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

Case Number: CSOS 791/WC/17

IN THE MATTER BETWEEN

ANTHE SOLOMON
(Applicant)

and

THE BODY CORPORATE OF BIKINI BAY
(Respondent)

ADJUDICATION ORDER

PARTIES

1. The applicant is Mrs Anthe Solomon, the registered owner of Unit 13 in the Bikini Bay Sectional Title Scheme, situated in Gordon's Bay ("the Scheme").

2. The Respondent is the Body Corporate of the Scheme.

INTRODUCTION

3. This application is 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 Western Cape Provincial Ombud Office. The application include a statement of case which sets out the relief sought by the applicant.

4. An attempt was made to settle the matter, but it was unsuccessful. This application is before me as a result of a referral sent by the Western Cape Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.

5. The hearing took place on 29 May 2018 and was attended by the Applicant, assisted by her husband, Mr Solomon and Messrs Rautner, van der Spuy and Theo Genis, representing the Body Corporate in their capacities as, respectively, the chairperson, a trustee and an ordinary member of the Body Corporate.

6. **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".

7. BACKGROUND, SUMMARY OF EVIDENCE AND EVALUATION THEREOF

7.1 This Adjudication follows a previous case heard by CSOS under case number CSOS 369/WC/16 in respect whereof a ruling was made in October 2017. In essence, case number 369 dealt with the removal of a garden on the common property of the Scheme and the order require the Body Corporate to re-instate the garden. This garden area is surrounded by a low vibacrete wall. It is uncertain when this wall was erected, but it is common cause that the wall has been there for a considerable period of time.

7.2 The dispute between the Parties arose on account of the replacement of the aforementioned vibacrete wall with a high (approximately 2 meters) security wall. The Applicant desires for this wall to be erected by the Body Corporate and agreed to some compromise on the re-instatement of the garden should this wall in fact be built. It is the contention of the Applicant that the failure to date to obtain the necessary approval for the erection of the wall is, to a large extent, a result of the actions and communications to other other owners by Mr Genis. The current trustees do not believe that the erection of the wall is in the best interest of the Body Corporate as a whole at this stage and are of the view that other projects should take precedent. Mr Genis denies that he is personally to be held responsible for the current impasse on the wall.

8. APPLICANT'S VERSION

8.1 The Applicant stated that she believed that reinstating the garden, as required by the order under Case number 369 is only solving a part of the problem as the garden was, as she understood, removed to discourage homeless people from using it as a place to sleep and thus creating a security problem. In her view, it makes sense to combine the garden reinstatement with the erection of a proper security wall (partially featuring palisade fencing) as, in the absence thereof, the problem created by the garden in the first place is not resolved. As such, in her view, reinstating the garden will result in wasteful and fruitless expenditure. The Applicant confirmed that she, a couple of years ago, did offer to pay for the garden wall, but that was rejected.

8.2 The Applicant tabled a number of plans indicating the proposed wall. These plans were, according to her distributed to other owners. The Applicant explained that access to the Scheme is easy and that security has become a real issue with a number of break ins having been reported. Only units 1 and 13 feature enclosed gardens and this is the way it was when she purchased the property in 2010. She furthermore explained that the current vibacrete wall is approximately 33 years old and in dire need of replacement or fixing. She explained that the proposed new wall will feature access to the electricity substation and will still allow access to the garden to all owners.

8.3 The Applicant noted that the matter was not discussed at the annual general meeting held on 30 September 2017 as the other owners were not interested in discussing it and there was no vote on the matter. The matter was again tabled at the trustee meeting held on 8 December 2017 and at this meeting it was decided that quotations should be obtained for a 2m wall to enclose the Unit 13 garden should be obtained and that the extension of the wall to secure the entire Scheme should be considered in future. However, following the distribution of the minutes of this meeting, Mr Genis communicated with all owners by email during December and, in the view of the Applicant, gathered support for a decision to not approve the wall in order to preserve the Body Corporate funds. He indicated then that the existing wall should be removed altogether. The Applicant furthermore believed that Mr Genis wished to turn the garden into a parking area. This was, in her view, evidenced by the wording of the updated Conduct Rules that were distributed to owners.

