



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

Ref: CSOS 6008/KZN/22

IN THE MATTER BETWEEN

EMMANUEL BARNABAS

Applicant

and

DIRECTORS OF CHARTHAM FLATS BODY CORPORATE Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:
- Section 39(1)(c) In respect of financial issues.
- 39(6)(a) In respect of works pertaining to private areas and common areas.
- Date Adjudication conducted 22 December 2022.
- Name of the Adjudicator: MISS ASHA SEWPERSAD.

Order:

- The relief sought by the Applicant in terms of Section 39(1)(c) is refused.
- The relief sought by the Applicant in terms of Section 39(6)(a) is granted.
- The Respondent is ordered to attend to repair of the consequential damages to unit 18 as per the report from Spectrum within 60 days of delivery of this Order.

- No order as to costs.

INTRODUCTION

1. The Applicant is the holder of a right to use and copy unit 18 Chartham Flats Share Block (Pty)Ltd, which is situated at 180 Brand Road, Glenwood, Durban, Kwazulu-Natal.
2. The Respondent is the Directors of the Chartham Flats Share Block, (Pty)Ltd, a legal entity duly incorporated in terms of the Share Block Control Act 59 of 1980, which is situated at 180 Brand Road, Glenwood, Durban, Kwazulu-Natal.
3. The community scheme Chartham Flats Share Block (Pty)Ltd, a 'community scheme' as defined in s1 of the Community Schemes Ombud Service Act 9 of 2011("the CSOS Act") situated at 180 Brand Road, Glenwood, Durban, Kwazulu-Natal. The scheme is wholly residential.
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-

s39 (1) In respect of financial issues

- (c) An order declaring that a contribution levied on owners or occupiers, or the way it is to be paid is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way.

S39(6) In respect of works pertaining to private areas and common areas

- (a) An order requiring the association to have repairs and maintenance carried out.

6. The 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 virtually or on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator.” The parties were invited to submit final written submissions prior to the determination of this order. The adjudication was conducted on 22 December 2022 and an order is now determined.

PRELIMINARY ISSUES

7. No preliminary issues were raised/ “(legal representation, points in limine).”

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. If the dispute has not been resolved through conciliation, the matter may be referred to an Adjudicator 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 7 November 2022.

SUMMARY OF RELEVANT EVIDENCE

16. Applicant's submissions

- 16.1 He complained to the Director and the managing agent for the past several months about the inside of flat 18 walls which are cracked and the paint flaking and falling off the walls.
- 16.2. The window on the side is corroded and rusted and the frames is broken, and the affected area is the main bedroom, porch and lounge.
- 16.3. MR Clinton from Tricor sent him an email on 22 June 2022 informing that the damages caused to flat 18 is through the water ingress and lack of maintenance on the building

Relief sought

- 17.1. The damages inside flat 18 to be repaired.
- 17.2. He is not prepared to pay the special levy as it is unreasonable.

Respondent's submissions

- 18.1. The shareholder is fully aware of the finances on the scheme as they received all audited financial statements and has attended previous annual general meetings where the financials were tabled and approved.
- 18.2. For the last three years the scheme has set aside R30 000-00 for annual maintenance and the annual maintenance for the last three years was R16 000-00 for 2020, R16 000-00 for 2021 and R29 000-00 for 2022.
- 18.3. The shareholder is in receipt of the breakdown of the annual expenditure and any funds not used as part of the budget remains in the company account and is accumulated over time to try and assist with major projects.
- 18.4. The company managed to save approximately R70 000-00 which was agreed at the last AGM to be used for some approved maintenance.
- 18.5. As quotes for the refurbishment were received and tabled at the AGM, the shareholders agreed that the levies will need to increase to cater for the standard increase in administrative costs and the refurbishment projects have in the past raised finances through a special levy as the last time the scheme had any major maintenance to the exterior was at least 8 years ago.

- 18.6. Clause 4 of the Use Agreement deals with maintenance regarding maintenance to parts of the building which the shareholder has exclusive use and the use of windows would fall within that category for share block companies, and it is only in sectional titles schemes where the cost will be 50/50 for maintenance.

