

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

Ref: CSOS4146/KZN/21

IN THE MATTER BETWEEN

**BIANCA MATOS**

**APPLICANT**

And

**LAGUNA RIDGE BODY CORPORATE**

**RESPONDENT**

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**ADJUDICATION ORDER**

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**EXECUTIVE SUMMARY**

- Relief applied for in terms of the CSOS Act:

**Section 39 (6) -In respect of works pertaining to private areas and common areas**

- (a) an order requiring the association to have repairs and maintenance carried out.
- (b) an order requiring the relevant person—(i) to carry out specified repairs or have specified repairs made; or (ii) to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the applicant.
- (c) an order requiring the association—(i) to carry out, within a specified time, specified works to or on the common areas for the use, convenience or safety of owners or occupiers.

- Date Adjudication conducted: 05 APRIL 2022.
- Name of the Adjudicator: Thandeka Qwabe.
- Order: **PARTIALLY GRANTED AND REFUSED.**
- No order as to costs.

## **INTRODUCTION**

1. The Applicant is Bianca Matos, the occupier at unit 2 at Laguna Ridge Body Corporate situated at 367 Peter Mokaba Road, Morningside, Durban, KwaZulu-Natal
2. The Respondent is Trustees of Laguna Ridge Body Corporate, a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011("STSMA") which is situated at 367 Peter Mokaba Road, Morningside, Durban, KwaZulu-Natal.
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 (6) -In respect of works pertaining to private areas and common areas**
  - (a) an order requiring the association to have repairs and maintenance carried out.
  - (b) an order requiring the relevant person—(i) to carry out specified repairs or have specified repairs made; or (ii) to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the applicant.
  - (c) an order requiring the association—(i) to carry out, within a specified time, specified works to or on the common areas for the use, convenience or safety of owners or occupiers.
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 23 February 2022. The adjudication was conducted on 05 April 2022 and an order is now determined.

## **PRELIMINARY ISSUES**

6. None.

**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. The respondent or affected persons failed to provide a response to the CSOS notice in terms of section 43. Accordingly, the dispute is therefore referred directly to Adjudication in terms of section 48 of the CSOS Act read with Clause 21.5.7 of the Practice Directive on Dispute Resolution. The Ombud referred the application together with any submissions and responses thereto to an Adjudicator on 12 January 2022.

## 15. **APPLICANT’S SUBMISSIONS**

15.1 The Applicant submits that Laguna Ridge is a sectional title building managed by Trafalgar and the Trustees. The Applicant’s family reside in unit 2 which is owned by her parents, Darryl & Corinne Myburgh. Unit 2 and Unit 4 were extended by 1.5m across the units, 37 years ago, by the original developer that built Laguna Ridge. Unit 2 is her section, anything beyond the walls and doors is common property as per the section plan. The extension is collapsing due to common property stormwater infrastructure failure.

15.2 Her parents bought unit 2 in 2009, and her family moved in as tenants. The outside patio brick work was so severely uneven and unsafe to walk on, in 2010 they employed the services of a contractor to come remove the bricks, level the sand and relay the same bricks to level the ground. Upon removing the bricks, the sand around the storm water drainpipe coming from the upper-level flats that goes under ground was soaking wet mud. After further investigations it was found the elbow pipe underground was completely broken and misaligned from the pipe going to the main storm water drains in the center of the garden.

