**ADJUDICATION ORDER IN TERMS OF SECTION 53 AND 54**
**OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Ref: CSOS3934/KZN/21

IN THE MATTER BETWEEN

| | |
|---|---|
| **ZONED EARTH DEV CO PTY LTD** | **1ST APPLICANT** |
| **ADMINCORP 23 CC** | **2ND APPLICANT** |
| **UNIT EIGHT UMHLANGA ROCKS (PTY) LTD** | **3RD APPLICANT** |

And

| | |
|---|---|
| **TRUSTEES OF 60 LAGOON DRIVE BC** | **1ST RESPONDENT** |
| **MALCOLM MOODIE** | **2ND RESPONDENT** |
| **PATRICK SCOTT-MARTIN** | **3RD RESPONDENT** |
| **BUDWA ABROSIE** | **4TH 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 the payment or re-payment of a contribution or any other amount.

**SECTION 39 (2) In respect of behavioural issues**

*(d)* an order for the removal of all articles placed on or attached illegally to parts of a common area or a private area.

**SECTION 39 (6) In respect of works pertaining to private areas and common areas—**

*(c)* an order requiring the association— (ii) not to carry out specified works.

**SECTION 39 (7) In respect of general and other issues**—

*(a)* an order declaring that the applicant has been wrongfully denied access to information or documents and requiring the association to make such information or documents available within a specified time.

- Date Adjudication conducted: 22 APRIL 2022.
- Name of the Adjudicator: Thandeka Qwabe.
- Order**: GRANTED,REFUSED AND DISMISSED.**
- No order as to costs.

**INTRODUCTION**

1. The Applicants are: Zoned Earth Dev Co (Pty) Ltd, the registered owner of unit 2 in the scheme (herein referred to as the 1st Applicant); Admincorp 23 CC, the registered owner of unit 7 in the scheme (herein referred to as the 2nd Applicant) ; and Unit Eight Umhlanga Rocks (Pty) Ltd, the registered owner of unit 8 in the scheme (herein referred to as the 3rd Applicant)

2. The Respondents are: Trustees of 60 Lagoon Drive Body Corporate , a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No.8 of 2011(the STSMA)(herein referred to as the "1st Respondent"), Malcolm Moodie, a trustee of the 1st Respondent, in his personal capacity (herein referred to as the 2nd Respondent);Patrick Scott-Martin, a trustee of the 1st Respondent, in his personal capacity (herein referred to as the 3rd Respondent); Budwa Abrosie, a trustee of the 1st Respondent, in his personal capacity (herein referred to as the 4th Respondent.)

3. This is an application for dispute resolution in terms of section 38 of the Community Schemes Ombud Service Act No. 9 of 2011 (the CSOS Act). The application was made in the prescribed form and lodged with the Community Schemes Ombud Service (the CSOS).

4. The application seeking relief in terms of section 39 of the CSOS Act, is in respect of-

**SECTION 39(1)- In respect of financial issues**

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

**SECTION 39 (2) In respect of behavioural issues**

*(d)* an order for the removal of all articles placed on or attached illegally to parts of a common area or a private area.

**SECTION 39 (6) In respect of works pertaining to private areas and common areas—**

*(c)* an order requiring the association— (ii) not to carry out specified works.

**SECTION 39 (7) In respect of general and other issues**—

*(a)* an order declaring that the applicant has been wrongfully denied access to information or documents and requiring the association to make such information or documents available within a specified time.

5. 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 on 24 March 2022. The adjudication was conducted on 22 April 2022 and an order is now determined.

## 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 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."

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 any 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 (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."

12. In terms of Section 50-

"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."

14. In terms of section 48(1) of the CSOS Act, "If the conciliation contemplated in terms of section 47 fails, the Ombud must refer the dispute together with any submissions and response thereto to an adjudicator." Accordingly, the dispute was therefore referred for Adjudication in terms of section 48 of the CSOS Act. The Ombud referred the application together with any submissions and responses thereto to an Adjudicator on 23 February 2022.

## 15. APPLICANT'S SUBMISSIONS

15.1 On or about the 8th of September 2021 the Applicants learnt that the Board of Trustees were apparently embarking on a project to purchase and install solar panel and the relevant ancillary equipment and infrastructure. Prior to that discovery, the Applicants were wholly unaware of such a project.

15.2 The Applicants sought legal advice from Northmore Montague Attorneys ("NMA") and in consequence of that advice caused NMA to urgently prepare and send a letter to the Board of Trustees. A copy of that letter and the correspondences which followed is submitted into evidence.

15.3 The Applicants submits that evidence submitted shows that the Board of Trustees has failed to disclose any specific information and / or documentation supporting the bald allegation that the project was authorised by members.

15.4 During the period of exchange of the aforementioned correspondences, discussions were held between representatives of the Applicants and of the Respondents, specifically between Mr Koop Styger and Mr Badwa Abrosie and between Mr Marius Khoury and Mr Badwa

Abrosie. During these discussions Mr Badwa first claimed that the project had been approved at the 2017 annual general meeting, and subsequently on 22 September 2021 alluded to having just obtained written authorisation from owners.

15.5 The alleged written authorisations have not been furnished to the Applicants. The Applicants have heard from certain tower block unit owners that the Trustees have in the last week (approximately) been desperately contacting owners to persuade then to sign a written document approving the solar panel project. The written document has not been furnished to the Applicants. As will be addressed further below, this frantic attempt to get written approvals after the fact not only reveals that the trustees are aware that they should have had owner approval but is nonetheless futile and would not serve to validate their unlawful actions.

15.6 As far as the alleged approval at the 2017 annual general meeting is concerned, an extract of the minutes of that meeting is submitted. It is abundantly clear that a solar panel project was neither presented to nor considered or approved by members at that meeting. It should go without saying that even if approval had been given 4 years ago, but not proceeded with at that time, such an approval would not still be valid and effective some 3 years later.

