



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

Ref: **CSOS-92/GP/23**

In the matter between:

**TEBOGO MOTSAI**

**APPLICANT**

**AND**

**THE EXECUTIVE COMMITTEE OF MUNYAKA  
HOMEOWNERS ASSOCIATION**

**FIRST RESPONDENT**

**ELGARU WATERFALL**

**SECOND RESPONDENT**

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**ADJUDICATION ORDER**

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**EXECUTIVE SUMMARY**

- Relief applied for in terms of the CSOS Act:

This is an application brought by the Applicant against the Respondent in terms of:

**Section 39 (7) (b) of the CSOS Act – any other order proposed by the Chief Ombud**

**That the Adjudicator make an order in the following terms:**

- 1.1. That the Applicant, being the registered owner of a unit at the Respondent scheme, be reinstated with access to as many visitors as other unit owners are on a daily basis.
- 1.2. A sanction be imposed on the Respondent for imposing the restriction on visitors.

- Date Adjudication conducted:  
19 December 2023.
- Name of the Adjudicator:  
Karen Bleijs.
- Order:  
Application Upheld.

## **INTRODUCTION**

1. The Applicant is **TEBOGO MOTSAI**, the registered owner of unit number 198 at the scheme, which is situated at Mia Drive, Waterfall City, Midrand, Johannesburg.
2. The Respondent is cited as “**THE EXECUTIVE COMMITTEE OF MUNYAKA HOMEOWNERS ASSOCIATION**” (“ the First Respondent”), being a community scheme as defined in the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act). .
3. The Second Respondent is **ELGARU WATERFALL** (“ the Second Respondent”), being the Managing Agent of the First Respondent, which office is situated at 1<sup>st</sup> Floor, Woodmead Office Park, Woodmead, Johannesburg.
4. This is an application for dispute resolution brought by the Applicant in terms of Section 38 of the Community Schemes Ombud Services Act No.9 of 2011. The

application was made in the prescribed form and lodged with the Gauteng Regional Ombud Office via Email.

5. After careful assessment of the application, the Community Schemes Ombud Service was of the opinion that the application warranted an intervention and requested the parties to furnish it with further written submissions on or before 17h30 on the 28<sup>th</sup> of July 2023.
6. The matter was referred to me on the 19<sup>th</sup> of December 2023 and the adjudication was conducted on the same day.

### **PRELIMINARY ISSUES**

7. No preliminary issues were raised by either party.

### **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

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. The CSOS Practice Directive No 2 of 2018, Part 5 clause 21.2. published on the 1<sup>st</sup> of August 2018 and signed by the Chief Ombud, permits the Ombud to refer a matter directly to adjudication if he or she considers the dispute inappropriate for conciliation.
16. The Practice Directive sets out some of the factors that the Ombud may consider in deciding whether a matter is not appropriate for conciliation and should be referred directly to adjudication and includes but is not limited to any aspect of urgency where an Applicant demonstrates that there is a current, genuine emergency requiring an urgent adjudication order with an issue or issues in dispute.

## **SUMMARY OF RELEVANT EVIDENCE**

### **Applicant's Submissions**

17. The Applicant's submission is summarised as follows:
  - 17.1. On the morning of 1 April 2023, the Applicant noticed that her app for access into the Respondent estate limits her to only 1 visitor per day.
  - 17.2. This follows communication from the estate manager on 31 March 2023 that visitor limit has been increased to 30 per unit per day following complaints on the limit of 5 codes per day which they implemented unilaterally without any communication.
  - 17.3. The Applicant contacted the estate manager on even date informing her that her app is limiting her to 1 visitor per day.
  - 17.4. At the time the Applicant was under the impression that this was a system error, but to her surprise, the estate manager informed her that her unit is under "access frustration". The Applicant contends that the limitation was a deliberate move on the Respondent's side.
  - 17.5. Ian, who is the Respondent's representative, and who attended the conciliation, is the one who informed the Respondent that the Applicant's

unit should remain under access frustration and refused to lift the block on her access to no more than 1 visitor per day.

**Relief sought by the Applicant:**

18. The Applicant seeks the following relief:

**Section 39 (7) (b) of the CSOS Act – any other order proposed by the Chief Ombud**

**That the Adjudicator make an order in the following terms:**

- 18.1. That the Applicant, being the registered owner of a unit at the Respondent scheme, be reinstated with access to as many visitors as other unit owners are on a daily basis.
- 18.2. That a sanction be imposed on the Respondent for imposing the restriction on visitors.

