



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

Case Number:00777/KZN/17

IN THE MATTER BETWEEN

MR ANTHONY LANGFORD

(Applicant)

and

DIRECTORS OF ZIMBALI ESTATE MANAGEMENT ASSOCIATION

(Respondent)

ADJUDICATION ORDER

1, PARTIES

The applicant is : Mr Anthony Langford who was accompanied by his son

Mr William Langford

The respondents are : The Directors of Zimbali Management Association who

was represented by the Chairman Mr S. Daval and the General Manager, Sarika

Somai.



ADJUDICATION ORDER
DATE: 11/05/2018
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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 20th March 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 disputes 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”.



4. SUMMARY OF DISPUTE

The Applicant contends that the terms of the contract entered between himself and The Zimbali Management Association (ZEMA) have been unilaterally changed by ZEMA with no consultation in that ZEMA have cancelled the capping of the Admin Fee and have introduced a R200 late registration fee. Neither of these terms were in the original contract.

4.1 APPLICANT'S VERSION

The Applicant stated that he had purchased a property in Zimbali in September 2015. As required, he had met with ZEMA representatives at the Welcome Centre where he had been advised of all the terms, conditions and rules with which he would have to comply when renting his property in Zimbali for short term holiday rental. A term of the contract was that there was an Admin Fee payable to ZEMA. The Applicant said that when this dispute had arisen he had requested a copy of the contract from ZEMA but had been advised that it had been lost in a fire. He did however have an email dated 15th September 2017 which confirmed the existence of a contract and which confirmed that, at the time he had entered into the contract, the Admin fee was :

1 booking per month	R695 including vat
2 bookings per month	R1390 including vat
3 bookings per month	R1960 including vat

The Admin Fee was capped at R1960.



The Applicant advised that this fee was increased annually and he accepted this but said that in 2017 he had received 3 days' notice of not only the increase in the Admin fee but also the addition of a R200 late registration fee and that the capping would no longer be applied. This had resulted in his monthly Admin fee almost doubling, in one month it had been R4900.

The Applicant advised that most of his bookings are 2 night, weekend bookings being a Friday and Saturday night and that his daily rental is between R1800 and R2000 per night. The new Admin fee means that it is, on some occasions, up to 25% of his rental income.

The Applicant said that ZEMA stated that the R200 late booking fee was to compensate for the additional work incurred by the Welcome Centre staff. He said there is no additional work, as whether a notification of a booking was received timeously or late the work was the same. He said it is the industry norm that late bookings are usually given at a reduced rate not a higher rate.

The Applicant said that, although ZEMA maintains that Zimbali is primarily a residential estate with the majority of owners residing permanently in their homes or occupying them during holiday periods, Zimbali was called a "resort" for advertising purposes and there were a number of hotels in the resort. Zimbali on its own letterhead calls itself a "Coastal Resort" and it is advertised on 'bookings.com" There should therefore be no doubt Zimbali is a holiday resort. The hotels do not have to pay the Admin Fee payable by other owners in the Zimbali who holiday rent their property.

The Applicant said that the cost of additional security used as a reason to uncap the Admin Fee is not due only to the holiday tenants but to owners who only occupy their properties over the holiday period.



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He said that Zimbali have strict rules with regard to the number of residents permitted per property and so whether they were owners or tenants there would be no effect to the cost.

The Applicant said that ZEMA is exploiting the owners who holiday let their properties and that this is against the terms of the contract. He and at least 2 other owners in Zimbali who holiday let their properties had objected to the new conditions and although the Directors, at the AGM, had agreed to reconsider these new conditions, they had merely advised that they had considered them and that they remained in force.

The Applicant stressed that he was not against the annual increase in the fee but insisted that the inclusion of the R200 late booking fee and the removal of the capping was a change in contractual detail done unilaterally and without consultation with him.

4.2 APPLICANT'S PRAYERS

That ZEMA receive payment of their Admin Fee in accordance with the agreed rate excluding the R200 late registration fee and including the capping and that he be reimbursed for the additional fees charged.

4.3 RESPONDENT'S VERSION

The Respondent clarified that this is not a levy dispute and this was agreed.

He also confirmed that the majority of properties in Zimbali are occupied by permanent residents with only approximately 160 properties being offered for rental.

He said that to these permanent residents one of the main reasons they had purchased into Zimbali was security and this was of prime concern to the Directors of the ZEMA.



The Respondent confirmed that there were hotels in Zimbali but that they each paid a levy and that they mostly had their own facilities e.g. a swimming pool. The hotels also handled their own administration for their guests, who were not processed through the Welcome Centre.

