



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

Reference Number: CSOS 736/GP/17

In the matter between:

**IZAAK DANIEL VAN NIEKERK**

Applicant

And

**IRELAND GARDENS BODY CORPORATE**

Respondent

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**ADJUDICATION ORDER**

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**THE PARTIES**

- 1 The Applicant is an owner of Unit 14, Ireland Gardens, Eldoraigue, Centurion.
- 2 The Respondent is the Ireland Gardens Body Corporate ("the Body Corporate / Scheme"). The complex is managed by Kibo Property Services ("the Managing Agent").

**PROCESS FOLLOWED**

- 3 The Applicant lodged his Application Form for dispute resolution dated 26 June 2017 with the Community Schemes Ombud Service ("**CSOS**") in terms of Section 38 of the CSOS Act ("**the Act**")<sup>1</sup> in the prescribed manner.

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<sup>1</sup> The Community Schemes Ombud Service Act No. 9 of 2011

- 4 The relief sought in the Application Form falls within the ambit of relief contemplated in Section 39 of the Act.
- 5 On 7 September 2017 the Applicant's Application Form was forwarded to the Respondent, with a request to the Respondent to make its submissions to CSOS within 7 (seven) days. On 27 September 2017, the Respondent filed its submissions through the Managing Agent.
- 6 On 5 October 2017, the Ombud referred the matter to Conciliation in terms of Section 47 of the Act and same was set down for 7 November 2017.
- 7 The Conciliation failed and on 22 November 2017, the Ombud referred the matter to Adjudication in terms of Section 48 of the Act.
- 8 The notice of set down was duly issued and served on the Applicant and the Respondent, and the fee prescribed in terms of Section 49 read with Regulation 3(2) was duly paid by the Applicant.
- 9 The matter was then duly setdown for adjudication for 14 March 2018 at 09h00 and all parties were duly served with a notice of setdown.
- 10 On 14 March 2018, the matter was called up to be proceeded with at 09h00. The Respondent was represented by Hendrik Theron and Aileen Gouws of the Managing Agent as well as Pieter Christoffel, a Trustee of the Respondent.

#### **RELIEF SOUGHT**

- 11 In his application form for dispute resolution dated 26 June 2017, the Applicant prays for relief in the following terms:

*"Want to keep the kitten on the basis that the existing conduct rule is unconstitutional and not binding.*

*Want the rule to be amended based on the principle that the rule discriminates against cats and my constitutional rights as a person.*

*In the amended rules, both cats and dogs should be treated equally and reasonably, as the law states."*

## THE APPLICANT'S CASE

12 In his application form, the Applicant describes the dispute as follows:

*"Were asked by Mr M van Niekerk (Trustee) to get rid of our kitten, March 2017 (in person);*

*5 April 2017, receive email letter from Body Corporate, (signed by CJ Brand) to get rid of cat. Letter mentioned that no letter of allowance exist for the cat;*

*5 May 2017, receive email from Aileen Gouws enquiring on behalf of the Trustees whether cat has been temporarily removed from unit;*

*Ireland Gardens Body Corporate Conduct Rules (see Conduct Rule 1.13, page 30/56 in members directory) states "cats are not allowed", while at the same time, dogs are allowed;*

*The "Application to Keep Pets" form (see P.16 of 56 of info guide) states "Please note that no cats are allowed and applications thereof will not be considered" while the form allows for applying for dogs, birds and other pets;*

*Hence the conduct rules are biased towards other animals and dog loving persons, discriminating against cat loving people. It distinguishes between cats and dogs as allowed animals;*

*According to findings by Advocate Elizabeth Niewoudt (Please see point 8 in attached article), a complex may not discriminate against certain animals from being allowed, and not allowing others;*

*Sectional Title Act (ST) 35(3) states: Any management or conduct rule made by a developer or body corporate shall be reasonable, and shall apply equally to all owners of units put to substantially the same purpose;*

*This rule (1.13 P.30 of 56 Info Guide) not reasonable and equal by allowing dogs but not cats."*

*"When we asked for the possibility to keep kitten, we were told that "almost everybody in the complex were against cats" by Mr Manie v Niekerk (a Trustee).*

*We decided to go around our own complex and query this statement, but found that a lot of people would actually agree that we could keep the cat. (Please see attached petition document) (23/29 people were asked = 78% would allow us).*

