



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

Case Number: CSOS 553/WC/17

IN THE MATTER BETWEEN

**CLUNY BODY CORPORATE  
(Applicant)**

and

**DEWALD BARKHUIZEN  
(Respondent)**

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**ADJUDICATION ORDER**

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**PARTIES**

1. The applicant is Cluny Body Corporate, situated in Pieter Street, Brackenfell(erf 17159), Cape Town and duly represented herein by Ms Naomi Combrink in her capacity as Trustee as well as Ms Renathe Matthee in her capacity as Managing Agent from Trust Managing Agents. Both attended the hearing in person.
2. The respondent is Mr Dewald Barkhuizen, owner of unit 15 as more fully described in the Sectional Title Plan (SS No. 695/2008). Respondent Mr Barkhuizen was however absent and failed to attend the hearing.

3. Cluny Body Corporate is a "community scheme" as contemplated in the CSOS Act of 2011. The definition of "community scheme" means any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings.

## **INTRODUCTION**

4. This is an application for dispute resolution in terms of Section 38 of the Community Schemes 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 includes a statement of case which sets out the relief sought by the applicant.
5. The adjudication hearing was set down for 24 April 2018 initially and postponed to 9 May 2018 for purposes of continuation due to respondent's absence. Respondent confirmed that the reason for his non-attendance was that he was unaware of the set down date and never received the Notice of Set Down. Respondent however failed to appear again on the 9<sup>th</sup> of May 2018 (after said date was agreed upon telephonically between both parties on the 24<sup>th</sup> of April 2018). The hearing consequently proceeded in respondent's absence after he failed to provide reasonable cause for his lack of appearance on the 9<sup>th</sup> of May. 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.

## **APPLICABLE PROVISIONS OF THE ACT**

6. The application was submitted 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".*

7. Section 39 provides that – "An application made in terms of section 38 must include one or more of the following orders:

(2) In respect of behavioural issues, (c) - an order declaring that an animal is being kept in a community scheme contrary to the scheme governance documentation, and requiring the owner or occupier in charge of the animal to remove it.

(7) In respect of general and other issues – (b) any other order proposed by the chief ombud."

8. 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'.*

9. 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".*

### **SUMMARY OF EVIDENCE**

10. Applicant is the owner of sectional title property and have three(3) dogs which is contrary to the scheme's conduct rules stating *inter alia* that "No more than two(2) pets per unit and no large breed dogs are allowed without the approval of the trustees." Applicant on the other hand alleges (as per correspondence) that the presence of his animals(dogs) attribute to the improvement of his son's medical condition and should he therefore be allowed to keep his three dogs on the premises.

### **APPLICANT'S VERSION**

11. Ms Naomi Combrink (trustee of Cluny Body Corporate) avers that the respondent currently has three(3) dogs on his premises without permission and in contradiction of Cluny Body Corporate Conduct Rules. The most recent dog is a Labrador, whereas she is not certain about the other two, maybe Jack Russels.
12. Respondent (Mr. Barkhuizen), who was a trustee previously, was also present at the Special General Meeting held on 27 September 2016 where the Rules were discussed and changed to permit two dogs per unit with trustees permission, whereas no dogs were previously permitted. This Rule is further consistent with the Municipal Regulations with regard to the size of respondent's erf, being 150m<sup>2</sup>.

13. Cluny Sectional Title Scheme consists of twenty eight(28) units (townhouses), whereas twelve(12) units have a dog and one or two units have two dogs.
14. The Conduct Rules of Cluny Body Corporate (as duly registered) state under clause 1 "Animals, reptiles and birds (pets)" the following;
- (1) 'An owner or occupier of a section shall not without the approval in writing of the trustees, which approval may not unreasonably be withheld, keep any animal, reptile or bird (pet) in a section or on the common property.
- (9) No more than 2(two) pets per unit and no large breed dogs (e.g. Bull Mastiff, German Sheherd, Doberman, Rotweiler) are allowed.'
15. Respondent have been warned since 2012 that he has no permission to have dogs on his premises and that permission should be sought from the trustees in this regard. Permission is generally granted on certain conditions, *inter alia* that all dogs should be on a leash in the complex. All other dog owners were granted permission on request with conditions.
16. Respondent has never requested permission for any of his dogs, nor is he prepared to remove any of his dog(s) from the complex. Mr. Barkhuizen has further presented the body corporate with reports from a Counselling Psychologist (Carey-Lee Vermoter dated 20 May 2016) as well as from Ms Inge Burger (a registered Speech-Language Pathologist) dated 24 January 2018 indicating that respondent's son "Dewan" was diagnosed with a Childhood Apraxia of Speech (CAS) – speech-language developmental delay in May 2016. The letter from Ms Inge Burger

specifically makes mention of the fact that Dewan is extremely fond of his Labrador "Maya" and that his anxiety and behavioural issues have subsided and his speech has improved since Maya became part of his life. Ms Burger concluded that: "Maya has been a great attribution in Dewan's global development and will continue to assist in improving his development."

