



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

Case Number: CSOS2044/GP/17

IN THE MATTER BETWEEN

ROLAND BERKHOUT

(Applicant)

and

CARRISBROOKE LIFESTYLE ESTATE BODY CORPORATE

(Respondent)

ADJUDICATION ORDER

THE PARTIES

1. The applicant alleges he is the owner of Unit 49 Carrisbrooke Lifestyle Estate which is situated at No.153 Benoni Road, Benoni North, Ekurhuleni, Gauteng.
2. The respondent is the Carrisbrooke Lifestyle Estate Body Corporate. Carrisbrooke Lifestyle Estate Body Corporate is a body corporate as contemplated in Section 2 of the Sectional Title Scheme Management Act No.8 of 2011 and to which it would be convenient to refer as "the body corporate".

INTRODUCTION

3. The development of Carrisbrooke Lifestyle Estate is a retirement village comprising of 98 residential sectional title units. The development is managed by a Board of Trustees of the body corporate and a managing agent, Stark & Scott.
4. This is an application for dispute resolution in terms of Section 38 of the Community Ombud Services Act No.9 of 2011. The application was made in the prescribed form and lodged with the Gauteng Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.
5. The adjudication hearing took place on 11 June 2018. This application is before me as a result of a referral sent by the Gauteng Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.
6. On 11 June 2018 all the parties entered an appearance in terms of the Notice of Set Down which was sent out to them on 16 May 2018 as contemplated in Section 48(4) of the Community Schemes Ombud Service Act No.9 of 2011.

APPLICABLE PROVISIONS OF THE ACT

7. The hearing was conducted in terms of section 38 of the CSOS Act No,9 of 2011 which provides that –

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

8. Section 45(1) provides that –

“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”

9. Section 47 provides that –

“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’.

10. Section 48 provides that –

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

11. Accordingly, this matter proceeded to conciliation on 25 April 2018 but the dispute could not be resolved and a certificate of Non Resolution was issued on 25 April 2018, in terms of Section 48(4) of the CSOS Act No.9 of 2011. The Ombud therefore, referred the matter to adjudication, in terms of Section 47 of that Act.

SUMMARY OF EVIDENCE

Applicant’s Submissions

The applicant was sworn in and testified as follows –

12. The applicant stated that he is the owner of unit 49 Carrisbrook Lifestyle Estate (the Estate). The applicant stated that he was the team leader to develop the estate. He stated that the development commenced in March 2015 and the first development in the estate was an old homestead which was converted into the clubhouse, his personal apartment, a wellness centre, a hair salon, laundry and the caretaker’s flat.

13. The applicant stated that he took occupation of his unit in May 2015 when the development of the entire estate commenced comprising of the 96 apartments. The applicant stated that when Phase 1 was built, the surveyor came out to measure up the units for the creation of sectional plans and at the same time included the applicant's unit and for some reason registered the applicant's unit as common property.
14. The applicant stated that due to his wife's ill failing health and subsequent demise in July 2016, he was not in a good space to realise that the surveyor had registered his unit as common property on the sectional plan.
15. The applicant stated that though his unit cost R738 000.00 (seven hundred and thirty eight thousand rand to remodel and he had offered the body corporate R550 000.00 (five hundred and fifty thousand rand) to acquire it as his unit and have it registered onto his name.
16. The applicant stated that a special meeting was held where he tabled his proposal to the body corporate. He stated that though the majority of the members had no objection to the proposal for him to acquire his unit out of the common property only four members, who are the trustees, would not relent, hence the proposal fell through.
17. The applicant stated that the trustees have refused his offer which would put cash into the body corporate's account which is currently at a negative affects the financial well-being of the estate. The applicant further stated that the trustees are not prepared to reimburse him for the improvements he has made in the unit.

APPLICANT'S PRAYERS

18. The applicant's prayers were listed as follows:
 - An order directing that the trustees and the body corporate either accept his cash offer of R550 000.00 or reimburse him for the improvements he has made in the unit.

