



**ADJUDICATION ORDER IN TERMS OF SECTIONS 53 AND 54 OF
COMMUNITY SCHEMES OMBUD SERVICE ACT 9 OF 2011**

Reference No: 0002236/GP/2017

In the matter between

RAJ BHATT

APPLICANT

and

ANGELS VIEW HOME OWNERS ASSOCIATION

RESPONDENT

ORDER

THE PARTIES

1. The Applicant is Raj Bhatt the owner of unit 34, Strubens Valley, Roodepoort, “the Applicant.” The Applicant represented himself at the adjudication.
2. The Respondent is the Angels View Home Owners Association, a homeowners association as contemplated in Section 1 of the Community Schemes Ombud Service Act 9 of 2011, the “Respondent or the HOA”. The Respondent was represented by Kerry Olivier, the Managing Agent from the Angor Property Group and by Paulo J A Renti, the ex Director of the Respondent.

TYPE OF APPLICATION

3. The adjudication was held under the auspices of the Community Schemes Ombud Service (the Ombud) having been referred by the office of the Ombud for adjudication in terms of section 48 of the Community Schemes Ombud Service Act 9 of 2011 (the Act). This order is issued in terms of section 54 of the Act.

BACKGROUND

4. The Applicant lodged a complaint against the Respondent. A conciliation hearing was held on 23 May 2018 at the offices of the Ombud in Sandton. A certificate of non-resolution was issued and the matter was referred for adjudication in terms of Section 48(4) of the Act
5. The matter was set down for adjudication on 9 July 2018.
6. Accordingly, this is the order flowing out of the adjudication of the above matter.

ISSUE TO BE DECIDED

7. The main issue to be decided in this matter is:
 - 7.1 Whether the Respondent is in breach of Section 71 of the Companies Act, 2008 in that the Applicant was removed as a Director of the Respondent without due process being followed.
 - 7.2 Whether the SGM convened to remove the Applicant as Director was lawfully constituted.

JURISDICTION

8. It is convenient to set out the relevant statutory and regulatory provisions governing the application.

9. Section 39 of the Act provides as follows:

An application made in terms of section 38 must include at least one or more of the following orders:

- (1) In respect of financial issues-*
 - (b) an order requiring the association to take action under an insurance policy to recover an amount;*
- (6) In respect of works required to be carried out in private and common areas-*
 - (a) an order requiring an association to have repairs and maintenance carried out;*
- (7) in respect of general and other issues-*
 - (b) any other order proposed by the chief ombud.*

Section 50 of the CSOS Act reads as follows:

“The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator –

- (a) Must observe the principles of due process of law; and*
- (b) Must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and*
- (c) Must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.”*

MAIN APPLICATION

THE APPLICANT

The Applicant made the following submissions, in summary, regarding the complaint for adjudication:

10. On 21 November 2017 the Applicant was elected as a Director of the Respondent. On 25 January 2018, the Applicant received a notice of a Special General Meeting (SGM) from Mr Pieter Steenkamp, the managing agent of the Respondent. The notice of the agenda of the SGM read “Vote to remove Raj Bhatt as Director of Angels View HOA.”

11. The Applicant was shocked when he read this item on the agenda. At the time as he was not aware of any allegations against him that would result in an SGM calling for his removal as a Director of the Respondent.
12. The Applicant then sent an e-mail to the Managing Agent of the Respondent, Mr Steenkamp, who informed the Applicant that one of the owners had taken a petition around to all the owners calling for support for the removal of the Applicant as a Director of the Respondent.
13. On 26 January the Applicant sent an e-mail to all the Directors with a request to meet urgently to discuss the matter. No response was received.
14. The Applicant submits that the Respondent has not followed due process in terms of the Companies Act to remove the Applicant as a Director of the Respondent and has thereby contravened the Companies Act, 2008 by acting unlawfully in removing the Applicant as a Director of the Respondent.
15. To date a copy of the petition has not been provided to the Applicant.
16. For these and the reasons stated above the Applicant submits that his name has been brought into disrepute, hence the complaint lodged with CSOS.

RELIEF SOUGHT

17. The relief sought by both of the Applicant is :
 - 17.1 An order that the Respondent tenders an apology to the Applicant;
 - 17.2 An order that the Respondent had contravened Section 71 of the Companies Act, 2008.

THE RESPONDENT'S SUBMISSIONS

18. The Respondent submitted in summary that the owners of the Respondent formulated a petition regarding the non-performance of the Applicant as a Director of the Respondent as per the agreed resolution of the Annual General Meeting held on 21 November 2017.
19. The managing agent, duly instructed by the Directors of the Respondent compiled a notice of a special general meeting for the owners to vote on the matter. The Respondent submits that the notice was compiled in accordance with Section 62 of the Companies Act, providing

for 17 business days notice, per Section 62(3) of the Companies Act , which notice included the meeting date, time, place as well as the purpose of the meeting.

