



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

Case Number: CSOS 130/WC/17

IN THE MATTER BETWEEN

**JUDITH NANKIN N.O.
DEBRA NANKIN N.O.
BRETT ASHLEY NANKIN N.O.
(Applicants)**

and

**TRUSTEES OF THE PONT DU GARD
BODY CORPORATE
(Respondents)**

ADJUDICATION ORDER

PARTIES

1. The Claimants are the trustees for the time being of the Penthouse Pont Du Gard Trust, a trust duly constituted and registered in terms of the Trust Property Control Act (bearing registration number T831/91) (hereinafter "the trust").
2. The Respondent is the Pont Du Gard Body Corporate, a sectional title scheme duly incorporated as such under Sectional Title Scheme Number 108/1991 in terms of Section 2 of the Sectional Titles Schemes Management Act, 8 of 2011.
3. The Trust is the registered owner of certain immovable property situated at Pont du Gard, Mouille Point, being Section 55, and apartment on the 8th Floor, being apartment 8A and section 58 being garage number 5. The trust is also

entitled to certain exclusive use areas being the terraces on the 8th Floor, and parking bay number 19.

4. 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

5. 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.
6. This matter was set down for adjudication on 19 September 2017, where after the matter continued on the 21st of November 2017 with an inspection *in loco* and legal arguments followed. 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 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"*.
8. Section 39 provides that –
"An application made in terms of section 38 must include one or more of the following orders – in this instance:
 - (1) In respect of financial issues – (e) an order for the payment or re-payment of a contribution or any other.*
 - (6) In respect of works pertaining to private areas and common areas – (a) an order requiring the association to have repairs and maintenance carried out, and/or (g) an order obliging an owner or occupier to accept obligations in respect of a defined part of a common area.*
 - (7) In respect of general and other issues –*
 - (b) any other order proposed by the chief ombud."*

SUMMARY OF DISPUTE

9. The essence of the dispute for determination at this juncture relates to what responsibilities and liabilities, specifically in respect of repairs, fall within the concept of "maintenance". The resolution of the further disputes between the parties should follow, as agreed to between the parties.

APPLICANT'S VERSION

10. Applicants (represented by Adv. S Rapaport) concede that they do not persist with the relief seeking the removal of the designated exclusive use areas in question or the re-drafting of the settlement agreement that was made an award.
11. On 24 September 1981 the rules for the control and management of the building and the body corporate were amended by the members of the Respondent by adopting a resolution substituting the rules contained in schedules I and II of the Sectional Titles Act 66 of 1971 ("the 1971 Sectional Titles Act") with Rules ("the Pont du Gard Rules") that were duly submitted to the Registrar of Deeds in terms of Section 5(3)(f) of the 1971 Sectional Titles Act.
12. In terms of Pont du Gard Rule 52.1, certain areas described as common Property on the sectional plan filed with the Registrar of Deeds would be for the exclusive use, occupation and enjoyment of the owner of each section corresponding with the areas cross-hatched on the plan annexed to the Pont du Gard Rules. These areas would be known as "exclusive use areas".
13. The Trust was allocated certain areas of common property as exclusive use areas (hereinafter "the Trust's exclusive use areas").

14. The following relevant Pont du Gard Rules were *inter alia* referred to;

14.1 *The Sectional Titles Act of 1971 (Act 66 of 1971) amended from time to time and any regulations made and in force thereunder.*

14.2 *If an owner –*

49.1 fails to repair or maintain his section in a state of good repair as required by section 32(c) of the Act and/or these rules and/or the House Rules; or

49.2 fails to maintain adequately any area of the common property allocated for his exclusive use and enjoyment – and such failure persists for a period...

14.3 *Exclusive use areas - 52.3 An owner shall be obliged to maintain the exclusive use area as if it were part of his Section and shall be obliged to take all reasonable and necessary steps to keep it in a clean, hygienic, neat and attractive condition.*

14.4 *52.5 Notwithstanding the provisions of 52.1. an owner shall permit a Trustee and/or other persons access to such exclusive use area for the purpose reasonably required for the maintenance thereof, or any area required to be maintained by any other owner...*

15. Certain disputes relating to the erection of two new structures on portions of its exclusive use areas and the repair by the respondent of leaks to the Munnik enclosure and a counterclaim by respondent for the payment of levies

by the Trust were referred to arbitration after which a settlement was reached and signed on 26 May 2000 in this regard. The following relevant terms hereof are as follows;

15.1 *"1.1 The defendants hereby furnish their consent to the erection of the structures contemplated in the sketch diagrams annexed to the expert summary of Mr Brian Mellon, which consent is subject to the following conditions:*

...

