



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

Case Number: CSOS 785/WC/17

IN THE MATTER BETWEEN

CHERYL ANN WILLIAMS
(Applicant)

and

THE BODY CORPORATE OF EMBASSY COURT
(Respondent)

ADJUDICATION ORDER

PARTIES

1. The applicant is Mrs Cheryl William, the registered owner of Unit in the Embassy Court Sectional Title Scheme, situated in Kenilworth ("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 CSOS 785/17

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 31 May 2018 and was attended by the Applicant, assisted by her son in law, Mr White, as well as Mr Gavin Laver, representing the Body Corporate as the managing agent (Brookes and Michael), Ms Sandra Christian in her capacity as trustee.

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 The Applicant is the owner of Unit 4 in the Scheme. She is a pensioner who rents out the unit to supplement her income.
- 7.2 The dispute between the Parties arose on account of the evidence of water damage/damp in a number of locations in the unit directly below that of the Applicant to which the Applicant was alerted. The Applicant contended that, in her view, any leak or related problem causing the dampness was likely to have been resolved by the tightening of a stopcock located in, what was described as a servitude area, adjacent to the Applicant's unit. The Applicant contends that the Body Corporate is responsible for piping and fittings located in this "servitude area" and that, as a result, also is responsible for the rectification of any water damage caused by such pipes and fittings. The Respondent is of the view that it is only responsible for pipes and fittings serving more than one unit and that the stopcock in question only serves Unit 4.

8. **APPLICANT'S VERSION**

- 8.1 Mr White, on behalf of the Applicant, stated that he received a call in October 2017 alerting him to a water leak/damp problem in the unit directly below that of his mother in law, the Applicant. He inspected this unit and the Applicant's unit shortly thereafter and discovered three instances/locations of water/dampness in the unit downstairs, namely: in the passage (ceiling), bathroom ceiling (above shower and in corner of shower), and in/around/on top of built in cupboard in main bedroom. On inspection of the Applicant's unit, he did not notice anything suspicious in the bathroom (although, he admitted that it would be difficult given that it is fully tiled), but he discovered that a stop cock situated in a void area behind the cupboard in the main bedroom appeared to be dripping and not tightly closed. Water from this stopcock dripped at a rate of approximately 1 drop per ten seconds. He also noted that a washing machine was situated directly above the water damage located in the passage of Unit 2. He noted that some of the water stains in the other two areas appeared to have been there for some time whereas the area in and around the cupboard in the main bedroom was wet to the touch. As far as he could ascertain, the water marks in instance one was most likely caused by water spillage from the washing machine that seeped through the floor. He stated that it is more problematic to ascertain the cause of the problem in the shower area as there are of necessity high levels of moisture. However, he stated that he is of the opinion that in both instances 2 and 3, the damage/evidence of water was most likely

caused by the dripping stopcock. He claimed that his conclusion was supported by the fact that no further damage has been reported and that the area in and around the cupboard appeared dry following the tightening of the stopcock.

8.2 Mr White explained in some detail his interaction with the occupant of the unit below that of the Applicant as well as that with the managing agent. He confirmed that he obtained a report from a representative of Prominent Paints and that such report and the moisture readings taken confirmed his conclusions. Interaction with the managing agent and the trustees caused some frustration to the Applicant as, according to him, they did not treat the matter with any urgency and he felt that they were being referred back and forth without any conclusive answer. He confirmed that the managing agent did in fact send a plumber to the downstairs unit (although this took a long time to be arranged and take place) and that he was present when the plumber tightened the stopcock further and also phoned the then chairman of the Body Corporate to ask if he can replace the stopcock. The plumber was told to file a report with the trustees. Mr White stated that this report took a very long time to emerge and also that he did not necessarily agree with the report as the plumber seemed to indicate that some leaks may have originated from under the bath in the Applicant's unit. Whilst there was, according to the Mr White, a flooding problem in the Applicant's unit some time ago, this has been resolved and reference to that flooding only serves to confuse the matter at this stage. The Applicant's bathroom was fairly recently renovated and re-tiled. Mr White claimed that interaction with the downstairs occupant was also confusing as he had had a lengthy discussion with the occupant where it was indicated that the problems with water ingress had been resolved, just to be told differently the next day.

