



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

Ref no: CSOS 8133 GP/23

In the matter between

JOSE'SNYDERS

APPLICANT

And

DIRECTORS OF WATERFALL COUNTRY VILLAGE HOA

RESPONDENT

ADJUDICATION ORDER

Adjudicator: Karen Bleijs

Delivered: 23rd December 2023.

EXECUTIVE SUMMARY.

This is an application in terms of Section 38 of the CSOS Act .

Relief sought: Section 39(1)(e).

(1) In respect of financial issues—

(e) an order for the payment or re-payment of a contribution or any other amount;

Order: Relief sought in terms of Section 39(1)(e) upheld.

INTRODUCTION

1. The Applicant is Jose Snyders (“the Applicant”), who is the registered owner of Unit 3707 Waterfall Country Village Home Owners Association, situated at Lulaba Drive, Waterfall, Midrand in Gauteng.
2. The Respondent is cited as the Directors of Waterfall Country Village Home owners Association (“the Respondent”), duly incorporated in terms of the Company laws of the South Africa, situated at Lulaba Drive, Waterfall, Midrand in Gauteng.

The Respondent is represented herein by the duly authorised representative, Clint Olivier of Trafalgar Property Management.

3. This application is brought in terms of Section 38(1) of the CSOS Act in compliance with Section 38(2)(a – c) and (3)(a – c) of the CSOS Act. The Applicant seeks relief in terms of section 39(1)(c) of the CSOS Act.
4. The dispute was directly referred to adjudication on the **2nd of November 2023** in terms of Section 48 of CSOS Act read with Clause 21.5.7 of the Practice Directive on Dispute Resolution as amended, 2019. Both parties were afforded the opportunity to file final written submissions not later than the **9th of November 2023**.
5. Paragraph 8.2 of the Amendment to Practice Directive on Dispute Resolution, 2019 makes provision for adjudication to be conducted based on papers filed by the parties and further written submissions, documents and information (including evidence in the form of affidavits and photos) as requested by the appointed Adjudicator.

. **PRELIMINARY ISSUES**

6. No preliminary issues were raised.

RELEVANT STATUTORY PROVISIONS

7. Section 1 of the CSOS Act defines:

- **“community scheme”**: as “any scheme or arrangement in terms of which there is shared use 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 constitute established to administer a 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”

8. 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”.

9. 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 a time before the Ombud refers the application to an adjudicator”.

10. 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”.

11. Section 48 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”.

12. Section 50 provides:

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

13. 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.

SUMMARY OF RELEVANT EVIDENCE

APPLICANT'S SUBMISSION

14. It is the Applicant's submission that the Respondent has issued a fine, as detailed in the attached document, citing a 'purported' security breach. The incident involves his daughter, a resident in his household, who entered the estate on October 7, 2023, at 17:37 in her car (Registration CF167194). The alleged breach centres on her use of the facial recognition system, where she gained access by leaning over her boyfriend, who was driving her car.

15. The Respondent contends that this action violates a conduct rule (referencing clause 6.3.3, though the correct reference is clause 11.1.1.2 in the attached conduct rules) prohibiting residents from opening for 'visitors.' According to the

Respondent, by leaning over the driver in her car, his daughter was deemed to be opening for the driver but not for herself as a passenger. In a discussion with Clint Olivier, the Risk Manager, it was clarified that had she been driving, there would not have been an issue, indicating that a resident need not declare a visitor in their car at the gate. Several key points merit consideration.