The Respondent tabled the ZEMA "Application for authorisation to lease property on the Zimbali Coastal Resort" which had been signed by the Applicant's son, Mr William Langford. Clause 3 and 5(c) of this agreement reads :

" The Applicant

3. binds himself to the standard conditions described in Part 3 of this application form, which terms shall constitute a binding undertaking by the applicant in favour of ZEMA;

Part 3 states :

Should ZEMA grant the applicant authorisation to let the property:

*5(c) an application Fee **prescribed by ZEMA from time to time** for the property must accompany each lease agreement forwarded to ZEMA for approval".*

I have put the words in bold for emphasis.

In response to CSOS on the dispute raised, the Respondent had included details of an incident that had occurred at the resort common swimming pool where short term tenants had created a disturbance that had resulted in security being involved at great inconvenience to the other residents. This had resulted in the employment of additional security and life-saving staff during long weekends and holiday periods to ensure that such an incident did not occur again.

Management resolved that the additional charges for these services should not be included in the ordinary levy paid by owners but that they should be recovered from the owners who rented out their property. This had resulted in the removal of the capping of the Admin fee.


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The Respondent explained that the Welcome Centre is open 24 hours a day and when they received notice of a rental agreement they had to process it into the system including advising security and programming the remotes to allow access into the estate.

When a late booking is received, the Applicant is correct that no additional work is involved, but it puts pressure on the staff to ensure that the process is concluded, orientation done and security informed, prior to the arrival of the guest. The Applicants comment that later bookings are usually given a discount and not an added charge, I must challenge as there are often "early bird" discounts for people booking earlier rather than later.

The Respondent advised that as the ZEMA financial year starts on the 1st January each year, the Admin Fee in increased annually. He explained that the proposed inclusion of the additional R200 late booking fee and the removal of the cap had been put before all members at the AGM and, on a show of hands, the new fees were agreed to. The Respondent said there had therefore been consultation with the Applicant as Mr William Langford had been at the meeting. Mr William Langford said he did not remember a show of hands. It was confirmed that only Mr Langford had pursued the dispute against the new Admin Fee. Although two other owners at the meeting had objected to the fees, they had subsequently agreed that the fees were reasonable. The other owners are all paying the new fee. Mr Langford is the only owner who has pursued this to dispute level.

5. EVALUATION OF EVIDENCE SUBMITTED

In considering all the evidence submitted by both the Applicant and the Respondent the only dispute is the inclusion of the R200 late booking fee and the removal of the capping of the Admin Fee right that ZEMA has in terms of the clause included in the Authorisation to Lease Property in Zimbali as held by the Respondent.



To modify a contract there must either be agreement by all parties or, if done unilaterally, there must be prior agreement by the parties to such amendment. This authority to unilaterally amend the contract must be exercised reasonably and for sound legal reasons. Security is, without doubt, a primary reason why people choose to live in a “gated estate”. Zimbali has strict security procedures and these are all paid for by the residents in the ordinary monthly levy which each owner pays.

It can be understood why, with the pressure additional holiday tenants place on the infrastructure, additional costs are applicable. It can also be understood why these costs should be paid by owners benefitting from the holiday rental income and introducing short term tenants into the estate rather than by owners who do not rent out their property.

With the strict and many processes that the staff must implement to ensure that a short term tenant is correctly processed, there is no doubt that pressure would be put on the Welcome Centre staff with a late booking leaving limited time to carry out this process. It could also result in booking notifications received before the late booking notification being delayed to process the late booking, definitely putting pressure on the staff. The owner has control over this late booking process in that, in his booking conditions, he can include the requirement that bookings must be received in time to enable due notification to ZEMA or he could include a provision to recover the fee from his tenant.

I would hold that the condition agreed to in the contract signed by Mr William Langford allows ZEMA the right to dictate the “*fee prescribed .. from time to time*” subject to the conditions attached to the exercise of this right as outlined above

Under the circumstances I must therefore find that ZEMA have the right to introduce the uncapping of the Admin Fee and the introduction of the late booking fee and it was reasonable for them to do so.

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 –

That Zimbali Estate Management Association have the right to uncap their Admin Fee and to introduce the R200 late booking fee.

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

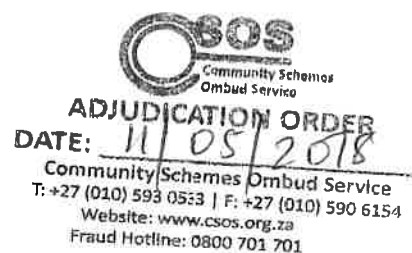
The parties' attention is drawn to-

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: 24th March 2018



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