1.1.2 The claimants shall be responsible for the maintenance of the proposed structures.

1.2 The claimants shall, from the time that the proposed structures are completed, be liable for levies in respect of such structures calculated in the same manner as the levies payable in respect of sectional title unit no. 55.

2.1 The defendants shall attend to the repairs of the leaks described in the reports of Malcolm Bannerman and David Matthews.

...

3.2 As from 1 June 2000, the claimants shall (subject to the provisions of clause 1.2 above) be liable for levies in respect of the uncovered areas adjacent to sectional title unit no. 55 in accordance with the provisions of section 37 of Sectional Title Act, 1986.

3.3 *The claimants accept their liability for levies in respect of the “Munnik” enclosure, from 1 June 2000, on the same basis as applies to the sectional title unit no. 55.”*

16. Claimants aver that the Trust’s duty to “maintain” its exclusive use areas only comprises a duty to maintain these areas in a clean, hygienic, neat and attractive condition and not as contested by respondent to include the liability to repair its exclusive use areas.

17. Claimants further refer to the following legislation and intention of the legislature to distinguish between “maintain” and “repair” and to illustrate that an obligation to maintain does not incorporate an obligation to repair;

17.1 Section 3(1)(a)(i) of the STSM Act provides for the establishment of an administrative fund by the body corporate to attend to the repair, maintenance, management and administration of the common property.

17.2 Section 3(1)(b) of the STSM Act provides for the establishment and maintenance of a reserve fund by the body corporate to cover the cost of future maintenance and repair of the common property.

17.3 Sections 3(1)(l) and 3(1)(r) of the STSM Act further highlight the distinction between the maintenance of common property in a state of good and serviceable repair and the maintenance and repair of pipes, wires, cables and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property.

- 17.4 Section 13(1)(c) of the STSM Act obliges an owner to “repair and maintain” his or her section in a state of good repair and, in respect of an exclusive use area, “keep it in a clean and neat condition”.
18. Claimants also refer to the dictionary meaning of “maintenance” as dealt with in *Body Corporate of the Solidatus Scheme No SS23/90 v De Waal and Others 1997 (3) All SA 91 (T)* and is of the opinion that the precedent set in this matter is not applicable here as the exclusive use areas in the Pont du Gard matter was created by the Rules of the scheme under the 1971 Act.
19. Claimants aver further in this regard that sections 10(9) - 10(12) of the STSM Act clearly differentiate between rules created under the 1971 Sectional Titles Act and the Sectional Titles Act. The *Solidatus* case only considered exclusive use areas that were created in terms of section 27 of the Sectional Titles Act and the provisions of section 37(1)(b) relating thereto. The precedent created is accordingly not applicable to the present matter, in which the Pont du Gard Rules were created under the 1971 Sectional Titles Act.
20. At the Annual General Meeting of 22 December 2014 a special resolution providing for a revised formula for the apportionment of levies was adopted (par 10.1 of minutes).
21. The Trust’s new levy, calculated according to its notional participation quota of 0.0480, for section 55 was R4 284.03.
22. An additional levy amount of R2 142.34, in respect of the Trust’s enclosed exclusive use areas totalling 132m², was calculated on the same basis as

applied to section 55. Claimants further state that the additional levy amount is raised in terms of Section 3(1)(c) of the STSM Act and is payable by the Trust as an owner enjoying a right of exclusive use over the common property. Therefore the proviso to the section in question is that the additional levy is payable unless in terms of the rules the Trust is responsible for the costs of rates and taxes, insurance and maintenance of its exclusive use areas. Therefore if the additional levy amount is payable by the Trust, the responsibility to attend to the repairs and maintenance of the Trust's exclusive use areas must lie with the Respondent.

23. The settlement agreement contemplating the incorporation of the enclosed exclusive use areas of the Trust into its section was not adopted at a special meeting of the Pont du Gard owners as a result of the dispute regarding where the obligation to repair and maintain the Trust's exclusive use areas lies. Therefore, if, as the Claimants' suggest, the obligation lies with the Respondent, then it follows that the opposition to the motion must have been unreasonable.

24. Claimants in conclusion contest that no rule in the Pont du Gard Rules, no term in the arbitration settlement agreement and no provision in the STSM Act that obliges the Trust to "repair and maintain" its exclusive use areas. It must follow that in respect of works pertaining to the Trust's exclusive use areas, the Respondent is liable to have repairs and maintenance carried out in circumstances where a levy is payable by the Trust in respect of those areas and that any opposition to the motion in question on the basis that the Trust should be held so liable must have been unreasonable.

