



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

Case Number: CSOS 749/WC/17

IN THE MATTER BETWEEN

**THE CROYDON VINEYARD ESTATE HOME OWNERS' ASSOCIATION
(Applicant)**

and

**MESSRS R VAN ECK AND S WARREN
(Respondents)**

ADJUDICATION ORDER

PARTIES

1. The applicant is Home Owners' Association of the Croydon Vineyard Estate ("the HOA").
2. The Respondent are Messrs R van Eck and S Warren, registered owners of properties in the Croydon Vineyard housing estate ("the Estate").
3. The hearing was held on 25 May 2018. The Applicant was represented by Mr Tobie Esterhuysen of the Managing Agent of the HOA and Mr Rob Watson, a trustee.

4. Mr van Eck was present at the hearing and represented both himself and Mr Warren.

INTRODUCTION

5. 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 Western Cape Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.
6. 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

7. 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”.

8. SUMMARY OF EVIDENCE

The dispute between the Parties arose on account of the decision by the home owners of the Estate at a meeting held in 2106 to oblige all owners to install walkways/pathways to a prescribed specification in front of their properties, adjacent to the road, at their own cost. It is the contention of the Applicant that the decision is enforceable against all owners. Mr van Eck voted against the adoption of the resolution and neither him nor Mr Warren have agreed to install the pathway in accordance with the decision.

9. APPLICANT'S VERSION

9.1 The Applicant stated that the owners of the Estate adopted a resolution at the annual general meeting held on 28 May 2016 which is recorded as follows in the minutes of the meeting:

“it was consequently resolved:

That all verges of developed erven must have a paved footway implemented to meet the design requirements of the HOA by 30 May 2017, at the cost of the respective homeowner.”

9.2 According to the Applicant, this decision was taken following a request by owners for measures to create a consistent appearance for all landscape verge designs. This included the request for a uniform verge pathway design. The proposal was accepted by 79 votes in favour and one (Mr van Eck) opposing.

9.3 It was explained that the HOA installs these pathways (approximately 1 m wide) by using a subcontractor. The cost is then recovered from the relevant owner, depending on the area of pathway required in the particular case, by way of a debit to his or her levy statement or via a deduction from his “building” deposit.

9.4 The Applicant stated that they have attempted to find common ground with the Respondents and have agreed to allow the extension of the driveway of Mr van Eck in the same cobblestone brick that the driveway is paved with, but that the negotiations broke down in respect of the insistence of the HOA that the verge pathway in front of the Respondents’ properties be paved in the same red brick used in the Estate by the HOA. The Applicant has, in earlier

negotiations, which have now broken down, agreed to install the verge pathway at his cost, but then in the cobblestones which match his driveway.

- 9.5 According to the Applicant, barring one other owner who has installed a cobblestone pathway (which was not approved by the HOA), the Respondents are the only owners refusing to comply with the verge requirement.
- 9.6 With respect to the publication of design guidelines by the HOA, the Applicant confirmed that a first set of verge guidelines was published in January 2017. However, these have been the subject of much controversy and the HOA has compiled new guidelines which are yet to be formally published.
- 9.7 It was confirmed that the verges that are to be paved are situated on the common property, in other words, it falls outside of the property boundary of the owners generally and specifically in the case of the Respondents. The walkway of Mr van Eck's neighbour (on the one side, he is on a corner) has been paved with the standard prescribed red brick pavers. In the view of the Applicant, the walkway in front of Mr van Eck's property should continue this theme and also be paved using these pavers so as to ensure a harmonious and uniform appearance of verge walkways throughout the Estate.
- 9.8 All new homes are required to pay a R30 000 "building" deposit to the HOA and the verge installation is funded from that in the case of undeveloped erven (when development starts).
- 9.9 The Applicant confirmed that maintenance of pathways/verges is the responsibility of the HOA.

10. APPLICANT'S PRAYERS

10.1 The Applicant demands that:

- 10.1.1 the Respondents be ordered to install the verge pathways in front of their respective properties in accordance with the decision of the 28 May 2016 annual general meeting and in compliance with the landscaping guidelines set by the Applicant.