15.7 During the aforementioned discussions the Applicants were also told that the project cost is approximately R1,2 million and that the Board of Trustees had already paid 50% as a deposit.

15.8 The Applicants were also advised that the solar panels would power the lift in the tower block of the scheme, garages area for the tower block and the staff's quarters (the garages and staff's quarters are exclusive use areas). The Applicants' units are not situated in the tower block.

15.9 During the last discussion on the 22nd of September 2021 Mr Abrosie advised that the installation would be commencing on Monday the 27th of September 2021.As per the discussion which took place on 22 September 2021 and the last letter received from LA on that date, the Board is manifestly determined to proceed notwithstanding the Applicants' legitimate concerns, which to date have not been addressed at all.

15.10 The Applicants are not aware of any valid approval for the solar project having been given, whether purportedly at an annual general meeting, special general meeting or in writing, nor the approval of any budget containing provision for a solar panel project. It is respectfully submitted that it is not reasonable or acceptable for the Trustees to refuse to disclose the

details of what meeting or written resolution they rely on (and provide the relevant documents) and instead to simply invite the Applicants to search through years' worth of body corporate records to attempt to find and identify a document that might be the purported authority the Trustees are supposedly relying on. It appears that the Board of Trustees are being intentionally uncooperative and evasive in addressing the Applicants' questions, queries and concerns.

**REQUIRED APPROVAL**

15.11. It is submitted that the installation of the solar panels and of the ancillary infrastructure and equipment constitutes an alteration or improvement to the common property. The Board has not obtained a unanimous resolution, nor has it complied with the procedures and requirement of prescribed Management Rule 29(2).

15.12 The incurring of expenditure and / or payments already made to third parties relating to the solar panel project:

(a) If paid from the administrative fund, is/are not in accordance with an approved budget for that fund.

(b) If paid from the reserve fund, is/are not in accordance with the requirements of prescribed Management Rule 24(5).

**PERSONAL LIABILITY OF TRUSTEES**

15.13 In proceeding with the solar panel project and incurring the related expenditure, without requisite authority from members (nor even any prior notice to owners), the 2nd Respondent and 3rd Respondent and 4th Respondent acted in breach of their fiduciary duties in terms of section 8 of the Sectional Titles Schemes Management Act, more specifically in that they failed to exercise their powers in the interests and for the benefit of the body corporate and acted without power and/or exceeded their powers.

15.14 In breaching their duties as aforesaid, the Trustees acted with recklessly. Each trustee has acted as such for a number of years and is not a novice to the position. Furthermore, the 2nd Respondent is a duly admitted attorney. Furthermore, the Trustees are aided by a well-established managing agency capable of providing advice and recommendations on the processes and requirements for such a project and expenditure. Furthermore, it is submitted that a reasonable trustee acting in good faith would not proceed to incur.

**EXPENDITURE OF SUCH A SIGNIFICANT AMOUNT WITHOUT SEEKING APPROPRIATE PROFESSIONAL ADVICE AS TO THE REQUIRED APPROVALS AND PROCEDURES.**

15.15 In terms of section 8(3) of the Sectional Titles Schemes Management Act the trustees, having acted in breach of their fiduciary duties, are liable to the body corporate for the loss suffered as a result, being the amount paid to date to third parties in respect of the solar panel project and the liability incurred but not yet paid.

**URGENCY**

15.16 As stated above, to the Applicants' knowledge the Trustees intend commencing with the installation on Monday the 27th of September 2021.

15.17 The Applicants requested that the work be halted pending a review and attempt to obtain approval from members. Having delayed responding to the Applicants' request, LA attorneys has now on the 22nd of September 2021 refused that request.

15.18 It is submitted that the Applicants have made all reasonable efforts to resolve this matter with the Trustees without having to launch these proceedings, but that the Trustees have refused to cooperate with the Applicants. The Trustees have *prima facie* acted unlawfully.

15.19 Allowing the installation to continue will serve to increase the prejudice and loss to the Body Corporate and to all owners. Urgently ordering that the work not take place will serve to protect the interests of the Body Corporate and all of its members, preserving the status quo whilst the underlying dispute regarding the required approval of the project is considered and resolved. There will be no prejudice suffered by the Respondents if the urgent order is issued.

**16. RELIEF SOUGHT BY APPLICANT**

**The Applicants seek the following reliefs:**

16.1 A. **URGENT ORDER:** That the Respondents are ordered not to carry out the installation of the solar panels or any ancillary infrastructure and equipment, pending the outcome of this application in respect of the further relief sought.

16.2 B. **URGENT ORDER:** That the 2nd, 3rd and 4th Respondents are ordered to furnish the Applicants with the following information and documentation, within 3 days of the date of the Order:

- Copies of minutes of all trustees' meetings and/or written trustees' resolution relating to the solar panel project;

- Breakdown of total costs of the project;

- Copies of all quotations obtained for cost/s of the project;

- Engineer's specifications.

- Did the Trustees obtain any report or presentation on the project, including but not limited to the lifespan of the assets and equipment, the parts of the electrical reticulation which would be powered by the system and the costs of operation, maintenance and repair of the system? – copies of all reports and/or presentations and proposals to be furnished.

- Cost benefit analysis.

- The reason/s why the Trustees did not revert to the members to consider the approval of the project.

- How the Trustees intended funding the project.

16.3 C. **URGENT ORDER:** An order that the Applicants are entitled to supplement their Claim Details in support of this application within 7 days of receipt of the information and documentation.

16.4 D. That the Respondents are directed to carry out, within 14 days, the removal of any equipment and any improvement or alteration to the common property carried out consequent to the solar panel project and to restore the common property to its prior condition.

16.5 E. That the 2nd, 3rd and 4th Respondents, jointly and severally the one paying the others to be absolved, pay to the 1st Respondent, within 30 days, the aggregate of all amounts paid to third parties and all liability incurred by the 1st Respondent as a result of the solar panel project.