APPLICANT'S PRAYERS

25. Claimants prayers as per their legal submissions, as follows;

25.1 That the Respondent is liable for and required to have any repairs and maintenance carried out to the Trust's exclusive use areas (as cross-hatched on the plan annexed to the Pont du Gard Rules), such areas including the three enclosed structures, and that the Trust is obliged to maintain its exclusive use areas in a clean, hygienic, neat and attractive condition;

25.2 Declaring that the contributions levied on the Trust from January 2013 were incorrectly determined and/or unreasonable, and stand to be corrected and/or adjusted to a reasonable amount; and

25.3 Declaring that the opposition to the motion for the resolution adopting a settlement agreement contemplating the incorporation of the enclosed exclusive use areas of the Trust into its section considered by a general meeting of the members of the Respondent was unreasonable insofar as the opposition was based on the Respondent's incorrect construction and/or interpretation of the obligations to repair and maintain the Trust's exclusive use areas.

RESPONDENTS VERSION

26. Respondents (represented by Mr. M Bey) refers to all the relevant legislation hereto, which will not be dealt with in detail, except for specific instances.

27. Respondents state that Rule 52.3 of Pont du Gard Body Corporate Rules – (where it states that the owner shall be obliged to maintain the exclusive use area as it were part of his section and shall be obliged to all reasonable and necessary steps to keep it in a clean, hygienic, neat and attractive condition) is not contrary to the erstwhile provisions of the Sectional Titles

Act nor the current provisions of the Sectional Titles Schemes Management Act 8 of 2011.

28. Reference is made to the definition of "maintain" as per Oxford Living dictionary meaning *inter alia*; to 'keep (a building , machine or road) in good condition by checking or repairing it regularly'. Also to "maintenance" defined as 'the process of preserving a condition or situation or the state of being preserved; the process of keeping something in good condition.' The synonyms for maintenance are further – upkeep, service, servicing, repair and repairs.
29. Respondents then deal with the question whether the repair of certain structural defects in a number of exclusive use areas in a sectional title scheme could be accommodated under the term maintenance in the Section 37(1)(b) of the Sectional Titles Act as decided in the *Body Corporate of the Solidatus Schemes No SS23/90 v De Waal [1997] 3 All SA 91(T)*. The court found that the legislator wanted to place the burden for the upkeep where the benefit lay, namely on the owner of the section to which those rights were attached. The Court accepted that the rights to exclusive use areas were so closely akin to ownership as to be virtually indistinguishable.
30. Respondents state further that this judgement went beyond this and also entertained the meaning of the word "maintenance" as well. Reference is made to Le Roux J in the Solidatus matter stating that; "What is clear, however, is that extensive repair and replacement of materials could fall within the ambit of the concept 'maintenance'. Also where Le Roux J states that; "*In the context of the Act and the then novel concept of exclusive-use areas, these rights are so closely akin to full ownership as to be virtually indistinguishable. As pointed out above, they can be sold and transferred, given as security for a loan and protected presumably by interdict from encroachment. It seems clear that the legislature wanted to place the burden for their upkeep where the benefit lay, namely, on the section owner to which these rights are attached. The fact that the CSIR report indicates that the prime culprits might have been the builders, or architect, for slovenly workmanship and/or poor design, does not in my view detract from the eventual responsibility of the section owner for defects and their correction.*"

31. Respondents are of the opinion that the Solidatus case is sufficient authority in support of their argument that maintenance includes repairs and therefore claimants are responsible for maintenance, which includes repairs, to its exclusive use and enclosed areas upon the exclusive use areas.
32. Respondents contest that It is the trustees, and not any individual owner, who are empowered to take a decision whether or not the imposition of a levy (which would include a special levy) is necessary as contemplated by Section 37(1)(b) of the STA and by Rule 31(4) of Annexure A to the regulations made in terms of the STA. According to Section 31(1)(d) of the STA, one of the functions of the body corporate is to determine from time to time the amount to be raised for the purposes aforesaid (as determined in *Body Corporate of Fish Eagle v Group Twelve Investments 2003 (5) SA 414 WLD (at 420 B-E)*).

