empowered to grant relief that is within the scope of section 39 of the CSOS Act. The relief sought in prayer (3) would be an interdict that would compel the respondents to, in future, pay contributions timeously.
42. I am of the view that section 39(1) of the CSOS Act does not empower an adjudicator to make this type of order. It is, therefore, my finding that the relief sought in prayer (3) is refused for lack of jurisdiction.

Prayer (4)

43. The relief sought in prayer (4) is for an order that the amount due must be paid within 30 days of the CSOS proceedings being concluded.
44. In such matters it is common to order that the respondent must pay the outstanding amount in full within a specified time, so as to not prejudice the applicant. However, the extraordinary circumstances in which our country finds itself as a result of the Covid-19 pandemic justify a different approach. The reality is that the pandemic caused widespread economic hardships, and I must take this into account. Without condoning the respondents' non-payment, the current circumstances persuade me that it is in the interest of justice and fairness to grant the respondents additional time to settle the arrear levies. It is, therefore, my finding that it would be reasonable to make an order that the respondents must pay off the arrears in instalments of R3 000,00 per month.
45. Therefore, the relief sought in prayer (4) is refused.

Prayer (5)

46. The relief sought in prayer (5) is for an order that payments must continue until all outstanding amounts have been settled in full.
47. It seems the applicant wants an order that the respondents must continue making payments of the normal ancillary levies whilst also paying the outstanding amount. It is correct to say that the respondents must keep paying the monthly levies, whilst also paying the outstanding amount. Paying off the arrears amount does not entitle the respondent to stop paying the normal levies, as such levies are payable monthly as per clause 6.4 of the MOI of the association.

48. However, as I have stated in 41 and 42 above, the CSOS Act does not empower an adjudicator to grant an order for payment of levies that have not yet become due. As such an adjudicator does not have jurisdiction to grant the relief sought in prayer (5).

49. Therefore, the relief sought in prayer (5) is refused.

COSTS

50. No order as to costs.

ADJUDICATION ORDER

51. In the circumstances the following order is made:

- (a) The relief sought in prayer (1), (3), (4), and (5) is refused;
- (b) An order is granted against the respondents in the amount of R34 483,16 plus interest at the rate of 1% per month compounded monthly and capitalised;
- (c) The respondents are jointly and severally liable for the amount of R34 483,16 the one paying the other to be absolved;
- (d) The respondents are ordered to pay off the amount of R34 483,16, in monthly instalments of R3 000.00 until the amount is paid in full;
- (e) The first payment of R3 000.00 must be made on or before 31 August 2023, and all subsequent payments must be made on or before the last day of each succeeding month;
- (f) Should the respondents fail to pay any instalment due to the applicant on the due date as per paragraph (d) and (e) above, then the full outstanding balance shall become immediately due and payable;
- (g) This order does not absolve the respondent from liability to pay any of the normal monthly levy and ancillary payments that may be payable to the Blue Saddle Ranches Equestrian Estate homeowners' association.

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 ON THIS 28th DAY OF JULY 2023



ADJUDICATOR