



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

Reference Number: CSOS00449/KZN/17

In the matter between:

**BHIMSEN RAMPHAR MAHARAJ**

(Applicant)

And

**THE TRUSTEES OF MORNINGSIDE RIDGE BODY CORPORATE**

(Respondent)

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**ADJUDICATION ORDER**

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**PARTIES**

1. The Applicant is Bhimsen Ramphar Maharaj. He is the owner of unit 58 in the scheme known as Morningside Ridge Body Corporate situated in Morningside, Durban.
2. The Respondent is the Trustees of Morningside Ridge Body Corporate. Appearing for the Respondent was **CSOSN**. Bramdaw (previous



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Chairman and Trustee) and Miss Phasile Mthembu (Building Manager for the complex). Mr. J. Wakefield also appeared (Managing Agent).

### **BACKGROUND**

3. On the 1<sup>st</sup> of February 2017, whilst exiting the complex, the Applicant pressed the remote button for the gate of the complex to open. There are sensors at the said gate which have been installed for the purpose of preventing the gate to close on vehicles whilst entering or exiting the complex. Unfortunately for the Applicant, the gate closed on the vehicle causing damage as a result. This is common cause.
4. On or about the 8<sup>th</sup> of February 2017, the Applicant put through an insurance claim via Miss Mthembu. The insurers were Commercial and Industrial Acceptances (CIA).
5. The Applicant was requested by the insurance brokers, Westside, to obtain various documentation in support of the claim. This included three quotations to have the vehicle repaired. The quotations varied as follows:
  - 5.1. Quote 1: R 22, 113.75 (TWENTY TWO THOUSAND RAND ONE HUNDRED AND THIRTEEN RAND AND SEVENTY FIVE CENTS).



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- 5.2. Quote 2: R 11,299.51 (ELEVEN THOUSAND TWO HUNDRED AND NINETY NINE RAND AND FIFTY ONE CENTS);
- 5.3. Quote 3: R 10,975.51 (TEN THOUSAND NINE HUNDRED AND SEVENTY FIVE RAND AND FIFTY ONE CENTS).
6. On 22<sup>nd</sup> of March 2017, the insurers repudiated the Applicant's claim for the following reasons, as set out in their letter:
- 6.1. *"No evidence of negligence on the part of our insured"*.
- 6.2. *"Our insured has contracted out of liability for any loss or damage by the erection of a clearly visible disclaimer board at the premises, as well as by the inclusion of a comprehensive indemnity clause in the body corporate rules"*.
7. The Applicant attended to have the vehicle repaired and same was concluded on or about the 23<sup>rd</sup> of May 2017. The Applicant's vehicle was not repaired by any of the companies that had provided the quotations but rather another situated in Stanger.
8. The Applicant stated that he paid cash to the panel beater in the sum of R 11,479.00 (ELEVEN THOUSAND FOUR HUNDRED AND

SEVENTY NINE RAND) to have the vehicle repaired directly to the said panel beater. He submitted a copy of that invoice, as well as three receipts for payments he claimed he made. The Respondent disputed the amount paid by Applicant as claimed including the validity of the invoice and receipts submitted by the Applicant.

### RELIEF SOUGHT

9. The Applicant is seeking relief as follows, namely for the Respondent to pay the amount of R 10,975.51 (TEN THOUSAND NINE HUNDRED AND SEVENTY FIVE RAND AND FIFTY ONE CENTS); for loss suffered as a result of the gate closing on his vehicle. This amount equates to the lowest of the three quotations mentioned above.

### THE APPLICANT'S CASE

10. The Applicant presented an invoice and a written report from the company known as SA Pulse dated 24<sup>th</sup> February 2017. It is common cause that SA Pulse are the preferred contractors of the Respondent for gate repairs and maintenance at the complex.
11. It is also common cause that on or about 24 February 2017, Miss Mthembu, was instructed by the Respondent, upon advice from the

insurance company, to instruct SA Pulse to replace the safety beam sensors at the gate.

12. The report from SA Pulse, after concluding the work, states the following:

*“found safety beams intermittently faulty – replaced, replaced cabling to receiver beam, tested and working”.*

13. An amount of R 1,850.00 (ONE THOUSAND EIGHT HUNDRED AND FIFTY RAND) was charged by SA Pulse. Applicant argued that it is apparent from the said report; coupled with the invoice; that this is sufficient proof that the beams were faulty and were not in proper working order. Furthermore if they were in proper working order there would have been no need to have the said safety beams replaced. In support of his claim, the Applicant also referred to an email dated 05 March 2017 from Mr Logan Odayan, an employee of the Insurance Brokers who wrote:

*“we note that the gate did, in fact, malfunction”.*

14. Applicant argued that it is as a result of the faulty safety beams that caused the gate to close on the Applicant's vehicle which caused the damaged to his car.

  
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15. Applicant then referred to Prescribed Management Rule 23 (6) (b) which states:

*“a body corporate must take out public liability insurance to cover the risk of any liability it may incur to pay compensation in respect of (b) any damage to or loss of property that is sustained as a result of an occurrence or happening in connection with the common property”.*

16. It is common cause that there is cover only where Applicant has acted negligently. Therefore Applicant's case is that Respondent ought to have contracted a term in this regard in the insurance policy to cover such loss. If they had done so, Applicant's claim may have been accepted.
17. Finally, the Applicant argued that the amount claimed for is consistent with the quotations even though the Applicant did not use any of the panel beaters who provided quotations.

### **RESPONDENT'S CASE**

18. The Respondent argued that Applicant is suing the wrong party. The Applicant should have rather sued the Insurers and not the Respondent. The Respondent claims they did everything they could to assist the Applicant with the filing of his claim. They cannot be held responsible for

  
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the repudiation by the insurance company of the claim. The matter is simply out of their hands.