Respondent's Submissions

19. The respondent was represented by the following:
- | | |
|------------------|--------------------------------|
| Mr Steve Burger | Trustee |
| Mr Gavin Meyer | Trustee |
| Mr Neels Vermaak | Trustee |
| Ms Una Prinsloo | Trustee |
| Mr Roy Palmer | (Managing Agent Stark & Scott) |
20. The respondent stated that the applicant stayed in the unit in his capacity as the project manager for the developer.
21. The respondent stated that when the developer handed over the development to the body corporate, the entire section, claimed by the applicant, indicated as common property. The respondent further submitted the Site Development Plans (SDP) approved by the Surveyor General on 17 December 2015, 18 July 2016 and 17 July 2017 respectively, all indicating that the applicant's alleged unit is part of common property. The respondent further stated that the body corporate was registered in November 2017 and in terms of the SDP there is no section 49 on the plans but only common property.
22. The respondent stated that the applicant does not have *locus standi* as owner of the unit because he cannot produce any proof or documents to substantiate his claim to the unit which forms a large portion of the common property.
23. The respondent further stated that the applicant does not pay rent or levies or water and is living on common property.
24. The respondent stated that a special general meeting was held on 23 January 2018 to allow the applicant to present his request and the body corporate to vote on the request. The respondent stated that the meeting was attended by 41 owners and the required quorum was present but in terms of section 5 (1) of the act an unanimous decision is required to sell or dispose of in any manner common property. The

respondent stated that four members of the body corporate did not give their permission and the proposal was thus not approved.

25. The respondent further stated that they have requested the applicant to provide a copy of the contract entered into between himself and the developer (for whom he works) to substantiate his claim to the unit but he has never provided such a document.
26. The respondent submitted a letter from the developer COUNTER ACT HOLDINGS (Counter Act Developments CC) dated 10 OCTOBER 2017, signed off by the Chief Executive Officer, Paul Goncalves, which read –

“TO WHOM IT MAY CONCERN

Late in 2014 our company was offered the opportunity to develop what is today Carrisbrooke Lifestyle Estate. At the time our project leader for this development, Chic Berkhout, was going through a rough time with his wife seriously ill with cancer. Because she had to be taken up at Hospice, Benoni, it was decided that he would sell up his home and rather invest in Carrisbrooke as his future home.

The only option available in early 2015 was to convert what was the old bedroom section of the original homestead into an apartment for Chic. We developed the apartment at our own cost and long before any other buildings existed on the property, Chic moved in in June 2015.

It was always the intention for Chic to live there for the rest of his life especially after his wife passed away in July 2016.

The surveyor, Andre van der Walt, measured up the unit at the outset of creating sectional plans, but recommended that we submit and register the unit with the Surveyor General in the last phase. We did not realise the implication of first showing the whole of the old homestead as common property, and this was our first sectional title complex, we obviously made a bad mistake in allowing all the old homestead to be shown as common property in phases one and two.

Sadly, it came to my notice that there are some trustees that refuse to accept that an honest mistake was made, and are determined to have Chic evicted from his unit”

27. The respondent stated that they have reason to believe that this letter was fabricated because the last paragraph of the letter mentions that some trustees refuse to accept that an honest mistake was made and are determined to evict the applicant. The respondent stated that this would never have happened because the letter is dated 10 October 2017 and the first board of trustees was only elected in November 2017.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

28. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
29. 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 as a whole and determine whether the applicant’s version is probable. It involves findings of facts based on an assessment of credibility and probabilities.
30. Having listened to all the submissions from the parties and also read all written submissions and emails. I have also requested the applicant to produce proof that he purchased the unit from the developer or any contract or agreement of sale entered into between himself and the developer. The applicant could not furnish any proof but submitted a quotation of the costs that have gone into renovating this unit and proposal to the body corporate.
31. I am persuaded, therefore, that the applicant was granted the right to occupation and not the right to ownership and therefore does not have locastandi to lodge this complaint. My finding therefore, is that this application is frivolous, vexatious, misconceived and without substance.

POWERS AND JURISDICTION OF THE ADJUDICATOR

32. The Adjudicator is empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the Community Schemes Ombud Act. The CSOS Act enables residents of community schemes including sectional title schemes to take their disputes to a statutory dispute resolution service instead of a private arbitrator or the courts. The purpose of this order is to bring closure to the case brought by the applicant to the CSOS.

ADJUDICATION ORDER

Accordingly, the following order is made –

33. Section 53 (1)(a) of the CSOS Act No.9 of 2011 provides that –
“The adjudicator may make an order dismissing the application if, after investigation the adjudicator considers that the application is frivolous, vexatious, misconceived or without substance.
34. The applicant has failed to prove ownership.
35. This application is dismissed.
36. No order as to costs.

RIGHT OF APPEAL

The parties’ attention is drawn to –

37. Section 57(1) of the CSOS Act of 2011 refers –
“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”

DOMBOLO MAKGOMO MASILELA

ADJUDICATOR