

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

Ref: CSOS5577/KZN/21

IN THE MATTER BETWEEN

**MUHAMMAD JAFRI**

**APPLICANT**

And

**TRUSTEES OF BENZELIA 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 (1) In respect of financial issues—**

(c) an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way.

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

(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.

**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: 11 APRIL 2022.
- Name of the Adjudicator: Thandeka Qwabe.
- Order: **PARTIALLY GRANTED AND DISMISSED.**
- No order as to costs.

## **INTRODUCTION**

1. The Applicant is Muhammad Dilshad Hussain Jafri (herein referred to as the “Applicant”) an owner of unit 11 at Benzelia Body Corporate which is situated at 276 Helen Joseph Road, Glenwood, Durban, KwaZulu – Natal.
2. The Respondent is Trustees of Benzelia Body Corporate of Auroras( herein referred to as the “Respondent”) , a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011(“ST SMA”) which is situated at 276 Helen Joseph Road, Glenwood, 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 (1) In respect of financial issues—**

(c) an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way.

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

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**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 11 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. 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 is 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 8 April 2022.

15. **APPLICANT’S SUBMISSIONS**

15.1 The Applicant submits that he bought flat no 11, at 276 Helen Joseph road Glenwood in July 2022 and he moved in November 2022. As he moved in, within one week there was a break-in at in the home, robbers broke the kitchen window from fire exist stairs and came inside the house while everyone was sleeping around 3am, they used some kind of chemical to make us unconscious, robbers took all our cell phones, wallets, laptop, car keys and one of the cars along with them.

- 15.2 When he brought this issue to trustees and asked them to arrange an urgent meeting to investigate the lope hole in the building security, the body corporate refused to arrange a meeting with him, no one from the body corporate or trustees came to him for condolence on my loss. He raised security concerns numerous times on the building WhatsApp group and in person with body corporate members and body corporate chairman, but he was turn down every time. He contacted body corporate and Wakefield's property management to come in between and raise security issue with him and he did not receive a response. He sent Wakefield numerous of emails asking for an explanation and possible solution for the lope holes in the building security, but he never received any response from the Wakefield's and body corporate.
- 15.3 He submits that he had no option left but to take matters on his own to do his own security , He wanted to seal the windows from where the robbers came so he put burglar bars from inside his house and he put a steel mesh grill on the outside of his window, which was from nowhere protruding the common property.
- 15.4 While he was taking all the precautions and putting the mesh and burglar bars, the Building Manager who lives next to his flat, nor he or anyone from the building took any objection on the changes done. But later after 3 months he received a letter from Wakefield's that the mesh net he put on the window is wrong. He requested the body corporate and Wakefield's again to have a meeting with him to discuss why he installed the mesh but received no response from Wakefield's, but body corporate agreed to have a meeting with him. During the meeting, In the presence of all body corporate members they agreed verbally to do minor changes to the installation and to write a permission letter to body corporate so the body corporate can permit him to leave the mesh as it is.
- 15.5 The Applicant submits the audio recording of the Body corporate chairman asking for permission letter and in the audio one can hear that he already spoke to body corporate members about this, and they only requested a permission letter from him side.
- 15.6 Later after few months same incident happened with flat 23 , they raised same security issues again but were turned down again and due to the poor security and non-serious attitude of the body corporate the Applicant had to leave his home and had to start living in another apartment for more safety , and same time he launched a complaint with CSOS and informed body corporate and Wakefield's about the CSOS and he informed the body corporate and Wakefield's that whatever CSOS will decide he will accept the decision, but as the body

corporate came to know that a complaint has been launched to the CSOS and the flat is empty , the Body corporate sent a contractor .

- 15.7 Without the Applicants' consent and prior notice or any quotation and discussion, contractors were sent to the flat and the mesh was removed, and the contractors did a poor job and now the body corporate is claiming R8600 for the cost of removing 2x mesh frames from windows from the Applicant, which is not more than R2000 job as he already had a quotation from the other contractor. No invoice or quotation from the contractor has been submitted to him or to CSOS as of today's date.
- 15.8 No member of the body corporate and Wakefield's takes CSOS seriously and due to which no one from Wakefield's or body corporate attended the previous section held by CSOS.

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

- 16.1 The Applicant would like CSOS to act against the body corporate for such a non-serious attitude towards the owners and victims and for not providing residents the security towards their lives and property.
- 16.2 The Applicant wants to be free from paying this R8600 as he was not informed of any such charges in advance, and after requesting numerous times about arranging a meeting again and after numerous emails sent to Wakefield's he did not receive a response, he totally believes that injustice happened with him and body corporate and Wakefield's is trying to hide their mistakes and their non seriousness and did an illegal act by protruding in his flat and damaging the window frames and charging him total false amount as a penalty. Body corporate wants to punish him for bringing into their notice that the building is not safe for residents and for the personal belongings.