*NB: We want to highlight the fact that we also see the strict need for rules around the keeping of cats in order to prevent cats from becoming a nuisance to other residents!!*

*For example: cats must be spayed, cats must be well marked in order to be able to identify cats/owners of the cats. Cats are not allowed outside of units during the night time.*

*And as with dogs, cats must be applied for (and other rules that apply to dogs also apply to cats, where relevant)."*

13 On 5 April 2017, a letter was sent to the Applicant by the Trustees stating that:

- "1. Dit is gerapporteer dat 'n kat op 2 April 2017 in die aand van die pad af by u eenheid se hek ingehardloop het. U word versoek om te bevestig dat u 'n kat by u eenheid aanhou. Dit is teenstryding met die Gedragsreël van Ireland Gardens wat bepaal dat katte nie aangehou mag word.*
- 2. Volgens die Regspersoon se rekords kan geen bewys gevind word dat u aansoek gedoen het of toestemming verleen is vir die aanhou van 'n kat nie. Dit sal waardeer word as u die Trustees kan voorsien van 'n brief wat toestemming aan u verleen.*
- 3. Indie nie, word u versoek om die kat uit Ireland Gardens te verwyder."*

14 The minutes of the Trustees meeting held on 10 April 2017 state that:

*"Brief is gestuur aan bewoner van eenheid no. 14 oor die aanhou van 'n kat. Die kat is verwyder."*

15 On 11 May 2017, the Applicant addressed a request to the Trustees for a Special General Meeting to be convened for the purposes of amending the rules. The Applicant states therein that he will take measures to ensure that the cat does not become a nuisance to others. This request was denied on 5 June 2017 on the basis that the Body Corporate had already adopted

a rule through a special general meeting to not allow any cats in the complex as there were many problems with cats.

## RESPONDENT'S CASE

16 In its submissions, the Respondent states the following:

16.1 The Applicant became a member since before the first set of Conduct Rules were approved at a special general meeting on 28 June 2007.

16.2 Rule 1.1 states that owners may not keep any animals, reptiles or birds without written approval of the Trustees. Rule 1.2 states that the Trustees may prescribe any reasonable conditions. The conditions approved by the Body Corporate state that if pets cause a disturbance and written complaint(s) are received, the pet owner will be granted a period of 14 days to address the problem. If the problem is not solved, the owner may be requested to remove the pet(s) from the premises.

16.3 Over time complaints had been received from residents about cats entering their houses and gardens at any time of the day or night. The complaints varied from cats helping themselves to food in the houses, in one case climbing on the bed of a child who was allergic to cat hairs, to cats defecating in gardens where children played. Residents felt that it was unreasonable to have to keep their windows and doors closed by day or night to keep the cats out. In the very nature of cats, it cannot be guaranteed to confine them within the boundary walls of their owners' units.

16.4 These conditions led to have the Conduct Rules amended to exclude the keeping of cats. Due notice was given to members of a special general meeting.

16.5 At the meeting on 25 November 2009 the proposed amended Conduct Rules were accepted and approved by the Body Corporate by a special resolution. The amended rules included Rule 1.13 reading "*Cats are not allowed. Cats for which approval has been given may be kept but not replaced by a cat should they die, be lost or given away.*" (A reasonable concession).

- 16.6 Despite the Conduct Rules, the Applicant brought a kitten into the complex without prior enquiry or applying for permission. The kitten was seen in the common property, and when the Applicant was approached he admitted that it was their kitten. The Trustees then sent him a written notice that the cat cannot be allowed.
- 16.7 The Applicant, having received the Trustees' notice, mentioned that he intended to have the Conduct Rules amended to allow cats. Having ignored the rules by his action of bringing the cat, he subsequently wants to have the rules nullified or amended after the fact. He was consequently informed of the stipulations contained in Section 10(2)(b) of the STSMA<sup>2</sup> and Rule 17(4) of the Management Rules<sup>3</sup> of the STSMA, to call for a special general meeting of the Body Corporate.
- 16.8 It has since come to the attention of the Trustees that the Applicant has filed an application with CSOS. In the application is included what is called a petition signed by only a portion of members of Ireland Gardens (the total being 110). It needs to be pointed out that only 13 registered members signed. The rest on his list are tenants. Management Rule 17(4) reads *"The trustees may by resolution call a general meeting whenever they think fit and must do so if either:*
- (a) Members entitled to 25 percent of the total quotas of all sections; or*
- (b) The holder of mortgage bonds over not less than 25 percent in number of all primary sections,*
- Deliver to the body corporate a written and signed request for a special general meeting".*
- 16.9 The Trustees have to date not received such written and signed request.