19. Mr Bramdaw' s interpretation of the report from SA Pulse is that the word "*intermittent*" does not necessarily mean that the safety beams themselves were faulty not that the Respondent was negligent. Furthermore, this is the very first occasion that the gate had closed on a vehicle. Hence the Respondent was not negligent and therefore cannot be held liable for loss suffered by the Applicant. This is especially as the insurance cover in place only covers incidents where the Respondent acted negligently.

20. Mr Bramdaw argued further that the Applicant rushed the gate upon exiting. By so doing the safety beam sensors were not able to react quickly enough and hence the gate closed on the Applicant's vehicle and therefore Applicant is negligent. The Applicant denied this and gave reasons as to why he was not negligent including that he has years of driving experience, his car has little power to accelerate in such a short space, also the angle he approach the gate whilst existing. However there is no evidence before which shows that the Applicant was negligent.

  
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21. As a defence; the Respondent also placed a lot of weight on the disclaimer sign displayed and the indemnification clause contained in the rules.
22. The Respondent was of the opinion that the Applicant did not pay the full amount which he has claimed. In fact the Respondent suspected that the Applicant had paid a much lower amount. The Respondent therefore disputed the validity of the invoice as well as the receipts. The Respondent asked for the matter to be adjourned so that they could get an expert witness to testify to this. The Applicant denied the allegation and did not consent to the request for the adjournment.
23. There is no evidence before me to suggest that these documents had been fraudulently prepared. Considering the facts and documentation before me, I rejected the Respondent's request for an adjournment and accepted the invoices and receipts as presented by the Applicant.

### MY OBSERVATIONS

24. There is nothing in law prohibiting the Applicant from taking legal action against the Respondent. I therefore disagree with the Respondent. The

  
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Applicant has the necessary *locus standi* to institute this claim against the Respondent.

25. I note the following:

- 25.1 From reading the report from SA Pulse, I am of the view that the safety beams were indeed faulty. If the safety beams were not faulty they would not have been replaced. There was no evidence produced by the Respondent to show me that the safety beams were in working order; as alleged.
- 25.2 Mr Bramdaw argued that the Respondent replaced the safety beam sensors as a precautionary measure to safeguard from damage to property reoccurring again, regardless of whether they were faulty or not. The report contradicts this version.
- 25.3 Neither Applicant nor Respondent requested that the contractor for SA Pulse be called as a witness to testify in order to clarify the report. I am therefore placing a lot of emphasis on the interpretation of the report which reads clearly that the gates were "faulty".

  
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- 25.4 The Respondent failed to produce any evidence to convince me that the Applicant was negligent.
26. Considering the above, and the evidence before me, I find that neither Applicant nor Respondent were negligent.
27. The Applicant has the onus to prove the elements of delictual liability. There are 5 elements of delictual liability that all have to be present in order for succeed with such a claim. These include the following: conduct, wrongfulness, fault (intention or negligence), causation and damages.
28. If one of these elements are not present then one cannot be held delictually liable to another. When one examines the element of fault, in particular, it is apparent that it was certainly not the intention of the Respondent to cause the damage to the Applicant's vehicle. Therefore one must examine whether the Respondent may have been negligent. The problem I have with the Applicant's case is that he failed to prove fault, i.e. negligence or intention. No expert witnesses were called; no documentation was tabled before me dealing with issues such as whether the maintenance of the gate and sensors were done, whether the quality of the equipment was of standard etc. As a result of this, delictual liability cannot be proved and therefore the Applicant cannot succeed with his against the Respondent.

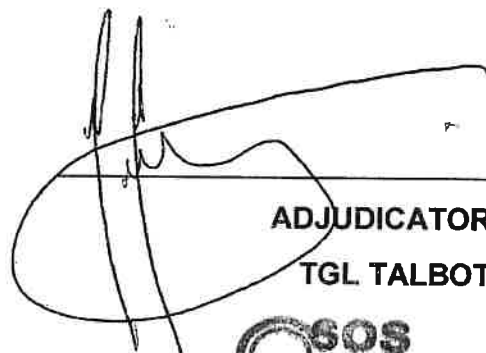


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29. I am of the view that the disclaimer sign and indemnification clause cannot be relied upon as a defence in the circumstances for the reason that no one would not expect a gate to randomly close on one's car at a reasonably busy complex such as Morningside Ridge. Unfortunately for the Applicant, this does not change my stance on the matter as he still is unable to succeed with his claim for the reasons mentioned above.
30. I also do not agree with the Applicant where he says that the Respondent had not complied with PMR 23(6). I was forwarded documentation from the Broker for the Respondent confirming that the said rule had been complied with by the Respondent. However I disagree with the interpretation of the rule by the Respondent in this respect. I do not wish to go into this point any further than I have already done other than to say that I am here to adjudicate only on whether the Respondent had complied with its obligation to have the required insurance cover in place to cover such loss. I believe they did. The issue of repudiation by the Insurer is not for me to adjudicate on.
31. Finally the Applicant may have only himself to blame for making a somewhat straight - forward situation difficult for himself. He advised me that he has his own insurance but elected not to put a claim through his insurance but rather through the insurance of the Body Corporate. My views here however do not have any significance as to the outcome of the matter but it is worth mentioning so to demonstrate the fact that the fairness of the decision of this ruling I make has taken into account the options that were available to the Applicant right from the outset; which he elected not to follow.

32. Accordingly I rule in favor of the Respondent and dismiss the Applicant's claim.

SIGNED AT Pietermaritzburg ON THIS THE 7 DAY OF March 2018

  
ADJUDICATOR  
TGL TALBOT



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