8.3 Whilst the problem seems to have been resolved, there is still the rectification of damage to take care of. The Applicant expressed the view that the leaking or faulty stopcock, which in all likelihood caused the most recent and most serious problem, is situated in a servitude area which, in his belief, serves all units and as such is the responsibility of the Body Corporate. The void area adjacent to (all) units-it runs from the ground up next to the units- contains the service ducts, and is thus, in the view of the Applicant, part of the common property and not of the Applicant's section. As such, the Applicant is of the conviction that the Body Corporate is responsible for the maintenance of the stopcock (or the replacement thereof should it be required now or in due course) as well as the damage which resulted from the dripping stopcock. Mr White

noted that one will have to turn off the water supply to the entire Scheme, should you work on the stopcock in question.

- 8.6 Mr White concluded by stating that the Applicant was particularly upset about a threatening email from the Managing Agent demanding the repair of all of the damp/water problems in Unit 2, especially as the Applicant felt that the Managing Agent and the trustees took an inordinately long time to address the matter.
- 8.8 Mr White stated that he had enquired from the Managing Agent whether other owners in the Scheme had in the past replaced stopcocks but were not given a straightforward answer.

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 take responsibility for the repairing or replacement of the stop cock and any damage caused by it in Unit 2.

10. **RESPONDENT'S VERSION**

- 10.1 The Respondent, by way of Mr Laver, confirmed that it is the trustee's view that the stopcock is not part of the common property and as such not the responsibility of the Body Corporate. As far as the trustees and the Managing Agent are concerned, the leak and damage is an issue between the owners of the two units and actually has nothing to do with them. They, nevertheless, to assist the owners, obtained the leak detection and another report at their cost.
- 10.2 Mr Laver stated that, as far as the trustees and Managing Agent are concerned, only pipes and fittings that serve more than one unit are the responsibility of the Body Corporate. Dedicated pipes and fittings are the responsibility of the section owner. In this case, the stopcock is situated on a portion of piping serving only the Applicant's section.
- 10.3 The Respondent explained that they wrote the letter to the Applicant in response to a request from the owners of Unit 2. According to the Managing Agent, there is at least one example of an instance where an owner has replaced a stop cock in this Scheme.

“‘common property’, in relation to a scheme, means
(a) the land included in the scheme;
(b) such parts of the building or buildings as are not included in a section; and
(c) land referred to in section 5(1)(d).”

11.5 The other important section in this regard is Section 3 (1) (q) STSMA which determines that “the body corporate must keep in a state of good and serviceable repair, and properly maintain the plant, machinery, fixtures and fittings used in connection with the common property, and sections. Section 3 (1) (r) of the STSMA furthermore determines as follows in respect of the obligations of a body corporate:

“subject to the rights of the local municipality concerned, to maintain and repair including renewal where reasonably necessary, pipes, wires, cables and ducts existing on the land and capable of *being used in connection with the enjoyment of more than one section* (my emphasis) or of the common property or in favour of one section over the common property.”

11.6 Usually, most of the utility infrastructure is considered common property for a sectional titles scheme and is therefore the body corporate’s responsibility to maintain. Where such utility infrastructure is serving more than one unit, Section 28 of the Sectional Titles Act, 95 of 1986 foresees that some common infrastructure may in fact be situated within a section and provides for servitudes for the passages of water, sewerage, etc. The servitudes apply to “common” pipes and drainage traversing a section and applies both in favour of and against any section in a scheme.

11.7 Having regard to the statutory provisions, the situation is thus, in summary, as follows:

11.7.1 the body corporate is responsible for the maintenance of the common property;

11.7.2 the body corporate is responsible for infrastructure shared by one or more sections even if that infrastructure is situated in a section and not on common property;

11.7.3 owners of sections are to allow the body corporate to maintain common infrastructure situated in their units;

11.7.4 owners of sections are responsible for the maintenance of their sections and for a utility that supplies a service to that section and it is located in that section (in other words, not on the common property).

