



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

Ref: CSOS 674/GP/23

IN THE MATTER BETWEEN

DANIEL GASELA MAGAGULA

APPLICANT

and

**THE TRUSTEES OF THE KEMPTONIAN BODY
CORPORATE**

RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:
 - Section 39(7)(a)** In respect of general and other issues — (a) an order declaring that the applicant has been wrongfully denied access to information or documents and requiring the association to make such information or documents available within a prescribed time.
 - Section 39(4)(c)(ii)** in respect of meetings (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association (ii) is invalid;

- Date Adjudication conducted:

16 AUGUST 2023

- Name of the Adjudicator:
AJ ANDREAS

- Order:

The relief sought by the Applicant insofar as it relates to prayer (a) is dismissed.

The Applicant seeks an order in the following terms;

- (a) That a resolution purportedly passed at a meeting of the Executive Committee, was void or is invalid;
- (b) That the Applicant has been wrongfully denied access to information or documents and directing the Respondents to make such information available within a specified time (Trustees Resolution relating to the termination of the security company).

The relief sought by the Applicant against the Respondents in respect of prayer (a) is dismissed.

The Respondents are hereby directed to provide the Applicant with the Trustees resolution relating to the termination of the erstwhile security company, within 10 (Ten) days upon receipt of this order, as provided for in Section 39 (7) (a) of the CSOS Act.

No order is made as to costs.

INTRODUCTION

1. The Applicant is **DANIEL GASELA MAGAGULA**, the registered owner of unit number 17, The Kemptonian, 1 Casuarina Street, Kempton Park, Johannesburg, Gauteng Province.
2. The Respondents are **THE TRUSTEES OF THE KEMPTONIAN 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".
3. A letter requesting final submissions was sent to the parties on the 14th 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(7)(a) In respect of general and other issues.
Section 39(4)(c)(ii) in respect of meetings.
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 16th of August 2023 and an order is now determined.

PRELIMINARY ISSUES

7. The Applicant raised the following points in limine (in dispute).
8. That he objects to the Managing Agent’s legal representation to the trustees in this matter for the following reasons:
9. That the management agreement between The Kemptonian Body Corporate and the Managing Agent, Oosthuysen Attorneys Inc t/a OPROPSA Attorneys was terminated on the 31st of May 2023, pursuant to an Adjudication Order with reference number CSOS8211/GP/22.
10. According to the Applicant they are no longer part of the scheme and, therefore, they are no longer part of the scheme and, therefore, not part of this particular matter.
11. The Applicant further submitted that in terms of the Community Schemes Ombud Service Act, 2011, "dispute" means a dispute regarding 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. The Applicant stated that Mr. Oosthuysen from the Managing Agent, Oosthuysen Attorneys Inc t/a OPROPSA Attorneys is an attorney by profession, and that there will be an unfair advantage provided to the Trustees of Scheme in this matter if he is permitted to represent them.
13. The Applicant further stated that parties were not entitled to legal representation in terms of section 52 of the Community Schemes Ombud Service Act, no 9 of 2011, and paragraph 1.6 of your Notice to affected persons or association in terms of section 43 of the community schemes ombud service Act, no 9 of 2011.
14. According to the Applicant he is one of the members of the body corporate who supported the direction given at the AGM held on 10th December 2022 for the management agreement between The Kemptonian Body Corporate and the Managing Agent to be cancelled and will as a result be prejudiced since Mr Oosthuysen will be unable to represent him.

RESPONDENT'S RESPONSE

15. The Respondent submitted that on the 26th of May 2023 the majority of trustees resolved that Riaan Oosthuysen of OPROPSA Attorneys act on behalf of the Kemptonian Body Corporate in this matter as well as any other CSOS matter.
16. The Respondent in support of their submission attached a copy of the written resolution which was marked as "POA CSOS MATTERS".
17. The above resolution was further signed by four Trustees and dated the 26th of May 2023.

DETERMINATION OF THE POINTS *IN LIMINE*

18. Section 52 of the Community Schemes Ombud Service Act 9 of 2011 provides that:
"The Applicant and any other relevant person are not entitled to legal representation during the adjudication process unless: (a) The adjudicator and all other parties consent; or (b) the adjudicator after considering- (i) the nature of the questions of law

raised by the dispute; (ii) the relative complexity and importance of the dispute; (iii) the comparative ability of the parties to represent themselves in the adjudication concludes that it would be unreasonable to expect the party to deal with the adjudication without legal representation.”

19. In making a determination on whether to afford the Applicant the right to legal representation as provided for in section 52 of the CSOS Act, I take cognisance of the fact that the matter is of substantial importance to the parties, that the legal issue is complex, as well as the potential prejudice to the Applicant.

20. It is trite that any administrative body should be cautious not to grant legal representation as it may effectively close the door on a litigant. Moreover, not to grant legal representation would prevent the matter from being properly ventilated and goes against the *audi alteram partem* rule.