16.6 F. That the 2nd, 3rd and 4th Respondents, jointly and severally the one paying the others to be absolved, pay to the Applicants, within 30 days, all legal costs incurred by the Applicants in this ap

17. **RESPONDENT'S SUBMISSIONS**

17.1 The Respondent submits that an application such as this one must comply with, inter alia, the provisions of section 38(3)(a) of the Community Schemes Ombud Service Act 9 of 2011 ("CSOS Act") which provides that:
The application must include statements setting out (a) the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39.

17.2 Section 39 of the same Act sets out the various prayers for relief that a party to a dispute in terms of section 38 may seek.

17.3 Only claim or prayer "B" of the application falls substantially within the scope of one or more of the prayers for the relief contemplated in section 39 of the CSOS Act.

17.4 In terms of prayer "B" the applicants seek to be furnished with certain documentation from the first respondent. Respondents accept that some (though not all) of the documentation requested qualifies as documentation which the Community Schemes Ombud Service would be empowered to direct the first respondent to make available to the applicants in terms of section 39(7)(a) of the Act.

17.5 The respondents' attorneys of record have furnished the applicants with the documents requested at prayer "B" insofar as is possible and to the extent that the applicants are entitled to the documentation requested in terms of the Sectional Titles Scheme Management Act 8 of 2011 and the regulations thereto.

17.6 It follows that the respondents have complied with prayer "B" of the application and to the extent that it may be argued that the respondents have not, the respondents aver that the documents which have not been furnished; do not exist; and / or are documents that the applicants are not entitled to be furnished with; and / or are documents which the Community

Schemes Ombud Service is not empowered to compel the respondents to deliver to the applicants in terms of section of the CSOS Act.

17.7 The balance of the relief sought by the applicants, i.e., prayers "C", "E" and "F" is beyond the scope of the prayers set out at section 39 of the CSOS Act and accordingly are beyond the jurisdiction or ambit of the Community Schemes Ombud Service.

17.8 The respondents accordingly pray for an order rejecting the application in terms of section 42(a) of the CSOS Act which provides that:

An ombud must reject an application by written notice to the applicant if—

(a) the relief sought is not within the jurisdiction of the Service.

**MERITS**

17.9 It is clear from the above that the relief claimed by the applicants does not fall within the scope of the prayers set out in section 39 of the CSOS Act, and this application is therefore beyond the jurisdiction of the Community Schemes Ombud Service.

17.10 However, the Respondents wish to briefly address the application substantively as it appears to be based on three main misconceptions and perhaps once these misconceptions are addressed, the applicants will reconsider their position.

17.11 The application herein is premised on the following misconceptions, namely that the installation of the inverter and solar panels:

(a) cost in excess of R 1m;

(b) only benefit or will be used by certain owners in the scheme; and

(c) were installed without the knowledge and / or approval of the owners in the scheme.

**COST**

17.12 The total cost of the installation of the inverter was R578 843.27 plus VAT. A copy of the relevant invoice to do the work from EcoElite Renewable Solutions (Pty) Ltd (the supplier that installed the inverter and solar panels) is submitted into evidence.

17.13 The Respondents not sure where the applicants came up with the figure of over R1 million for the project, but that figure is not accurate and is clearly overstated.

**ONLY BENEFIT CERTAIN OWNERS**

17.14 It is important to note at his point that the inverter and solar panels do not benefit any one particular owner directly but indirectly benefit all of the owners in the scheme.

17.15 The layout of the scheme and building is as follows: There are 24 units or dwellings in the scheme and four different types of dwellings, namely 4 cabanas units (which are three storey dwellings). 4 duplex units (which are double storey) and then 16 tower block units or dwellings made up of single floor apartments and penthouse suites (which are also double storey),The cabanas are semi-detached and separate from the tower block.

17.16 Apart from the dwellings mentioned above there is also a three-storey garage complex which consists of a supervisor's apartment plus double and single garages, domestic servant quarters and storerooms.

17.17 The scheme is situated on the Umhlanga beach front promenade with direct pedestrian access to and from the beach or promenade. Prior to the installation of the inverter and solar panels, load shedding or power failures meant that the following essential services or common services could not function,

(a) the main gate;

(b) the electronic pedestrian gates on both the road and beach sides;

(c) the electronic main doors and garage doors;

(d) the biometric access system at the pedestrian gates, the main gate and the lifts;

(e) the security system including the electric fence, CCTV cameras, security lights and alarm systems; f the service and residential lifts; and

(g) the WiFi.

17.18 It follows that, previously, when there was load shedding or a power failure:

(a) residents would be unable to access their units due to the biometric access not functioning.

(b) passengers would be stuck in the lifts in breach of municipal by-laws and the elevators would not return to the ground upon loss of power.

(c) residents (including elderly residents) would have to walk up 16 flights of stairs.

(d) residents would be unable to access vehicles parked in garages; access to and from the complex was compromised as the main gate would not function.

(e) security lighting (including lighting of fire escapes) would be compromised which is a further breach of municipal bylaws.

17.19 Following the installation of the inverter and solar panels at 60 Lagoon Drive, the services mentioned above now all continue to function during electricity interruptions.

17.20 While it is accepted that the applicants, as owners of cabana units, do not benefit directly from the functionality of the lifts during a power outage, they do benefit from the biometric access system, the security features (including the lighting of fire escapes / exits) and also from the main gate and garages (for those cabana unit owners that have garages and staff quarters) being able to function during such power outages. Further, the cabana unit owners benefit more from the electrical fencing remaining on during load shedding as those units are situated on the ground floor.

