



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

Case Number:00774/KZN/17

IN THE MATTER BETWEEN

KISHORE KARSON PATEL

(Applicant)

and

TRUSTEES OF MONACO BODY CORPORATE

(Respondent)

ADJUDICATION ORDER

1. PARTIES

The applicant is : Mr Kishore Karson Patel

Who represented himself and whose son was present as an observer

The respondent is : the Trustees Monaco Body Corporate

Who was represented by two owners and the managing agent. The two owners had been trustees but had resigned due to the continued harassment of disputes being lodged with CSOS.


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2. INTRODUCTION

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.

The adjudication hearing took place on 12th February 2018. This application is before me as a result of a referral sent by the KZN Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.

3. APPLICABLE PROVISIONS OF THE ACT

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”.

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”

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 dispute

set out in the application, the ombud must refer the matter to conciliation

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”.


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4. SUMMARY OF DISPUTE

The Applicant had lodged a list of nineteen issues for adjudication.

- 1 Audited annual financial statements year ending 2016;
- 2 Withdrawn
- 3 Roof repairs to Unit 11;
- 4 Unjust enrichment by Ms I. Figenschou in respect of damages in Unit 11;

The Applicant withdrew issues 5 – 19 advising that they could be resolved with the Body Corporate

4.1 APPLICANT'S VERSION

- 4.1 Audited annual financial statements (AFS) year ending 2016;
The AFS for the 2016 year were not presented to the AGM held May 2017. This is a serious violation of body corporate governance and for this reason the AGM does not qualify to be an AGM; The Applicant agreed that the 2015 AFS were correct and he signed them;
- 4.2 Withdrawn;
- 4.3 Roof repairs to Unit 11 : The Applicant said that the owner of Unit 11 is asking for the roof to be completely replaced and the roof could be repaired and need not be replaced. This is also not the only roof as there are three buildings and all three roofs should be dealt with, not just the roof above Unit 11;
- 4.4 The Applicant said that repairs had already been done inside Unit 11 to the value of R30000. He said he has asked for the ledger card showing the details of the work done inside Unit 11 as he said that more work was done than just the repairs to the areas damaged by the water leak. The Applicant said there is an engineer's report stating this. He mentioned that the raising of the patio had caused a problem.
The Applicant confirmed that he was aware of the work done inside Unit 11 but at the time he had authorised payment of each invoice, he was under the impression that the split of the cost between the Body Corporate and the owner was still to be finalised.
The Applicant said there were cracks in the walls inside the flat and the engineer had confirmed these were not structurally threatening. The Applicant said the repair of these cracks and the painting after the repair should not be paid by the Body Corporate but by the owner;



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- 4.5 A Special General Meeting (SGM) was called for the 2nd September 2017. Item 3 on the Agenda was "to waive the required 30 day notice period as the trustees deemed the items to be discussed as urgent." 14 days notice had been given for the meeting. 76.63% of owners calculated in value, were present or represented at the meeting. The Applicant confirmed he was the only owner present or represented at the meeting who had not agreed to the short notice;

4.2 APPLICANT'S PRAYERS

- 4.2.1 That the AFS for the year ending 2016 be produced and that the proceedings of the AGM held May 2017 be declared null and void;
- 4.2.2 Withdrawn;
- 4.2.3 To grant an order prohibiting the replacement of a new roof. To compel trustees to be in strict compliance with the sectional (sic) act when authorising an expenditure such as non-luxurious replacement, comply with the passing of special resolution and mandatory keeping in line with budgets;
- 4.2.4 That an order be granted that Ms I. Figenschou has unjustly enriched herself be repaid to the Body Corporate. An order stating that trustees must not breach their fiduciary duty;
- 4.2.5 I can find no specified Prayer in the documents before me for this contravention of S6(2) of the STSMA 8 of 2011.

4.3 RESPONDENT'S VERSION

- 4.3.1 The Managing Agent representative present advised that the auditor would not issue the AFS for the 2016 year as the AFS for the 2015 financial year had not been approved or signed. The respondent confirmed that the 2015 AFS had been approved at an SGM however none of the trustees wanted to sign them. After the Applicant had signed the 2015 AFS, one of the Respondent representatives present also signed them. The Managing Agent agreed to submit the signed 2015 AFS to the Auditor. She said that now that the 2015 AFS had been signed the auditor would release the 2016 AFS, the audit already having been done;
- 4.3.2 Withdrawn;
- 4.3.3 The Respondent said that the roof had been leaking into unit 11 since 2007. The Respondent said that there was a spend restriction placed on the trustees of R10 000. A meeting had to be held to get permission for the roof repair due to this restraint. The leaking roof is now an emergency due to the damage that is again being caused inside flat 11 due to the water ingress through the roof;

It is possible that due to the repair being delayed, the repair will now cost even more as the quotes had been obtained some time ago. None of the other roofs are leaking and their maintenance/repair or replacement can be included in the 10 year plan being prepared.

