



**ADJUDICATION ORDER IN TERMS OF SECTION 53 AND 54
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT, 2011**

Case Number: CSOS 678/GP/17

IN THE MATTER BETWEEN

**NKUNA FAMILY TRUST
(Applicant)**

And

**TRUSTEES OF THE BODY CORPORATE OF WESTWOOD GARDENS 1
(Respondent)**

ADJUDICATION ORDER

EXECUTIVE SUMMARY

In this dispute the applicant seeks an order in respect of meetings in terms of section 39 (4) (a) and general and other issues in terms of section 39 (7) (a) of the Community Schemes Ombud Service Act, 2011, which respectively empower an applicant to seek an order requiring the board of trustees of a body corporate to call a general meeting of its members to deal with specified business and that the applicant has been wrongfully denied access to information or documents.

The respondent failed to attend the adjudication hearing despite having been given notice to do so. The adjudication therefore proceeded in the respondent's absence. The applicant produced evidence,

which was uncontroverted, to support its claim that the respondent had not held annual general meetings since 2014 and had not provided the applicant with annual financial statements.

An adjudication order was therefore made ordering the respondent to call a general meeting of its members to deal with specified business and requiring the respondent to make available audited financial statements for the 2015, 2016, 2017 and 2018 financial years.

INTRODUCTION

Details of the parties and representation

1. The applicant is the Nkuna Family Trust (the applicant), a trust duly registered in terms of the Trust Property Control Act, 1988 and the registered owner of Unit 87 in the sectional title complex known as Westwood Gardens 1, which is situated at 25 Hoogenhout Street, Lindhaven, Johannesburg, Gauteng.
2. The applicant was represented at the adjudication by its duly authorised representative, Keith Nkuna (Nkuna).
3. The respondent is the Trustees of the Body Corporate of Westwood Gardens 1 Body Corporate as envisaged by section 7 of the Sectional Titles Schemes Management Act, 2011.
4. The respondent did not attend the adjudication and was not represented at the adjudication.

Details of Hearing

5. The adjudication was held on 16 July 2018 in the absence of the respondent under the auspices of the Community Schemes Ombud Service (the CSOS) at its Johannesburg office.

RELEVANT STATUTORY PROVISIONS AND BACKGROUND TO THE ADJUDICATION

Statutory provisions

6. Section 38 of the Community Schemes Ombud Service Act, 2011 (the Act) deals with

applications. More specifically, section 38 (1) provides that-

“Any person may make an application if such person is a party to or affected materially by a dispute”.

7. Section 45 of the Act deals with the amendment or withdrawal of applications. More specifically, section 45 (1) deals with an ombud’s discretionary powers concerning amendments to applications and 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”.

8. Section 47 of the Act deals with conciliations. It 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”.

9. Section 48 of the Act deals with the referral of a dispute to adjudication. More specifically, section 48 (1) 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”.

Background to the adjudication

10. The applicant made an application for dispute resolution against the respondent in terms of section 38 (1) of the Act. The Application for Dispute Resolution Form records, amongst other things, that-

- 10.1. From as far back as 3 March 2016 the applicant has requested documents and information from the respondent but has still not received them;

- 10.2. The body corporate has not held an annual general meeting since 2 October 2014 and the respondent has failed to communicate the reasons for such failure;
- 10.3. The respondent has failed to provide audited financial statements for the 2014/2015, 2015/2016 and 2016/2017 financial years;
- 10.4. The respondent has failed to account for the individual maintenance, security and finance portfolios. Nor has the respondent provided satisfactory budgetary breakdowns for approval;
- 10.5. The body corporate is being run without due governance and accountability to its members;
- 10.6. The individual members comprising the respondent have failed to fulfil their fiduciary duties as trustees, to act honestly and in good faith, and in the interests of the members of the body corporate; and
- 10.7. The applicant would like the respondent to be dissolved and the members of the body corporate be given an opportunity to appoint new trustees.
11. The dispute was originally set down for conciliation on 21 May 2018 in terms of section 47 of the Act. The applicant attended the conciliation but the respondent did not. On 21 May 2018 the conciliator, Dombolo Masilela, therefore issued a certificate of non-resolution and referral to adjudication in terms of section 48 (4) of the Act.
12. The office of the Gauteng Provincial Ombud (the ombud) gave the applicant and the respondent timeous notice that the adjudication had been set down for hearing at 12:00 on 16 July 2018.