17.21 This is not the first time that the applicants have complained about having to contribute to the costs of the lifts in the scheme however having to contribute to common property expenses you may not derive a direct use or benefit from is part and parcel of community scheme living,

**NO KNOWLEDGE / APPROVAL**

17.22 The installation of an uninterrupted power supply solution to minimize the negative impact of load shedding on the scheme has been discussed at each ACM held by the scheme since 2015.

17.23 At the AGM in 2017 the members approved an upgrade to the electrical room which housed the distribution board and meters for the scheme. In this same ACM, as had been the case in 2016, it was confirmed that no restrictions or directions were to be placed on trustees when undertaking projects for the scheme.

17.24 At the same ACM in 2017, the issue of an uninterrupted power supply was again raised, and members were addressed by Mr Sheldon Brown of Tytech, a firm of energy specialists, who proposed various upgrades and installation of uninterrupted power supply equipment. The minutes of the ACM held in 2017 are submitted into evidence.

17.25 Sadly, Sheldon Brown of Tytech passed away in September 2018, which delayed the project further. In January 2019, the scheme was inspected by the eThekwini Fire Department and was advised that various aspects of the scheme's fire safety mechanisms were not compliant with the Municipality's by-laws. Particularly the scheme's fire escape/ exits and the old electrical room (which was over 45 years old) were not compliant.

17.26 Although there was a slight delay due to Covid-19, the electrical room, as the first phase, was refurbished in October / November 2020. When refurbishing the electrical room, it was always the intention of the trustees to provide for the installation of an alternate uninterruptable power supply to combat load shedding.

17.27 During the upgrade of the electrical room the plan for installing an uninterruptable power supply was discussed with various owners both formally at the AGMs and informally. For example, the first and third applicants undertook extensive alterations and renovations to their units from 2017 to 2021 and the trustees specifically required that in doing such renovations the roofs of the units were rebuilt in a manner in which they could accommodate having solar panels and / or water harvesting equipment being installed on said roofs. It follows that the owners were well-aware that it was the trustees' intention to install an uninterrupted power supply solution and that it would likely involve solar energy,

17.28 At the 2020 AGM, add-ons to the electrical room (i.e., uninterrupted power supply solutions) were discussed and it was agreed that an inverter would likely be the best solution for the scheme. A copy of the 2020 AGM minutes is submitted into evidence.

17.29 Although the 2020 AGM minutes anticipated that the inverter would cost R300 000.00 it ultimately cost R450 000.00 while the installation of the solar panels to power and charge the inverter and batteries added to the cost. However, these costs were still under budget for what was approved for the renovations undertaken at the 2017 AGM.

17.30 Finally, the applicants contend that the installation of the inverter and solar panels was a luxurious improvement to the common property that was not reasonably necessary and thus was unauthorised in the absence of a unanimous resolution approving same.

17.31 The trustees dispute this. The installation of the inverter and solar panels was undertaken as reasonably necessary improvement to the common property in that it ensures that during load shedding:

(a) the lifts operate in compliance with the Municipal by-laws applicable.

(b) the fire escapes and exits are sufficiently lighted so as to comply with Municipal by-laws.

(c) the scheme's security system is not compromised; and finally

(d) emergency personnel are able to gain access to the scheme should the arise for them to do so.

17.32 The trustees further allege that there has been substantial compliance with the requirements of section 29(2) of the regulations to the Sectional Title Scheme Management Act 8 of 201 1 with the regard to the installation of the inverter and solar panels.

17.33 Finally, at this point the Respondents submits that of the 24 owners in the scheme, the installation of the solar panels and inverter is supported by 20 owners, seemingly opposed by 3 owners (being the applicants herein) while one owner's views, Mr Engels, are not known.

17.34 It follows that the vast majority of the members of the body corporate support the installation of the solar panels and inverter as undertaken by the trustees.

**PERSONAL LIABILITY OF THE TRUSTEES**

17.35 From the above it is clear that the second to fourth respondents have not breached their fiduciary duties to the body corporate

**18. RELIEF SOUGHT BY RESPONDENT**

The application must be dismissed.

**19. APPLICANT'S REBUTTAL I.T.O SECTION 44(b) OF THE CSOS ACT**

**ALLEGED LACK OF JURISDICTION**

19. 1 The Respondents have averred that the Community Schemes Ombud Service lacks jurisdiction to adjudicate this matter. The purported basis of that averment is that the orders sought supposedly do not fall within the available relief prescribed in section 39 of the Community Schemes Ombud Services Act (excluding prayer B, which they concede does fall within section 39).

19.2 With regards to prayer A: 3.1 Patently this relief falls away given that the Respondents have completed the installation of the solar panels and ancillary infrastructure and equipment.

19.3 The Respondents persisted with the completion of that project despite demand by the Applicants that the project be held in abeyance pending the resolution of their concerns and/or dispute. The Respondents' attitude was to refuse to provide any of the requested information and documentation and to push forward in haste with the completion of the projection, notwithstanding initiation of this application.

19.4 Although formal explanation has not yet been provided, the urgent application was apparently not processed at the Community Schemes Ombud Service in accordance with the proper / usual protocols for an application in which urgent relief is sought, in the result that the project was completed before the urgent relief was able to be considered.

19.5 Completion of the project has resulted in prejudice being suffered not only the Applicants but by all of the members of the First Respondent. The prejudice suffered shall only be remedied by the granting of the relief sought in prayers D and E.

19.6 With regards to prayer C, section 45 of the Community Schemes Ombud Services Act bestows on the Ombud a discretion to grant or deny permission to amend the application - It is respectfully submitted that once the Respondents have (eventually )provided all the pertinent documentation as per prayer B, the information gleaned therefrom (and previously withheld from the Applicants, unlawfully) may necessitate an amendment to the application, which would include supplementation.

19.7. With regards to Prayer D: 5.1 It is respectfully submitted that the prayer falls clearly within the content of section 39(6) of the Community Schemes Ombud Services Act. The content of section 39(6) patently provides for an association to be ordered:

(i) not to carry out specified works to the common property.
(ii) to carry out specified work to the common property.
(iii) to dispose of specified property.
(iv) to carry out repairs and maintenance.