The Managing Agent advised that the body corporate has surplus funds in excess of R200 000. The roof replacement is going to cost approximately R80000.

The Respondent confirmed that work had been done inside Unit 11 after the previous repair to the roof however thereafter it became obvious that the repair had not resolved the problem and there was still a leak.

The Respondent said it made no sense to continue repairing the roof and was a better financial decision to replace the roof as a permanent solution;

4.3.4 The Respondent denied that the patio had been raised and said that the water was ingressing under the door. The engineer's report recommended that either a roof be installed over the patio or the door be removed and sealed.

The door was removed, sealed and replaced and this has stopped the water problem from this source;

The Respondent said that Unit 11 had previously had a parquet floor which had been damaged by all the water leaks and the body corporate had insisted that the Unit be tiled instead of the parquet flooring being replaced. This was not the owner's preference but she had agreed.

The Respondent advised that the Applicant had been a trustee at the time the work was done and had signed all the invoices for the work done.

The Respondent said that the cracks on the internal walls was caused from the outside and the repair thereof was for the body corporate account;

4.2.5 The Respondent confirmed that there was no rule that allowed for shorter notice.

5. EVALUATION OF EVIDENCE SUBMITTED

5.1 The 2015 AFS were signed and will be submitted to the auditor allowing the release of the 2016 and 2017 AFS. No award necessary;

5.2 Withdrawn;

5.3 It was noted that the trustees are authorised and in fact obligated, in terms of the STSMA, to maintain common property. This was agreed by both the Applicant and the Respondent. It certainly makes sense to replace the roof rather than to keep carrying out repairs when it is obvious that the repair is not solving the leaking problem. This must be a trustee decision taking all circumstances and reports into consideration. It is the trustees' decision of whether or not to use surplus funds to carry out the roof replacement or to raise a special levy to pay for this;

5.4 From the evidence given it is evident that although money was spent on repairing the inside of Unit 11, further damage had occurred inside Unit 11 when the roof, after being repaired, continued to leak. I can find no evidence of undue enrichment by Ms I. Figenschou. No award necessary;

- 5.5 S6(2) of the STSMA clearly states that “*The body corporate must, at least 30 days prior to a meeting of the body corporate where a special resolution or unanimous resolution will be taken..... Except where the rules provide for shorter notice*”

Emphasis is that of the adjudicator.

It was confirmed that there was no rule permitting shorter notice nor had all owners agreed to accept short notice as the Applicant had not agreed.

I am however not convinced that a special resolution was required to be achieved for the trustees to proceed with the replacement of the roof or to use surplus funds to cover this cost. This work is emergency maintenance and the trustees can take the decision in this regard.

I will therefore make no award on this item.

6. POWERS AND JURISDICTION OF THE ADJUDICATOR

6.1 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.

6.2 The purpose of this order is to bring closure to the case brought by the applicant to the CSOS.

7. ADJUDICATION ORDER

In the circumstances, the following order is made –

7.1 The trustees are, as soon as is reasonably possible, to take a resolution with regard to the repair or replacing of the roof of Unit 11 taking into consideration the engineer’s report and the fact that previous repairs to the roof had failed;

7.2 The trustees are to further resolve whether or not to use surplus funds for this repair or to raise a special levy taking into consideration the fact that the continuing damage into Unit 11 has now rendered the repair/replacement of the roof to be emergency maintenance;

7.3 That as the roof repair/replacement is now deemed to be an emergency maintenance item, that notwithstanding the fact that it exceeds the R10 000 restriction placed on the trustees, that it be carried out as soon as possible.



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- 7.4 That the repair/replacement of the other roofs in the scheme be included in the 10 year maintenance plan being prepared;

8. Sections 56 (1) of the CSOS Act, 2011

The parties' attention is drawn to-

Section 56 (1) of the Act 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 Court must, on lodgement of a copy of the order, register it as order in such Court'.

9. RIGHT OF APPEAL (SEC 57)

57.(1) *An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may apply to the High Court, but only on a question of law.*

(2) *An appeal against an order must be lodged, within 30 days after the date of delivery of the order of the adjudication.*

(3) *A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.*


ADVOCATE BARBARA SHINGLER

ADJUDICATOR

DATE: 18th February 2018