**Respondents' Submissions**

19. The Respondent's answer to the Applicant's Statement of Claim is summarised as follows:

- 19.1. Case number CSOS 9405/GP/23 is irrelevant to the present matter as it does not pertain to "Access Frustration" or other access control related issues, nor does it include any relief granted for such a petition. The Adjudication order for CSOS 9405/GP/23 was issued on the 29th of June 2023; however, the Applicant makes reference to this case in her current application.
- 19.2. The Applicant was informed by Estate Management that her personal access to the Estate and Unit remains unaffected and undisturbed, *while only Visitor access is subject to the imposed access frustration, as substantiated in ANNEXURE A.*
- 19.3. Notwithstanding that access frustration may impact an Owner's entry or exit to and from the Estate, it is expressly demonstrated in the extract

from the access control register in ANNEXURE B that the Applicant's access was neither frustrated nor affected in any manner.

- 19.4. The Members of the Residents Association Committee duly sanctioned the implementation of access frustration as a punitive measure against Units that have outstanding Levies. Dominique Botha of the Second Respondent has confirmed that access has never been “revoked” for Unit 1530. “The Applicant’s access to the Estate, amenities or the Unit has never been refused, nor is there any evidence that access has ever been withheld”.
- 19.3. She also stated: “ Access frustration is a sanction put in place to ensure owners adhere to the constitution, rules and end-user lease, the implementation of access frustration only decreases the number of visitor codes available a day, the owner and tenant has full access to the estate and amenities as normal.”

#### **Relief requested by the Respondent:**

20. Dismissal of claim.

#### **Applicant’s Reply:**

21. The Applicant replied to the Respondent’s Answer but changed the material facts of her claim and stated that the Respondent, on occasions, denies her access to the Respondent scheme and she must use the visitors’ entrance, as must her tenants.

However, the emailed correspondence that she received notifying her that she would be denied access to the scheme if she fell into arrears in respect of her levies is dated April 2023, whilst she approached the CSOS for this adjudication in July, and the relief is because of “access frustration” in respect of the number permitted entrance to the Respondent scheme per day as a result of the arrear levies owed by the Applicant.

#### **EVALUATION & FINDING**

22. I confirm having considered both the Applicant and the Respondent's respective submissions.
23. The general rule in adjudicating a dispute 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 *preponderance of probabilities*.
24. This means that once all the evidence has been tendered, it must be weighed up and determined whether the Applicant's version is probable.
25. It involves findings of fact based on an assessment of credibility and probabilities.
26. The general rule is that only evidence, which is relevant, should be considered.
27. Relevance is determined with reference to the issue or issues in dispute.
28. The degree or extent of proof required is a balance of probabilities.
29. This means that once all the evidence has been tendered, it must be weighed up by the Adjudicator in order to determine whether the Applicant has discharged the burden of proving his case on a balance of probabilities.
30. At this point it is incumbent on me to refer to a number of Court decisions that clearly and unequivocally prohibit a community scheme from limiting or denying access to an owner or his or her tenant:
  - 30.1. The first of these is the matter of Fisher v Body Corporate Misty Bay<sup>1</sup>, where the presiding Judge stated the following:

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<sup>1</sup> 2012 (4) SA 215 (GNP) [2011] ZAGPPHC 23440667/2018 (P20) (13 NOVEMBER 2018)



*"[24] Access that is intended to retain possession or use of property should be found to be protected under the principle of mandament van spolie. Therefore, any limitation of access that would curtail the applicant's possession or use of the house and or motor vehicle should be found to amount to spoliation."*

30.2. In **Zungu v Nilgra Flats CC**<sup>2</sup> the Court held that:

*"The fundamental principle in issue is that nobody may take the law into their own hands. In order to preserve order and peace in society the court will summarily grant an order for restoration of the status quo where such deprivation has occurred, and it will do so without going into the merits of the dispute".*

*(The Applicant referred to both of the above cases in her reply.)*

31. There are also numerous CSOS adjudication orders based on the aforementioned that support the above principle.

32. It is trite in South African Law that spoliation is unlawful.

33. In the instant case, the Respondent's representative states that access to the scheme has never been denied to the Applicant, but that the Respondent only limits access to the number of Applicant's visitors who independently require access to the scheme per day.

34. The above is confirmed in a whatsapp, which both the Applicant and the Respondent presented in evidence.

*(It would, however, appear to be the case that if the Applicant herself brings her visitors into the scheme there appears to be no restriction).*

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<sup>2</sup> (2017/44199) [2017] ZAGPJHC 417

35. Spoliation as it is known and accepted in our Law, only applies to restriction of access to the person who was in peaceful and undisturbed possession or access to a property or 'thing', and which possession is then unlawfully taken away or disturbed, but never where access is denied **to his visitors.**
36. Consequently, the Applicant has failed to discharge the onus of proving her case on a preponderance of probabilities, and her application must fail

### **COSTS**

37. There is no order as to costs.

### **ADJUDICATION ORDER**

38. Consequently, the application is dismissed in terms of section 53(1)(a) of the CSOS Act, No.9 of 2011, as it is misconceived.

### **RIGHT OF APPEAL**

39. 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 SANDTON ON THE 19<sup>th</sup> OF DECEMBER 2023**



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**KAREN BLEIJS**  
**ADJUDICATOR**

