



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

Case Number: CSOS1605/GP/17

IN THE MATTER BETWEEN

AMOGELANG NAWA
(Applicant)

and

PETUNIA MOKWENA
(Respondent)

ADJUDICATION ORDER

PARTIES

1. The applicant is the registered owner of Unit 60 Plattebrug which is situated at No.30 Vlottenburg Street, Equestria, Pretoria East, Gauteng.
2. The respondent is the registered owner of Unit 61 Plattenburg.

INTRODUCTION

3. The development comprises of 100 residential sectional title units managed by the Body Corporate and the Board of Trustees and Pretor, the managing agents. The 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”.
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 4 April 2018 and the dispute could not be resolved. Therefore the Ombud issued a certificate of Non Resolution dated 4 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 –

12. The applicant stated that he is the registered owner of unit 60 Plattenberg Complex. The applicant stated that the drain pipe located inside the wall of the unit above me (Unit 61) is leaking and the water has travelled through the wall into the applicant’s

kitchen causing damage to the kitchen unit. The applicant stated that he reported the damage to the body corporate and the managing agent informed him that the body corporate's insurance does not cover leaking pipes that fall within the median line of the owner. The applicant stated that he was advised by the managing agent to appoint a plumber to detect the source of the leak.

13. The applicant stated that he appointed Plumb Ambulance to detect the source of the leak and Plumb Ambulance stated in its report, which is part of the applicant's submissions dated 6 September 2016, that the leak emanates from the sink waste pipe inside Unit 61. The applicant submitted the invoice from Plumb Ambulance in the amount of R2310.00 (two thousand three hundred and ten rand).
14. The applicant stated the respondent informed the managing agent that she does not have the funds to effect the damage caused to my kitchen unit. The applicant state that the managing agent served the applicant with a 30 day notice to effect repairs to the applicant's kitchen unit failing which the body corporate would repair the damage and add the costs of such to her levy account. The applicant stated that the respondent informed the managing agent to go ahead and repair the applicant's kitchen unit because she does not have the finances.
15. The applicant stated that after the 30 days he followed up with the managing agent and he was advised that the trustees have decided not to go ahead with the repairs because the matter is between the applicant and the respondent. The applicant further stated that the chairperson of the board of trustees informed him that the it would not be in the interest of the other 98 members of the scheme to effect the repairs especially because the respondent is undergoing sequestration for being in arrears with her levies.
16. The applicant stated that he pleaded with the trustees to intervene because he is also a member of the body corporate and their intervention would be in the interest of one of their members. The applicant stated that the body corporate sought legal opinion on the matter and repaired the source of the damage i.e. the leak. The applicant stated that he then launched an insurance claim with the insurance and paid an excess of R1000.00 (one thousand rand) for the kitchen unit to be repaired.

APPLICANT'S PRAYERS

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

- An order directing that the respondent refunds the applicant the total sum of R3310.00 (three thousand three hundred and ten rand) in lieu of the R2310.00 paid to Plumb Ambulance for detecting the source of the leak and the R1000.00 paid towards the insurance claim for repairs to the kitchen unit damaged by the leak.

Respondent's Submissions

The respondent was sworn in and testified as follows –

18. The respondent stated that it is her submission that the body corporate was responsible for the leak detecting costs and the repairs to the applicant's kitchen unit because the drain pipe is situated inside the wall and is not visible. The applicant stated that because of this reason it is not her responsibility but that of the body corporate.
19. The respondent stated that the body corporate sent out plumbers to detect the leak in her unit and the plumbers found the source and by-passed the respondent's waste pipe. The respondent stated that she was informed by the plumber that the leak is due to the normal wear and tear of the waste pipe. The respondent stated that he paid the plumber an amount of R3500.00 (three thousand five hundred rand) for the by-passing of the waste pipe.
20. The respondent stated that the applicant was then advised to look to the respondent for repair of the consequential damages caused by the leak to the applicant's kitchen unit.

RESPONDENT'S PRAYERS

21. The respondent's prayers were listed as follows:
- An order directing that the body corporate is responsible for the applicant's plumber costs and the repairs to the kitchen unit.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

22. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
23. 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.
24. Having listened to all the applicant's submissions and read all written submissions and evidence presented by emails and invoices it is not disputed that the applicant's unit is situated underneath that of the respondent. The respondent states in her submissions that she was advised by the plumber that the waste pipe is leaking due to normal wear and tear and not negligence. It is obvious that if the pipe was visible the respondent would have seen it and attended to it, therefore, it is true that it cannot be construed as negligence on the part of the respondent. Therefore, I have to ascertain who is responsible for the wear and tear of this waste pipe. It has been proven that the source of the leak is from the waste pipe servicing the respondent's unit. However, the respondent disputes that she is responsible for the maintenance of this waste pipe but submitted that it is the responsibility of the body corporate.
25. 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.

26. 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.
27. 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.
28. Therefore, 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.
29. It is evident from the submissions before me that the waste pipe forms part of the respondent's primary section and only serves her primary section (Unit 61). Section 13 (1)(c) of the Sectional Titles Management Act No.8 of 2011 provides that –

*“An owner must repair and maintain his or her section
in a state of good repair”*

30. Therefore, I am persuaded that it is the responsibility of the respondent to repair and maintain this waste pipe. Therefore, the respondent is responsible for the call out costs of the applicant's plumber.

31. Section 14(2) of the STSMA provides that –

“This section does not limit the rights of an owner to insure against risks other than damage of his or her section”

32. The applicant took insurance for any damage to his section. The applicant therefore, launched an insurance claim with his insurance and had to pay the excess of R1000.00 to repair the damages caused by the leak emanating from the respondent’s waste pipe.

33. I am persuaded that the respondent must refund the applicant the excess he paid to his insurance.

34. There was no sequestration or liquidation order submitted to the adjudicator except that it was mentioned in the written submissions.

POWERS AND JURISDICTION OF THE ADJUDICATOR

35. 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 –

36. That the respondent must refund to the applicant a total amount of R3310.00 (three thousand three hundred and ten rand) in lieu of the R2310.00 paid to Plumb Ambulance for detecting the source of the leak and the R1000.00 paid towards the insurance claim for repairs to the kitchen unit damaged by the leak.

37. That the respondent pays to the applicant the amount of R3310.00 by no later than 31 July 2018.

RIGHT OF APPEAL

The parties' attention is drawn to –

38. 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