



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

Case Number: CSOS949/GP/17

IN THE MATTER BETWEEN

MALOSE MASALESA

(Applicant)

and

JAN HENDRIK GRIESSEL

(First Respondent)

THEA VAN ZYL

(Second Respondent)

LEON GROBBLER

(Third Respondent)

LESLEY MASIA

(Fourth Respondent)

SAJEEV ELENGICAL

(Fifth Respondent)

MAMRE PROPERTY MANAGEMENT

(Sixth Repondent)

ADJUDICATION ORDER

PARTIES

1. The applicant is Malose Masalesa the owner of Unit G075 S401 Glen Park Apartments which is situated at 15 Celeste Street, Waterkloof Glen, Pretoria, Gauteng.
2. The first to fifth respondents are the Trustees of Glen Park Apartments 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 sixth respondent is Mamre Property Management, the managing agents and to which it would be convenient to refer to as “the managing agents”.

INTRODUCTION

3. The development comprises of 100 sectional title units and the scheme is managed by the Trustees of the Glen Park Apartments Body Corporate and the managing agent, Mamre Property Management.
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 14 February and subsequently postponed to 6 March 2018 whereby it was once again postponed for 9 April 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 9 April 2018, the applicant and the first, second, third, fourth and sixth respondents were present at the hearing. The parties entered an appearance in terms of the Notice of Set Down which was sent out to them on 6 March 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, a certificate of Non Resolution was issued 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 the Act.

SUMMARY OF EVIDENCE

Applicant's Submissions

Annual General Meeting

12. The applicant stated that the notice served for an Annual General Meeting (AGM) held on 22 August 2017 was invalid because it was called at short notice. The applicant stated that the notice (Annexure GP1), was not properly signed by the Trustees but was signed by the Managing agent on 27 July 2017 and only sent out to members on 7 August 2017. The applicant stated that the notice was defective because members were not given the 14 (fourteen days) as required by the STSMA. The applicant further stated that there were flaws on the proxies which were specifically used for an AGM of 16 August 2017 and re-used at the AGM held 22 August 2017.

13. The applicant stated that the quorum was not met due to the faulty and corrupted signed proxies which were specifically used for an AGM of 16 August 2017 but re-used again with a date of 22 August 2017 inserted at the top of the proxy. The applicant stated this was deliberately designed to confuse the members and therefore the proxies were invalid for the AGM of 22 August 2018. The applicant further submitted that a group of owners raised objections at the AGM against the wrongdoings, maladministration and further financial prejudice suffered, but the chairperson, Griessel and the Trustees ignored the concerns and proceeded with the AGM.

Annual Financial Statements

14. The applicant alleged that the AFS which were presented at the AGM as a legal document were not signed by either the responsible auditors, van Zyl Accountants, nor the Board of Trustees. The applicant submitted annexure GP3 of the bundle of documents. The applicant stated that the respondents were in contravention of the STSMA which required audited signed Financial Statements. The applicant stated that AFS are an official legal document required at an AGM. The applicant stated that a letter was addressed to the Chairperson and the Trustees but they deliberately ignored it and proceeded with the AGM.

APPLICANT'S PRAYERS

15. The applicant's prayers were listed as follows:
- An order directing that the AGM held on 22 August 2017 and its Resolutions, including the election of the Trustees, is invalid;
 - An order directing that Annual Financial Statements presented at the AGM are invalid;
 - An order directing that the proxies submitted at the AGM held 22 August 2017 are invalid;
and
 - An order directing the appointment of independent auditors.

Respondent's Submissions

16. The respondent was represented by Masia, the fourth respondent. He is the owner of Unit N108 and a Trustee of the Glen Park Apartments Body Corporate.
17. Masia stated that he was a previous Trustees, elected at an AGM held 28 July 2016, together with the erstwhile Trustees. Masia stated that he subsequently resigned as a Trustee due to the lack of proper corporate governance. Masia stated that the body corporate's funds were misused by the previous trustees whereby a forensic audit was conducted which cost the body corporate an amount of +- R100 000.00 (one hundred thousand rand). Masia stated that he registered his concerns regarding the misuse of the body corporate's funds especially because it was based on personalities (email dated 7 March 2017).
18. Masia stated that the concerned owners addressed a letter to the then Chairperson Ms Zodwa Dlamini (Dlamini) requesting a SGM but this was ignored. Masia stated that the owners went ahead and held an SGM on 28 June 2017 whereby 56 of the 100 owners attended the meeting either in person or proxy representing a value of 55.80%. Masia stated that the members resolved to remove the erstwhile Trustees as envisaged in terms of Management Rule 6(g) of the Regulations.
19. Masia stated that the members elected new Trustees. Masia stated that the erstwhile Trustees refused to co-operate with the new Trustees and the new Trustees made an application to the High Court for an interdict and the High Court granted the interdict marked Annexure 1 of the bundle of documents. Masia stated that, in spite of the court order, the

erstwhile trustees have refused to handover to the new Trustees and the new managing agent, Mamre all the records of the body corporate.

20. Masia stated that one of the mandates given by the owners to the interim trustees was to look into the forensic audit and report back to the owners.