16. His daughter is a resident, and the vehicle in question is permanently housed at their residence. She did not open for anyone; rather, she was returning home in her car, albeit not as the driver. On the day in question, her boyfriend, who entered with his own car (Registration CF 86562), was already registered as a visitor.
17. There is no discernible security distinction between a resident opening the gate as the driver or as a passenger when entering for personal access to their residence. This clarification seeks to emphasize the nuanced circumstances of the incident and advocate for a reconsideration of the imposed fine in light of the actual conduct rules.
18. The Applicant maintains that his daughter's act of opening the gate for herself as a passenger in her vehicle is no different from her driving herself in with her boyfriend as an unidentified visitor. The risk manager confirmed that there would be no issue if she were driving herself, despite her passenger being an unidentified visitor. This inconsistency raises questions about the reasonableness of the rule. There is no discernible security difference and the HOA failed to provide the same in their response.
19. The Respondent's reference to fingerprint access contradicts their admission in that the rules referring to biometrics are not yet approved. Her daughter used "facial recognition," which was not specified in the previous rules. This ambiguity in the rules further complicates the matter - they were not transparent regarding this point in the correspondence imposing the fine violating the good faith required by the Companies Act.
20. While the Respondent claims to have conducted an investigation, it has not provided any explanation as to why the investigation did not involve any

communication with the resident or the alleged transgressor. This lack of due process is concerning, and the punitive approach without consultation or an opportunity for residents to respond is in conflict with the principles Good Faith and Diligence required by the Companies Act.

21. Overall, the Respondent's response lacks clarity on the discernible security risks that were breached, and they appear to be rigidly focused on compliance without offering explanations or considering the unique circumstances of residents.
22. In addition to the relief he is seeking in his application, he would like to request that the Respondent be compelled to clarify in the new rules (*and send such communication to all residents*) that a resident entering as a passenger is, in fact, opening the gate for the driver and not for themselves. This distinction is essential to prevent judgment calls by dogmatic officials and to ensure fairness in the community.
23. Further to this, any distinction that would allow a resident to enter the estate driving their own vehicle with an unknown and undeclared visitor while penalizing them if they are passenger (when the reverse position applies - i.e. bringing an unknown visitor in as a passenger whilst resident is driving) would be discriminatory. The Applicant believes that addressing these concerns and ensuring that the Respondent adheres to legal requirements will contribute to a more equitable and harmonious community.

RELIEF SOUGHT BY THE APPLICANT

24. The Applicant seeks relief in terms of Section **Section 39(1)(e) of the CSOS Act**

(1) In respect of financial issues—

(e) an order for the payment or re-payment of a contribution or any other amount;

The Respondent to waive the fine and its withdrawal with immediate effect.

RESPONDENT'S SUBMISSIONS

25. The Respondent firstly, would like it noted, that it takes umbrage to the fact that the applicant contacted the Conciliator without the knowledge of the Respondent. It is trite that all parties to a CSOS matter needs to be aware of

correspondence between the parties.

26. The Respondent does not seek to introduce new evidence based on new facts and allegations never previously submitted or filed. This retort is purely made in response to the Applicant's response of 2 November 2023. 21. It is noteworthy that the Scheme ("Estate") is registered as a Homeowners Association, and as such, is bound by the Company's Act, as well as its Rules and Regulations in terms of their registered Memorandum of Incorporation ("MOI"), Conduct Rules and Architectural Guidelines. The Applicant makes reference to the Sectional Titles Act which bears no relevance to this Estate as it is not a Sectional Title Scheme.
27. The Respondent denied the assumption made by the Applicant that the Estate has chosen to adopt a zero-tolerance approach to illogical or improperly defined rules. It was expressed in the initial response that the Estate's Risk Manager, together with the appointed Security Company and OPS Members of the Estate did in fact investigate the transgression at the time the Security Officer reported the matter. After such investigations, it was clear that the Applicant's daughter residing in the Estate breached the access control procedure in place for the Estate.
28. The Estate's Conduct Rule 2.4 states: "These Rules will be enforced by the Board. Any infringement of these Rules may result in the offender being penalised with a fine or such other sanction as may be deemed appropriate by the Board and as more fully provided for in the Articles." This was the Rule used as the basis for this transgression and specifically, the reason the penalty was raised.
29. The Estate's Conduct Rule 6.3.3 expressly state that a resident may not use their own fingerprint (in this case their access rights, due to the implementation of a new access control system) to open for family members, guests, and service providers.
30. Residents must at all times ensure that the Estate's correct access control procedures are strictly followed as protocol. The Applicant, in his own admission advised that there is no difference to his daughter allowing access to a visitor

whilst being a passenger in the vehicle entering the Estate, then being the driver of such vehicle.

