



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

Case Number: CSOS2367/GP/17

IN THE MATTER BETWEEN

LERATO MALULEKE

(Applicant)

and

GERT VAN DEN HEEVER

(First Respondent)

TAMBOTIE BODY CORPORATE

(Second Respondent)

ANKURA TRADING

(Third Respondent)

ADJUDICATION ORDER

EXECUTIVE SUMMARY

1. The dispute is in respect of financial issues, management services and works pertaining to common areas.

2. Firstly, the applicant is seeking an order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order.
3. Secondly, the applicant is seeking an order declaring that the association does or does not have the right to terminate the appointment of a managing agent, and the appointment is or is not terminated.
4. Thirdly, the applicant is seeking an order requiring the association to have repairs and maintenance carried out.
5. This order is in line with section 39 of the CSOS Act No.9 of 2011 (the CSOS Act).

INTRODUCTION

6. The applicant is Lerato Maluleke (Maluleke), the registered owner of Unit 6 Tambotie which is situated at 44 Burgers Street, Polokwane.
7. The first respondent is Gert Van Den Heever (vd Heever), the owner of Ankura Trading.
8. The second respondent is the Tambotie Body Corporate, represented by vd Heever from Ankura Trading.
9. The third respondent is Ankura Trading, the managing agent.
10. This is an application for dispute resolution in terms of Section 38 of the CSOS Act. The application was made in the prescribed form and lodged with the Gauteng Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.
11. The first claim was brought in terms of section 39(1)(d) of the CSOS Act which provides that –

“An application made in terms of section 38 must include one or more of the following orders (1) in respect of financial issues – an order requiring the association to

have its accounts, or accounts for a specific period, audited by an auditor specified in the order”

12. The second claim was brought in terms of section 39(5)(b) of the CSOS Act which provides that –

“An application made in terms of section 38 must include one or more of the following orders (5) in respect of management services – an order declaring that the association does or does not have the right to terminate the appointment of a managing agent, and that the appointment is or is not terminated”

13. The third claim was brought in terms of section 39(6)(a) of the CSOS Act which provides that –

“An application made in terms of section 38 must include one or more of the following orders (6)(a) – an order requiring the association to have repairs and maintenance carried out”

14. The adjudication hearing took place on 28 June 2018. This application was 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 all the parties.

15. On 28 June 2018, the applicant entered an appearance in terms of the Notice of Set Down sent to the parties dated 14 June 2018. The first respondent was absent at that hearing. An Interim Order was issued on 28 June 2018 whereby the second and the third respondent's were joined accordingly and the hearing was postponed to 19 July 2018.

16. On 19 July 2018, the all the parties entered an appearance in terms of the Notice of Set Down sent to the parties dated 29th June 2018. The applicant represented herself and the first, second and third respondents were represented by vd Heever.

17. The development is a sectional title scheme managed by the Tambotie Body Corporate, 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” and the managing agent Ankura Trading which it would be convenient to refer as “the managing agent”.

APPLICABLE PROVISIONS OF THE ACT

18. 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”.

19. 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”

20. 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’.

21. 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”.

22. Accordingly, this matter proceeded to conciliation on 1 June 2018 and the dispute could not be resolved. Therefore the Ombud issued a certificate of Non Resolution dated 1 June 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 –

Financial Issues

23. The applicant stated that the managing agent has been operating without a license as required by the Estate Agency Affairs Act and has been collecting levies from the body corporate yet not in compliance.
24. The applicant stated that due to the managing agent not in compliance with the EAAB she requires an independent auditor to audit the body corporate financials to ensure that there has been no misappropriation of the levies.
25. The applicant stated that she is not paying her monthly levies because she wants to see this matter resolved.
26. The applicant stated that the managing agent has not provided audited financials for 2016 and the 2017 financials were unsigned. The applicant further stated that it was concerning that there were owners who are not paying their levy account and the body corporate is doing nothing about it.

Managing Agent

27. The applicant stated that the managing agent is also the chairperson of the board of trustees and that depicts a conflict of interest. The applicant further stated that the managing agent approached some owners requesting them to serve on the board of trustees.
28. The applicant stated that she requested the contract or the service level agreement (SLA) entered into between the managing agent and the body corporate but was informed by the managing agent that his office, which was situated at Unit 20 Tambotie, was burgled and all the scheme's files were stolen. The applicant stated that Unit 20 was owned by the managing agent. The applicant further stated that whenever she requests documents from the managing agent, the managing agent does not furnish her with the documents.
29. The applicant stated that the managing agent moved his offices from the complex and did not furnish the body corporate with the address of the new office but has been sending the levy statements using a company unbeknown to the owners.
30. The applicant stated that the owners do not have a good relationship with the managing agent which has led to some of the owners boycotting the payment of levies.

Conduct Rules

31. The applicant stated that the managing agent and the body corporate has failed to enforce the conduct rules of Tambotie body corporate and the complex was experiencing overcrowding of units and noise.

