



**ADJUDICATION ORDER IN TERMS OF SECTIONS 53 AND 54 OF  
COMMUNITY SCHEMES OMBUD SERVICE ACT 9 OF 2011**

Reference No: 000/2643/GP/2017

**In the matter between**

**HEATHERVIEW ESTATE BODY CORPORATE  
APPLICANT**

And

**ADELINE M KOMANE  
RESPONDENT**

---

**ADJUDICATION ORDER**

---

**EXECUTIVE SUMMARY**

1. In this matter the Applicant claims arrear levies in the amount of R43 016,49 from the Respondent.
2. The Respondent made submissions that the Respondent has not paid the Respondent's levies to the Applicant but that the Respondent has instead, paid the Respondent's levies into a separate banking account because the Respondent has a dispute with the Applicant about the Home Owners Association (HOA) Memorandum of Incorporation (MOI) of the Applicant and the election of the HOA's Board of Directors. This order is an order in accordance with Section 39 of the Community Schemes Ombud Service Act 9 of 2011.

## **FINDINGS**

The Applicant's complaint against the Respondent is upheld.

## **INTRODUCTION**

### **THE PARTIES**

3. The Applicant is the Heatherview Estate Body Corporate, a body corporate as contemplated in Section 2 of the Sectional Titles Schemes Management Act 8 of 2011. The Applicant was represented at the adjudication by Mr G Vosloo, of JRL Property Management CC.
4. The Respondent is Adeline M Komane the registered owner of unit 585, Heatherview Estate, 307 Willem Cruywagen Street, Heatherdale, Heatherview, Pretoria. The Respondent was represented at the adjudication by Ms N Mavuso, a legal representative, from the firm De Swart Vogel Myambo.
5. The adjudication was held under the auspices of the Community Schemes Ombud Service Act 9 of 2011 having been referred by the office of the Ombud for adjudication in terms of section 48 of the Community Schemes Ombud Service Act 9 of 2011 ("the Act.") This order is issued in terms of section 54 of the Act.
6. The Applicant lodged a complaint against the Respondent. A conciliation hearing was set down on 17 July 2018 at the offices of the Ombud in Sandton. The matter was not resolved at conciliation.
7. Accordingly, a certificate of Non- Resolution was issued in terms of Section 48(4) of the Act. The Ombud therefore, referred the matter for adjudication, in terms of Section 47 of the Act. The matter was then set down for adjudication on 3 September 2018. Accordingly, this is the order flowing out of the adjudication of the matter.

### **APPLICABLE PROVISIONS OF THE ACT**

8. 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".*  
*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.”*

Section 47 provides that –

*“on acceptance of an application and after receipt of any submissions from affected 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’.*

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”.*

Section 50 of the Act provides as follows:

*“The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator –*

- (a) Must observe the principles of due process of law; and*
- (b) Must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and*
- (c) Must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.”*

## **SUMMARY OF THE EVIDENCE – POINTS IN LIMINE**

### **LEGAL REPRESENTATION**

9. Ms Mavuso, made application at the adjudication to represent the Respondent at the adjudication.
10. The adjudicator considered the request of Ms Mavuso that consent be granted to Ms Mavuso to represent the Respondent at the adjudication.
11. Section 52 of the Community Schemes Ombud Service Act 9 of 2011, states as follows:

*The Applicant and any other relevant person are not entitled to legal representation during the adjudication process unless:*

- (a) The adjudicator and all other parties consent; or*
  - (b) The adjudicator after considering-*
    - (i) the nature of the questions of law raised by the dispute;*
    - (ii) the relative complexity and importance of the dispute;*
    - (iii) the comparative ability of the parties to represent themselves in the adjudication concludes that it would be unreasonable to expect the party to deal with the adjudication without legal representation.*
12. It is placed on record that the Applicant has not consented to the Respondent's request for legal representation.
13. The Applicants application centres on a claim for payment of arrear levies by the Applicant against the Respondent. This in itself it not a complex legal dispute. However, the additional legal point in limine raised by the Applicant, being *res judicata* is a question of law that requires argument that the Respondent, in the absence of legal representation, may not be in a position to answer.
14. Accordingly, after listening to the parties and in order to expedite the matter the adjudicator granted the Respondent consent to legal representation.

#### **RES JUDICATA**

15. The Applicant raised the legal issue of *res judicata*. To understand this issue regard must be had to the judgment handed up by the Applicant under case number 68052/2016 in the High Court of South Africa, Gauteng Division, Pretoria.
16. The issue before the adjudicator is a claim for arrear levies by the Applicant against the Respondent. The submission of the Respondent to the Applicant's claim is that:
- 16.1 the levies due to the Applicant by the Respondent is admitted;
  - 16.2 the levies have not been paid over to the Applicant by the Respondent, but instead are held in a separate banking account;
  - 16.3 the decision referred to in 16.2 above was taken by the Respondent and other owners due to a dispute the Respondent has with the Applicant about the HOA's MOI and the election of the Directors of the HOA.

17. These are similar issues, the Applicant submits between the same parties as those decided in the High Court matter referred to in 15 above. In the High Court matter in question, the Application of the various Respondents (Applicants) was dismissed with costs against the Respondent (Applicant) and 39 others.
18. It is the finding of the adjudicator that in the case finalised in the High Court, the Respondent was not a party. *Res judicata* would therefore have no application in this matter currently before the adjudicator.