9. APPLICANT'S PRAYERS

9.1 The Applicant seeks an award in accordance with the provisions of Section 39 of the Community Schemes Ombud Service Act, 2011 as follows:

9.1.1 an order requiring the Body Corporate to upgrade security by removing the old vibacrete wall that encloses the garden and replacing same with a new plus minus 2 meter security wall.

10. **RESPONDENT'S VERSION**

10.1 Mr Genis took issue with the fact that he has been singled out, in his view, by the Applicant as the one opposing the erection of a new security wall. He explained that he is only an ordinary member and was merely expressing his views after having read the minutes of the 8 December 2017 trustee meeting. This he did by two emails directed to the managing agent with the request that these be distributed to owners (as it turned out, the emails were in fact not distributed). In these he explained his position with respect to the proposed wall. He strongly denied any allegation that he wished to replace the garden with a car park and explained that the confusion came about as a result of the draft conduct rules, which were general and not specific to the Scheme, distributed to owners by the managing agent without proper explanation. Mr Genis expressed suspicion at the timing of the trustee meeting held in December and also the date and time then proposed for the annual general meeting. He furthermore expressed skepticism about the election of the chairperson at the December 2017 trustee meeting as well as the content of the minutes insofar as the Applicant's insistence about the colour of the paving and the selection of the contractor are concerned.

10.2 The Respondent expressed the view that they cannot justify spending a large amount of money on the securing of one unit, being Unit 13, whereas the same benefit is not bestowed on other owners. It was furthermore stated that the Body Corporate has many other priorities, not least of which is the requirement to rectify the storm water draining system on the northerm side as it potentially may lead to a claim from the owners situated below the Scheme. Whilst the wall should be part of the longer term planning of the Scheme, it should be carefully considered as it will have to feature a large number of vehicle access gates and, should any of these be left open at any stage, acces will by default be granted to the entire Scheme. The aesthetics and cost should also be carefully considered. Given that it is a small Scheme, the economies of scale do not work in favour of such a costly project. The Scheme was built in the eighties when security was not such a prominent issue and securing the Scheme as a whole is complicated given the design and layout. It is the view of the Respondent that each owner should take care of its own security by way of securing its entrance. In this regard, it was noted that the Applicant's unit is vulnerable given that the front door consists of a glass sliding door.

10.3 The Respondent expressed the view that the Applicant is abusing the CSOS system to get what she wants, being the security wall paid for by the Body Corporate. She is, according to the Respondent, using the order granted under Case number 369 to her own advantage, hence the delay in

implementing it (given that the Applicant in her capacity as trustee could have seen to the order being implemented immediately). The proposed wall will benefit only Unit 13 and will result in the value of that unit being enhanced. Mr Genis noted that since the garden was removed, vagrants have in fact stopped using the area behind the vibacrete wall.

10.4 The Respondent explained that the question of the wall was on the agenda for the meeting held on 28 February 2018, but was taken off at the meeting by the Applicant as the CSOS process in respect of this adjudication was by then already underway.

10.5 It was confirmed by the Respondent that there is not current plan to remove the existing low vibacrete wall at this stage.

10.6 The Respondent explained that the current reserve fund of the Scheme amounts to approximately R240 000. If the wall is built at the estimated cost, it will wipe out a large portion of these funds.

11. EVALUATION OF EVIDENCE SUBMITTED

11.1 The facts in this matter are largely common cause, being:

11.1.1 the garden outside Unit 13 has been removed and there is an order to reinstate same;

11.1.2 the garden and proposed wall both comprise common property of the Scheme;

11.1.3 the current low vibacrete wall around the garden has been there for many years;

11.1.4 the trustee meeting of 8 December 2017 did discuss the proposed erection of security wall to enclose the (to be) newly reinstated garden, but no decision was taken to do so. The meeting decided to obtain quotations to install the wall and the following was stated with respect to a comprise offered by the Applicant in respect of the reinstatement of the garden "and if the Body Corporate is prepared to pay for the wall..."

