



**ADJUDICATION ORDER IN TERMS OF SECTION 53
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Ref: CSOS2031/GP/23

IN THE MATTER BETWEEN

ANDRESHA BALRAM

APPLICANT

and

TRUSTEES OF PEBBLE PARK 2 BODY CORPORATE

RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:
Section 39 (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”.
Section 39(1) In respect of financial issues— (e) “an order for the payment or re-payment of a contribution or any other amount.”
- Date Adjudication conducted:
10 OCTOBER 2023.

- Name of the Adjudicator:

N. FOCA.

- Order:

In the circumstances, the following order is made:

- (a) The relief sought by the Applicant against the Respondent in terms of section 39(6) (a) and 39(1) (e) of the CSOS Act, is misconceived.
- (b) The relief sought by the Applicant against the Respondent is dismissed in terms of **section 53(1) (a) of the CSOS Act**.
- (c) No order as to costs.

INTRODUCTION

1. The Applicant is **ANDRESHA BALRAM**, the registered owner of unit 001 Pebble Park 2, Stoneridge Drive, Greenstone Hill, Johannesburg, Gauteng Province.
2. The Respondent is the **TRUSTEES OF PEBBLE PARK 2 BODY CORPORATE**, which together are the persons who are elected as the executive organ of 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. 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.
4. The application seeking relief in terms of section 39 of the CSOS Act, is in respect of **Sections 39(6) (a)** in respect of works pertaining to private areas and common areas and **39(1) (e)** in respect of financial issues.
5. A letter requesting final submissions was sent to the parties confirming that due to the current situation regarding the Covid-19 pandemic, the CSOS is taking the appropriate precautions against the further spread of COVID-19 (Coronavirus) and is adjudicating disputes on documents submitted, without the need to meet parties face to face.

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”. Parties were requested to make written submissions. The adjudication was conducted on the 10th of October 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 direct referral to adjudication was done 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 **22nd of September 2023**.

SUMMARY OF RELEVANT EVIDENCE

Applicant's Submissions

16. The Applicant submitted that she had requested the Respondent to attend to the replacement of the two leaking corners in her gutter system, as she had obtained the report of the service provider who had recommended that two additional downpipes be installed to allow adequate drainage of water from the roof. **(In this regard copies of the quotation by the service provider as well as photographs of the gutters and the wall were attached to the application.)**
17. According to the Applicant, the Respondent has absolved itself from the responsibility of maintaining, repairing, and replacing the gutters as they claim that the gutters are not on the original sectional title plans, despite the gutters being a major capital item in any dwelling whether free-hold or sectional title.
18. The Applicant further submitted that the gutters are attached to the roof which is considered common property and is maintained by the body corporate, therefore according to the Applicant, the Respondent's rationale for not accepting responsibility for the gutters is unreasonable and unfounded.
19. According to the Applicant, the scheme's 10-year maintenance plan includes the gutters, but the Respondent is refusing to pay for the same, claiming that the members of the scheme had illegally install the gutters without body corporate approval.
20. The Applicant further submitted that the cost of maintaining, repair and replacing the gutters cannot be the members' responsibility, whilst the calculation of the 10-year maintenance reserve fund levy on items 5 and 6, includes the costs for the gutters. **(In substantiating the same, a copy of the scheme's 10-year maintenance plan was attached to the application.)**

Relief sought by the Applicant:

21. Wherefore the Applicant prays for an order in the following terms.

- (a) An order directing the Respondent to approve the installation of two additional gutter downpipes as per service provider's quotation submitted on the 28th of April 2022.
- (b) The Applicant further seeks an order directing the Respondent to re-imburse her an amount of R2,850.00 incurred for the replacement of two leaking corners of her gutters and sealing the rest of the other corners.