#### **SUMMARY OF THE EVIDENCE – MAIN MATTER**

19. The Applicant made the following submissions, in summary, regarding the complaint for adjudication.
20. The Applicant claims the amount of R43 016,49 (fourty three thousand and sixteen rand and forty nineteen cents) from the Respondent being arrear levies which the Applicant submits is due and payable by the Respondent to the Applicant.
21. Despite demand for the outstanding levies the Respondent has not brought the Respondent's levies up to date, citing the dispute with the HOA's MOI and the election of the Directors of the HOA as a defence. The Applicant submits that this is not a defence citing the High Court matter above wherein the Respondents case against the Applicant was dismissed with costs.

#### **APPLICANT'S PRAYER**

22. The Applicant seeks the following order from CSOS:
  - 22.1 That the Respondent be ordered to pay the Applicant the arrear levies in the amount of R43 016,49.

## THE RESPONDENT'S SUBMISSIONS

23. The Respondent does not dispute that the Respondent is in arrears with the Respondent's levies and admits that the amount of R43 016,49 representing arrear levies is due and payable to the Applicant.
24. The main dispute of the Respondent is that the MOI of the HOA is not in compliance with the Companies Act 2008 and that the Directors of the HOA were not lawfully elected.
25. Accordingly, a decision was taken by the Respondent and other owners, to pay their levies into a separate bank account until such time as the dispute between the parties is resolved.

## RESPONDENT'S PRAYERS

26. The Respondent asks that the claim of the Applicant for the arrear levies in the amount R43 016,49 be dismissed.

## EVALUATION OF THE EVIDENCE

27. The Applicants brought an application for dispute resolution to CSOS of the complaints referred to in 19-21 above.
28. It is common cause and therefore not in dispute that the Respondent is indebted to the Applicant in the amount of R43 016,49 in respect of arrear levies. It is common cause that a HOA was established and that the dispute relates to the HOA on the basis referred to in 16 above.
29. Section 2 of the of the Sectional Titles Scheme Management Act 8 of 2011 states as follows:  
*"with effect from any date upon which a person other than a developer becomes an owner of a unit in a scheme, there shall be deemed to have been established for that scheme a body corporate of which the developer and such person are members, and any person who thereafter becomes an owner of a unit in that scheme, is a member of that body corporate."*
30. In law therefore every owner in a sectional title scheme, such as the Respondent, is a member of the body corporate
31. Section 3 of the Act provides as follows:  
*"3(1) A body corporate must perform the functions by or entrusted to it under this Act or the rules, and such functions include-*

*(a) To establish and maintain an administrative fund which is reasonably sufficient to cover the estimated and annual operating costs-*

*(i) For the repair, maintenance .....of the common property;”*

*(ii) For the payment of rates and taxes and other local municipality charges for the supply of gas, water...;*

*(iii) For the payment of any insurance premiums...;*

*(iv) For the discharge of any duty or the fulfilment of any other obligation of the body corporate.”*

*(b) To establish and maintain a reserve fund.*

*(c) To require the owners wherever necessary, to make such contributions to such funds...”*

32. In terms of section 3(2) and (3) of the Act, contributions and special contributions are due and payable on the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered from the persons who were owners of units at the time when the resolution making the contributions due and payable was passed and may be recovered by application to the ombud.
33. It follows that an owner like the Respondent, who defaults in his levy payments is effectively being subsidized by the other members of the body corporate who conscientiously pay their contributions. The body corporate and the HOA cannot perform their functions in the absence of funds from owners, such as the Respondent.
34. The Applicant handed up to the adjudicator a statement of account of the Respondents indebtedness to the Respondent for arrear levies. It is the finding of the adjudicator that, based on the Respondents own submissions, the Respondent has not disputed that the Respondent is indebted to the Applicant in the amount of R43 016,49.
35. Accordingly, after listening to the parties, the adjudicator, based on the evidence before the adjudicator finds in favour of the Applicant that the Respondent is indebted to the Applicant in the amount of R43 016,49.
36. If the Respondent believes that the Respondent is entitled to withhold payment of the Respondent’s levies to the Applicant, then the Respondent should declare a dispute and apply to the Ombud for relief.

## **ORDER**

37. Accordingly, for the reasons stated above, I make the following order:

- (i) The Applicant's complaint against Respondent is upheld.
- (ii) The Respondent must pay the Applicant the amount of R43 016,49 being the arrear levies by 1 October 2018.
- (iii) The Respondent must continue to pay monthly levies to the Applicant as invoiced by the Applicant.
- (iv) There is no order as to costs.

### **RIGHT OF APPEAL**

38. The party's attention is drawn to the following sections of the Act:

*Section 56 (1) –*

*“If an adjudicators order is .....within the jurisdiction of the Magistrates Court, the order must be enforced as if it were a judgment of such Court....”*

*Section 56(2) –*

*“If an adjudicators order is .....beyond the jurisdiction of the Magistrates Court, the order must be enforced as if it were a judgment of the High Court....”*

*Section 57 (1)-*

*“If an Applicant or the association or any affected person who is dissatisfied by an adjudicators order, may appeal to the High Court, but only on a question of law.*

SIGNED AND DATED ON THIS 13<sup>th</sup> DAY OF SEPTEMBER 2018.

A handwritten signature in black ink, appearing to read 'P A Beck', written in a cursive style.

**P A BECK**  
**ADJUDICATOR**