19.8 Further to the above, it is pointed out that, given the clear authority and power to order that specified works to the common property not be carried out [section 39(6)(c)(ii)], to interpret the remainder of section 39(6) in a manner that excludes the Ombud's power to undo the unauthorised, wrongful, unlawful and prejudicial carrying out of works by trustees would contravene and offend the trite principles of interpretation of statutes, including but not limited to the presumption against harsh, unjust or unreasonable results, the presumption that legislation does not contain futile or meaningless provisions and the purposive approach to interpretation – If the drafters intended to allow the Ombud to stop the carrying out of unlawful works to the common property, as they clearly did, that purpose would not be served if the Ombud conversely lacked the authority to rectify the unlawful situation where the unlawful works has already been carried out to completion all of which directly relate to the relief sought in prayer D – The removal of equipment from the common property and the restoration of the common property is indisputably the carrying out of specified works to the common property.

19.9 With regards to prayer E, section 39(1)(e) clearly empowers the Ombud to grant an order for the payment or repayment of a contribution or *"…any other amount"* – Patently there is no limit to the nature of the monetary claim, save for the obvious implicit limitation that the claim must arise out of the community schemes legislation and applicable rules. The drafters of the

Act could, but chose not to, clarify or limit the *"any other amount"* that could be ordered. In the circumstances, it is submitted that the power to order the payment or repayment of "any other amount" patently means any amount which is due under the sectional title legislation and/or applicable rules. As will be addressed in further detail below, prayer E arises directly from section 8(3) of the Sectional Titles Schemes Management Act.

19.10 With regards to prayer F, such relief is also clearly authorised in section 39(1)(e), read with section 52. If the amount is not agreed to, those costs would be taxed at the relevant court under the provisions of section 56.

**GROUNDS OF DEFENCE – PRAYER B**

19.11 In defence of this claim, the Respondents offer only the bold allegation that they have now furnished the documents *"insofar as is possible and to the extent that the applicants are entitled to the documentation requested".* The Respondents make absolutely no attempt to explain which of the documents listed in prayer B they have provided and, in respect of those not provided (there being an admission that some have not been provided), exactly which of the missing documents they contend does not exist or that the Applicants are not entitled to, or that the Ombud is not empowered to compel to be furnished. The Respondents have in essence just cast the net as wide as possible and appear to expect the Adjudicator to assist them in working out what "defence" might relate to any given requested document. It is respectfully submitted that such an approach is not only obstructive but that a negative inference is to be drawn.

19.12 The Applicants respectfully submit that all of the documentation listed in prayer B: Fall within the documents and records addressed in prescribed management rule 27 and are to be furnished to members on request in terms of rule 27(4); and/or constitute books of account or (financial) records which in terms of prescribed management rule 26 (2) are to be furnished to a member on request.

19.13 The Respondents have not furnished at all any trustees' meeting minutes or trustees' resolution relating to the solar panel project. It is impossible that such documents do not exist – that is unless a trustee/s have been acting independently and without approval by the Board of Trustees! If that is the case, such would constitute an additional ground supporting the unlawfulness of the solar panel project. The breakdown of the total costs of the project has not been furnished.

19.14 Only one 2021 quotation for the solar panel project has been furnished, namely annexure "MM3" to the Respondents' response. Either other quotations were indeed obtained, and the Trustees have withheld those from the Applicants, or the Trustees proceeded to incur a cost of almost R700 000,00 (on their version) without any attempt to establish of the one quotation obtained was fair, reasonable and market related.

19.15 The Respondents have not furnished any report or presentation on the project addressing the cost of operation, maintenance and repair of the system. Either such report / presentation was obtained, and the Trustees have withheld those from the Applicants, or the Trustees proceeded with the project without any attempt to establish those costs.

19.16 In the circumstances, and specifically the Respondents failure to take the Ombud into their confidence in disclosing why they have refused / failed to provide the missing the documents, the Applicants are entitled to the relief sought in prayer B, and consequently in prayer C.

19.17 In light of the Respondents' attitude to this claim for provision of records, the Applicants seek a small amendment to prayer C, namely the substitution of the first sentence of the prayer with the following:

*"That the 2nd , 3rd and 4th Respondents are ordered to furnish the Applicants with each of each of the following information and documentation; Alternatively in the event that a document or records is not in their possession, to furnish an affidavit explaining that and why the document / record in question is not in their possession, within 3 days of the date of the Order:"*

**GROUNDS OF DEFENCE – PRAYERS D & E**

19.18 It is the Applicants' position that the installation of the solar panels and of the ancillary infrastructure and equipment constitutes an alteration or improvement to the common property.

19.19. It is not disputed that the Board has not obtained a unanimous resolution.

19.20 Although the Respondents dispute that the solar panel project constitutes a luxurious improvement that was not reasonably necessary (which would have required a unanimous resolution), the Trustees have asserted that the solar panel project was a *"reasonably*

*necessary improvement to the common property*. As such, it is not in dispute that the procedures and requirements of prescribed Management Rule 29(2) are applicable.

19.21 It is not in dispute that the Respondents have not complied with the procedures and requirements of prescribed Management Rule 29(2), including but not limited to that:
The Respondents did not make any attempt to give the required 30 days written notice to members of the proposal: and
To the extent permissible (which the Applicants will demonstrate would not be permissible in the absence of the preceding 30 days written notice) the Respondents have not obtained a special resolution of members approving the solar panel project.

19.22 In the circumstances, the Respondents concede that the provisions of Rule 29(2) are applicable to the solar panel project, but the Respondents fail to event assert let alone to prove that they have complied with the requirements of that Rule, ie no written notice to members was sent, nor was the solar panel project approved by special resolution.