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<sup>2</sup> Sectional Titles Schemes Management Act, Act No. 8 of 2011

<sup>3</sup> Management Rules contained in Annexure 1 to the Sectional Titles Schemes Management Regulations No. R.1231 of 7 October 2016, promulgated in terms of the STSMA

- 16.10 It needs to be pointed out that since that time, (the adoption of the Rule), no further complaints have been received, an indication that the enforcement of the rule has had the desired effect.
- 17 The amended Conduct Rules of the Scheme which were adopted and registered on 15 July 2010 provide as follows:
- 17.1 **Rule 1.1** – An owner or resident of a unit may not keep any animals, reptiles or birds in a unit or on the common property without the written approval of the Trustees. Such approval may not be unreasonably withheld.
- 17.2 **Rule 1.2** – When granting such approval, the Trustees may prescribe any reasonable condition.  
Conditions: If pets cause a disturbance and written complaint(s) is received, the person(s) concerned will be granted a period of fourteen (14) days to address the problem. If the problem is not solved, the owner(s) may be requested to remove the pet(s) from the premises.
- 17.3 **Rule 1.9** – All dogs and cats must wear their owner's identity at all times.
- 17.4 **Rule 1.13** – Cats are not allowed. Cats for which approval has been given may be kept but not replaced by a cat should they die, be lost or given away.

#### **FURTHER EVIDENCE**

- 18 During the adjudication hearing, the Applicant testified that:
- 18.1 he bought his unit when the complex was under development about 14 years ago;
- 18.2 at that time he had cats and he did not deny that there were numerous complaints about cats in the complex;
- 18.3 when the rule that no cats should be allowed was debated, he was against it and the cat lovers were out-voted at the Annual General Meeting;

- 18.4 when the rule was adopted at the Annual General meeting, he had two cats which h was allowed to keep but not replace;
- 18.5 both cats died eventually and he decided to obtain another cat with the intention of keeping it secretly indoors;
- 18.6 it is this cat that was spotted by one of the Trustees which led the Trustees to order him to remove it from the complex;
- 18.7 he conducted a petition to gauge the feeling of residents about cats (not owners);
- 18.8 he obtained 25 signatures in favour of keeping cats, out of a total of 110 units in the Body Corporate;
- 18.9 he has not petitioned a general meeting to overturn the Rule; and
- 18.10 although he is of the view that he can keep the cat indoors and never allow it to venture outside, he has not considered the well-being of the cat in keeping it in this manner.

## FINDINGS

- 19 There are two issues which arise and which I need to deal with specifically. The first is the issue of process followed by the Applicant as raised by the Respondent, and the second is the reasonableness of the adopted conduct Rule as raised by the Applicant.

### The Process

- 20 Section 10(1) of the STSMA provides that a Scheme must be regulated and managed by means of rules.
- 21 Section 10(2) provides that such rules must comprise the prescribed management rules and conduct rules which may be amended, added to or repealed, in the case of conduct rules, by special resolution of the Body Corporate.



- 22 For a special resolution to be passed, one needs 75% of the votes (in number and value) either in a general meeting or agreed to in writing.
- 23 When the Applicant requested that a general meeting be called for the purposes of putting the Rule against cats to the vote, the Trustees refused on the basis that a resolution passing the very Rule had been taken in 2009 already.
- 24 The Applicant then approached the CSOS for the resolution of the issue.
- 25 While I accept that the Applicant could have petitioned a general meeting in terms of Rule 17(4)<sup>4</sup>, I agree with the view of the Trustees that the matter had been voted on previously. I therefore find that the Applicant acted reasonably by referring the matter to CSOS as, in any event, the most important issue is the reasonability of the Rule itself. No purpose would have been served by him referring the matter to the general meeting again.