11. RESPONDENT'S VERSION

- 11.1 The Respondents, in the person of Mr van Eck, stated that the design guidelines applicable to the verge walkway has a long history and were discussed as far back as 2012. At that stage, no specification was stipulated, owners had some freedom of decision and those that had verges at the time, could continue as is. This changed in 2016 and, according to Mr van Eck, this

may well change again. In his view, the HOA does not have the right to oblige owners to follow the red brick specification currently used as the previous guidelines specifically allowed the cobblestone paving that he has used to pave his driveway. He also referred to the precedent set by other owners not following the red brick specification.

- 11.2 Mr van Eck furthermore stated that he, during, earlier negotiations with the HOA following the conciliation meeting, agreed to install the verge pathway, subject to a number of provisos. One of these was that he be allowed to use the cobblestones used to pave his driveway to pave the verge walkway. In his view, this will be a more aesthetically pleasing solution for his particular property. However, since agreement could not be reached on the brick specification, his offer to install the verge pathway fell away in its entirety.
- 11.3 The Respondents claimed that the HOA is acting outside of its authority and mandate by insisting that owners pay for the verge pathway installation as the constitution of the HOA ("the Constitution") only provides for payments to be made by owners in respect of either levies or special levies. Payment for the verge walkway does not fall into either one of these two categories.
- 11.4 The Respondents claimed that the May 2016 Annual General Meeting resolved to have a special "landscaping and verges" meeting by September 2016. This meeting never took place. The Respondents furthermore referred to the January 2017 guidelines and stated that these (especially photo 1) do not support the insistence by the HOA to have red brick pavers used for verge pathways.

12. EVALUATION OF EVIDENCE SUBMITTED

- 12.1 This matter in essence revolves around the question whether the decision by the HOA of 28 May 2016 is valid and enforceable. This question in itself has a number of components to it: can an owner be obliged to pave common property (in other words, areas that belong to the HOA and not the owner itself), if so, can the owner be compelled to do it by complying with a specific specification and thirdly, does the HOA have the authority to oblige the owner to carry the cost of the paving?
- 12.2 The governing document in the case of the Croydon Estate is the Constitution. The relevevant clauses are:

"4. MAIN OBJECTS

The main object of the Association is the matter referred to in section 29 (2) (b) and (c) of LUPO, and more specifically:

4.8 to prescribe measures for the landscaping and development of Erven on the Estate, and for the architectural design and building improvements to Residential Erven on the Estate so as to ensure a harmonious and aesthetic development of the Estate....”

6. MEMBERSHIP AND OBLIGATIONS

6.11 Membership shall be responsible to landscape and maintain, at their own cost, the road verge/s separating their erf from the road/s, it being recorded that when the erf is located on a corner, there will be at least two road verges.”

7.4 The Trustee Committee shall be entitled to determine a Sidewalk Deposit and a Builders’ Management Fee...”

12.3 Clause 8 of the Constitution deals with levies and does provide for the payment of levies by the owners of Residential Erven. Clause 8.6 addresses special levies.

12.4 With reference to clause 4.8, it is important to note that the definition of Erven in clause 2.1.12 is as follows: “the Erven means all the Erven located on the Estate be they Residential, Non-Residential or Common Areas. “Common Areas” are in clause 2.1.5 described as the private roads, private open spaces and the land upon which the vineyards, olive groves, winery and Lifestyle Centre are established.

11.1 At first glance, the dispute between the parties, seems trivial-it is really about cobblestone vs red brick for a verge pathway. However, understandably, it does bring into play the rights and obligations and the authority of the HOA and how that is balanced against those of the owners, including the Respondents. The question was raised at the hearing as to why the trustees, on behalf of the HOA, do not simply execute the paving the way it wishes to have it done to ensure the uniformity that it desires and charge the owners via the levies (there is no reason why an estimate of the number of pathways to be constructed in any year cannot be included in the overall budget), or where required, special levies? The land upon which these verge pathways are constructed does in fact fall under the jurisdiction of the HOA as a whole and not the individual owner as it is common property. The response to that was that it will mean that all owners who have to date installed verge pathways at their own cost will have to be refunded and a special levy raised to cover the loss then reflected in the books of the HOA. This is presumably seen as too

much of an administrative hassle and the recovery of verge pathways costs from owners via the building deposit or their individual levies seems an easier solution.