19.23 What the Respondents assert though is that there was *"substantial compliance"* with Management Rule 29(2). The Applicants refute that there was substantial compliance, addressed further below. Nonetheless, even if there was substantial compliance, which is denied, such would not be sufficient to constitute approval of the solar panel project, rendering the improvement proper and lawful.

19.24 Rule 29(2) is clear and the provision peremptory that the proposal may not be implemented until all members are given at least 30 days written notice, and in which notice certain compulsory information is to be given to members, and that no owner has within that 30 day period requested the convening of a general meeting.

19.25 The Respondents appear to base their claim of substantial compliance on the following assertions: That the installation of the solar panels and inverter is supported by 20 owners, and accordingly is supported by "the vast majority of the members":–

- Firstly, absolutely no evidence of this supposed support has been provided.

- Furthermore, Management Rule 29(2) does not permit such improvements to be carried out to the common property as long as the "vast majority" of owners approve of them. As already dealt with above, the Respondents' failure to provide the required 30 days written notice

renders the Trustees implementation of the solar panel project as unauthorised and unlawful. Nonetheless, even if the Trustees could have skipped the process of sending the written notice (which is denied) the Trustees would have at the least have required a special resolution of members. It is common cause that no special resolution approving of the solar panel project has been passed.

19.26 23(2) That the installation of an uninterrupted power supply solution has been discussed at each AGM held by the scheme since 2017:-

- At the risk of flogging the proverbial dead horse, discussion of a topic cannot under any circumstances be elevated to a valid resolution by members, let alone compliance with the very clear, specific and more onerous requirements for a reasonably necessary improvement.

- None of the annual general meeting minutes proffered by the Respondents even purport to record an approval by members to the solar panel project.

- Reference is made to paragraph 13.3 of annexure "MM4" in which is recorded that Mrs Fuhr *"enquired about a generator installation for the building"*. It was further noted that it was a *"consideration to possibly consider a solar installation in the future"*. Under even the most generous interpretation, this does not by any means indicate even a general sentiment, in principle, of approval for the solar panel project. No proposal was being considered and no vote was taken.

- The allegation that Mr Sheldon Brown addressed members regarding the issue of an uninterrupted power supply at the 2017, is denied. The minutes do not record Mr Brown as being in attendance. Furthermore, it is utterly inexplicable why Mrs Fuhr would have raised the enquiry about the generator installation if in fact the members had just been given a presentation about uninterrupted power supply options.

- The approval of the refurbishment of the electrical room (at the 2017 AGM) patently has nothing to do with the solar panel project. That was approved (as part of a greater R3million rand project) in 2017 when the issue of an alternative power supply was manifestly at best a consideration (raised by an owner), and not part of the proposal to members.

- Reference is made to paragraph 17.2 of minutes dated 17 December 2020 in which is recorded that "*After some investigating, it seemed that an inverter would be the cheapest option compared to the generator / solar options"*. The accuracy of those minutes is challenged, in that no discussion at all about an inverter took place at that meeting. Even so,

if one accepted the accuracy of the minutes in that regard, the minutes demonstrate only that possible alternative power supply solutions were just a consideration – no proposals were presented, and no votes taken.

- The fact that such considerations were raised by and discussed with members (whether formally and/or informally, as alleged by the Respondents) only supports the fact that owners expected to be reported to and included in the decision-making process – Not that the Trustees could simply unilaterally decide on such a project and proceed without any recourse to members.

19.27 In their answering affidavit the Respondents attempt to justify their (unlawful) conduct by motivating the usefulness and benefits of the solar panel installation. They also attempt to justify that the Cabana owners do indeed benefit therefrom. They also downplay the costs of the solar panel project. The fact of the matter is that no such justifications, irrespective of their validity (or lack thereof), does not overcome the lack of proper authority for the solar panel project.

19.28 The cost, how those costs would be paid and the motivations for the project are exactly what the Trustees were supposed to notify the owners of before embarking on the project. Management Rule 29(2) expressly requires that the Trustees provide this information to members to afford them the opportunity of considering the proposal and of exercising their right to call for a general meeting. It is the right of the members to consider and deliberate, at a general meeting of any one owner required, such factors as:-

- whether they believe the proposal is beneficial, if so whether the benefit justifies the costs;
- when the project should be undertaken.
- whether a generator or an inverter or solar was the best option.
- what maintenance and upkeep costs would apply.
- what contractor should be appointed.
- whether reserves could be applied, or a special levy raised; and
- whether the members contributions towards the project should be raised/applied equally, according to participation quota and/or by only certain owners – this is particularly relevant

in this situation given that the benefit to the Cabana owners, even on the Respondents' version, is far less than the owners/ residents of the Tower block units.

19.29 The Respondents also attempt to justify their conduct with the averment, remarkably deficient in detail, that the scheme was inspected by eThekwini Fire Department in January 2019. Nothing in the brief paragraph indicates that the alleged non-compliance had anything to do with the installation of an alternative power supply. Neither is any official notice of non-compliance provided. Furthermore, if in fact some aspect of the alleged non-compliance did relate to the solar panel project (for which there is not even a positive averment by the Respondents, let alone any evidence) the Trustees did nothing about the project for more than a year and a half. Two annual general meeting was held thereafter (on 25 October 2019 and on 17 December 2020) and there is no record that the Trustees reported any issue of non-compliance to members and/or presented any proposals to cure any such non-compliance.

19.30 The 2nd, 3rd and 4th Respondents robbed the members of their right to consider all relevant factors, including those referred to above, before the significant costs of this project were incurred.

19.31 It is common cause that the provisions of Management Rule 29(2) applicable. It is furthermore common cause that the Trustees have not complied with the procedures and requirements prescribed in Management Rule 29(2). "Substantial compliance" is not sufficient. Even if it were, the Respondents have not substantially complied. There is no evidence whatsoever that the details of the solar panel project were ever presented to owners, nor that any resolution approving the project was ever passed, whether ordinary or special. The project was accordingly undertaken unlawfully, *ie* without the requisite approval. The Trustees manifestly exceeded their powers.