11. **EVALUATION OF EVIDENCE SUBMITTED**

11.1 It is clear that this matter has caused considerable anxiety and stress to the Applicant and it is regrettable that the trustees and the Managing Agent did not make their standpoint clearer from the outset. I also find it odd that the Respondent on the one hand claims to want nothing to do with the dispute, but on the other hand addresses a threatening letter to the Applicant.

11.2 I find it unnecessary to comment in any detail on the damage and the cause thereof as, although it is ultimately necessary for the parties involved to locate the actual source of the dampness/ water ingress, it does not directly relate to the relief sought by the Applicant. It is highly technical and no expert technical evidence was tabled by any of the parties. From the evidence that was in fact presented, it appears likely that the stopcock was, if not the cause of all the problems, at least the source of the water in the cupboard and cupboard area of the downstairs unit. In this regard, I accept the evidence from the Applicant that there was a visible change to the presence of water in the cupboard following the tightening of the stopcock. I also believe the Applicant's testimony that the water/leak marks evident on the ceiling of Unit 2 are likely to have been there for a considerable period of time. It was not ultimately clear if the problems have been resolved in its entirety. The Applicant seemed to believe that there are not further leaks/water ingressing the downstairs unit, but the interaction with the owner of the downstairs unit in November suggests differently. I do not believe it is necessary to rule on that aspect.

11.3 The question here is whether or not the stopcock falls within the responsibility sphere of the Applicant or the Respondent. The question of liability for damage resulting from the faulty stopcock (if indeed the damage can be linked to the stopcock) is a different question altogether.

11.4 I will deal with the stopcock itself first. In this regard, one must have refer to the definition of common property as that term is defined in Section 1 of the Sectional Titles Schemes Management Act, no 8 of 2011 (the "STSM Act"), being

- 11.8 In this case no evidence has been led to support any notion that the void area housing the water, sewerage and other piping is common property. One therefore has to accept that it belongs to the section to which it is contiguous, in this case Unit 4. Common infrastructure in this void, although situated in the section of the Applicant, will remain the responsibility of the Body Corporate in terms of Section 3 (1) (r) of the STSMA. However, service infrastructure situated in this void area that serves only the section in which it is located, is the responsibility of the owner of that section.
- 11.9 The Respondent has made a convincing case that the stopcock serves only the section belonging to the Applicant and as such it is the responsibility of the Applicant to maintain. In this regard, it was confirmed that the stopcock is actually situated on that portion of pipe that leads off the main water supply to serve the Applicant's section only. I also do not believe that the fact that one will of necessity interrupt the water supply to the entire Scheme should one work on the stopcock serving Unit 4 makes any difference to this. One, however, has some empathy with the Applicant in this case as he was clearly was not aware initially of the existence of the stopcock situated in the void area.
- 11.10 This brings me to the second part of the question, being the damage suffered by the downstairs unit. The owners of this unit are not a party to these proceedings and no relief was sought by them. The Body Corporate seems to have acted on their behalf when they communicated with the Applicant in December 2017, but clearly, if the stopcock is the responsibility of the Applicant (as they alleged), they have no locus standi to claim any rectification or repair works to Unit 2 from the Applicant. This is up to those owners and in law they will have to prove not only that the damage was in fact caused by the stopcock, but that the Applicant was negligent in not maintaining or repairing same and that such negligence is the cause of the damage suffered by them. There is no strict liability in our Sectional Title law that makes anybody automatically liable for another's loss or damage, purely on the basis of the problem having originated in his or her section. I am not making any ruling on whether or not the stopcock did cause the damage or whether, if so, the Applicant is or was negligent in not maintaining same and that the lack of maintenance of the stopcock resulted in the loss or damage suffered. It may or may not be the case and it is up to the owners of Unit 2 to prove their case. Hopefully the owners, between themselves, can come to agreement. It may also be prudent to involve the insurance companies of the owners.

- 11.11 I suggest that the Managing Agent alert all owners to the existence of the stop cocks in their sections and advise them to have those inspected from time to time to prevent the situation that has arisen here.

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



ADJUDICATION ORDER
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