



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

Ref: CSOS6599/WC/23

IN THE MATTER BETWEEN

TRUSTEES OF SQUIRREL ON OAK BODY CORPORATE

APPLICANT

and

NEVER HAPPY(PTY) LTD

RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act: **Section 39(1)** In respect of financial issues
 - (e) an order for payment or re-payment of a contribution or any other amount.

 - (f) an order requiring a specified tenant in a community scheme to pay to the association and not to his or her landlord, all or part of the rentals payable under a lease agreement, from a specified date and until a specified amount due by the landlord to the association has been paid: Provided that in terms of such an order;

 - (i) the tenant must make the payments specified and may not rely on any right of deduction, set-off or counterclaim that he or she has against the landlord to reduce the amount to be paid to the association;

(ii) payments made by the tenant to the association discharge the tenant's liability to the landlord in terms of the lease; and

(iii) the association must credit amounts received from the tenant to the account of the landlord.

- Date Adjudication conducted: 09 January 2024.
- Name of the Adjudicator: Matlose Moela.
- Order: **The relief sought in terms of section 39(1)(e) of the CSOS Act is granted.**

The relief sought in terms of section 39(1)(f) of the CSOS Act is refused.

INTRODUCTION

1. The Applicant is the **TRUSTEES OF SQUIRREL ON OAK BODY CORPORATE**, a community scheme as defined in the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act) situated at Oak Street, Kenilworth, Cape Town, Western Cape.
2. The Respondent is **NEVER HAPPY (PTY) LTD**, the owner of units 6 and 2, Squirrel on Oak, Oak Street, Kenilworth, Cape Town, Western Cape.
3. An email requesting the Respondents to respond to the Applicant's submission on or before the 18th of October 2023, was sent to the parties by the writer on the 12th of October 2023, confirming that the Ombud is adjudicating disputes on documents submitted, without the need to meet parties face to face.
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 seeks relief in terms of section 39 of the CSOS Act, in respect of:

Section 39(1)(e) and (f): **In respect of financial issues.**

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”. The parties were requested to make written submissions. The adjudication was conducted on the 09th of January 2024 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. In terms of Clause 21 of the Practice Directive on Dispute Resolution, 2019 as amended, the Ombud referred the application for dispute resolution directly to adjudication in that the Ombud considered the dispute as being not appropriate for conciliation. The Ombud referred the application together with any submissions and responses thereto to an adjudicator on the 14th of November 2023.

SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

16. According to the Applicant, the Respondent is liable to the body corporate to the arrear levies to the amount of R56 090.39(Fifty-Six Thousand Ninety-Rand and Thirty-Nine Rand) for unit 6 and R58 372. 66(Fifty-Eight Thousand Three-Hundred and Seventy-Two Rand Cents Sixty-Six) for unit 2.

17. The Applicant further indicated that the amounts above have been unpaid as at 30 August 2023.
18. The Applicant indicated that the Respondent is withholding payment of levies due to maintenance grievance which is being attended by the body corporate.
19. The Applicant indicated that a letter from the Respondent Attorneys indicated that the levy amounts have been paid into trust.

Relief sought by the Applicant:

20. An order requiring the Respondents to pay the outstanding levies to the amount of R56 090.39 (Fifty-Six Thousand Ninety-Rand and Thirty-Nine Rand) for unit 6 and R58 372. 66 (Fifty-Eight Thousand Three-Hundred and Seventy-Two Rand Cents Sixty-Six) for unit 2.
21. An order directing tenants to pay rental income to the body corporate.

Respondent's Submissions

22. The Respondent indicated that the waterproofing alleged to have been done was inefficient as the lounge ceiling in unit 6 is still leaking.
23. The Respondent also indicated that the redecoration project carried out in 2021 was not accurately carried done as the maintenance issues of the Respondent remain.
24. The Respondent indicated that it is willing to pay the levies provided the Applicant attends to water leak problems in his unit.
25. The Respondent indicated that the levies have been paid in its Attorney's trust account.
26. The Respondent indicated that the Applicant is not entitled to the relief on rental income as such is meant for paying all disbursements of the property.

Relief sought by the Respondent.

27. An order directing the Applicant to make a written undertaking to attend to the water leak.
28. An order directing the Applicant to make use of reputable contractor whose work is guaranteed.

EVALUATION & FINDING

29. I have perused the Applicant's written submissions.
30. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
31. 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.
32. The Applicant claims that the Respondent is liable for the arrear levies to the amount of R56 090.39 (Fifty-Six Thousand Ninety-Rand and Thirty-Nine Rand) for unit 6 and R58 372.66 (Fifty-Eight Thousand Three-Hundred and Seventy-Two Rand Cents Sixty-Six) for unit 2. The Respondent has indicated the intention to pay the arrear levies only when the Applicant has attended to the water leak and maintenance issues in unit 6.
33. **Section 39(1)(e)** of the CSOS Act 9 of 2011 makes provision for the following competent order to be handed down by the Adjudicator, "an order for the payment or repayment of a contribution or any other amount".
34. Section 2 of the Sectional Titles Schemes Management Act No.8 of 2011 states that "with effect from the date on which any person other than the developer becomes an owner of the unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the

developer and such persons are members, and any person who thereafter becomes an owner of a unit in that scheme is a member of that body corporate”.