APPLICATION TYPE

13. This is an application made in terms of section 38 (1) of the Act concerning meetings in terms of section 39 (4) (a) and general and other issues in terms of section 39 (7) (a) of the Act.

POWERS AND JURISDICTION OF THE ADJUDICATOR

14. I am empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the Act. I am specifically empowered by section 54 (3) of the Act to make an order that may contain such ancillary and ensuing provisions as I consider necessary or appropriate. The Act enables residents of community schemes as well as sectional title schemes and home owners' associations to lodge disputes with the CSOS, which is a statutory dispute resolution service, instead of having their disputes determined by a private arbitrator or the courts. The purpose of this order is to bring finality to the dispute that the applicant lodged with the CSOS against the respondent.

SUMMARY OF EVIDENCE

Applicant

15. Nkuna stated that the applicant was dissatisfied with the respondent's management of the complex. He described the management of the complex as being "in disarray". According to Nkuna, the respondent had not followed proper governance procedures when appointing the managing agents and the situation at the complex had become "a shambles".
16. Nkuna added that the respondent had frustrated the applicant's attempts to obtain information concerning the governance of the body corporate, which is why the applicant had made an application to the CSOS. He confirmed the details of the alleged breach stated in the Application for Dispute Resolution Form as appears more fully in paragraph 10 of this order.

APPLICANT'S PRAYER

17. As a first step towards enforcing the applicant's rights, the applicant requests an order that the respondent is within 30 days of receipt of this order to-
- 17.1. Call a general meeting of its members to deal with the following specified business-
- 17.1.1. Management of the complex;
- 17.1.2. Role of the managing agents;
- 17.1.3. Appointment of managing agents and service providers;
- 17.1.4. Service provider contracts;

17.1.5. Future general meetings of members; and

17.2. Furnish the applicant with the audited financial statements for the 2015, 2016, 2017 and 2018 financial years.

EVALUATION OF THE EVIDENCE

The general rule

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

19. 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 weighed up and determined whether the applicant's version is probable. It involves findings of fact based on assessing the credibility of witnesses and the probabilities.

Analysis

20. I have considered the evidence placed before me in the absence of the respondent, which failed to attend the adjudication hearing despite having been given notice to do so. I therefore only have the applicant's version before me. Nkuna came across as a good witness. I have no reason to doubt his version of events, which shows that the respondent has frustrated the applicant's attempts to obtain information concerning the governance of the body corporate and has failed to hold an annual general meeting since October 2014.

21. Consequently, I am satisfied that as a first step towards enforcing the applicant's rights it is just and equitable to grant the applicant the relief sought.

ADJUDICATION ORDER

22. Accordingly, I make the following order-

22.1. The respondent is by no later than 15 November 2018 to call a general meeting of its

members to deal with the following specified business-

- 22.1.1. Management of the complex;
 - 22.1.2. Role of the managing agents;
 - 22.1.3. Appointment of managing agents and service providers;
 - 22.1.4. Service provider contracts;
 - 22.1.5. Future general meetings of members; and
- 22.2. The respondent is by no later than 15 October 2018 to furnish the applicant with the audited financial statements for the 2015, 2016, 2017 and 2018 financial years.

ENFORCEMENT OF ORDERS

23. The parties' attention is drawn to Section 56 of the Act, which deals with the enforcement of orders. More specifically-

23.1. Section 56 (1) provides that-

"If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of a magistrate's court, the order must be enforced as if it were a judgement of such Court and a clerk of such a Court must, on lodgement of a copy of the order, register it as an order in such Court."

and

23.2. Section 56 (2) provides that-

"If an adjudicator's order is for the payment of an amount of money or any other relief which is beyond the jurisdiction of the magistrate's court, the order may be enforced as if it were judgement of the High Court, and a registrar of such a Court must, on lodgement of a copy of the order, register it as an order in such Court."

RIGHT OF APPEAL

24. The parties' attention is also drawn to section 57(1) of the Act, which deals with the right of

appeal. It provides that-

“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.”

DATED AT JOHANNESBURG ON 21 SEPTEMBER 2018

A handwritten signature in black ink, appearing to read 'Trevor Bailey', written over a horizontal line.

TREVOR BAILEY
ADJUDICATOR

NkunaFamilyTrust.WestwoodGardensBC.678.17