31. However, this is denied by the Respondent. It is undeniable that by performing such an act, the Applicant's daughter explicitly chose to disregard the Estate's access control procedures as well as the rules and regulations of the Estate. It is an accepted fact that all vehicle access control systems are set up to establish the identity of the driver of the vehicle. Hence why all biometric reading equipment is on the driver's side. No provision is made to establish the identity of passengers.
32. The Respondent denies the allegation made that there is ambiguity in the rules and that the Respondent was not transparent regarding the transgression. Submitted as evidence in the Respondent's initial response, the Applicant was issued with a notice clearly outlining that the Applicant's daughter breached Conduct Rule 6.3.3 and as such, Rule 2.4 allows for the Directors to ensure the rules are enforced and an appropriate course of action needs to be taken for such a breach.
33. In this case, the Directors implemented a penalty for such a transgression. It must be recorded that any form of access rights to the Estate is in order gain entry and/or exit. The mention of "fingerprint" vs "facial biometrics" is due to the implementation of a new access control system. Residents no longer use fingerprints for access but instead use facial biometrics.
34. Upon the Applicant receiving such communication, he contacted the Risk Manager, Clint Olivier, to express his concern that the HOA has implemented such a penalty. It is noteworthy that the Applicant was still unhappy with the Risk Manager's reply that the penalty for such transgression will remain and proceeded to advise that he will turn to CSOS.
35. The Estate's normal practice in matters of dispute is to engage with homeowners to resolve the dispute. If this is not possible, the point of escalation is to the CEO of the Estate. It is the submission of the Respondent that the Applicant did not in fact, exhaust all the avenues in this dispute in order for resolution to be met.

The Applicant hasn't escalated the dispute to the Estate's CEO, however made an application against the Respondent through CSOS.

36. The Respondent's objective is to resolve a dispute, without the need to approach CSOS to ensure that the CSOS route is an absolute last resort. The Respondent hereby contests that the Applicant did not afford the Estate the opportunity to resolve the issue, as it does with most disputes of the Estate. It is apparent that the Applicant's daughter breached the access control measures of the Estate, by contravening the rules and that the Applicant should have directed his concerns to the Estate's CEO.
37. It must be noted that the new Conduct Rules for the Estate have been approved by the Waterfall Country Estate HOA Board of Directors, the Respondent, registered by the Companies and Intellectual Property Commission ("CIPC") and filed with CSOS.
38. It is noteworthy that the new Rule 11.1.1.2 distinctly outlines the use of personal access rights: "Neither Members, Residents nor Operating Lessees may use their own facial biometrics (or personal access rights) to open the booms or turnstiles for any other Person. The access rights of Members, Residents and Operating Lessees are not transferable."
39. In furtherance to the above, these new Conduct Rules have been shared with the Members of the Estate, of which the Applicant already referred to in his application.
40. The Respondent explicitly reiterates that it views the security of the community within the Estate as one of the most important matters of the Estate, and it is for this reason that the conduct rules are written to protect the community from persons seeking to override the access control procedures. As such, it must be recorded that the Estate cannot give exceptions to any security breach nor rescind the penalty issued to the Applicant in terms of breaching such security protocols

RELIEF SOUGHT BY THE RESPONDENT



41. The Respondent humbly prays:

- The Applicant's claim be rejected / dismissed in full; and
- Further and / or alternative relief.

EVALUATION OF EVIDENCE AND FINDINGS

42. In the main I am called upon to determine whether to grant, refuse or dismiss the Applicant's claim. The relief sought is in respect of financial issues, 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 contribution to a correct or reasonable amount or an order for its payment in a different way. This relief is in terms of Section 39(1) (c) of the CSOS Act.

43. Both parties' evidence is set out in detail *supra*; I therefore intend not to repeat the evidence but to remark only on salient facts.

44. In evaluating the evidence and information submitted, consideration is given to the probabilities of the case together with the credibility and reliability of the filed witness statements.

45. The most basic rule of evidence is that it must be relevant to the case. Evidence is relevant when it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. Once evidence is shown to be relevant, that evidence is admissible unless it is excluded by some other rule of law or evidence. Irrelevant evidence is not admissible.