35. Every owner in a sectional title scheme, such as the Respondent is a member of the body corporate.
36. Section 3 of the Sectional Titles Scheme Management Act No.8 of 2011 further states that “a body corporate must perform functions entrusted to it in terms of the Act, including the function to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs for amongst other things repairs, maintenance, management and administration of the common property”.
37. Section 3(2) of the STSMA further confirm that “liability for contributions levied under any provisions of subsection (1); save for the special contributions contemplated in subsection (4), accrues from the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by an application to an Ombud from the persons who were owners of units at the time when such resolution was passed: Provided that upon the change in ownership of the unit, the successor in title becomes liable for the pro-rata payment of such contributions from the date of change of ownership”.
38. In terms of section 3(2) and (3) of the above Act, contributions and special contributions are due and payable on the passing of a resolution to that effect by the trustees of the body corporate and may be recovered from the persons who were owners of the unit at the time when the resolution making the contributions due and payable was passed by application to the Ombud. It is therefore the adjudicator’s considered view that the Respondent is liable for the contribution of his levies and must therefore make means to settle them. The Applicant is therefore entitled to recover all the outstanding levies from the Respondents. The decision to pay the amount owed to the Applicant into the Respondent’s lawyers as a security or proof to show that they are willing to settle the levies is unfounded and baseless. It is not a valid claim for the payment of arrear levies as this does not lead to the extinction of the claim. For this reason, the Respondent’s counter argument is refused. Similarly, the Respondent’s argument that the Applicant must first deal with the outstanding maintenance issues is not ripe before me. If the Respondent has a dispute on maintenance issues against the Applicant, a referral form must be completed in which same is aligned for a proper ruling to be made.

39. The Applicant submitted the latest levy statement of the Respondent with an outstanding levy to the amount of R56 090.39 (Fifty-Six Thousand Ninety-Rand and Thirty-Nine Rand) for unit 6 and R58 372. 66 (Fifty-Eight Thousand Three-Hundred and Seventy-Two Rand Cents Sixty-Six) for unit 2.
40. Accordingly, I find that the Respondent failed to make a payment of levies and is in arrears to the amount of R56 090.39 (Fifty-Six Thousand Ninety-Rand and Thirty-Nine Rand) for unit 6 and R58 372. 66 (Fifty-Eight Thousand Three-Hundred and Seventy-Two Rand Cents Sixty-Six) for unit 2.
41. It is not in dispute that the Respondent is in arrears with their levy payments, to the amount of R56 090.39 (Fifty-Six Thousand Ninety-Rand and Thirty-Nine Rand) for unit 6 and R58 372. 66 (Fifty-Eight Thousand Three-Hundred and Seventy-Two Rand Cents Sixty-Six) for unit 2.
42. In respect of interest, the PMR 21(3) (c) states that “the body corporate on authority of a written trustee resolution is entitled to charge interest on any overdue amount payable by a member to the body corporate; provided that the interest rate must not exceed the maximum rate of interest payable per annum under the National Credit Act (2005) Act No 34 of 2002), as compounded monthly in arrears”.
43. In the Body Corporate of ***Central Park v Makhalele Mosa Case No. A3064/2021***, the Court confirmed that “liability ...accrues from the passing of a resolution to that effect by the trustees and may be recovered”. This means that liability for normal levies/contributions accrues from date of the passing of a resolution to that effect by the trustees and can be recovered by the body corporate. In other words, the body corporate’s right to claim payment of contributions/normal levies vests on passing of a resolution by the trustees and becomes due and payable by an owner of a unit in the sectional titles scheme in each consecutive month thereafter.
44. In the circumstances, I direct the Respondent to pay each arrear levies for units 6 and 2 within 14 days of receipt of this order.
45. In respect of the request that I direct the rental income receivable for Units 6 and 2 to be directed to the body corporate, I am unable to do so as there is no proof before me that there are occupants other than the owner in those units. Furthermore, there is no proof that such occupants have been enjoined to the proceedings. No rental agreement is also attached to the application.

46. In Ex Parte Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA) at 1238J – 1239 E Navsa JA said: “It is a principle of our law that interested parties should be afforded an opportunity to be heard in the matters in which they have a direct and substantial interest. In Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 651 the following is stated:

“It was rather a subtle reasoning, which helped the court to do what it no doubt regarded as substantial justice in the peculiar circumstances of the case, while at the same time enable it to stand firm on two essential principles of law that had to be borne in mind, viz (1) that a judgement cannot be pleaded as res judicata against someone who was not a party to the suit in which it was given, and (2) that the court should not make an order that may prejudice the rights of parties not before it”.

47. Later in the judgement (at 659-60) the following appears: “Indeed it seems clear to me that the court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the admit of such a course, taking other adequate steps to ensure that its judgement will not prejudicially affect the party’s interests... it must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both”. The Application for an order against the tenant is therefore refused.

COSTS

48. There is no order as to costs.

ADJUDICATION ORDER

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

(a) The Respondent is indebted to the Applicant to the amount of R56 090.39(Fifty-Six Thousand and Ninety-Rand and Thirty-Nine Rand) for unit 6 and R58 372. 66(Fifty-Eight Thousand Three-Hundred and Seventy-Two Rand) for unit 2.

(b) The Respondent is hereby directed to pay the Applicant an amount of R56 090.39(Fifty-Six Thousand and Ninety-Rand and Thirty-Nine Rand) for unit 6 and

R58 372. 66(Fifty-Eight Thousand Three-Hundred and Seventy-Two Rand) for unit 2 in respect of the arrear levies within 14 days of receipt of this order.

- (c) No further interest must accrue for the outstanding amount within this period allowed for payment.
- (d) The above order does not affect the usual regular monthly levies and ancillary payments required to be made by the Respondent.
- (e) In the event of the Respondent defaulting on any 1(one) payment as ordered above, the full amount due to the Applicant shall become immediately due and payable by the Respondent.
- (f) The relief sought by the Applicant against the Respondents in respect of section 39(1)(f) of the CSOS Act is dismissed.

RIGHT OF APPEAL

50. 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 09th DAY OF JANUARY 2024.



**MATLOSE MOELA
ADJUDICATOR**