



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

Case Number: CSOS1646/GP/17

IN THE MATTER BETWEEN

ABDUR-RAHMAN SULIMAN
(Applicant)

and

ZINNIIVILLE BODY CORPORATE
(Respondent)

ADJUDICATION ORDER

PARTIES

1. The applicant is the registered owner of Shop 46 Zinniaville which is situated at Sonneblom Street, Rustenburg.
2. The respondent is the Zinniaville Body Corporate. The Zinniaville 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”.

INTRODUCTION

3. The development is a business complex comprising of 61 business sectional title units managed by the Body Corporate and the Board of Trustees.
4. This is an application for dispute resolution in terms of Section 38 of the Community Schemes 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 28 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 28 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 14 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 28 May 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 –

12. The applicant stated that he is an executor of the estate of the late Sa-eed Suliman and the registered owner of the shop situated in Unit 46, Zinniaville. The applicant stated that he does not reside in Rustenburg but is still the owner of Unit 46 Zinniaville.

13. The applicant alleged that he has found numerous discrepancies in the control, management and administration of the body corporate's common area.
14. The applicant stated that certain owners have extended their properties onto the common property and other owners have erected shacks on common property without the permission of all the owners.
15. The applicant further stated that there are squatters residing on common property and others running business on the common property.
16. The applicant stated that the board of trustees have completely failed in their responsibility to manage the complex on behalf of the owners. The applicant submitted the body corporate has –
 - (i) failed to enforce the management and conduct rules of the body corporate;
 - (ii) failed to collect levies from unit holders;
 - (iii) failed to maintain the common property;
 - (iv) allowed the property to degrade over time;
 - (v) allowed squatters to build residential shacks on common property;
 - (vi) allowed squatters to build and run business shacks on common property;
 - (vii) allowed unit owners to build residential shacks for their staff on common property;
 - (viii) allowed unit owners to build extensions to their units without the body corporate approval and without municipal approval;
 - (ix) allowed unit owners to make extensions and renovations to their units with zinc; and
 - (x) allowed unit owners to build on exclusive use areas without body corporate approval and without municipal approval.
17. The applicant stated that on or about February 2012 he wrote a letter to the body corporate regarding the illegal extensions on common areas and exclusive use areas, by other unit owners. The applicant stated that he did not get any response from the body corporate and he then approached the Rustenburg Fire Department to investigate the fire hazardous situation brought about as a result of the illegal

extensions. The applicant stated that the fire department attended to the complex and found many illegal and hazardous structures throughout the complex.

18. The applicant stated that on or about July 2012 he visited the Chief of the Fire Department to find a way forward and hand delivered a letter of complaint to the office of the Mayor of Rustenburg. The applicant stated that the Mayor's office conducted an inspection of the entire complex and notices were issued to the unit owners who had violated the by-laws by erecting illegal structures.
19. The applicant stated that on or about August 2012 the municipality removed all illegal occupants from the common property and demolished certain illegal structures in the complex.
20. The applicant stated that on or about December 2012 he employed the services of an attorney who wrote a letter to the body corporate with suggestions on the way forward, but no response was received from the body corporate.

APPLICANT'S PRAYERS

21. The applicant's prayers were listed as follows:
 - An order directing that the respondent conducts an audit of the sectional title scheme as it stands today;
 - An order directing the return of ownership of the scheme to its rightful owners as per the registration at the Deeds Office;
 - An order directing that the body corporate appoints a managing agent who has experience in sectional title schemes;
 - An order directing that the CSOS appoints a chairman that is not a unit holder; and
 - An order directing that the body corporate is placed under administration until integrity and order is restored.

Respondent's Submissions

22. The respondent was represented by the Board of Trustees - Mr Solly Tayob, Mr Ahmad Aminjee and Mr M.F. Satar. They were all sworn in and testified as follows –

23. The representatives of the respondent stated that they were also owners of business units at the zinniaville complex. They stated that they availed themselves to stand for the nomination of the board of trustees, at the body corporate's last Annual General Meeting (AGM) held in December 2017. The representatives stated that they were voted in as the board of trustees at that AGM.
24. The respondent stated that the complex was developed and has been in operation from 1997 and acknowledged that there were challenges in the management of the complex.
25. The respondent stated that when the municipality took the resolution that owners must pay their rates and taxes directly to the municipality the owners stopped paying their monthly levies to the body corporate. The respondent stated that due to the body corporate not receiving the levies the management of the complex has suffered.
26. The respondent further stated that when the new trustees took office in January 2018 they have tried to improve the management of the shopping complex. The respondent stated that, under the current circumstances they introduced a levy of R200.00 (two hundred rand) per owner in order to maintain the complex but the applicant opposed the payment of the R200.00 and this decision was shelved.
27. The respondent stated that, in the five months that the new trustees have been in office, they have managed to sort out the water leaks and sewer through the intervention of the council. The respondent further stated that the trustees were attempting to deal with the problems faced by the body corporate, step-by-step.
28. The respondent stated that, due to the non-payment of levies, the body corporate does not have funds to appoint an auditor.
29. The respondent stated that the body corporate will require funds to engage lawyers for the eviction of the squatters and the taxi rank running its business from the body corporate's common property. The respondent stated that whenever they engage with the illegal squatters and those running illegal business, their lives are threatened.