Maintenance

32. The applicant stated that the complex was not being maintained by the body corporate and it seriously needed attention because things were falling apart.

33. The applicant stated that the complex was experiencing sewer flowing along the pavements of the common areas and this poses a health hazard to residents in the complex.
34. The applicant further stated that the fire extinguishers were not in working order and these are also used to clean the sewer from the pavements.

APPLICANT'S PRAYERS

35. The applicant's prayers were listed as follows:
 - An order directing that an independent auditor must be appointed by the body corporate to audit the body corporate's financials.
 - An order directing that the services of the managing agent are terminated.
 - An order directing that the body corporate maintains the complex.

Respondent's Submissions

The respondents, represented by Gert van den Heever, was sworn in and testified as follows
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Financial Issues

36. The respondents stated that every complaint that is received by the trustees or the managing agent is attended to at the earliest convenience.
37. The respondents stated that the body corporate's current auditors are Pro-Forum Limpopo which was duly appointed at the Annual General Meeting. The respondents stated that he was requested to bring the bank statements to the AGM to which he obliged and informed the applicant that the bank statements were only for information and not for auditing because the audit had been completed by the auditors. The respondent stated that audited financials were distributed to all the owners for the AGM held in 2017 and 2018 respectively.
38. The respondent stated that the auditing the financials was not done prior 2016 but since the promulgation of the CSOS Act the body corporate has complied and audited

its financials for 2017 and 2018. The respondent stated that the audited financials could not be signed off because the owners who were trustees sold their units and vacated the complex and the new trustees had to sign off the financials.

39. The respondent stated that all those owners whose arrears are in excess of R6000.00 (six thousand rand) have been handed over to attorneys for collection of the outstanding levies.
40. The respondent stated that the applicant can appoint her own auditor should she wish to do so.
41. The respondents stated that the owners are given the permission to view the body corporate's documents anytime they request to view the documents.

Managing Agent

42. The respondent stated that he was employed as a managing agent by Rental Solutions prior to the body corporate approaching him to manage Tambotie due to the previous managing agent having embezzled the body corporate's funds. The respondent stated that he first operated under the trade name Just Letting which closed down on 30 June 2017.
43. The respondent stated that Ankura Trading has continued to render the services to the body corporate as at 1 July 2018. The respondent stated that he is not registered with EAAB and is not compelled to because Tambotie body corporate has its own bank account and pays its levies into its bank account and not the respondent's trust account. The respondent stated that the only rights he has on the body corporate's bank account are to access bank statements. He further stated that he has the rights to load on line payments and these payments are then released or authorised by a trustee.
44. The respondent stated that his offices, which were situated at Unit 20 Tambotie, were burgled and computers were stolen. The respondent stated that the Contract/SLA requested by the applicant was electronically stored in the computer and as soon as the body corporate's documents were recovered he furnished the SLA to the

applicant. The respondent further stated that he referred the applicant to the Sectional Titles Schemes Management Act No.8 of 2011 which outlines the duties of a managing agent.

45. The respondent stated that he was not the chairperson of the body corporate. He stated that at the AGM of 2017 the meeting ended in chaos and had to be adjourned but a group of owners at the meeting went ahead and appointed trustees who were not in good standing with their levies. The respondent stated that the applicant was made the chairperson of the board of trustees. The respondent stated that the trustees did not follow through with their functions and the members of the body corporate called a annual general meeting for April 2018 whereby the trustees were asked to step down and new members were appointed into the board of trustees namely Mrs Botha, Mr Peterson and Ms Ledwaba.

Conduct Rules

46. The respondent acknowledged that there was a lot of overcrowding taking place at the complex. The respondent stated that the board of trustees will be registering the body corporate's conduct rules and management rules with the CSOS in order to deal with the overcrowding problem.

Maintenance

47. The respondent stated that the complex is faced with numerous maintenance problems due to the non payment of levies by some of the owners. The respondent stated that the body corporate does not have the funds to maintain the building. The respondent further stated that nine of the twenty nine owners are in arrears with their levy accounts to a total amount of R209 000.00 (two hundred and nine thousand rand) to date.
48. The respondent stated that the complex is in dire need of painting. He further stated that the garage doors also require maintenance but a resolution was taken at an AGM in 2015 that should an owners garage door break, all owners will replace their garage doors, at their own cost, with Wispeco doors.

49. The respondent stated that Tambotie was an old building ranging about 40 years old. The respondent stated that type of pipes, originally used during the development of the complex, have collapsed over time and need to be replaced. The respondent stated that they have acquired quotations from plumbers for the replacement of the pipes but the body corporate does not have funds to replace the pipes. The respondent stated that the pipes are constantly getting blocked and experiencing constant bursts causing sewer to run on the common property.
50. The respondent stated that that the money received from the owners who are paying their levies is enough to pay the municipality, insurance, general worker and management fees.
51. The respondent stated that the fire extinguishers were in working order until the municipality built trenches on the road and tampered with the fire extinguishers. The respondent stated that the water pressure from the fire extinguishers was low and giving the general worker difficulty to clean the sewer from the pavements in the common areas. The respondent stated that he has submitted a complaint with the municipality but has not received a response from them.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

52. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
53. 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.

