



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

Ref: CSOS 8183/KZN/23

IN THE MATTER BETWEEN

FRANCESCA CARMELINA SCHUMACHER

Applicant

and

MICHAEL BRONN

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act: Sections 39(6)(b)(i) - in respect of works pertaining to private areas and common areas.
- Date Adjudication conducted: 28 February 2024.
- Order: Granted.
- Name of the Adjudicator: Adv. AS du Toit.
- Quality Assured by & date: Ms. P Moodley on 1 March 2024.

INTRODUCTION

1. The applicant is Francesca Carmelina Schumacher, the owner of unit 31 in the scheme.
2. The respondent is cited as Michael Bronn, owner of unit 34, which is situated right above applicant's unit in the scheme. The body corporate of Bay Ridge sectional title development (SS556/1999) was not cited as a party to the proceedings. The scheme is situated at Dolphin Crescent, Ballito, Kwazulu-Natal.
3. Bay Ridge sectional title scheme qualifies as a community scheme, which is described as a scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings in terms of the Community Schemes Ombud Service Act¹ ("CSOS Act").
4. Respondent is a member of the scheme by virtue of his ownership of property in the scheme.
5. This is an application for dispute resolution in terms of section 38 of the CSOS Act, whereas the definition of a "person" authorised to make this application. The application was made in the prescribed form and lodged with the Community Schemes Ombud Service (CSOS) by way of email dated 11 October 2023.
6. The application seeking relief in terms of section 39 of the CSOS Act, is in respect of Section 6(b) – "*an order requiring the relevant person – (i) 'to carry out specified repairs, or have specified repairs made'*". Jurisdiction is confirmed in terms of the provisions of section 39 of the CSOS Act. The Community Schemes Ombud Service is therefore authorised to determine this dispute.

¹ Act 9 of 2011.

7. This matter is adjudicated in terms of the CSOS Act and Practice Directive on Dispute Resolution of 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 papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator”*. The parties were requested to make written submissions. The adjudication was conducted on 28 February 2024 resulting in the drafting of this order.

RELEVANT STATUTORY PROVISIONS

8. Section 1 of the CSOS Act defines-

- ‘community scheme’ as “any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing cooperative and "scheme" has the same meaning.”
- ‘dispute’ as “a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly.”

9. Section 38 of the CSOS Act provides that;

“Any person may make an application if such person is a party to or affected materially by a dispute.”

10. Section 47 provides-

“On acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the Ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the application, the Ombud must refer the matter to conciliation.”

11. Section 48 provides-

“If the conciliation contemplated in section 47 fails, the Ombud must refer the application together with any submissions and responses thereto to an adjudicator.”

12. 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 case the dispute has not been resolved through conciliation, the matter may be referred to an adjudicator. Accordingly, a certificate of Non-Resolution was issued in terms of section 48(1) of the CSOS Act. This application together with any submissions and responses thereto was subsequently referred to an adjudicator by the Ombud.

PRELIMINARY ISSUES

15. Section 38(1) of the CSOS Act determines that “*Any person may make an application if such person is a party to or affected materially by a dispute*” in order to establish *locus standi* (legal standing). Although, it is noted that applicant’s property was subsequently sold (OTP signed on 9 November 2023)

with registration in the Deeds Office on 11 December 2023, applicant might still be “materially affected” by this dispute in that an amount of R70 000 (seventy thousand rand) was withheld from applicant, as per agreement (immovable property condition report) and transfer of property² on condition that certain repair work be conducted.

16. “*Locus standi in iudico*” is defined as “the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted”. The Supreme Court of Appeal in the matter of *Four-Wheel Drive Accessory Distributors CC v Leshni Rattan NO*³, best described the requirements of *locus standi* as follows: “. . . that the appellant must have an adequate interest in the subject matter of the litigation; the interest must not be too remote; the interest must be actual; and the interest must be current (not hypothetical)”. The Court also stated that *locus standi* is, and should be, one of the first things to establish in a litigation matter.
17. The term “dispute” means 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”. However, there is nothing in the CSOS Act that makes the reader thereof any wiser as to how to ascertain with certainty whether a person is “*affected materially by a dispute*”. This is a legal term with a specific legal content.
18. In the Kwazulu Natal case of *Durdoc Centre Body Corporate v Singh*⁴ the issue of what constitutes legal standing or *locus standi* was deliberated, and the Court concluded that the applicant in the CSOS application had to be the owner of the unit. In this case Singh was not the owner of the units but merely the manager of the company that owned the units, and the Court found that the CSOS

² As per addendum to agreement.