- 15.3 They called the chairlady and supervisor at the time, as it is common property the Trustees repaired the pipe with their plumber. They weren't familiar with Sectional title living, the act and rules, at the time. As of today, this same storm water pipe that goes under ground was never repaired properly and as per reports attached and pictures, is still problematic and damaged, so it has been year after year for who knows how long, water just keeps flowing under the unit. At any given time, day/nights summer/winter, hot/cold the veranda brickwork is always wet.
- 15.4 In 2015 they noticed the floor inside of the ground floor garden flat dropping to a concerning point. They employed the services of a structural engineer to evaluate the issue. Please see attached report which states that the floor settlement would not continue further provided that there was no storm water drain leakages or any water ingress underground. They emailed this report to the trustees of the body corporate in 2015.
- 15.5 Fast forward to 2019, they noticed a problem with the storm water drain in the centre of the common property garden, they reported the issue to the Managing agents and the Trustees, and nothing was done. September 2020, they were standing on a ladder in the Applicant's bedroom taking down curtains when she noticed the wall had completely pulled away from the ceiling in her bedroom, she can stick her fingers right through to the outside. They immediately reported the issue to Trafalgar and the trustees. However, the issue is not just my flat it's the common property pedestrian walkway, the pool area and the front reception foyer entrance to the building. They went backward and forward from September 2020 to December 2020 requesting the Trustees to assist and attend a site meeting to discuss the damages and issues. October 2020, they employed an attorney to try and assist with instructing the Trustees to act and responsibility, again, the trustees refused.
- 15.6 In December 2020, they had structural contractors come on site to unit 2 and surrounding garden with the intention to do investigative work, they were met by the chairman threatening to call the SAPS for illegal entry on private property without permission. May 2021, they had Laguna Ridge Insurance send out an assessor, the claim was rejected due to mismanaged storm water infrastructure and gradual damage. May 2021 Laguna had a SGM whereby unit 2 issue was discussed. The owners at the SGM agreed that the trustees should get involved and it was agreed that another Structural Engineer and a Civil Engineer would assess the site damages and issue another report.

- 15.7 Despite numerous requests to the managing agent Trafalgar and the Trustees of Laguna Ridge, the Trustees have refused a meeting, refused to communicate with them to discuss the issue, refused to assist regardless of the issue coming from common property. Instead, they have chosen to work against them based on what they believe, regardless of what they have been advised on. In a letter dated 10<sup>th</sup> November 2020, the trustees did advise that they had conducted a thorough investigation of the sewer reticulation and stormwater plumbing systems and all was in good working order, that no remedial work was needed. They requested the reports to confirm that all was in working order and no such reports are available to date. The Applicant submits that they have been to a lawyer to try and force the trustees to assist with no luck. The trustees have even gone as far as writing a letter to all the owners in the building advising them that they "believe" they have no responsibility for the structural defects to their unit. They also stated that they had no choice but to hire an attorney at the body corporates expense to defend a case against the body corporate who were being sued by the owners of unit 2. This is a blatant dishonest statement.
- 15.8 Unit 2 have never taken legal action against the body corporate. It was clarified at the SGM by Trafalgar that no legal action had been taken against the body corporate by unit 2. It was also clarified by Trafalgar as to who was responsible for the resultant damages to their unit. They have also accused them of the extension being illegal. The approved plans for the extension done in the early 90's by the previous owner was submitted by the Applicant. The land surveyor also amended the section plan. These documents have been perused by all the structural and civil engineers confirming all is above board. After 1 year of begging for assistance from Trafalgar and the trustees, beginning of September 2021, the Applicant eventually advised them that they would be taking the next step, which was to contact a building inspector and take the legal route. Trafalgar asked them to give the Respondent till Monday 13 September 2021 which she did, and Monday came and went. I then emailed advising them that I would be contacting a Building inspector. Friday, 17<sup>th</sup> September 2021 a building inspector came to assess the resultant damages to unit 2 and surrounding common property, same day, Trafalgar agreed to come to unit 2 for a meeting and see the damages to unit 2 and surrounding common property. Suddenly, the Trustees want to have a meeting same day in the boardroom, they still refuse to come to the unit to see, acknowledge and discuss the damages. Over the years there have been many sink holes on common property walkways to the foyer and the pool area, all that is done by the supervisor, is a quick cover up by lifting the bricks, laying more sand and placing the brick back down (there is proof of these sink holes from Trustees meeting minutes on request if needed) There is a drain

channel just outside unit 2 garden area which collapsed many years ago and doesn't serve any purpose for which it is intended.