17. The trustees further also requested training certificates as proof of the alleged training of the dogs, respondent failed to submit to date. Claimant has indicated that the trustees will permit the Labrador Maya in the circumstances to stay, but one of the other two dogs need to be removed from the complex. The trustees are also concerned about the unfavourable precedent created by allowing respondent to keep three dogs on the premises in contravention of the Conduct Rules.
18. A written complaint regarding respondent's Jack Russel running around and barking in the complex was also received by the trustees on 30 April 2018 and submitted in support of their claim.

#### **APPLICANT'S PRAYERS**

19. Applicant requests an order for the removal of one of Respondent's animals (dog) kept in the community scheme contrary to their governance documentation.

#### **RESPONDENT'S VERSION**

20. Respondent failed to appear for the hearing on the 9<sup>th</sup> of May 2018, after said date was confirmed and agreed to between the parties, where after

the adjudication hearing proceeded in his absence due to his failure to provide good cause for his absence in the circumstances. The only evidence from Respondent on record to evaluate therefore is his defence as incorporated in Applicant's version (as referred to in par. 15 above) and will be further discussed under "Evaluation of Evidence".

### **EVALUATION OF EVIDENCE SUBMITTED**

21. The fact that respondent has three(3) dogs on his premises and further that this is a contravention of Cluny Body Corporate's Conduct Rules seem common cause and not in dispute here. The only fact to determine is if applicant proved its case on a balance of probabilities and if respondent's reason for maintaining three(3) dogs contrary to the Conduct Rules should be regarded as reasonable and fair in the circumstances.
  
22. The matter of the Body Corporate of The Laguna Ridge Scheme v Dorse 1999 2 SA 512 (D) is applicable here. In this matter it was held that the trustees have a discretion to permit or disallow pets in a complex, a discretion that must be reasonably exercised. The trustees are obliged however to apply their minds to the matter and each matter has to be considered based on its own merits and facts and circumstances relevant to the particular case.
  
23. The trustees must give reasonable consideration to any request for permission at their meetings. In determining this 'reasonableness' the following factors should also be considered;

- 23.1 "The nature of the animal,
- 23.2 The type of the scheme,
- 23.3 The likelihood of other occupiers being inconvenienced, and
- 23.4 Whether there are already other similar animals at the Scheme." (Sectional Title Survival Manual Paddocks 8<sup>th</sup> Ed January 2017 Graham Paddock P146).

24. Reasonableness also entails a rule to be;

- 24.1 "Necessary,
- 24.2 Not to be excessively wide in its scope,
- 24.3 Based on good reason, i.e. sensible in the circumstances, and Operate so as to promote the best interest of the sectional community, for example in preserving the quality of life in the scheme or the value of the units as investments." (Sectional Title Survival Manual Paddocks 8<sup>th</sup> Ed January 2017 Graham Paddock P80).

25. Having considered the relevant evidence, submissions and carefully considered the special circumstances of the respondent (son with speech-language developmental condition and the positive impact that his Labrador Maya may have on Dewan's development) it is found that Conduct Rule 1 (in respect of animals, reptiles and birds (pets)) and the application thereof by the trustees in the circumstances seem both fair and reasonable and is accordingly valid. However a Labrador that may be considered as a large breed dog - is not specified as such in clause 1(9), nor was there any mention made during testimony thereto, and in light of



the concession by the trustees that they do not have any preferences as to which dog should be removed it only seems reasonable in the circumstances that the Labrador be kept.

### **ADJUDICATION ORDER**

26. In the circumstances, the following order is made in terms of Section 54(1)(a) read with Section 39 (2)(c) of the Community Schemes Ombud Service Act No.9 of 2011 in that;

26.1 Applicant's relief sought in terms of prayer - as per par. 19 (above) is granted. One of Applicant's three(3)dogs are being kept in a community scheme contrary to the scheme governance documentation, and the Applicant(owner) in charge of the animal is required to remove it on or before 30 June 2018.

26.2 No order is made as to costs herein.

### **Sections 56 (1) of the CSOS Act, 2011**


27. 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 '.

## RIGHT TO APPEAL

28. Section 57 of the CSOS Act of 2011, also determines that;

- (1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal 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 adjudicator.
- (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.

  
**ADJUDICATION ORDER**  
DATE: 2018/05/10  
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**Adv. DRIES DU TOIT**  
**ADJUDICATOR**  
**10 May 2018**