Relief sought by the Respondent

19. None.

EVALUATION & FINDING

20. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
21. The general rule is that only evidence, which is relevant, should be considered. Relevance is determined with reference to the issues in dispute. 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.
22. Clause 3.2. of the Agreement of Use and Occupation states as follows:
"Once in every calendar year, or more frequently if circumstances warrant this, the Board of Directors of the Company shall cause an estimate to be made of all the expenses likely to arise during the ensuing year in connection with the upkeep, operation, cleaning and services, care and maintenance, management and control of the Company's property including the payment of any Municipal and Water rates, and any charges by these or other authorities for the supply of services of any kind to the property, the payment of salaries and wages to employees of the Company, and the creation of such reserves or funds as the Directors may consider necessary to cover periodical maintenance of the exterior of the property. The holder shall contribute to such levies in instalments payable each month in advance, his pro rata shares which shall be decided by the Directors on such basis as they consider fair and equitable. This basis shall not be varying save with the consent of the General Meeting of shareholders of which not less than FOURTEEN (14) days' notice in writing has been given to owners of all share blocks, and a resolution varying the percentage has been passed by not less than two-thirds of those present and voting at the meeting, either in person or by proxy."

23. Clause 4.1. of the Agreement of Use and Occupation states as follows:

“The Company undertakes at all times to keep the Company’s property (other than such portion thereof as shall be reserved for the exclusive occupation and/or use of any shareholders of the Company) in good order and condition and the holder agrees to contribute to the cost thereof of such amounts as may from time to time be payable by him in terms of the agreement.”

24. The minutes of the AGM held on 6 September 2022 states as follows:

“SPECIAL BUSSINESS

The board of directors advised that Chartham is in desperate need of some maintenance as the last time the bricks and painting was sealed and maintained was more than 7 years ago. The directors proceeded to obtain quotations for the full sealing and painting of the share block company exterior. The work urgently needs to be undertaken as this is now causing water ingress in some units which is causing damages.

Quotes were obtained from various contractors who are named below:

Coating Worx – R424 000
 Dreamcoat – R170 000
 Spectrum – R140 000
 Dafco – R553 000 (plaster all the bricks and then paint)

The shareholders agreed that the work has to be undertaken however the finance is the main issue as this must still be raised. Over and above this, the issue of the levy increases for the standard running costs must be implemented.

The Shareholders agreed that Spectrum should be awarded the contract as they were used previously, and they further offer the best price.

The shareholders were further reminded that over and above the R140 000 required for the painting and sealing, wash lines need to be revamped and some plumbing addressed. The quotes for the washing lines amount to R10 000 and the quote for the plumbing amounts to R20 000. This means that R170 000 will be needed to address all 3 items

In terms of the finances, after some debate on the matter, it was unanimously agreed that the following takes place:

- 1) **An increase of 6% be implemented in the levies and this effective from the 1st of November 2022. This increase is approved for the next 3 years to be done annually.**
- 2) **A special levy will be raised of R180 000 amongst the shareholders. This will be payable upfront or in 6 equal instalments monthly.**

Those Shareholders who are wanting to pay their special levy upfront can do so as this will assist in having the project started and the relevant repairs undertaken.

It was agreed that Spectrum supply a report on the damages of unit 18 which is currently experiencing damages due to water ingress from the exterior which is a company responsibility to maintain. This will then finalise the matter as the report will be acted upon. “

25. Notwithstanding the provisions of the clauses contained in the Agreement of Use and Occupation discussed above, it was resolved at the AGM that the contractor appointed, i.e., Spectrum supply a report on the damages in unit 18 due to water ingress from the exterior which is a company responsibility and this would finalise the matter as the report will be acted upon and a special levy of R180 000-00 to be paid equally by the 11 shareholders was unanimously agreed.
26. Whilst the Applicant believes that the imposition of a special levy is unreasonable , based on the Respondent's submissions, the imposition of the special levy is necessary to enable the commencement of the renovation project mentioned above. The special levy is usually imposed for unforeseen expenses for which provision was not made in the annual budget. Based on the evidence before me, the special levy is necessary in the circumstances.
26. In the circumstances the relief sought by the Applicant in terms of Section 39(1) (c) is refused and relief sought in terms of Section 39(6)(a) is granted.

COSTS

27. I make no order as to costs

ADJUDICATION ORDER

28. In the circumstances, I order as follows.
 - 28.1. The relief sought by the Applicant in terms of Section 39(1)(c) is refused.
 - 28.2. The relief sought by the Applicant in terms of Section 39(6)(a) is granted.
 - 28.3. The Respondent is ordered to attend to repair of the consequential damages to unit 18 as per the report from Spectrum within 60 days of delivery of this Order.

RIGHT OF APPEAL

29. 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 DURBAN ON THIS 22ND DAY OF DECEMBER 2022



ADJUDICATOR

ASHA SEWPERSAD