



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

Case Number: CSOS1615/GP/17

IN THE MATTER BETWEEN

HEYLEY URSHELA LIEFRING
(Applicant)

and

SAN LYNNE BODY CORPORATE
(Respondent)

ADJUDICATION ORDER

PARTIES

1. The applicant is the registered owner of Unit 5 San Lynne which is situated on Leslie Street, Florida Park, Florida, Gauteng.
2. The respondent is the San Lynne Body Corporate. The San Lynne 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 comprises of 18 residential sectional title units managed by the Body Corporate and the Board of Trustees and the managing agent, Mervill Property Administrators.
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 25 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 25 June 2018, the applicant and the respondent entered an appearance in terms of the Notice of Set Down which was sent out to them on 1 June 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 24 April 2018 and the dispute could not be resolved. Therefore the Ombud issued a certificate of Non Resolution dated 24 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 –

Outstanding Levies and Legal Costs

12. The applicant stated that on or about 27 August 2015 she received summons from the body corporate for unpaid levies in the amount of R7111.52 (seven thousand one

hundred and eleven rand and fifty two cents). The applicant stated on the advise of her attorney she settled the outstanding levies on or about 22 October 2015. The applicant stated that shortly thereafter, on the 26 October 2015 she received an account from the body corporate for legal costs in the amount of R6694.05 (six thousand six hundred and ninety four rand and five cents).

13. The applicant stated that to he enquired from the managing agent about the outstanding arrears of R6694.05 because she had settled the outstanding levies. The applicant stated that she was informed by the managing agent that this amount is the outstanding legal costs levied in the applicant's levy statement for the unpaid levies and the subsequent summons.

Burst Pipe and Damage to Property

14. The applicant stated that on or about July 2017 she experienced a burst pipe which is located inside the wall and reported the burst pipe to the managing agent. The applicant stated that she was asked by the managing agent whether the water was on the outside or inside of the wall. The applicant stated that the manging said she was asking this question in order to ascertain where the responsibility lies between the applicant and the body corporate.
15. The applicant stated that she informed the managing agent that the water was on the outside wall and the managing agent confirmed that in that case the account would be for the body corporate and sent out a plumber to repair the burst pipe.
16. The applicant stated that the managing agent sent out a leak detecting company to identify the source of the leak and it was verified that it was from a waste pipe in the applicant's main bathroom. The applicant stated that the managing agent sent out a plumber to repair the burst pipe and the plumber had to break the tiles inside the applicant's bathroom in order to reach and repair the burst pipe. The applicant stated that the burst pipe was repaired by the body corporate and she was not charged for the costs of repairs done to the burst pipe but to her surprise the body corporate

refused to repair the resultant damage caused to the applicant's bathroom and replace the broken tiles.

17. The applicant stated that an insurance claim was launched with the insurance but the insurance repudiated the claim on the grounds that the pipes were not properly maintained and that it was a wear-and-tear issue which the insurance does not cover. The applicant submitted the letter from Commercial and Industrial Acceptances (Pty) Ltd (CIA), acting on behalf of the Compass Insurance Company Limited written to the San Lynne Body Corporate, dated 1 August 2017 confirming that the building has not been properly maintained by the body corporate. The letter read as follows:

“REJECTION

We act on behalf of the Compass Insurance Company Limited and all their rights herein are reserved. According to information received the damage herein was not as a result of a sudden and unforeseen occurrence but rather due to a leaking, rusted pipe. In this regard we would like to point out that the cause of the damage is excluded in terms of specific exclusions 1h) and i) on page 21 and 3 c) on page 22 of the Community Living Insurance Policy working which read as follows:

We will not pay for any loss or damage directly or indirectly caused by, or arising from, or aggravated by, or resulting from gradual deterioration and gradually operating causes occurring over a period of time including decay and wear and tear..... we will not pay for the cost of repairing leaking pipes..... nor will we pay for the cost of repairing the damage caused by accessing the leaks, unless caused by damage otherwise excluded”.

18. The applicant stated that it was his understanding that if the building is tilted upside down and whatever does not fall is covered by the body corporate insurance. The applicant stated that because the burst pipe was situated in between the wall to her unit, the body corporate decided to repair the burst pipe from the inside of his unit instead of the outside thereby breaking the tiles in her bathroom wall. The applicant submitted photographs of the damages to the Adjudicator. The applicant stated that the body corporate has refused to repair the damage caused to her bathroom wall and

has been told that the resultant damage costs are to be borne by the owner of the unit. The applicant stated that had she been aware that the body corporate was going to refuse to repair the resultant damage she would not have given them access to her bathroom and instead have them do the repairs from the outside.

Parking Levies

19. The applicant stated that she has two parking space allocated to her. She stated that it is the close up garage and one open parking. The applicant stated that the body corporate is charging her a levy for the open parking and yet she has a notorial deed for exclusive use. The applicant submitted a copy of the notorial deed to the Adjudicator

APPLICANT'S PRAYERS

20. The applicant's prayers were listed as follows:

- An order directing that the respondent repairs the damaged tiles caused to her bathroom wall;
- An order directing that it is illegal for the respondent to charge levies for exclusive use.

Respondent's Submissions

The respondent was sworn in and testified as follows –

21. The respondent was represented by the managing agent's Ms Lorraine Goldacre and a Trustee Ms Izelle Adams, who was connected via Skype.