- 15.9 The pictures and reports submitted reflect that there is a downslope to unit 2 and surrounding common property from the road and there is no storm water catchment infrastructure in place to prevent water hitting unit 2. Unit 4 extension was done the same time as unit 2 (as per the approved building & section plans submitted ) unit 4 has no damage or structural issues whatsoever, they are on flat ground with no downward slop and stormwater ingress issues.
- 15.10 The Applicant submits that the unit is constantly damp, her children are constantly sick, with the constant influx of sand, dust and debris that comes through all the cracks. With the cold and windy months, they close all the windows at night and the rain and wind still comes through all the cracks where the wall meets the ceiling. June 2021, they had a damp detection specialist come and do an inspection, please see report attached. If they lay any blanket or mattress on the lounge floor all the moisture causes everything to get wet. All the floor tiles are lifting, cracking. A month ago, late at night, they heard a loud crack and on inspection the main bedroom sliding door had cracked from severe tension cause from the twisted frame. (picture have been submitted into evidence)
- 15.11 Unit 2 cannot be repaired and restored to its original condition until the problem causing the damages is addressed. The trustees have been advised on the matter by Trafalgar and are in possession of all the engineers reports. Both unit 2 and body corporate have been issued 21-day notices by the Municipality for Dangerous situation and contravention of the national building regulations and building standards act. The Applicant submits that they have 11 days left on both notices. Again, they have been requesting a meeting with the trustees and they refuse to respond. The family need to vacate the unit for health & safety reasons and for the duration of the repairs. Failure to adhere to the notices will result in fines and legal action by the Municipality law enforcement. They have exhausted every possible avenue of communication with the Trustees. The structural integrity of unit 2 and surrounding common property has been compromised by uncontrolled storm water management.

## **16. RELIEF SOUGHT BY APPLICANT**

- 16.1 an order requiring the association to have repairs and maintenance carried out.

- 16.2 an order requiring the relevant person—(i) to carry out specified repairs or have specified repairs made; or (ii) to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the applicant.
- 16.3 an order requiring the association—(i) to carry out, within a specified time, specified works to or on the common areas for the use, convenience or safety of owners or occupiers.

## **17. RESPONDENT'S SUBMISSIONS**

- 17.1 The Respondent submits that the previous owner of Unit two (2) appointed their own contractor and structural engineer to carry out the work required to extend their section. The Respondent submits that extension was unauthorised by the Body Corporate as a unanimous resolution at a general meeting and proper processes were not followed to register the extension of the section in the management rules or at the Deed's registry office.
- 17.2 The current owner or applicant took transfer of the property with the extension of the section already in place as "Voetstoots" and thus the Respondent submits that the owner acquired the extension as part of the section.
- 17.3 The work carried out to extend the section was subsequently found to have been carried out with poor workmanship, as per the Pinnacle report. The Respondent submits that the owner of Unit 2 is fully responsible and liable for the maintenance and repairs of the extension.
- 17.4 The Respondent submits that the owner of the unit is enjoying the use of the extended section exclusively without paying an increased levy in line with Laguna Ridge participation quota.
- 17.5 The allegation that the Body Corporate is liable for any cost will be rejected for the reasons mentioned above. The Body Corporate cannot in any instance be liable for any repairs of damages caused by the previous owner's contractor's poor workmanship.
- 17.6 Plumbing inspections have been carried out on several occasions over the past months, and once again recently, as instructed by the eThekweni Building Inspector, and according to the plumber's report, no issues have been located.
- 17.7 The Respondent submits that with recent correspondence between applicant's attorney and the attorney representing the body corporate, confirmed that the issues experienced by the applicant stems from poor workmanship.
- 17.8 The Applicant requested the eThekweni Development Management Department Building Inspectorate to send an inspector on site. The building inspector arrived on 23 September



2021 and their report dated 27 September 2021 concluded that the owner of Unit 2 must attend to the repairs of the extension and that the Laguna Ridge Body Corporate was to appoint a registered plumber to provide a report for the drainage system functionality.

- 17.9 According to the eThekweni report, there was concern that the storm water down pipes were blocked and that the underground storm water pipes may be cracked or damaged. The chairman contacted the inspector telephonically and confirmed that the drainage system is in good working order, and he subsequently contacted a registered plumber who was appointed to inspect the drainage system as instructed, and a report was submitted. Speed Plumbers inspected the drainages, manholes and Unit 2 verandas downpipes. Thorough tests were done, and the report clearly states that there were no issues with the drainage or downpipes.
- 17.10 The Respondent submits that there is indeed a construction problem with Unit 2, and whilst they do empathize with the owner, the Body Corporate cannot take responsibility on an area deemed to be part of the section and subsequently for bad workmanship that was carried out and subsequently approved by the previous owner and the building inspector at the time.