Respondent's Submissions

- 22. The Respondent submitted that, the Applicant paid for the gutter repairs to her own section without any agreement or undertaking by the Respondent and thereafter submitted a claim post repair.
- 23. According to the Respondent, on the 22nd of May 2023, the Applicant submitted communication to the Respondent wherein she recorded that her unit required additional downpipes, to which she was referred to the registered Exclusive Use Rights for her section where it is clearly recorded that all fittings erected in the exclusive use area shall be maintained by the owner. **(In this regard, the Respondent attached Annexure "C" which reads as follows: "All fittings and structures in the exclusive use area shall be maintained by the unit owner who shall be required to maintain these structures and fittings to the desired standards as determined by the Body Corporate from time to time. Upon failure by the owner to carry out a request to perform maintenance, the Body Corporate shall have the right to retract approval of such structure or fitting and enforce the removal of the same from the common property at the cost of the owner."**
- 24. The Respondent further submitted that on the 25th of May 2023, the Applicant submitted further correspondence informing the Respondent that she had paid for the required maintenance, to which a response was sent to her wherein she was advised that the works be placed on hold as the Body Corporate was conducting investigations into the subject of gutters.
- 25. The Respondent further submitted that it had no ability to ascertain if the works in question were the correct works or required – this notwithstanding that the works were within the Exclusive Use Area of the Applicant's section and that the obligation to maintain and or repair an Exclusive Use Area is that of a member who enjoys the use of the same.

26. In refuting the Applicant's claims regarding the scheme's 10-Year Maintenance Plan, the Respondent submitted that the Applicant has misunderstood the structure and application of the 10-Year Maintenance Plan.
27. The Respondent further submitted that whilst the scheme's approved 10-Year Maintenance Plan refers to the gutters, it does not require the Body Corporate to accumulate funds for future repair work or replacement of the gutters, rather it is a recommendation for provisions to be made for the repainting of the installations, as is carried out by the Body Corporate.

Relief sought by the Respondent.

28. No relief sought.

EVALUATION & FINDING

29. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
30. 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.
31. In prayers (a), the Applicant seeks an order directing the Respondent to approve the installation of two additional gutter downpipes as per service provider's quotation submitted on the 28th of April 2022.
32. To enable the writer to make a finding relating to the relief sought by the Applicant against the Respondent, 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.

33. Section **39 (6) (a) of the CSOS Act** makes provision for the following competent order to be handed down by an Adjudicator, (a) “an order requiring the association to have repairs and maintenance carried out”.
34. Section (3) (1) (a), of the Sectional Titles Schemes Management Act (STSMA) under the heading Functions of Bodies Corporate, provides as follows, A body corporate must perform the functions entrusted to it by or 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 annual operating costs— (i) for the repair, maintenance, management and administration of the common property (including reasonable provision for future maintenance and repairs)…”
35. Additional to the above, section 3(1) (b) of STSMA provides, (b) to establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister.”
36. The above provisions must be read in conjunction with sections 3.(1) (l) and (t) which provides, “to maintain all the common property and to keep it in a state of good and serviceable repair”, and (t) states that, “in general, to control, manage and administer the common property for the benefit of all owners”.
37. Common property is defined in the Act as the land included in the scheme as shown on a sectional plan, such parts of the building or buildings as are not included in a section as shown on a sectional plan as well as any land bought to extend the common property.
38. Examples of common property shall include amongst others the outer shell, wall window of the building that forms a boundary between a section and the common property, driveway, parking area, swimming pool, electric fence etc.
39. An owner’s duty to maintain is confined to a large extent to his or her section in terms of section 13(1) of the Sectional Titles Schemes Management Act (STSMA).
40. It is clear from the above provisions that the obligation to maintain common property is that of the Respondent, and the Applicant’s is only limited to her unit.