- 12.6 However, this may all be unnecessary, since clause 6.1 very specifically places an obligation on owners to “landscape and maintain, at their own cost, the road verge/s separating their erf from the road/s.” I fail to see why the HOA is not relying on this provision to force the Respondents to construct the verge pathways in respect of their erven. Surely “landscaping” includes a measure of paving?
- 12.7 If the HOA thus are authorized, via clause 6.1, to enforce this obligation at the direct cost of the owner (in other words, not via a levy or special levy), is it furthermore authorized to insist that the verge pathway aesthetically complies with a certain standard or guideline? It does appear so from the reading of clause 4.8 and clause 19.6 in terms whereof the trustees have the power to “issue architectural and landscape design manuals...”
- 12.8 There seems to be some controversy as to the verge guidelines as those published in January 2017 (by mistake?) do feature a cobbled pathway. However, this does not mean that the trustees may not amend those as it clearly has the power to do so in terms of clause 19.6. It seems clear that they have in practice (if not formally) amended it by only installing red brick pathways. As such, they remained in control of the interpretation of the 2016 mandate and the guidelines and it is only in exceptional circumstances, such as that of the Respondents, where residential building works are completed but the pathway remains incomplete, that the guidelines as it currently reads may be problematic. As such, it is necessary for the trustees to formally adopt a new set of verge guidelines in order to ensure certainty within the Estate. Furthermore, the 2016 Annual General Meeting clearly overwhelmingly mandated the implementation of measures to ensure a consistent appearance in verge design, which includes verge walkways. This has now been implemented and interpreted by the HOA in the installation of red brick walkways throughout. The question is thus whether the Respondents can rely on the 2017 guidelines to insist on installing a cobbled pathway (at least in the case of Mr van Eck)? I do not believe so. The pathways by the Respondents are not built yet and I cannot see it being reasonable and fair to allow them to insist on the cobbled pathway purely because a photo in the January 2017 guidelines features a cobbled pathway. They know what the current standard is and should not be able to deviate from it simply because the trustees have not formally adopted the amplified or amended guideline.

12.9 In conclusion, I am thus of the view that the Respondents are to comply with the standard set by the HOA in respect of the installation of the red brick pathway.

12.10 It is very much in the interest of the HOA and the Respondents to put this unpleasantness behind them. The Respondents, clearly in the case of Mr van Eck, seems to be active and involved members of the HOA and able to contribute to the running of the Estate in the interest of all.

13. 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 take 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.

14. ADJUDICATION ORDER

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

14.2 In terms of section 39 (6) (g) the adjudicator may make an order "obliging an owner to or occupier to accept obligations in respect of a defined part of a common area."

14.3 In terms of section 54 (1), if the application is not dismissed, the adjudicator must make an order-

"granting or refusing each part of the relief sought by the applicant."

14.4 On the basis of my finding set out in paragraph 12, the Applicant's prayer is granted and the Respondents are ordered to install red brick verge pathways in conformity with that of the rest of the Estate in front of their properties at their own cost.

14.5 Each party is to carry its own costs.

15. SECTION 56 OF THE CSOS ACT, 2011

The parties' attention is drawn to the status of the order made herein. In terms of Section 56, (which reads as follows:

'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)

orders made under the CSOS Act are of the same status as that of an order made by either the Magistrate's Court or the High Court, depending on the amount of money or relief sought. As such, the order made herein may be enforced by a party in the same way as it would enforce a court order. Any party who wishes to enforce an order made in terms hereof, should approach the clerk of the relevant court (being the Magistrate's Court or High Court in the area where the Scheme is situated) to ensure that the order is registered with such court, whereafter it is capable of being enforced as a court order.

16. RIGHT TO APPEAL

- 16.1 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).
- 16.2 An appeal against an order must be lodged within 30 days after the delivery of the order of the adjudicator.
- 16.3 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

DATE: 07.06.2018
Community Schemes Ombud Services
T: +27 (010) 593 0533 | F: +27 (010) 590 6154
Website: www.csos.org.za
Fraud hotline: 0800 701 701