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

- 17.1 The Respondent submits that with reference to the application with regard to repairing body corporate common property damaged / defaced during the renovations of flat 11.
- 17.2 This matter was referred to CSOS by the owner of flat 15, Ref: number 01522/KZN/21. This application was lodged to force the body corporate to make the necessary alterations forthwith.

- 17.3 This was lodged after the Applicant had been asked, both in writing and verbally, a number of times to carry out the necessary repairs and informing him that if not done, the body corporate would do them, each time he refused.
- 17.4 The Respondent submits that CSOS instructed the parties to resolve the matter referred to above and they did so. Halfway through, the Applicant sent Wakefields, managing agents a threat warning the body corporate to stop, however as stated above, after many requests ignored, the Respondent was instructed to carry on, so they did.

18. **RELIEF SOUGHT BY RESPONDENT**

The Respondent submits that the Applicant has no claim against it.

**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. The owner of the unit adjacent to unit 61 has not been cited in these proceedings and an order cannot be made against the owner.
22. Section 3 (1 ) of the STSMA provides, "A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include (l) to maintain all the common property and to keep it in a state of good and serviceable repair." The section mandates the body corporate to maintain and keep the common property in a state of good service. This means the land and parts of the building/s which are not included in a section.
23. This in my view will include the security that is shared in the community scheme such as the fence and gates. It does not ,however, impose a responsibility on the body corporate to instal security in an inside of a section.

24. The obligation to ensure that the section is secure is conferred by Section 13(1) of the STSMA stipulates “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.” This means that the owner of the section is responsible for the security of his or her section.
25. Regulation 4(2) of the STSMA under the Conduct Rules states, “An owner or occupier of a section must be considered to have the trustees’ consent to install a locking or safety device to protect the section against intruders, or a screen to prevent entry of animals or insects, if the device or screen is soundly built and is consistent with a design, colour, style and materials approved in writing by the trustees.” This provision states that consent to install locking or safety device is deemed to be granted subject to the installed device complying with the prescribed design, colour, style, and materials by trustees.
26. The Respondent referred to the fact that the issue was addressed and finalised under reference number 1522/KZN/21. I perused the file and the Applicant in the matter was another owner who wanted the Body Corporate who were the Respondent to act against the Applicant in this case for renovations to his section without consent as the building is considered to be a heritage site.
27. The problem arose when the owner installed safety device on common property and contravenes Regulation 4 (1) of STSMA under the Conduct Rules states, “The owner or occupier of a section must not, without the trustees’ written consent, mark, paint, drive nails, screws or other objects into, or otherwise damage or deface a structure that forms part of the common property.” The evidence is that this is what happened in the Applicants case. The Applicant on his own admission states that he installed the mesh and burglar guards without consent, and he was further frustrated that the Respondent did not entertain the fact that his unit had been broken into. It is also evident that the Applicant installed aluminium windows that were not approved by the Respondent.
28. The Respondent submits that the Applicant was told numerous times that he was in breach of the Body Corporate rules by defacing the common property and he should repair the common property. The evidence is that he failed to rectify the breach and the Respondent took it upon themselves in terms of Regulation 31 (2) of the STSMA under Management Rules states, “If despite written demand by the body corporate, a member refuses or fails to (b) repair or maintain a section owned by that member in a state of good repair as required by section 13(1)(c) of the Act; and that failure threatens the stability of the common property, the safety of the building or otherwise



materially prejudices the interests of the body corporate, its members or the occupiers of sections generally, the body corporate must remedy the member's failure and recover the reasonable cost of doing so from that member; provided that in the case of an emergency, no demand or notice need be given to the member concerned."