41. It is further evident from the same section that the authority to act on behalf of the scheme in respect of what the Applicant's dispute is about, is vested with the Respondent.
42. In addressing the Applicant's averments, the Respondent submitted that upon receiving the Applicant's request, the Applicant was advised to await the outcome of the scheme's investigation that would determine what maintenance is required in respect of the gutters.
43. It is therefore unreasonable for the Applicant to insist that approval must be granted despite the process put in place that would address not only her concerns but rather the scheme's common property as a whole, as the same would have to be done in accordance with the approved scheme's maintenance plan.
44. For all the reasons which have been set out above, I can find no justification for the relief sought in respect of the Applicant's prayers for relief in terms of section 39(6)(a) of the CSOS Act.
45. The Applicants prayers for relief against the Respondent is as a result misconceived and accordingly, is dismissed in terms of **section 53(1)(a) of the CSOS Act**.
46. In prayers (b) the Applicant seeks an order directing the Respondent to reimburse her for the costs incurred in replacing the corners of the gutters and sealing some which she did without obtaining the Respondent's approval.
47. It is my considered view that the same falls outside the scope of section 39 of the CSOS Act.
48. Readers are referred to the **Western Cape High Court's** decision of **Prag N.O and Another v Trustees for the time being of the Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body Corporate and Others (A260/2020) [2021] ZAWCHC 132 (16 July 2021)**, which held at paragraph (28) that, "If one considers the terms of the CSOS Act as a whole, and the kinds of matters in respect of which an adjudicator can make orders in terms of s39 of the Act, they either concern regulatory/governance issues, pertaining to the administration of a sectional title scheme, or behavioural issues, pertaining to the conduct of members of the scheme *inter se* (which commonly would cover so-called nuisance or neighbour disputes). **It was clearly not**

intended that the Ombud would have the power to adjudicate on delictual claims for damages, which involve weighty considerations pertaining to wrongfulness (which depend on prevailing societal norms and public policy) and fault, and the quantification and determination of the quantum of any damages which may have been sustained pursuant thereto, which are matters which are best left for judicial officers and Courts.” (my own emphasis)

49. Should any of the relief fall outside of the scope of the prayers of the relief as set out in section 39 of the Act as aforesaid, then the Adjudicator is not empowered to grant an order in terms of the Act.

50. The court further held at paragraph (29) that, “In addition, to allow the Trust to proceed in terms of s 39(6)(b)(ii) would allow it to claim delictual damages without showing any fault on the part of the body corporate, in circumstances where it was the one at fault, and where it was responsible for being unable to claim any compensation by way of an indemnification in terms of the scheme’s insurance policy. Had this been a delictual claim which required determination in a Court it would have been defeated on these grounds i.e., on the basis that it had not been shown that the body corporate had been at fault and that its conduct, as opposed to that of the Trust, had caused the loss which had been suffered. This too could never have been intended by the law-maker, **and to allow a claim in such circumstances would subvert the basis and principles of delictual claims for damages.**” (my emphasis)

51. It is the Adjudicators finding that the abovementioned High court decision supports the view that the relief sought by the Applicant in respect of the second part of her prayers, is not relief that would be competent for an Adjudicator to grant in terms of Section 39 of the CSOs Act.

52. 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.**

53. Should any of the relief fall outside of the scope of the prayers of the relief as set out in section 39 of the Act as aforesaid, then the Adjudicator is not empowered to grant an order in terms of the Act.

54. The Western Cape High Court in the case of **Trustees for the Time Being of the Avenues Body Corporate vs Shmaryahu and Another (A31/2018) [2018] ZAWCHC 54 2018 (4) SA 566 (WCC) (10 May 2018)** add paragraph [17], held that “the character of the various types of substantive relief that an Adjudicator is empowered to grant in terms of the Act appears from the provisions of Section 39”.

55. The Adjudicator is further not empowered in terms of the applicable legislative framework, to grant the relief as sought by the Applicant.

56. For all the reasons which have been set out above, I can find no justification for the relief sought in respect of the Applicant’s prayers for relief.

57. Accordingly, the Applicants prayers for relief against the Respondent is as a result misconceived and is, dismissed in terms of **section 53(1)(a) of the CSOS Act**.

COSTS

58. There is no order as to costs.

ADJUDICATION ORDER

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

- (a) The relief sought by the Applicant against the Respondent in terms of section 39(6) (a) and 39(1) (e), is misconceived.
- (b) The relief sought by the Applicant against the Respondent is dismissed in terms of **section 53(1) (a) of the CSOS Act**.
- (c) No order as to costs.

RIGHT OF APPEAL

60. 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 13TH DAY OF OCTOBER 2023.



**NO FOCA
ADJUDICATOR**