#### 18. **RELIEF SOUGHT BY RESPONDENT**

The Respondent did not submit any relief sought.

### **EVALUATION & FINDING**

19. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
20. 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.
21. Section 3 (1) of the STSMA states, "A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include—(m) to comply with any notice or order by any competent authority requiring any repairs to or work in respect of the relevant land or building." The body corporate is mandated to ensure compliance with competent authority addressed to the body

corporate. The letter from the inspector of the eThekweni Municipality dated 27 September 2021 is addressed to the owners and not the Respondent.

22. The Applicant who is a tenant in her parents' house has submitted evidence in picture form and various reports from experts who have confirmed the problem that she is experiencing in the unit. The notice that the Applicant has submitted from the eThekweni Municipality dated 27 September 2021 stated that, "Your attention is drawn to the fact that the cracked walls of your property are considered to be dangerous to life and property." The pictures submitted reflect problems in the inside of the unit. Section 13 (1) of the STSMA stipulates, "An owner must—(b) forthwith carry out all work that may be ordered by any competent authority in respect of his or her section, other than such work as may be required for the benefit of the building generally, and pay all charges, expenses and assessments that may be payable in respect of his or her section." The municipality ordered the owner of the unit not the Applicant in this instance to appoint a registered competent person to inspect and report on the stability of the building and for the owner to carry out the remedial work within 21 days.
23. The Respondent submits that the owner of the unit is enjoying the use of the extended section exclusively without paying an increased levy in line with Laguna Ridge participation quota and the Respondent will not be held liable for any maintenance of the area.
24. The Applicant's Ganga Plumbers expert report stated that they noticed, "We noted that the ground and the paving had subsided at the exterior walls of the three bedrooms and living room. This indicates something had washed away the soil. We noted there to be two storm waters down pipes traveling into the ground and a nearby storm water manhole located where the subsiding has taken place." They further stated, "We inspected the exterior walls of these rooms and found that the walls have pulled away from the ceiling thus allowing moisture and dampness to gather and settle in these rooms." . The conclusion that was made was "**We advise further investigation by means of CCTV pipe surveillance within the two-storm water down pipes and the nearby storm water manhole.**"
25. The internal camera inspection dated 8 December 2020 by Pinnacle Structural Specialist conducted an inspection and amongst the issues noted was "Pipe wall indentations may be racked which could result in: Water leaking into the surrounding soil causing saturation. □ Trough formation leading to compromised flow."
26. The letter from Trafalgar dated 10 November 2020 which was submitted by the Applicant states, "We refer to your letter dated 26<sup>th</sup> October 2020 and advise that the Trustees have conducted a thorough investigation of the sewer reticulation and storm water plumbing systems at Laguna and did not find any faults or blockages. From the assessment, all is in working order and therefore no remedial work is

required. The Trustees have not been provided with any evidence of damage done to Unit 2 – or any other unit –resulting from malfunctioning systems at Laguna Ridge.”

27. An email dated 20 September 2021 from the Respondent states, “We refer to our meeting on Friday 17 September 2021 with Peppi and Wendy after I met with Bianca and confirm that the Trustees will expose the storm water pipe at Unit 2 to establish damage and then call in a plumber to attend to said repairs. Further, we confirm that we will contact the Executor of Flat 12 to attend to the opening of the drainage pipes on the balcony to allow the water to drain instead of pooling.”
28. It is my view that the concession made by the Respondent in an email dated 20 September 2021 suggests that they acknowledge their responsibility to maintain and repair the common property in line with section 3(1)(l) of the STSMA which states, “to maintain all the common property and to keep it in a state of good and serviceable repair.” and should comply with same. This in my view suggests that the Respondent concedes that it is necessary for them to investigate the common property.
29. The Applicant did not agree with the Respondents’ approach to the investigation and stated in an email on the same day, “...The trustees want to dig up the storm water drain but the bigger issue is the **catchment** of all water **BEFORE** it hits my unit, surrounding common property, the pedestrian walkway, and the front entrance foyer, which we can all see from the picture below is in a downward slope. The drain channel just outside my garden collapsed many years ago and it does not serve the purpose for what it is intended for. Further to this from other reports and pictures submitted, the storm water pipe that runs down my wall just outside my lounge, going underground is still problematic and has been since we moved in, in 2009, the water just keeps flowing under my unit, again all on record! When Laguna’s plumber comes on site, he needs to see the bigger picture to do what is required in full, it is not just a quick dig up of unit 2 garden! What will be the scope of work and what purpose will it serve...”?
30. The Respondent to bring closure to the matter should agree on terms of reference for the plumber with the Applicant in doing the investigation and repair referred to in the email dated 20 September 2021. This will avoid any gaps that will come back.
31. I must hasten to mention though that section 13(1) (c) of the STSMA is clear that the Applicant is responsible for the maintenance and repair of his or her section and the Respondent cannot be held liable for repair same. It states , “13. (1) An owner must— (c) repair and maintain his or her section in a state of good repair and, in respect of an exclusive use area, keep it in a clean and neat condition.”