11.1.5 no decision in compliance with the Sectional Titles Schemes Management Act, no 8 of 2011 with respect to the wall had been taken by the owners to date;

11.1.6 there was email correspondence between Mr Genis, who is opposing the wall, the Applicant, the managing agent and other owners following the 8 December 2017 trustees meeting.

11.2 This matter falls to be dealt with in terms of the Management Rules of the Sectional Titles Schemes Management Act, no 8 of 2011. It was confirmed that the Scheme does not have bespoke rules and that the pro forma rules thus apply to the Body Corporate. As the garden and proposed wall comprise and will comprise common property of the Scheme, Section 29 of Part 7 of the Management Rules applies and reads as follows:

> "Improvements to common property
>
> 29 (1) The body corporate may on authority of a unanimous resolution make alterations or improvements to the common property that is not reasonably necessary.
>
> (2) The body corporate may propose to make alterations or improvements to the common property that are reasonably necessary; provided that such proposal may be implemented until all members are given written notice with details of –
>
> (a) the estimated costs associated with the proposed alterations or improvements;
>
> (b) details of how the body corporate intends to meet the costs, including details of any special contributions or loans by the body corporate that will be required for this purpose; and
>
> (c) a motivation for the proposal including drawings of the proposed alterations or improvements showing their effect and a motivation of the need for them;
>
> and, if during this notice period any member in writing to the body corporate requests a general meeting to discuss the proposal, the proposal must not be implemented unless it is approved, with or without amendment, by a special resolution adopted at a general meeting."

11.3 I find it unnecessary to deal with the email exchange following the trustee meeting of 8 December 2017 as it has no bearing, from a legal point of view, on the decision. Email exchanges between members of a body corporate are not unusual and there is nothing standing in anybody's way

to communicate with whomever they want to (within the confines of the law, of course). As such, the Applicant could have responded to the emails by Mr Genis and copied all owners if she had wanted to.

11.4 The question here is if the wall is reasonably necessary or not. If it is not reasonably necessary, the provisions of Section 29 (1) applies and under normal circumstances, a unanimous resolution of the Body Corporate is required. Should it be considered reasonably necessary, the procedure set out in Section 29 (2) becomes applicable.

11.5 The discussion about reasonableness and not reasonableness begs another question: does the fact that an improvement potentially only benefits one owner influence the test? In other words, does the fact that a large amount of money spent by the Body Corporate on essentially one owner make an improvement per se not reasonably necessary? I don't think so. It is in any event in most cases not that clear cut as to who will benefit and generally an improvement does to some extent usually serve the entire Scheme. That is the very nature of sectional title schemes-in some instances owners on the ground floor of a block in a scheme pay towards the lifts in another block. The test is an objective one and the question of how many owners it may potentially benefit is in my view not a determining factor. The question is whether the improvement is reasonably necessary for the Scheme as a whole and that includes its parts, being the individual owners.

11.6 This leads to another question: how relevant is the fact that a body corporate may have other priorities and that the funds for an improvement, even if reasonably necessary, is not readily available? I believe it is irrelevant. If an improvement is found to be reasonably necessary by the owners, they need to fund it by applying the provisions of the Sectional Titles Schemes Management Act. The reality of course is that schemes may have a number of competing "reasonably necessary" expenses and that they do need to prioritise. In the prioritizing it would be natural for a body corporate (when voting on the issue in terms of Section 29) to look at the number of owners being benefited by any particular improvement-this may pose a problem to owners who are genuinely dependant on the installation of a particular improvement.

11.7 One has empathy with the Applicant insofar as her security concerns are concerned. It is accepted that security in Gordon's Bay has become an issue. The fact that she is the only one potentially benefitting from the improvement, does mean that, even if the wall is objectively seen to be reasonably necessary, the Applicant is unlikely to find the necessary support amongst the owners in a Section 29 process. This may mean that

an intervention such as this in terms of the Community Schemes Ombud Service Act may be her only option.