³ 2018 JDR 2203 (SCA)

⁴ 2019 (6) SA 45 (KZP)

Adjudicator had erred in equating authority with legal capacity to litigate, as the application to the Ombud was lodged by Singh in his own name and personal capacity. The Court held that the right to lodge a dispute was prescribed by legislation as a right that accrued to owners of units who were materially affected by a community scheme related matter. Furthermore, the court emphasised that the standing of a person to commence litigation does not depend on authority to act, it depends on whether the litigant is regarded by the court as having a sufficiently close interest in the litigation and its outcome.

19. As regards the definition of “material interest”, there appears to be no specific legal definition of this term except “*a sufficiently close interest in the litigation*” as stated above, and additionally, in respect of financial terms, more specifically in relation to the Companies Act, and related to a directors duty to disclose such interest “material Interest” is said to mean: “*an actual or potential benefit or detriment, other than one that would devolve on the corporation or the shareholders generally, that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken*”.
20. Having taken all of the above aspects into consideration, including the definition of “dispute” in section 1 of the CSOS Act, it is my considered opinion that the applicant, whilst ownership of the unit in the scheme have passed and bearing in mind that the application herein was filed on 11 October 2023 (prior to transfer date), have demonstrated that she has a material interest in the matter to be adjudicated on and consequently she has fulfilled the requirement of *locus standi in iudico* to appear before the CSOS in this matter.

SUMMARY OF RELEVANT EVIDENCE

Both parties' submissions

21. Both parties' submissions will be considered simultaneously for convenience

sake. Applicant contends that her section (31) sustained damages resulting from water ingress, apparently emanating from the respondent's unit 34, which is situated directly above applicant's unit. The damages sustained to section 31 include the wall & ceiling to applicant's main bedroom as well as the balcony ceiling. These damages have been brought to respondent's attention on numerous occasions, to no avail. An investigation was conducted & report compiled by Detecta Leak CC (dated 21 January 2021) regarding the leakage and water ingress, as agreed to between the owners of sections 31, 32, 34 & 35 respectively.

16. The report from Detecta Leak CC referred to the following;
 - 16.1 *"Inspected the affected areas in unit 31 and noted there to be visible water damage to the main bedroom walls and ceiling along with the balcony ceiling."* (fig 8 unit 31 balcony).
 - 16.2 *"Thermal imaging was carried out in unit 31 with evidence of dampness noted as indicated with the darker shades in the thermal image captured."* (fig 9 unit 31 bedroom).
 - 16.3 *"Moister testing was carried out in unit 31 affected areas with high moister readings noted."* (fig 11 unit 31 bedroom).
 - 16.4 *"Plugged off unit 34 balcony drainage point and dye and flood tested unit 34 balcony with green dye over a 24 hour period."* (fig 12 unit 34 balcony).
 - 16.5 *"Noted that unit 34 balcony drainage point was leaking in the brick work where the pipe exits the balcony stub wall."* (fig 16 unit 34 drainage outlet).
 - 16.6 *"There was no visible due in the internal walls of the units but noted that the moister readings taken after the dye testing had increased by more than half. Moister testing along with thermal imaging was carried out in unit 32 with low readings noted indicating that the unit 33 balcony waterproofing was in working order."* (fig 17 unit 31 bedroom).