Outstanding Levies and Legal Costs

22. The respondent stated that on or about February 2015 summons were issued to the applicant in the amount of R7014.02 and a default judgement against the applicant

was obtained on or about 9 July 2015 and a warrant of execution was obtained on or about 27 August 2015 for a total debt of R7111.52.

23. The respondent stated that the applicant settled the debt of R7111.52 on or about 22 October 2015 and at that point in time her levy account was still in arrears in the amount of R6694.05. The respondent submitted a copy of the applicant's ledger and statements showing the summons amount and the applicant's payment but her account remained with an outstanding arrear balance of R6694.05. The respondent stated that the applicant has been requested in numerous occasions to advise what other payments have been made towards her account that do not reflect in her levy statements, to no avail.

Burst Pipe and Damage to Property

24. The respondent stated that the applicant queried the repudiation of the insurance claims at the Annual General Meeting held on or about September 2017 and was informed by the managing agent that she was responsible for the repairs and maintenance to the interior of her unit. An email, dated 20 February 2018, to this effect, was submitted with the respondent's submissions.

Parking Levies

25. The respondent stated that even though the applicant has a notarial deed for exclusive use of the open parking she is still required to pay a levy for the upkeep and maintenance of this parking.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

26. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
27. 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.

28. I have listened to all the applicant's submissions and read all written submissions and evidence presented by way of emails, statements and photographs.

Outstanding Levies and Legal Costs

29. This matter emanates from 2015, before the promulgation of the CSOS Act and its Regulations which were promulgated on 16 October 2016.

30. Section 42(d) of the Community Schemes Ombud Service Act No.9, 2011 provides that

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“An ombud must reject an application by written notice to the applicant if the ombud is satisfied that the dispute should be dealt with in a court of law or other tribunal of competent jurisdiction”

31. Therefore, I am persuaded that the CSOS does not have jurisdiction to order on this matter because the CSOS Act does not apply retrospective.

Burst Pipe and Damages

32. I would like to draw the attention of the parties to Section 37 1(j) of the Sectional Titles Act No.95 of 1986 which requires a body corporate to maintain and repair the common property and the trustees are duty bound to ensure that such maintenance and repair work is conducted in a proper workmanlike manner, failing which they are in breach of their fiduciary duties.

33. Sections 37(1)(o) and (p) of that Act specifically deals with the issue of maintenance to pipes. If the pipe is part of the section, in other words within the median line, it is the owner's responsibility, unless the pipe serves more than one section or the common

property, in which event the Body Corporate would be liable for the maintenance thereof. If the pipe is located outside the section, in other words on the common property, the Body Corporate must maintain and repair it, even if it only serves one section.

34. In terms of the provisions of Section 5(4) of that Act, the common boundary between any section and another section or between a section and common property is defined as the median line of the dividing floor, wall or ceiling as the case might be.
35. Therefore, the body corporate must establish the location of the pipe and whether it forms part of the common property, in which event the Body Corporate would be liable for the maintenance and repair thereof, or whether it forms part of the primary section. If it forms part of the primary section and only serves that primary section, then the owner of that primary section is responsible for the maintenance and upkeep thereof, but if it forms part of the primary section and serves more than one section, then the Body Corporate is responsible for the maintenance and repair thereof.
36. Having perused all the evidence submitted to me the respondent acknowledged that a plumber was sent out to detect the burst pipe and the source. It was further submitted that the respondent resolved to repair the burst pipe but in order to reach the pipe the respondent had to acquire access by breaking the applicant's bathroom wall. However, after the repairs were completed, the respondent did not repair and replace the tiles broken off from the applicant's bathroom wall. The body corporate took responsibility to repair the burst pipe and in my opinion it was because it was proven that the responsibility was that of the body corporate. However, the damage to the applicant's wall, which in my view amounts to consequential damages was not replaced so that it is in the same condition as it was found prior to the plumber breaking the wall.
37. The insurance report submitted further confirms that this leak or burst pipe was not as a result of a sudden and unforeseen occurrence but rather due to a leaking rusted pipes.

38. There was no report submitted to me to the contrary except an email whereby the managing agent had informed the applicant that the internal repair and maintenance were the responsibility of the owner. However, because this was consequential damage resultant due to the body corporate repairing the burst pipe I am persuaded that the body corporate must repair and replace the applicant's bathroom wall.

Parking Levies

39. Section 3(1)(c) of the Sectional Titles Schemes Management Act No. 8 of 2011 provides that –

“A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include to require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts”

40. Therefore, it is expected of the body corporate to maintain the upkeep of the open parking bays, especially because they are situated in the common property. It follows that the costs to maintain the upkeep of the parking bays must be borne by the registered owners. I am persuaded that it is the responsibility of the applicant to pay the levy for the open parking.

POWERS AND JURISDICTION OF THE ADJUDICATOR

41. 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 –

42. The CSOS does not have the jurisdiction to order on the outstanding levies because they were raised in the applicant's levy statement of 2015 prior to the promulgation of the CSOS Act No.9 of 2011.
43. The respondent must repair the applicant's bathroom wall by no later than 31 July 2018.
44. The applicant must pay the monthly levy, as charged by the body corporate, for the open parking allocated to her as exclusive use.

RIGHT OF APPEAL

The parties' attention is drawn to –

45. 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