



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

Ref: CSOS 123/GP/23

IN THE MATTER BETWEEN

**DIRECTORS OF ANTALYA
HOMEOWNERS ASSOCIATION**
(Registration No: 2005/1032651/08)

Applicant

and

MOLOTO MERAPE
(Owner unit 2)

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

Relief applied for in terms of the Community Schemes Ombud Services Act (“the CSOS Act”):

Section 39(2)) In respect of behavioural issues— (a) an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way.

Date Adjudication conducted:

12 JULY 2023

Name of the Adjudicator:

KAMOGELO MAPUTLA

Order:

- (a) The application succeeds.
- (b) The Respondent is ordered to refrain from causing within 5 days from the date of this order being issued.
- (c) No order is made as to costs.

INTRODUCTION

1. The Applicants are **DIRECTORS OF ANTALYA HOMEOWNERS ASSOCIATION (“the Association”)**, as defined in section 1 of the Companies Act¹. The Association is a community scheme as defined in the CSOS Act, duly registered and incorporated in terms of the company laws of South Africa, bearing registration number 2005/1032651/08, with principal address situated at 49 Cromartie Road, Hurlingham, Johannesburg, Gauteng Province.
2. The Respondent is **MS. MERAPE MOLOTO**, the registered owner as defined in the section 1 of CSOS Act of unit 2, situated at 49 Cromartie Road, Hurlingham, Johannesburg, Gauteng Province.
3. In terms of clause 5.9 of the CSOS dispute resolution practice directive dated **1 August 2018**, dealing with applications states that: “*Where the applicant is a community scheme, a copy of a resolution by Executive Committee of the scheme **must** be attached to the application authorising the lodgement of the application*”. [Own bolding and underlining]
4. On **22 March 2023**, the managing agent was favoured with a resolution in compliance with the abovementioned clause, thus the Applicant is duly authorised to bring this application calling for determination.
5. This is an application for dispute resolution in terms of section 38 of the CSOS Act. The application was made in the prescribed form and lodged with the

¹ Act 71 of 2008.

Community Schemes Ombud Service (CSOS) by way of email on **30 March 2023**.

6. The Applicant predicates this application on the basis of continued nuisance caused by the Respondent.
7. The Applicant is seeking relief in terms of section 39 of the CSOS Act, in respect of section 39(2)(a) in respect of behavioral issues.
8. Accordingly on **30 May 2023**, the dispute was referred directly to Adjudication in terms of section 48 of the CSOS Act read with Clause 21.5.7 of the Practice Directive on Dispute Resolution.
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 on **8 June 2023**, with a due date of **14 June 2023**. The adjudication was conducted on **12 July 2023** and an order is now determined.
10. The prescribed fee for adjudication was not paid owing to clause 3 of the amended practice directive dated **2 December 2021**.

PRELIMINARY ISSUES

11. None.

RELEVANT STATUTORY PROVISIONS

12. 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".
- **"managing agent"** as "any person who provides management services to a community scheme for reward.
- **"owner"** as "a person who has a legally secured right to possession and occupation of a private area, including but not limited to the owner of a sectional title unit, the holder of shares in a share block company and the holder of an occupation right in a housing scheme for retired persons."
- **"practice directive"** as "a practice directive issued in terms of section 36".

13. Section 38 of the CSOS Act provides that-

"Any person may make an application if such person is a party to or affected materially by a dispute".

14. Section 45(1) of the CSOS Act provides that-

"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".

15. Section 47 of the CSOS Act provides that-

"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".

16. Section 48 (1) of the CSOS Act provides that-

"If the conciliation contemplated in section 47 fails, the Ombud must refer the application together with any submissions and responses thereto to an adjudicator".

17. In terms of Section 50 of the CSOS Act provides that-

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

18. Section 51 of the CSOS Act provides 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”.

19. Section 54(4) of the CSOS Act provides that-
- “The order must set the time- when the order takes effect; or within which the order must be complied with.”

SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

20. The Applicant avers that on **2 January 2023**, the Chairman of the Association received a call from the owner of unit 1, complaining about rowdy behaviour, noise disturbances, verbal abuse and threats as well as foul language being used and made against him by the Respondent.
21. It must be recorded that the neighbouring units as well as a few of the Directors, security guards and other members of the Association, have first-hand experience with unit 2’s constant noise disturbances, which includes but not limited to, being disorderly, parties being hosted in the unit, loud music being played from the unit at all hours of the day and night – all the days of the week; shouting emanating from the unit; verbal abuse and foul language used when unit 2 is approached to resolve her unruly behaviour.

Relief sought by the Applicant:

22. The Applicant seeks an order in the following terms:
- a) The Respondent must adhere to the Conduct Rules.

Respondent's Submissions

23. The Respondent has not favoured the Adjudicator with any version.

Relief sought by the Respondents.