11.8 However, no evidence has been led by the Applicant to support a notion that the erection of a 2 m wall is necessarily the answer to her security problems, given the particular circumstances of the Scheme and its building layout as well as the nature of her unit with its particular front door set up. She has not provided any alternative options or suggestions and seemed set on having the wall. I am further not convinced that providing security is an absolute obligation of the Body Corporate-this could be endless. Whilst, admittedly, times have changed, the Applicant bought the unit as it is with the low vibacrete wall and there are potentially other measures that she can take to improve the security of her unit. She is not, in my view, any worse off than some of the other owners in the Scheme in this respect. If she believes the reinstatement of the garden will worsen her security situation in particular, that aspect should be addressed. Insisting that the proposed wall is the only answer, does not make sense. Even if one then discounts the fact that the proposed wall in this instance undoubtedly favours the Applicant more than it does other owners and the fact that the Body Corporate has other pressing needs, I am not convinced that the improvement, whilst not an outlandish request, is reasonably necessary in the circumstances.

11.9 I do believe, however, that it would be prudent for the Body Corporate to discuss and compile a plan and programme to address the security needs of the owners, which may include the erection of a security wall. It would also make sense to allow owners to, at their own cost, should they so wish, execute security measures which are in conformity with and supportive of the overall plan agreed to by the Body Corporate. In this way, owners who feel particularly vulnerable, but are unable to convince the Body Corporate to fund a particular improvement on the basis of it being reasonably necessary at any given time, can nevertheless execute same.

11.10 The Respondent, on the basis that they believed the application by the Applicant to be opportunistic and an abuse of the CSOS Act and systems, (including the view that the Applicant is misusing the order granted under Case number 369 to achieve her personal agenda), has requested that costs should be awarded in their favour. In this regard, the Respondent also claims the costs of Mr Genis' travel from Gauteng and his time. It is correct that in law, costs usually follow the success. As such, in this regard, one would consider reasonable costs in favour of the Respondent. However, the fact that Mr Genis chose to travel from Gauteng for the hearing has nothing to do with the Applicant. Whilst he believed there was some personal agenda against him and that he needed to set the record

straight, that is just his view. The Scheme is situated in the Western Cape, and the Respondent is the Body Corporate. Whom they choose to represent them, is not in the control of the Applicant. Furthermore, whilst I did not find the request for the wall to be reasonably necessary, I don't find the request by the Applicant in any way outrageous or totally out of line. She is not asking the Body Corporate to install a heated olympic size pool on the common property. What she is asking, is something that many schemes under different circumstances would potentially find reasonably necessary. One could question the choice of the Applicant not to have the matter discussed at the February 2018 annual general meeting and so, potentially, have avoided the hearing. However, given the rhetoric prevailing about the wall in the Body Corporate at the time and the fact that she is, as stated above, clearly the one owner who will benefit most from the proposed wall, I don't find her decision not to risk achieving the necessary majority for a special resolution in terms of Section 29 of the Management Rules, but to rather take her chances on a ruling by an adjudicator unreasonable.

12. POWERS AND JURISDICTION OF THE ADJUDICATOR

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, no 9 of 2011 ("CSOS Act"). The CSOS Act enables residents of community schemes including sectional title schemes to refer 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.

13. ADJUDICATION ORDER

13.1 Sections 39, 53 and 54 of the Community Schemes Ombud Service Act No. 9 of 2011, determine which orders an adjudicator is competent to make.

13.2 In terms of section 54 (1) (a), if an application is not dismissed, the adjudicator must make an order granting or refusing each part of the relief sought by the Applicant.

13.3 Based on my findings set out in paragraph 11 above, I refuse each part of the relief sought by the Applicant.

13.4 Each party is to carry its own costs.

14. SECTION 56 OF THE CSOS ACT, 2011

On the basis that the Applicant's prayer for relief is refused, the provisions of Section 56 are not applicable to this matter.

15. RIGHT TO APPEAL

15.1 The Applicant, the Respondent or any affected person who is dissatisfied by the order may appeal to the High Court on a question of law in terms of Section 57 (1).

15.2 An appeal against an order must be lodged within 30 days after the delivery of the order of the adjudicator.

15.3 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.

HANNCHEN ELIZABETH LOUW
ADJUDICATOR

CSOS Community Schemes Ombud Service

ADJUDICATION ORDER

DATE: 01 . 08 . 2018

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