54. I have listened to all the parties' submissions and read all written submissions and evidence presented by way of emails and documents.

Financial Issues

55. I would like to draw the attention of the parties to Prescribed Management Rule (PMR) 17(6)(j)(v) (vi) and (viii) made under the Sectional Titles Schemes Management Act No.8 of 2011 which provides that

“The order of business at general meetings is as follows:

(j) if the meeting is an annual general meeting

(v) consider the annual financial statements;

(vi) appoint an auditor to audit the annual financial statements, unless all the sections in the scheme are registered in the name of one person;

(viii) elect trustees

56. I am satisfied that the annual financial statements were considered at the AGM and the auditors, Pro Forum Limpopo, were appointed by the body corporate at the AGM as required by the PMR. There is no provision in the STSMA or the Regulations for the applicant to appoint her auditor outside the AGM. If the applicant had reservations regarding the financials and the appointment of the auditor, this should have been opposed at the AGM and members would then vote in terms of PMR 20(2)(a) which provides that –

“Except for special and unanimous resolutions, a member is not entitled to vote if a member fails or refuses to pay the body corporate any amount due by that member after a court or adjudicator has given a judgement or order for payment of that amount”;

57. Under Requirements for office and disqualification PMR 6(4)(i) provides that –
- “A trustee ceases to hold office if that trustee fails or refuses to pay the body corporate any amount due to that trustee*

after a court or adjudicator has given judgement or order for payment of that amount”.

58. The applicant did not dispute that the trustees appointed at the AGM held September 2017 were in arrears with their levy account. Therefore, it follows that they were not supposed to have been elected into the office of trustee.

Managing Agent

59. PMR 28(5)(b) provides that –

“The body corporate may, if trustees so resolve, and must if required by a resolution of members, appoint a managing agent to perform specified financial, secretarial, administrative or other management services under the supervision of the trustees”

60. I am satisfied that it is well within the powers of the body corporate to appoint the managing agent. If the body corporate wants to terminate the services of the managing agent they must comply with PMR28(7)(a) and (b).

Conduct Rules

61. Section 10 of the STSMA requires that a scheme must be regulated and managed by means of management rules and conduct rules. Therefore the body corporate must ensure that the management rules and conduct rules are established and lodged with the CSOS in order to regulate the overcrowding and noise that is being experienced at the complex.

Maintenance

62. Section 3 of the STSMA required the body corporate to perform functions entrusted to it under this Act or the rules and these functions include the establishments of an administrative fund and a reserve fund sufficient to cover the estimated annual operating costs and future maintenance and repairs of common property at the

complex. Therefore, it is expected of the owners to pay their levy account in order to fund the administrative fund and reserve fund.

63. PMR25(2)(a) of the Regulations require that –

“If money owing is not paid on the dates specified in the notice referred in sub-rule (1), the body corporate must send a final notice to the member, which notice must state that the member has an obligation to pay the overdue contributions and charges and any applicable interest immediately”.....

64. Section 43 of the CSOS Act provides that –

“If the application affects owners or occupiers generally, or a particular category of owners or occupiers, the ombud need not serve a copy of the notice on each affected person individually, but may instead serve notice in a way that ensures, as far as is reasonably practicable, that the notice comes to the attention of all owners or occupiers or all members of that particular category”.

65. It follows therefore, that the applicant and all owners or occupiers who are outstanding with their levy account must pay their outstanding levy accounts.

66. Therefore, a Special General Meeting must be held by no later than 30 September 2018 to introduce the managing agent, the trustees and the auditors to explain any outstanding queries the owners may have on the audited financials. The managing agent must furnish the applicant, owners or occupiers who are outstanding with their levy account, their statements and the applicant, owners or occupiers must pay their levy accounts to enable the scheme to address the maintenance issues.

POWERS AND JURISDICTION OF THE ADJUDICATOR

67. 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 –

68. The auditors, Pro Forum were legally appointed by the body corporate. Another audit is not required. There is no finding against the 2017 audited financials.

69. The managing agent was legally appointed by the body corporate. There is no finding against the managing agent.

70. The body corporate must establish and lodge its management rules and conduct rules to the CSOS by no later than 30 November 2018. The body corporate must put in place rules to address overcrowding and noise.

71. A Special General Meeting must be held by no later than 30 September 2018 to introduce the managing agent, the trustees and the auditors to explain any outstanding queries that the owners may have on the audited financials for the current year.

72. The managing agent must, at the SGM, furnish the applicant, owners or occupiers who are outstanding with their levy account, their statements and the applicant, owners or occupiers must pay their outstanding levy accounts to enable the scheme to address the maintenance issues.

RIGHT OF APPEAL

The parties' attention is drawn to –

73. 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