46. This matter turns on whether the Respondent was unreasonable in the enforcement of its Rules when it issued a fine against the Applicant's daughter for contravention of its security rule.

47. It common cause that the Respondent has Conduct Rules in place. **Clause 6** of the Conduct Rules makes provision for Security.

48. **Clause 6.3** makes provision for access control for family members, guests and

service providers as follows:

6.3.1 Family members, guests and service providers may not be registered onto the association's access control system (Click-on). Access may be provided through the approved visitor management system installed for access control. Only family members who live on the property may be registered for access.

6.3.2 Requests for special dispensation must be provided in writing to the Security Sub Committee for consideration.

6.3.3 Residents may not use their own finger prints to open for their family members, guests and service providers. Residents must at all times ensure that the estates correct access control procedures are strictly followed as protocol.

6.3.4 Residents will be notified of all transgressions in writing, if the transgressions continue fines may be levied.

49. The Applicant's contention is that his daughter is a resident, and the vehicle in question is permanently housed at their residence. She did not open for anyone; rather, she was returning home in her car, albeit not as the driver. On the day in question, her boyfriend, who entered with his own car (Registration CF 86562), was already registered as a visitor.

50. There is no discernible security distinction between a resident opening the gate as the driver or as a passenger when entering for personal access to their residence. This clarification seeks to emphasize the nuanced circumstances of the incident and advocate for a reconsideration of the imposed fine in light of the actual conduct rules.

51. The Applicant maintains that his daughter's act of opening the gate for herself as a passenger in her vehicle is no different from her driving herself in with her boyfriend as an unidentified visitor. The risk manager confirmed that there would be no issue if she were driving herself, despite her passenger being an unidentified visitor. This inconsistency raises questions about the reasonableness

of the rule. There is no discernible security difference and the HOA failed to provide the same in their response.

52. To a certain extent, I agree with the Applicant's argument that there is no discernible security distinction between a resident opening the gate as the driver or as a passenger when entering for personal access to their residence. Rule 6.3.3 does not prohibit using their own fingers opening for themselves as passengers.
52. On the other hand, the Respondent referred to the **new Rule 11.1.1.2** which distinctly outlines the use of personal access rights: "Neither Members, Residents nor Operating Lessees may use their own facial biometrics (or personal access rights) to open the booms or turnstiles for any other Person. The access rights of Members, Residents and Operating Lessees are not transferable."
53. I believe the above Rule different from 6.3.3; makes it clear that "Neither Members, Residents nor Operating Lessees may use their own facial biometrics (or personal access rights) to open the booms or turnstiles for any other Person. The access rights of Members, Residents and Operating Lessees are not transferable."
54. In view of the above, there is no question that the Applicant's daughter contravened the Rule. However, the question is whether issuing the fine at the first instance of committing the offence was a bit a harsh punishment or not.
55. In terms of sub clause 6.3.4, residents will be notified of all transgressions in writing, if the transgressions continue fines may be levied.
56. In *casu*, there is no evidence proving that the Applicant's daughter has been notified of the transgression in writing but nonetheless continued with the conduct
57. It is in this regard that on the strength of Clause 6.3.4, the Respondent must have shown leniency with regard to the punishment.

58. In light of the above and I am no satisfied that the Applicant has proven his claim against the Respondent on the balance of probabilities. As a consequence, the relief sought is granted.

ORDER

59. In the premise, I make the following order:

1. The Applicant's claim in terms of Section 39(1) (e) is granted.
2. The Respondent shall credit the Applicant's account with the full amount of the fine debited to his levy account, as well as any interest raised on the account as a result of the fine not having been paid, **within 14 (fourteen) days of receipt of this adjudication order.**

COSTS

60. No order costs.

RIGHT OF APPEAL

61. Accordingly, parties' attention is drawn to the Right to Appeal in terms of Section 57 which stipulates that:

- (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 by 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.

THUS DONE AND SIGNED ON THIS 24TH DAY OF DECEMBER 2023





KAREN BLEIJS
ADJUDICATOR