29. The Applicant might have been frustrated that he had raised his concern about the safety issue in the body corporate and did not get positive feedback or in his submission any feedback but that would not justify him not complying with an instruction to remedy the defaced common property, which was in contravention of the scheme's rules, if any. The court held in **Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others (323/2018) [2019] ZASCA 30; 2019 (4) SA 471 (SCA) (28 March 2019)**, where the following was stated with regard to the nature of the Rules of Homeowners Associations (which are regarded as similar, if not the same, as bodies corporates established in terms of the STSMA): "*When the respondents chose to purchase property within the estate and become members of the Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature. The conduct rules, and the restrictions imposed by them, are private ones, entered into voluntarily when an owner elects to buy property within the estate.*" This means that when you buy into a scheme you have to abide by the rules of the scheme as you have bound yourself to them.
30. There is evidence that the Applicant communicated with the Chairman who requested him to submit a permission letter for the renovations which included the security devices this is reflected in an email dated 3 May 2021. The problem here is that the Chairman alone cannot grant permission for anything. Regulation 14(4) of the STSMA under Management Rules provides, "Trustees must adopt decisions by resolutions adopted by majority vote: Provided that resolutions may be put to the vote —..." Although the Chairman might have condoned the Applicant's conduct, he did not have the authority to do so in the absence of a majority resolution and that in my view includes deciding on an application for permission.
31. The evidence from the Applicant is that he did not consent to remedy the contravention of the Body Corporate Rules, prior notice or any quotation and discussion by the Respondent and the costs were recovered from him. The evidence from the Respondent is that the Applicant was informed to remedy his contravention but failed and that is why they took it upon themselves and recovered the costs thereof from him. A letter addressed to the Applicant dated 20 April 2021 from the Respondent required the Applicant to remedy the breach by 31 May 2021, but he failed to do so.

32. Paragraph 11 of CSOS Practice Directive – Circular On Amendment Of Rules In Terms Of The Sectional Title Schemes Management Act issued on 1st of December 2020, Annexure “A” under ‘Fines and Penalties’ which provides, “The trustees do not have any power to decide on fines and penalties on their own or to take any action against an owner or occupier – the fair and equitable procedure as set out in the rules must have been followed.” The Applicant was afforded an opportunity correct the contravention. He was advised of the rules and fine that exists.
33. Having found that the issuing of penalties or fines by the Respondent, was done in accordance with the scheme’s conduct rules, I cannot find a justification for granting the relief sought by the Applicant, accordingly the Applicant’s claim against the Respondent is dismissed.
34. There is no evidence before the adjudicator proving or suggesting that the Respondent had not acted in the best interest of the scheme.
35. It follows that the Applicant has not succeeded in his case against the Respondent and is not entitled to the relief sought.
36. Accordingly, the relief sought in terms of section 39(1)(c) is dismissed, in terms of section 53(1)(a) of the CSOS Act.

**The Applicant would like CSOS to act against the body corporate for such a non-serious attitude towards the owners and victims and for not providing residents the security towards their lives and property**

37. The relief sought does not fall under section 39 of the CSOS Act. Section 38 of the CSOS Act states as follows:  
“(1) Any person may make an application if such person is a party to or affected materially by a dispute.  
(2) An application must be- (a) made in the prescribed manner and as may be required by practice directives; (b) lodged with an ombud; and (c) accompanied by the prescribed application fee. (3) 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 relief contemplated in section 39; (b) The name and address of each person the applicant considers to be affected materially by the application; and (c) The grounds on which the relief is sought.”
38. **In Trustees for the Time Being of the Avenues Body Corporate v Alain Shmaryahu and**

**Another** 2018 (4) SA 566(WCC) it was stated as follows: -

“An applicant for relief in terms of the Act is required to identify in its application which of the orders particularised in s39 it seeks.” The Applicant has failed to set out which of the order particularised in Section 39 of the CSOS Act, as the ones he seeks are not within the ambit of section 39.

39. The Adjudicator as a creature of statute is bound by the CSOS Act and the Adjudicator, therefore, has no authority to act outside the powers accorded to him or her in terms of the CSOS Act.
40. The relief sought is dismissed.
41. The Applicant sought information in respect of proof of payment and invoice or quotes from contractors in respect of the R8500.00 claimed by the Respondent.
42. The Respondent should furnish the Applicant with the proof of payment and invoices pr quotations in respect of R8500.00 as it is reasonable and fair that the Applicant must be furnished with the proof of the costs incurred as a result of the remedy by the Respondent.

### **ADJUDICATION ORDER**

43. In the circumstances, the following order is made:
  - 43.1 The relief sought in respect of section 39(1)( c) and 39 (6) (c) is dismissed.
  - 43.2 The relief sought in respect of section 39(7)(a)is granted- The Respondent must furnish the Applicant with the proof of payment and invoices or quotations in respect of R8500.00 to recover the costs incurred to remedy the work in the Applicant’s unit. The said information must be furnished within 14 (fourteen) days of delivery of this order.
  - 43.2 No order as to costs.

### **RIGHT OF APPEAL**

44. 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 14 APRIL 2022.**

A handwritten signature in black ink, appearing to read 'T.P. Qwabe', written in a cursive style.

**T.P QWABE  
ADJUDICATOR**