19.32 Further legal argument and supporting authorities will be provided at the adjudication hearing or with the final written submissions, whichever may be applicable.

**Grounds of Defence – Prayer E**

19.33 Aside from the challenge to the Ombud's jurisdiction and a bold claim that the Trustees have not breached their fiduciary duties, the Respondents offer no defence to this claim.

19.34 If it is determined that the Trustees proceeded with the solar panel project without the necessary approval from members (whether deemed or by special resolution, according to Rule 29(2)), it follows that the Trustees acted without authority and /or exceeded their powers. Section 8(2) of the Sectional Titles Schemes Management Act prescribes that acting without or exceeding their powers constitutes a breach of the trustee's fiduciary duty.

19.35 In terms of section 8(3) of the Sectional Titles Schemes Management Act the trustees, having acted in breach of their fiduciary duties, are liable to the body corporate for the loss suffered as a result, being the amount paid to date to third parties in respect of the solar panel project and the liability incurred but not yet paid.

19.36 With regards to the amount of the solar panel project, the Applicants dispute that the amount of R665 669,76 represents the total cost of the project. The Respondents have avoided clearly and unconditionally providing the breakdown of the total costs. Annexure "MM3" is not an invoice, as claimed, but a Pro Forma invoice. The notes clearly state that the pricing is subject to availability. The project was completed prior to deposing to the answering affidavit and yet the final invoice is for some unexplained reason not provided. It is submitted that a negative inference is to be inferred by the Trustees' failure to furnish the final invoice. The approximate price of the project exceeding R1,2 million was obtained from a discussion with a Trustee (See paragraph 12 of the Claim Details), so it is somewhat circumspect that the Respondents now put up only a pro forma invoice, possibly to downplay the actual costs of the project.

19.37 The Respondents have not provided any averments and / or evidence to demonstrate that the solar panel project was duly approved in accordance with the requirements of the Sectional Titles Schemes Management Act.

19.38 The solar panel project was indisputably carried out without requisite approval and accordingly unlawfully.

19.39 The Trustees patently acted without authority and accordingly in doing so breached their fiduciary duty.

19.40 The Applicants have made all reasonable efforts to resolve this matter with the Trustees without having to launch these proceedings, but that the Trustees refused to cooperate with the Applicants and persisted with the project notwithstanding the challenge to their authority to do so.

19.41 The installation having been carried out unlawfully, the unlawful installation stands to be undone.

19.42 The Body Corporate and accordingly their members have suffered a loss, *ie* the costs incurred in the unlawful installation and the subsequent removal of the solar panel project

**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. 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 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. The Applicant who completed the application form, that being the third Applicant indicated that he is an owner on the form. The Respondents disputes that the third applicant is an "owner" of the sectional title development known as 60 Lagoon Drive. He is not an owner as stated in this form and accordingly does not have the requisite authority as an owner to launch such an application.

23. The Respondents submits that a simple CIPC/BizPortal search will confirm that Marius Khoury is not even a director/member of the first and second applicants. It is submitted that Marius Khoury has no relationship to these entities.

24. This information is critical even though it was only raised when parties were requested to make written submissions and is in essence new evidence is not allowed to be introduced at this stage. It is in the interest of justice that this issue should be addressed for enforceability.

25. The Applicant's response is that Mr Marius Khoury is a registered director of the Third Applicant. Reference is made to a copy of the CIPC online records which was submitted. Mr Khoury, who signed the dispute referral form was accordingly duly authorised to initiate these proceedings on behalf of the Third Applicant.

26. On the face of the document the Applicant's name does not appear in his personal capacity. Unit 8 reflects to be owned by the third Applicant. The application was not rejected in terms of section 42 of the CSOS Act.

**RELIEF A: That the Respondents are ordered not to carry out the installation of the solar panels or any ancillary infrastructure and equipment, pending the outcome of this application in respect of the further relief sought**

27. The solar panels have been installed and the matter though requested to be treated urgently was not referred as an urgent matter. The relief in respect of relief A as prayed for is therefore moot as the Adjudicator cannot grant it.

**RELIEF B: That the 2nd, 3rd and 4th Respondents are ordered to furnish the Applicants with the following information and documentation, within 3 days of the date of the Order**

-Copies of minutes of all trustees' meetings and/or written trustees' resolution relating to the solar panel project;

- Breakdown of total costs of the project;

- Copies of all quotations obtained for cost/s of the project;

- Engineer's specifications;

- Did the Trustees obtain any report or presentation on the project, including but not limited to the lifespan of the assets and equipment, the parts of the electrical reticulation which would be powered by the system and the costs of operation, maintenance and repair of the system? – copies of all reports and/or presentations and proposals to be furnished;

- Cost benefit analysis;

- The reason/s why the Trustees did not revert to the members to consider the approval of the project;

- How the Trustees intended funding the project.

28. The Applicants have requested information from the 1st Respondent. Regulation 26 and 27 of the STSMA under Management Rules is specific on what information may be kept and divulged in regard to the administration of the community scheme.

29. The Applicants submit that the information they requested fall within the documents and records addressed in prescribed management rule 27 and are to be furnished to members on request in terms of rule 27(4); and/or constitute books of account or (financial) records which in terms of prescribed management rule 26 (2) are to be furnished to a member on request.

30. Regulation 26(2) of the STSMA provides, "On the application of any member, registered bondholder or of the managing agent, the body corporate must make all or any of the books of account and records available for inspection and copying."

31. Regulation 27 (4) of the STSMA stipulates, " On receiving a written request, the body corporate must make the records and documents referred to in this rule available for inspection by and provide copies of them to —(a) a member;(b) a registered bondholder; or (c) a person authorised in writing by a member or registered bondholder."