24. None.

EVALUATION & FINDING

25. In the absence of further documents, and in the interest of time and progress the adjudicator adjudicates on this application on the undisputed facts.
26. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
27. 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.
28. Section 38(3)(a) of the CSOS Act specifically states that the application to CSOS for dispute resolution must include statements that set out the relief sought by the Applicant, **and in addition, the relief sought must be within the scope of one or more of the prayers for the relief contemplated in section 39 of the Act.**
29. From the facts, the Applicant has complied with its duty to exhaust all internal remedies to no avail from the Respondent. The Adjudicator is satisfied that there has been compliance with clause 9.2 of the CSOS dispute resolution practice directive dated **1 August 2018**, dealing with exhausting internal dispute resolution.

30. Notwithstanding the fact that Applicant has approached CSOS for intervention which is the correct process to follow provided, when dealing with scheme issues, one is minded of case law which asserts confidence in this position. The Court in *Wingate Body Corporate v Pamba & Another*², the Court eloquently stated that: “[13] *In the Heathrow matter, the Court set out the position thus: ‘by establishing the CSOS whose personnel is required to consist of suitably qualified adjudicators, the legislature had intended that the CSOS be the primary forum for the adjudication and resolution of disputes in matters such as the present’. The court went on to state that: ‘a court is not only entitled to decline to entertain such matters as a forum of first instance, but may in fact be obliged to do so, save in exceptional circumstances. Such matters will not be matters which are properly before the High Court, and on the strength of the principle in Standard Credit (and a number of courts thereafter, including the Constitutional Court in Agriwire), it is accordingly entitled to decline to hear them, even if no abuse of process is involved.’*”
31. As regards the Applicant’s relief under section 39(2)(a) of the CSOS Act, the following observations are made.
32. At the outset it is apposite to mention that the Association does not have separate Conduct Rules as it is only governed by their Memorandum of Incorporation as well as the Company’s Act.
33. In terms of the Blacks Law Dictionary (7th Edition), the word **nuisance** is defined as: “1. A condition or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property. • Liability might or might not arise from the condition or situation, formerly also termed annoyance. 2. Loosely, an act or failure to act resulting in an interference with the use or enjoyment of property. • In this sense, the term denotes the action causing the interference, rather than the resulting condition.”
34. For instance, on the reading of the first wording a '**nuisance**' is a state of affairs. To conduct a nuisance is a tort. In torts, the word 'nuisance' has had an

² [2022] ZAGPPHC 46 (21 January 2022) @ para 13.

extremely elastic meaning; sometimes it is little more than a pejorative term, a weasel word used as a substitute for reasoning. The general distinction between a nuisance and a trespass is that the trespass flows from a physical invasion and the nuisance does not.

35. It is trite that a fact is the event that has led to litigation, whilst the law refers to actual rules that decide how the facts will be viewed by the trier of facts. If the facts of a case fall within the law or regulation, it is a question of fact that calls for determination. However, interpretation and the scope of the law on the other hand will be a question of law that calls for determination.
36. It is rather unfortunate that the Association has an idea of what nuisance they wish to regulate, however, they have not formulated any Conduct Rules to address concerns like nuisance and any unneighbourly behaviour. Conceptually the Applicant would like to see the specific wording in the Conduct Rules but have not taken any positive steps to prepare such Conduct Rules since the formulation of the Association. These words from the suggestions in the submissions are: “*rowdy behaviour, noise disturbances, verbal abuse, threatening comments, foul language, disorderly parties being hosted, loud music being played from the unit at all hours of the day and night – all the days of the week.*”
37. Regard must be had to the Supreme Court of Appeal decision of *Mount Edgecombe Country Club Estate Management Association Two (RF) NPC v Singh and Others*³, where the court held that: “***When the respondents chose to purchase property within the estate and became members of the Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature. The conduct rules, and the restrictions imposed by them, are private ones, entered into voluntarily when an owner elects to buy property within the estate***”. [Own bolding]
38. In *Wright v Cockin*⁴, when dealing with nuisance the Court remarked as follows: “*In my view, however, the issue is a straightforward one. This is not, in my view,*

³ (32/2018) [2019] ZASCA 30 (28 MARCH 2019) at para 19.

⁴ [2004 \(4\) SA 207](#) (E) at 217G-I.

dealing as we are with an alleged nuisance emanating from respondents' property, the type of case where the Court is required to render a value judgment as to what society's notion of justice demands. A landowner has an intrinsic right to the reasonable enjoyment of his land. If his neighbour through his positive actions unjustifiably interferes with that right thereby causing him physical or patrimonial harm then his actions are wrongful."

39. In light of the foregoing, the applicant has made out a proper case for the relief sought.

COSTS

40. No order is made as to costs.

ADJUDICATION ORDER

41. In the circumstances, the following order is made:
- a) The application succeeds.
 - b) The Respondent is ordered to refrain from causing nuisance within 5 days from the date of this order being issued.
 - c) No order is made as to costs.

RIGHT OF APPEAL

42. 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 12TH DAY OF JULY 2023.

KAMOGELO MAPUTLA

ADJUDICATOR

(Not signed due to electronic transmission)