21. Accordingly, it is my finding that it is in the interests of justice to permit the Applicant legal representation.

RELEVANT STATUTORY PROVISIONS

22. 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".

23. 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”.

24. 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”.

25. In terms of Section 50-

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

26. 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.

27. 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 12th of July 2023.

SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

28. The Applicant submitted that the Respondents had alleged that he had ceased to be a Trustees on the 6th of February 2023 due to his alleged failure to pay his levies and after judgement was obtained against him.

29. The Applicant further submitted that this was in fact incorrect, since the matter is sub-judice on (CSOS 10277/GP/22), and he is therefore still a Trustee pending the outcome of the matter.

30. According to the Applicant the managing agent and the Trustees have unlawfully excluded the Applicant from attending the Trustees meeting as well as the decision to appoint a security company, and that the Respondents are therefore in breach of MR11 and MR14(4), amongst other provisions.
31. The Applicant submitted that there was no signed contract in place with the irregularly appointed security company, and that previous security company was costing the body corporate only R16800.00 per month.
32. However, the recently appointed security company is R12099.99 more expensive than the previous company i.e. (R28899.99 – R16800) but the service and the number of guards are the same; the only difference being according to the Applicant is the illegally installed cameras by this company.
33. The Applicant submitted that no Trustees meeting was called for or held on the 31st of March 2023 nor was a notice sent to each Trustee containing the text of any proposed resolutions and requesting the Trustees to sign the resolution, which signatures should have been received by the body corporate before expiry of the closing date specified in the notice in terms of MR14(4)(a) and (b).
34. According to the Applicant there was no budget approved by an AGM to appoint a new security company. Trustees further never sourced any quotations for new Security Companies before appointing a new security company.
35. The Applicant further submitted that there was no Trustee meeting held where the security companies' proposals were considered, and the new security company appointed and therefore also no minutes for such decision.

Relief sought by the Applicant:

- (a) That a resolution purportedly passed at a meeting of the Executive Committee, was void or is invalid;
- (b) That the Applicant has been wrongfully denied access to information or documents and directing the Respondents to make such information available within a specified time (Trustees Resolution relating to the termination of the security company).

Respondents' Submissions

RIAAAN OOSTHUYSEN (ON BEHALF OF THE RESPONDENTS)

36. The Respondents submitted that on the 26th of May 2023 the majority of trustees resolved that Riaan Oosthuysen of OPROPSA Attorneys act on behalf of the Kemptonian Body Corporate in this matter as well as any other CSOS matter.
37. The Respondents further submitted that the Body Corporate had advised all owners that the Applicant had ceased to be a Trustee on the 6th of February 2023 due to his failure to pay his levies subsequent to court judgements obtained against him.
38. However, according to the Respondents the Applicant launched a CSOS application under CSOS 10277/GP/22 that the resolution that the trustees took to replace him as a trustee was void or invalid.
39. The Respondents submitted that the CSOS dismissed the application on the 16th of May 2023, and therefore confirmed that the Applicant ceased to be a Trustee since February 2023.
40. According to the Respondents the Applicant stated in his application that “As a trustee I was unfairly excluded from this decision”, while the Applicant was no longer a Trustee when the Trustees made the decision.
41. The Applicant submitted that in terms of Section 4(a) read with Section 7(1) of the STSMA the appointment of any agent MUST be performed or exercised by the Trustees. No directions were imposed by owners at any general meeting with regards to the termination or appointment of security services by the trustees.
42. As a result, on the 3rd of April 2023 the Trustees informed the managing agent that the trustees had resolved on the 31st of March 2023 that the services of Raisei Security were to be terminated, and that FBI Security was to be appointed as the new security company.
43. According to the Respondents the resolution was further reduced to writing.
44. The resolution was further reduced to writing. A copy of the written resolution was attached marked as “Resolution appt FBI “.
45. According to the Respondents the Trustees obtained numerous quotations for a new Security Company before appointing FBI as the new security company.

46. The Respondents submitted that after considering all relevant information the trustees in terms of Section 4(a) of the STSMA considered it fit to appoint FBI security.

Relief sought by the Respondents.

47. That the relief sought by the Applicant should be dismissed.

EVALUATION & FINDING

48. I have perused the parties' written submissions.

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

50. 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.

51. The relief sought by the Applicant is for an order that the resolution purportedly passed at a meeting of the Executive Committee, was void or is invalid, and that the Applicant has been wrongfully denied access to information or documents and directing the Respondents to make such information available within a specified time (Trustees Resolution relating to the termination of the security company).

52. To enable the writer to make a finding relating to the relief sought by the Applicant against the Respondents, it is prudent to establish whether there is a lawful or alternatively a reasonable basis on which the relief prayed for by the Applicant may be granted.

53. It is evident from the submissions made by both the Applicant and the Respondents, that the main thrust of the Applicant's complaint relates to the resolution by the Respondents to appoint a new Security company for the body corporate.