32. **In the case of Prag N.O and Another v Trustees for the time being of the Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body Corporate and Others (A260/2020)**

[2021] the court held, “26. In second place, and as previously pointed out, in the affidavit<sup>16</sup> which he filed in support of the appeal<sup>17</sup> first appellant alleged that the basis for the Trust’s claim was that the body corporate had negligently failed to comply with its statutory ‘duty of care’ to ensure that the buildings in the scheme were properly insured, which resulted in damages being suffered by the Trust. It is trite that in referring to a ‘duty of care’ the appellant was using terminology which is more appropriately used in English tort cases, where wrongfulness and *culpa* ie fault are conflated. In our law we speak of a legal duty, which pertains to wrongfulness, and which is determined by the expectations and norms of the community’s *boni mores*, to which a further ingredient of *culpa* in the form of negligence is added, before liability will ensue. Be that as it may, in argument before us appellant’s counsel conceded that, framed as it was, the appellants’ claim essentially constituted a delictual claim for damages.

27. In my view it was never intended that such a claim could be adjudicated upon by the Ombud in terms of the CSOS Act, which is aimed at resolving disputes in regard to the administration of a community scheme between persons (which by definition include not only individual members of a scheme but also any association ie any structure which is responsible for its administration), who have a material interest therein.

28. If one considers the terms of the CSOS Act as a whole, and the kinds of matters in respect of which an adjudicator can make orders in terms of s 39 of the Act, they either concern regulatory/governance issues<sup>21</sup> pertaining to the administration of a sectional title scheme, or behavioural issues<sup>22</sup> pertaining to the conduct of members of the scheme *inter se* (which commonly would cover so-called nuisance or neighbour disputes). It was clearly not intended that the Ombud would have the power to adjudicate on delictual claims for damages, which involve weighty considerations pertaining to wrongfulness (which depend on prevailing societal norms and public policy) and fault, and the quantification and determination of the quantum of any damages which may have been sustained pursuant thereto, which are matters which are best left for judicial officers and Courts.”

33. The Adjudicator does not have the power to adjudicate on delictual claims for damages, which involve weighty considerations pertaining to wrongfulness (which depend on prevailing societal norms and public policy) and fault. I mention this because the Respondent has disputed responsibility for the damages to the section and find it unnecessary to go back as to how the extension was constructed in my view as ultimately it exists, and the inside of the unit remains the responsibility of the owner.

34. In determining this order, I exercise the powers conferred upon me as an Adjudicator in terms of section 54 (3) of the STSMA which provides that, "The order may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate."

### **ADJUDICATION ORDER**

36. In the circumstances, the following order is made:
- 36.1 The relief sought in respect of section 54(3) is granted.
- 36.2 The Applicant and Respondent must meet and agree on the scope of the investigation to be conducted by the plumber who will be appointed by the Respondent as stated in the email dated 20 September 2021. The said meeting must be convened within seven (7) days of delivery of this order.
- 36.3 The Respondent must remedy any repairs recommended by the plumber after investigation. The investigation and repairs must be concluded within fourteen (14) days from delivery of the investigation report.
- 36.4 The relief in respect of section 39(6)(b)(i) and (ii) is refused.
- 36.5 The relief sought in respect of section 39(6)(c)(i) is granted in line with paragraph 36.2 above.
- 36.6 No order as to costs.

### **RIGHT OF APPEAL**

37. 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 07 APRIL 2022.**



**T.P QWABE**  
**ADJUDICATOR**