#### Reasonableness

- 26 Regulation 6(1)<sup>5</sup> provides that Rules, as prescribed by the STSMA, and as amended by the Body Corporate in accordance with Section 10 of the STSMA, must be considered to be and interpreted as laws made by and for the Body Corporate of that Scheme.
- 27 It is for this reason that Section 10(3) of the STSMA provides that the management or conduct rules adopted by a Body Corporate must be reasonable and apply equally to all owners of units.
- 28 Section 2(5) of the STSMA provides that the Body Corporate is responsible for the enforcement of the Rules and for the control, management, administration of the common property for the benefit of all owners.

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<sup>4</sup> Of the Management Rules

<sup>5</sup> Of the Sectional Titles Schemes Management Regulations No. R.1231 of 7 October 2016, promulgated in terms of the STSMA

29 Accordingly, when the Trustees requested the Applicant to remove the cat, they did so exercising their delegated powers.

30 Section 13(1)(d) and (e) of the STSMA provides that while all owners have a right to use and enjoy their sections and common property, they have a duty not to do so in a manner which may cause a nuisance to owners and occupiers of other sections.

31 Management Rule 30(a) and (b) provides that bodies corporate must take all reasonable steps to ensure that a member does not use the common property / section / exclusive use area in a manner that unreasonably interferes with or causes a nuisance to others.

32 At the heart of community living is tolerance and a willingness to forego certain privileges, which one would ordinarily enjoy outside such communal living.

33 Rule 1 of the prescribed Conduct Rules<sup>6</sup> provides as follows:

*"(1) an owner must not, without the trustees' written consent, which must not be unreasonably withheld, keep an animal, reptile or bird in a section;*

*(2) ...*

*(3) the trustees may provide for any reasonable condition in regard to the keeping of an animal, reptile or bird in a section."*

34 From the evidence led before me, it was clear that not only cats cause a nuisance but there are other animals such as dogs which cause nuisance. I accept for the purposes of this order that cats did cause more nuisance than other pets.

35 As stated above, while the bodies corporate have the power to make rules, such power must be exercised reasonably, and the rules must apply equally to all owners of units, and not a certain class or category of them.

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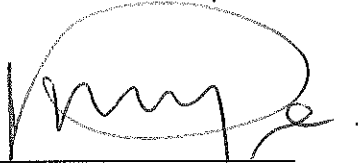
<sup>6</sup> Conduct Rules contained in Annexure 2 to the Sectional Titles Schemes Management Regulations No. R.1231 of 7 October 2016, promulgated in terms of the STSMA

- 36 Both the prescribed Conduct Rules as well as the Scheme's own Rules (Rules 1.1, 1.2 and 1.9) empower the Trustees to impose conditions on the keeping of animals. Such a power extends to all animals, reptiles and birds. There is no reason why such a power cannot be exercised in relation to cats.
- 37 The problem with the insertion of Rule 1.13 to the amended conduct rules is that it constitutes a complete ban on keeping certain animals. Such a rule has an effect on the use and enjoyment of sections by owners who love such banned animals and this renders the Rule unreasonable and not of equal application.
- 38 The problem is exacerbated by the fact that some cat lovers bought their properties in the scheme when their right to enjoy cats was respected. What should now happen to them? Are they now expected to either sell their homes or stop loving cats? Is it reasonable to put them in such a position while other animal lovers get to enjoy their animals in the comfort of their homes?
- 39 The Rule would have been acceptable had it applied to all pets and not just cats.
- 40 As stated above, communal living unfortunately requires that one's choices and preferences be affected.
- 41 It is in this spirit that I must rule that Rule 1.13 is unreasonable and should be set aside. The Trustees must act in accordance with Rules 1.1, 1.2 and 1.9 read together with the "Conditions" stipulated therein to ensure that cats do not cause a nuisance in the Scheme.

**I THEREFORE ORDER AS FOLLOWS:**

- 1 Rule 1.13 of the Conduct Rules of the Scheme is unreasonable and of unequal application as it treats cat owners differently from other animal owners, to their prejudice, and is therefore set aside;
- 2 Each party is to bear its own costs in relation to these adjudication proceedings;
- 3 This order shall take effect immediately on the date on which it is served on the parties by CSOS electronically.

KINDLY TAKE NOTE that any party who is dissatisfied with this order has a right to lodge an Appeal on a question of law with the High Court within 30 (thirty) days after the date of delivery of this order.



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**K MABASO**  
**ADJUDICATOR**  
**11 May 2018**