54. **Prescribed Management Rule (9) Trustee Meetings and Decisions** makes provision for the following; General Powers and duties 9. The Trustees must –
- (a) meet to carry out the body corporate’s business, adjourn and otherwise regulate their meetings as they think fit, subject to the provisions of the Act, these rules, and the common law of meetings;
 - (b) exercise the body corporate’s powers and functions assigned and delegated to them in terms of section 7 (1) of the Act in accordance with resolutions taken at general meetings and at meetings of trustees;
 - (c) apply the body corporate’s funds in accordance with budgets approved by members in general meetings;
 - (d) **appoint any agent or employee** in terms of section 4 (a) of the Act in terms of a duly signed written contract: **(the writer’s emphasis)**
55. Section 4(a) of the STSMA under heading **POWERS OF THE BODIES CORPORATE** provides as follows, “The Body Corporate may exercise the powers conferred upon it by or under this Act or the rules, and such powers include the power (a) to appoint such agent and employees as the body corporate may consider fit”.
56. Section 7(1) of the STSMA under the heading **TRUSTEES OF THE BODY CORPORATE**, states that, “The functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the **Trustees of the Body Corporate holding office in terms of the rules. (My own emphasis)**
57. It was submitted by the Respondents, that there were no limitations or directions given to the elected Trustees by the members of the body corporate, which was not disputed by the Applicant.
58. The submission by the Applicant that he is still a Trustee pending the finalization of the dispute referred to the CSOS with reference number 10277/GP/22, cannot be supported.
59. The Adjudicator in an order dated the 22nd of May 2023 made the following finding relating to the status of the Applicant as a Trustee, “The Respondents have provided me with an issued default judgment between the Applicant and the scheme, by

Kempton Park Magistrate's court under case number 7251/2022 and stamped on 23 January 2023. In such judgement, prayers 2,3 and 4 were granted by the court, and same were for payment of an amount of R12 330.21, with interest and well as costs. The order is silent in terms of when exactly such amount is payable. However, no evidence has been brought before that the Applicant has complied with order, considering the date of the order. As a result, it is my view that the Applicant has not complied with such order. It is therefore my view that, in light of the court judgment granted, the Respondents did not act in contravention of the PMR 6(4) in taking a resolution to **remove the Applicant from office. (My own emphasis)**

60. Accordingly, it is the finding of the adjudicator that the Trustees have not acted outside of their powers as conferred on them by the Act nor have they failed in their fiduciary duties nor have they been wilfully negligent in the exercise of their fiduciary duties.

61. There is nothing before the Adjudicator to prove that the Trustees have not acted in the best interests of the scheme.

62. Accordingly, the relief sought by the Applicant in respect of prayer (a) which relates to a resolution passed at a meeting of Trustees, is dismissed.

63. Having dismissed the relief sought by the Applicant in respect of prayer (a), I now turn my attention to the relief sought by the Applicant in respect of prayer (b), which is that the Applicant has been wrongfully denied access to information or documents and directing the Respondents to make such information available within a specified time (Trustees Resolution relating to the termination of the security company).

64. The Applicant submitted that he sought an order as per the provisions of section 39(7) (a) that the Respondents be ordered to provide him with a copy of the Trustees resolution relating to the termination of the erstwhile security company.

65. Section 39(7)(a) of the CSOS Act makes provision for the following competent order to be handed down by an Adjudicator "(a) an order declaring that the applicant has been wrongfully denied access to information or documents and requiring the association to make such information or documents available within a specified time".

66. Regulation 27(3)(k) of the STSMA, states that, “The Body Corporate may obtain and keep copies of all correspondence sent or received by the body corporate and trustees”.
67. Regulation 27(4) provides that, “On receiving a written request, **the body corporate must make** the records and documents referred to in this rule available for inspection by and provides copies of them to a member”. **(My own emphasis)**
68. Regulation 27(5) states that, “The body corporate must comply with a request for inspection or copying under this rule within 10 days unless the request is in respect of the rules, in which case the body corporate must the request within five days”.
69. It is evident from the above provisions of the STSMA more specifically its regulations, that there is an obligation placed on the Body Corporate to keep records of information and make same available to members on request within a specified period.
70. It is the Adjudicators finding that the Applicant is lawfully entitled to the information requested, as provided for in Section 39(7)(a) of the CSOS Act.
71. The Respondents are hereby directed to provide the Applicant with the Trustees resolution relating to the termination of the erstwhile security company, within 10 (ten) days upon receipt of this order, as provided for in Section 39 (7) (a) of the CSOS Act.

COSTS

72. There is no order as to costs.

ADJUDICATION ORDER

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

- (a) The relief sought by the Applicant against the Respondents in respect of prayer (a) is dismissed.

(b) The Respondents are hereby directed to provide the Applicant with the Trustees resolution relating to the termination of the erstwhile security company, within 10 (Ten) days upon receipt of this order, as provided for in Section 39 (7) (a) of the CSOS Act.

(c) No order is made as to costs.

RIGHT OF APPEAL

74. 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 18TH DAY OF AUGUST 2023.



**AJ ANDREAS
ADJUDICATOR**