32. The Applicants have submitted that they did not receive all the documents that they requested namely: trustees' meeting minutes or trustees' resolution relating to the solar panel project, The breakdown of the total costs of the project has not been furnished, any report or presentation on the project addressing the cost of operation, maintenance and repair of the system.

33. The Respondents have indicated that they have furnished the Applicants with documents and those that have not been furnished do not exist or the Applicants are not entitled to them or CSOS is not empowered to compel the Respondent to deliver the documents.

34. The trustees' meeting minutes or trustees' resolution relating to the solar panel project, the breakdown of the total costs of the project has not been furnished, any report or presentation

on the project addressing the cost of operation, maintenance and repair of the system. It is my view that these documents fall within the ambits of Regulation 27 and any other records required by the regulations which the Applicants are entitled to.

35. The Respondent's failure to furnish the Applicant with same is acting contrary to the Regulations if such information exists and I order that same must be furnished to the Applicants.

**RELIEF C: An order that the Applicants are entitled to supplement their Claim Details in support of this application within 7 days of receipt of the information and documentation**

36. The relief sought under C does not fall under section 39 of the CSOS Act. Section 38(3) of the CSOS Act states, "The application must include statements setting out—*(a)* the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39." This relief does not fall comply with section 38(3)(a).

37. In the case of **Trustees for the Time Being of the Avenues Body Corporate vs Shmaryahu and Another** 2018 (4) SA 566 (WCC) the court held at paragraph 17 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". It stands to reason that if 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.

38. The relief is accordingly dismissed as misconceived.

**RELIEF D: That the Respondents are directed to carry out, within 14 days, the removal of any equipment and any improvement or alteration to the common property carried out consequent to the solar panel project and to restore the common property to its prior condition.**

39. The solar panel project has been completed. There is no document submitted that the Respondents complied with Regulation 29 of the STSMA when the solar was installed. The minutes of 15 December 2017 under item 8 did not place restrictions on trustees due to the stated projects, per the resolution, that needed to be attended to. It is not clear to me which

projects were referred to as per the resolution. I do note under clause 13.3 that it was resolved that consideration would be had for a solar installation in the future.

40. With that said I believe that the relief sought has been overtaken by events in that the project has been completed and I do not see how it would serve the interests of the members to remove the solar panels and inverters. The relief sought is refused.

**RELIEFF E. That the 2nd, 3rd and 4th Respondents, jointly and severally the one paying the others to be absolved, pay to the 1st Respondent, within 30 days, the aggregate of all amounts paid to third parties and all liability incurred by the 1st Respondent as a result of the solar panel project.**

41. Section 8 (1) of the STSMA provides, "Each trustee of a body corporate must stand in a fiduciary relationship to the body corporate. The trustees have a legal obligation to act in the best interest of the body corporate. The trustees must not exceed powers conferred upon them.

42. The Respondents have not produced evidence that when the improvement was implemented, they complied with Regulation 29(2) of the STSMA. It cannot be said that they implemented it to a great extent as submitted by the Respondents. It is either implemented or not. In the absence of producing evidence of following the process it is conclusive that the process was not followed.

43. Because of that failure the Applicants now seek to recover the costs incurred by the body corporate as a result of the solar panel. The Respondent has submitted the difficulty that the members had prior to the installation of the solar panels and inverter during load shedding and how this has been addressed by the solar panel project.

44. Everything that has been done has been for the benefit of the scheme and not the 2nd to 4th Respondents. I see no evidence where the 2nd to 4th Respondent acted malicious as the issue of the panels was a discussion in previous AGMs it was the process of implementation that was not followed when the time to do the improvement came.

45. Regulation 8(4) of the STSMA states, "The body corporate must indemnify a trustee who is not a managing agent against all costs, losses and expenses arising as a result of any official act that is not

in breach of the trustee's fiduciary obligations to the body corporate." It is my view that the trustees did not breach their fiduciary obligation to the body corporate in this instance.

46. It is my view that the legislator foresaw that such situations will occur which is why section8(4) of the STSMA stipulates , "Except as regards the duty referred to in subsection (2)*(a)*(i), any particular conduct of a trustee does not constitute a breach of a duty arising from his or her fiduciary relationship to the body corporate if such conduct was preceded or followed by the written approval of all the members of the body corporate where such members were or are cognisant of all the material facts."

47. The relief sought by the Applicants is accordingly refused.

**RELIEF F. That the 2nd, 3rd and 4th Respondents, jointly and severally the one paying the others to be absolved, pay to the Applicants, within 30 days, all legal costs incurred by the Applicants in this application.**

48. Section 52 of the CSOS Act provides**, "** The applicant and any other relevant person are not entitled to legal representation during the adjudication process unless…" legal representation is not allowed unless agreed to by all parties including the Adjudicator. CSOS was created as an alternative to the courts with the intention of little legalities or the need for assistance of legal experts. The Applicants elected to utilise the services of Attorneys and I see no reason why the Respondents need to incur costs for the Applicants election to employ the services of the Attorneys. This can be considered to be a delictual claim should the Applicants wish to pursue and does not fall under the ambits of section 39 of the CSOS Act.

49. The relief sought is accordingly dismissed.

## ADJUDICATION ORDER

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

50.1 Relief sought under A,C,F is dismissed.

50.2 Relief sought under B is granted-The 1st Respondent must make the trustees' meeting minutes or trustees' resolution relating to the solar panel project, the breakdown of the total costs of the project has not been furnished, any report or presentation on the project addressing the cost of operation, maintenance and repair of the system information or documents available within 10 (ten) days from delivery of this order.

50.3 Relief sought under D and E is refused.

50.4 No order as to costs.

**RIGHT OF APPEAL**

51. 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 29 APRIL 2022.**

**T.P QWABE**

**ADJUDICATOR**