1.7 SUMMARY

- ☐ *"The dye and flood testing of unit 34 and 35 indicated ingress through the existing tiles and waterproofing with the dye evident to be leaking out from the front face of the balconies with yellow and green dye evident in the adjacent units' balconies of unit 33 and 32.*
- ☐ *The thermal imaging and moisture testing confirmed the dye and flood testing with the readings prior to the flood testing dramatically increasing after the flood testing was carried out with visible dye evident on the external areas but no visible dye evident on the internal walls of the unit.*
- ☐ *We assume that if the flood test was carried out over a longer period the dye would ingress to the internal areas noted.*
- ☐ *Noted that unit 34 drainage outlet was leaking in the wall with visible dye evident when draining the balcony."*

1.8 RECOMMENDATION:

- ☐ *"UNIT 34 and 35 will need to strip the balcony floor tiles and waterproof and re tile.*
- ☐ *Unit 34 balcony drainage point will need to be broken out and replaced.*
- ☐ *Refer with waterproofing specialist such as Industrial linings or EThekwini roofing and waterproofing."*

17. Respondent has failed/neglected to respond and participate in the proceedings, notwithstanding that he apparently initially agreed to the inspection by Detecta Leak and report compiled.
18. Applicant has exhausted all internal remedies in this regard with no success, as the managing agents also informed respondent to conduct the necessary repairs to his section.

Relief sought by the applicant:

19. The respondent be ordered to conduct some repairs to his balcony and balcony drainage point as well repairs to applicant's unit.

EVALUATION & FINDING

20. In evaluating the evidence and information submitted, 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 based on a balance of probabilities.

21. The Detecta Leak report (dated 21 January 2021) is undisputed and evident that the leak into applicant's section 31 emanates from the balcony of respondent's section 34, which is situated right above applicant's section. Although, the body corporate is usually also added to these kind of applications and relief sought, an owner is nevertheless responsible to –

21.1 *“Repair and maintain his or her section in a state of good repair....”*⁵

21.2 In respect of an insurance claim *“a member is responsible for any excess amount that relates to damage to any part of the buildings that member is obliged to repair and maintain in terms of the Act or these rules.”*⁶ It is uncertain from the facts herein if a claim was lodged with the insurance.

22. The scheme's Conduct Rules further determines in respect of balconies that *“The balcony forms part of the section and therefore is the responsibility of the owner to repair and maintain. This includes the waterproofing of the balcony and drainage outlets. If an owner fails to maintain his balcony and such failure*

⁵ Section 13(1)(c) of the STSMA.

⁶ PMR 23(2)(b).

causes damage to common property the body corporate shall recover the costs of repair to common property from such an owner.”⁷

23. CSOS is regarded as a statutory body and as such a creature of statute and adjudicators’ powers are confined to the provisions of section 39 of the CSOS Act⁸, as confirmed in the matter of *Evergreen Property Investments (PTY)Ltd v Messerschmidt*⁹ and *The Kingshaven Homeowners Association v Botha*¹⁰.
24. Having evaluated the evidence and submissions herein I am satisfied that applicant has discharged the onus of proof on a balance of probabilities in order for the relief sought to be granted. The recommendations contained in the Detecta Leak Report, as referred to above, is also accepted in the circumstances.

COSTS

25. Parties are generally expected to cover their own costs in respect of the resolution of disputes determined in terms of section 54 of the CSOS Act, whereas cost orders are more readily issued in terms of section 53 orders providing for the dismissal of applications considered to be frivolous, vexatious, misconceived or without substance (sub section 1(a)) or 1(b) – where applicant fails to comply with a requirement in terms of section 51. This scenario is however not applicable here. The circumstances in this matter do not justify a cost order – the parties therefore bear their own costs in the matter.

⁷ Clause 9.5.2 of the Conduct Rules.

⁸ 9 of 2011.

⁹ 2019 (3) SA 481 (GP), para.18.

¹⁰ 2020 JDR 1783 (WCC), para(s).6 and 34.

ADJUDICATION ORDER

26. In the circumstances, the following order is made in terms of Section 54(1), read with subsection (3) of the CSOS Act;

26.1 Applicant's relief sought in terms of Sections 39(6)(b)(i) is granted. Respondent is ordered to conduct the necessary repairs to his balcony as well as to the bedroom wall and balcony ceiling of unit 31, as per the Detecta Leak Report dated 21 January 2021 - to the reasonable satisfaction of the trustees of Bay Ridge Body Corporate on/before 30 April 2024. A copy of this order to be distributed to the trustees of Bay Ridge and the new owner of unit 31 in terms of section 55(1) of the CSOS Act.

26.2 No order is made as to costs.

RIGHT OF APPEAL

27. 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 CAPE TOWN ON 28 FEBRUARY 2024.

Andries du Toit

Adv. AS du Toit

ADJUDICATOR