Annual General Meeting

21. Masia stated that a proper notice for the AGM scheduled on 22 August 2017 was electronically dispatched to the owners on 7 August 2017 thereby giving the owners 14 days notice as required by the STSMA.
22. Masia stated that the notice of the AGM was sent by the managing agent on the instruction of the Trustees of the Body Corporate and signed on behalf of Mamre by Mr Albert Jacobsz. Masia stated that the signature does not contravene any provision of the STSMA and the Rules and Regulations promulgated thereunder.
23. Masia stated that the respondents dispute the averment that a quorum was not present due to the "faulty and corrupted proxies. Masia submitted that before the meeting commenced the proxies were tabled and accepted. Masia further stated that the applicant was present at the AGM when this process was undertaken and the members were satisfied that the AGM was properly constituted.
24. Masia stated that the forensic audit findings were presented at the AGM and the members voted that there was nothing fraudulent on the part of Mamre and the forensic audit was nullified.

Annual Financial Statements

25. Masia stated that the body corporate has suffered financial loss as a result of the conduct of the applicant and the former trustees. Masia stated that when the erstwhile trustees took office Mamre transferred into the body corporate's standard bank account an amount of R353 868.16 (three hundred and fifty three thousand eight hundred and sixty eight rands and sixteen cents) on 5 May 2017, but by September 2017 the funds of the body corporate were depleted to an amount of R42 320.14 (forty two thousand three hundred and twenty rands and fourteen cents).

26. Masia stated that despite the concerns raised by other trustees regarding the baseless forensic audit, the erstwhile trustees went ahead with the forensic audit on Mamre which set back the body corporate +- R100 000.00 and salary increases were given to staff members and service providers without proper documentation and not provided for in the budget. Masia stated that, to date, the former trustees have failed to submit the body corporate's records to the new trustees and this has contributed to the challenges in the finalisation of the audit.
27. Masia stated that there is no provision in the STMA and its Regulations nor in the Auditing Profession Act that states that Auditor's report must be signed or that a meeting must be postponed or cancelled because of the fact that the report was not signed.
28. Masia stated that, despite the challenges in compiling the AFS, due to the refusal of the erstwhile Trustees to handover the body corporate's records, the Audited Financial statements have been finalised and signed and will be presented at the next AGM.

RESPONDENT'S PRAYERS

29. The respondent's prayers were listed as follows:
 - An order directing that the AGM held on 22 August 2017 and its Resolutions, including the election of the Trustees is valid;
 - An order directing that Annual Financial Statements are presented at the AGM;
 - An order directing that the former trustees, present all the body corporate's records to the new trustees.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

30. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
31. 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.

32. I have perused all written submissions and taken into consideration all submissions stated before me at the day of the hearing.

Annual General Meeting

33. Rule 15(1)(a) and (b) of the Regulations as promulgated under the STSMA of 2011 provides –

“Subject to sub-rule (7), at least 14 days written notice of a general meeting specifying the place, date and hour of the meeting must be given to all members, all registered bondholders.....”

34. According to the documents submitted to me I am persuaded that the notice sent out to all members and or all registered bondholders was not defective because all parties agree that though the notice was dated 27 July 2017 it was sent out on 7 August 2017 for the AGM to be held 22 August 2017. The applicant did not present any other document that contradicts that the notice was short-serviced. Therefore, I am persuaded that Rule 15 of the STSM Regulations was adhered to by the Trustees.

35. Rule 27 of the Regulations as promulgated under the STSMA of 2011 outlines the Administrative Management expected of a body corporate. Clause (7) provides that –

“If a body corporate terminates its contract with an employee or a managing agent, that person must within 10 days deliver to the body corporate all the records referred to in this rule that are in the person’s possession or under the person’s control.”

36. Therefore, I am persuaded that the previous managing agent, Gamag Property Management & Services and or the erstwhile Trustees must hand over all the body corporate’s records in their possession to the current managing agent, Mamre Property Management.

37. Rule 28 (5)(b) of the Regulations as promulgated under the STSMA of 2011 provides –

“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....”

38. The notice of the AGM was sent on instruction of the Trustees of the Body Corporate. The notice clearly states that –

“Mamre Property Management (PTY) Ltd, as instructed by the Trustees of your body corporate, give notice of an Annual General Meeting of the Body Corporate, on the date, time and place as stated above.....”

39. Therefore, there was no wrongdoing on the part of the Managing Agent sending out the notice for the AGM because Rule 28 state the functions of a managing agent and the trustees may mandate the managing agent to carry out instructions. Again, I am persuaded that there was nothing untoward by the trustees instructing the managing agent to send out the AGM notice on behalf of the trustees.

Annual Financial Statements

40. Rule 26(4) of the Regulations promulgated under the STSMA of 2011 provides that

“Unless all the sections in the scheme are registered in the name of one person, the body corporate must present audited financial statements to a general meeting for consideration within four months after the end of the financial year”

41. Rule 26(5) (b) further provides that –

“The audit of a body corporate’s annual financial statements need not be carried out in accordance with any recognised financial; reporting framework of guidelines for financial accounting.”

42. The STSMA and its Regulations does not provide that the AFS presented at an AGM must be signed. Neither does it provide for the AGM to be cancelled should it be found that the AFS presented at the AGM are not signed. However it is standard practice and good corporate governance that signed Audited Financials are kept. Masia submitted that signed Audited Financials will be presented at the next AGM.

POWERS AND JURISDICTION OF THE ADJUDICATOR

43. 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 –

44. The AGM held on 22 August 2017 is valid
45. The Minute and the Resolutions taken at the AGM held on 22 August 2018 are valid and are a true reflection of the AGM.
46. The signed Audited Financials must be presented at the next AGM to be held by the body corporate.
47. The previous managing agent, Gamag Property Management & Services and or the erstwhile Trustees must hand over all the body corporate's records in their possession to the current managing agent, Mamre Property Management by no later than 31 May 2018.

RIGHT OF APPEAL

The parties' attention is drawn to –

48. 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