30. The respondent stated that the zinc structures and some extensions were built ten (10) years ago and the local municipality once came to demolish these structures but it was found that some of the structures were built on approved plans and the process was halted. The respondent stated that the two shops situated behind the applicant's shop had approved plans from the council and therefore, the body corporate could not interfere.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

31. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
32. 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.
33. I have listened to all the applicant's submissions and read all written submissions and evidence presented by way of emails, documents and photographs. I am satisfied that the CSOS does not have jurisdiction on the illegal structures because they were erected in 2012, before the promulgation of the CSOS Act No.9 of 2011 and furthermore, the CSOS does not have the powers to evict therefore, the applicant would have to approach a court of law with competent jurisdiction.
34. However, the parties must educate themselves with the CSOS Act, the Sectional Titles Schemes Management Act No.8 of 2011 and the Regulations made under the Act.
35. Section 3(1)(a) (i) (iii) and (iv) (b) (c) (e) and (f) of the STSMA provides that –

“A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include –

- (a) To establish and maintain an administrative fund which is*
- (b) reasonably sufficient to cover the estimated annual operating costs –*
- (i) For the repair, maintenance, management and administration of the common property (including reasonable provision for future maintenance and repairs);*
- (iii) For the payment of any insurance premiums relating to the building or land; and*
- (iv) For the discharge of any duty or fulfilment of any other obligation of the body corporate.*
- (c) To establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of the future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister;*
- (d) To require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the right to the exclusive use of a part or parts of common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs.*
- (e) to determine the amounts to be raised for the purposes of paragraphs (a), (b) and (c) ;*
- (f) to raise the amounts so determined by levying contributions on the owners in proportion to the quotas of their respective sections.*

36. Accordingly, the body corporate is required, in terms of the Act, to perform all its functions entrusted to it by law. Therefore, a Special General Meeting must be held by

no later than 30 September 2018 to determine the way forward regarding the levy amount to be paid for the establishment of the administrative and the reserve fund.

37. Part 5 of the Regulations, Rule 22(1) (a) provides that

“A body corporate or trustees must prepare a written maintenance, repair and replacement plan for the common property, setting out –

(a) The major capital items expected to require maintenance, repair and replacement within the next 10 years”.

38. Therefore, the respondent must ensure that a maintenance, repair and replacement plan is prepared and presented annually at the AGM. This plan will also assist the body corporate to determine the monthly levy or a special levy.

39. Part 2 of the Regulations, Rule 6(1) and 7(1) provides that –

“A trustee need not be a member or the legally recognised representative of a member who is a juristic person”; and

“A member may nominate any person for the office of trustee”

40. Rule 12 (3) continues to provide that –

“At the commencement of the first meeting of trustees after an annual general meeting at which trustees have been elected and whenever else necessary, the trustees must by majority vote elect a chairperson from among the number”.

41. Therefore, owners may appoint anyone, and not necessary a member of the body corporate as a trustee and the trustees must, by majority vote, elect the chairperson.

42. Part 7 of the Regulations, Rule 29 (1) provides

“The body corporate may on the authority of a unanimous

resolution make alterations or improvements to the common property that is no reasonably necessary”.

43. Therefore, no extensions, residential shacks or business shacks etc shall be permitted without obtaining a unanimous resolution from the body corporate.

POWERS AND JURISDICTION OF THE ADJUDICATOR

44. 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 –

45. The CSOS does not have the jurisdiction to evict or demolish the zinc shacks and extensions built on common property because they were erected or built on or before 2012, prior to the promulgation of the CSOS Act No.9 of 2011. Therefore, the applicant must approach a court of law with competent jurisdiction.
46. The parties must educate themselves on the CSOS Act, the Sectional Titles Schemes Management Act No.8 of 2011 and the Regulations made under the Act.
47. The body corporate must hold a Special General Meeting (SGM) by no later than 30 September 2018 to present the 10 year maintenance, repair and replacement plan.
48. The body corporate must, at the SGM, raise the amounts determined as levy contribution in proportion to quotas of the respective sections.

49. The body corporate must establish the administrative and the reserve fund.
50. No extensions, residential shacks or business shacks etc are permitted on common property without obtaining a unanimous resolution from the body corporate.
51. The owners may appoint any person as a trustee and it is at the trustee's first meeting, after the AGM, where by majority vote, the trustees elect the chairperson. There is no finding regarding any wrong doing on the nomination and appointment of the current board of trustees. The applicant may approach the court should he want to pursue placing the body corporate under administration.
52. The body corporate must compile and enforce the management and conduct rules.

RIGHT OF APPEAL

The parties' attention is drawn to –

53. 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