20. In terms of the Companies Act the meeting required a 25% quorum. The SGM had a 40% quorum of owners either in person or via proxy. Hence the meeting was properly quorated.
21. The minutes of the AGM held on 21 November 2017, under item 9(ii) of the minute confirms the election of the Applicant as a Director and that the Directors elected will be under review for the first three months of their appointment. Further that should the elected Directors not “perform up to standard of the owners they will be asked to resign or voted off by the Board of Directors.” The minute of the SGM dated 27 February 2018 under item 9, refers to a discussion concerning the removal of the Applicant as a Director of the Respondent and the Applicant’s submissions on this item on the agenda.
22. The Respondent submits that due process was followed in compliance with the Companies Act and that the Board acted in the best interests of the scheme as mandated by the majority of the Directors.
23. The main complaint against the Applicant appears to be the barrage of e-mails and whatsapp messages addressed by the Applicant to the Managing Agent and to the owners. It is the evidence of the Respondent that in a space of two months the Applicant had sent out approximately 30 e-mails to the Directors and the Managing Agent of issues the Applicant wanted to have addressed. These issues related to an allegations of suing Directors for an amount of R56 000,00 which the Applicant viewed as a “loss” due to the negligence of the Directors; sending a Director an sms on 29 December 2017 threatening the Director with legal action related to the perceived loss of R56 000,00; complaints about the security guards sleeping in the guard house whilst on duty; numerous whatsapp messages 2/3 days before 27 December 2017 from the Applicant complaining about unit 1 not paying for the remote controls; whatsapp messages about security issues, panic buttons; and security problems and the like.
24. The Respondent and the other Directors were not in agreement with the Applicant’s approach nor with the allegations levelled against the previous Directors. The Directors wished to look forward not backward and did not, given the conduct of the Applicant, view the Applicant as a suitable person for the “job.”
25. The Respondent submits that due process was followed that resulted in the removal of the Applicant as a Director and asks that the complaint of the Applicant be dismissed.

CONSIDERATION OF THE EVIDENCE

26. The Applicants brought an application for dispute resolution to CSOS of the complaints referred to in 10-16 above.
27. It is common cause that a decision was taken at the SGM of 27 February 2018 to remove the Applicant as a Director of the Respondent
28. Section 71 (1) of the Companies Act 2008 provides as follows:
A Director may be removed by an ordinary resolution of the shareholders at a shareholders meeting. Section 71(2) states that prior to a resolution for the removal of a director being considered by the shareholders, the affected director must be given notice of the meeting and the proposed resolution to have him removed as a Director. The affected Director has to also be afforded a reasonable opportunity to make representations, either personally or through a representative, to shareholders prior to the resolution being considered and put to a vote. The ability of shareholders to remove a Director applies irrespective of a provision to the contrary contained in the MOI, or an agreement between a company and a Director, or even an agreement between any shareholders and a Director.
29. *Section 71(3) of the Act provides for the removal of a director by the board if there are more than 2 directors and one of the following grounds have been alleged by a shareholder or director –*
 - (a) *The director has become ineligible or disqualified to act as a Director in terms of section 69 of the Act;*
 - (b) *the Director has become incapacitated to the extent that the director is unable to perform the functions of a director and is unlikely to regain that capacity within a reasonable time; and*
 - (c) *the director has neglected or been derelict in the of his or her functions.*
30. Therefore, once the allegation has been made the board of the company must give the affected Director a notice with the proposed resolution and a statement explaining the reasons for the resolution. Prior to any consideration of the resolution, the affected Director must be given an opportunity to make representations to the board, either personally or through a representative, prior to the resolution being considered and put to a vote.

31. At the time when the Applicant approached the Ombud for relief the SGM had not as yet been held and part of the relief sought by the Applicant was that the Applicant wanted reasons why the Applicant's removal as a Director was being sought at the SGM. The Applicant viewed this act of calling for the Applicant's removal as an act that sought only to embarrass and humiliate the Applicant.
32. Events have however have overtaken us and the decision to remove the Applicant was taken and effected at the SGM of 27 February 2018. It is clear to the adjudicator after listening to the Applicant, that the Applicant has been embarrassed in the process that resulted in the Applicant's removal as a Director of the HOA; that the Applicant was blindsided by the call for his removal as a Director, when the Applicant sought only to act in the best interests of the scheme.
33. No evidence has been led by the Applicant to support a finding that there has been a contravention of the Companies Act either procedurally or substantively. In as much as the Applicant was shocked to receive notification of the SGM calling for his removal and was effectively blindsided by the call for his removal, the notification of the SGM and the minutes recorded at the SGM confirm that the Applicant had an opportunity to address the SGM and to present "his case" as recorded in the minutes of the SGM. Further proper notice was given to the Applicant in terms of the Companies Act of the SGM. The minutes of the SGM also reflect the Applicant's response to the call for his removal, albeit the Applicant challenges the content of the minute.
34. The Applicant alleges a conspiracy in the call for his removal but has led no evidence in support of this allegation. On being asked whether he seeks to be re-instated as a Director by the adjudicator, the Applicant said that he did not. When the Applicant was informed at the adjudication by the Respondent that there were two vacancies for Directors on the HOA and that the Applicant was welcome to fill one of positions, the Applicant declined.
35. The Applicant came across as a credible witness and the adjudicator has no reason to doubt the evidence given by the Applicant. The Applicant has however not made out a case to support a finding that his removal as a Director of the Respondent was not lawfully executed.
36. In hindsight, the matter could have been handled better with more decorum taking into account the human factor in situations such as these.

37. Accordingly, on the facts before the adjudicator, the adjudicator cannot make a finding in favour of the Applicant.

ORDER

38. Accordingly, I make the following order:

- (i) The Complaint of the Applicant is not upheld.
- (ii) There is no order as to costs.

39. The party's attention is drawn to the following sections of the Act:

Section 56 (1) –

“If an adjudicators order iswithin the jurisdiction of the Magistrates Court, the order must be enforced as if it were a judgment of such Court....”

Section 56(2) –

“If an adjudicators order isbeyond the jurisdiction of the Magistrates Court, the order must be enforced as if it were a judgment of the High Court....”

Section 57 (1)-

“If an Applicant or the association or any affected person who is dissatisfied by an adjudicators order, may appeal to the High Court, but only on a question of law.

SIGNED AND DATED ON THIS 2nd DAY OF AUGUST 2018.

A handwritten signature in black ink, appearing to read 'P A Beck', written in a cursive style.

P A BECK
ADJUDICATOR