RESPONDENTS PRAYERS

33. Respondents seeks the following order as per their legal submissions;
 - 33.1 That upon a proper interpretation of Management Rule 52 read with section 37(1)(b) of the Sectional Titles Act, read with section 3(1)(c) of the Sectional Title Act, the Trust (as represented by the Claimants) is obliged to maintain its exclusive use areas, including the structures thereon (in terms of the Arbitration Award) and such maintenance includes repairs and the correction of defects (if any), and
 - 33.2 Declaring that upon a proper interpretation of the arbitration award, the Trust is obliged to pay levies:
 - 33.2.1 of the Munnik enclosure and the further enclosures calculated in terms of the normal manner in calculating levies in respect of section 55, that is in terms of section 3(1)(a) and 3(1) (b) of the Act, read with the Management rules, in terms of the notional PQ and addition sum agreed to at the Special General Meeting held in 22nd December 2014; and

33.2.2 in respect of the remaining areas of the exclusive use area not so enclosed, then in terms of the proviso to section 3(1)(c) read with Management Rule 52.

33.3 That the Claimants are, not in the circumstances, permitted to claim set off of any amounts as against their levies.

EVALUATION OF EVIDENCE SUBMITTED

34. In essence the issue to be determined is what responsibilities and liabilities, specifically in respect of repairs, can be incorporated within the concept of "maintenance" and does it include 'repair' in the circumstances with regard to relevant legislation, *inter alia* section 37(1)(b) of the Sectional Titles Act, section 3(1)(c) of the Sectional Titles Schemes Management Act and Management Rule 52.3.

35. Having considered the arguments, evidence and submissions in this matter, the following;

35.1 Le Roux J decided in the Solidatus matter that an owner who holds a registered right (a section 27 exclusive use right) would be liable to maintain and repair that exclusive use right. He *inter alia* determined that: "... *although the exclusive use area is technically part of common property, its use is exclusively reserved for the holder of the right.*" I am however not convinced that the precedent in the Solidatum case created is applicable to this matter, in which the Pont du Gard Rules were created under the 1971 Sectional Titles Act. The Solidatum case only considered exclusive use areas that were created in terms of section 27 of the Sectional Titles Act and the provisions of section 37(1)(b) relating thereto whereas in this instance (rule created akin to Section 27A – not registered as a real right, as per defendants' expert

notice and summary in respect of Brian Mellon) an owner would however be liable if this repair responsibility was specifically made part and parcel of the rule. The court further concluded that *"It seems clear from the above that the concept "maintenance" is a general term with no exact or precise meaning in law...In my view the application of the dictionary meaning of this word does not bring clarity to the question in issue..."*

- 35.2 An owner would therefore only be liable in the circumstances for the repair of his exclusive use area if this is specifically stated as such in the Pont du Gard Rules. Rule 49.1 and 49.2 clearly distinguish between an owner's obligations to "repair and maintain" its section as against its obligation to "maintain" its exclusive use areas coupled with recourse provided to the body corporate to remedy the owner's failure and to recover the reasonable cost of doing so from such owner where the failure persists after written notice to repair "or" maintain (referring to Rules 49(1) and 49(2) respectively). Whereas Rule 52.3 obliges an owner to "maintain" its exclusive use areas by taking all reasonable and necessary steps to keep it in a clean, hygienic, neat and attractive condition. Rule 52.3 (Exclusive use areas) should therefore be read and interpreted in conjunction with Rule 49 (Owner's failure to maintain). The second part of Rule 52.3 from the word "and" onwards is merely descriptive in nature, explaining the manner in which the exclusive use areas should be maintained in my opinion.
- 35.3 Cognisance is also taken of the provisions in section 13(1)(c) of the Sectional Titles Schemes Management Act in this regard as well as sections 3(1)(a)(i), 3(1)(b), 3(1)(l) and 3(1)(r) of said Act and section 37(1)(a) and (b) of the Sectional Titles Act.
- 35.4 Both parties have further agreed that clarity is required with regard to the concept of "maintenance" and if the term 'repair' can be incorporated into maintenance in the context of this matter. The terms

of the Settlement Agreement by Adv. E Fagan (referred to above), except for the clarification, do not seem to be in dispute in essence here. The parties have also further indicated that the other disputes will be resolved between themselves, hence no need to discuss it further.

ADJUDICATION ORDER

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

36.1 Applicant's relief sought in this instance is granted with regard to his prayer as set out in par 25.1 (above) only,
(Respondent is liable for and required to have any repairs and maintenance carried out to the Trust's exclusive use areas (as cross-hatched on the plan annexed to the Pont du Gard Rules), such areas including the three enclosed structures, and that the Trust is obliged to maintain its exclusive use areas in a clean, hygienic, neat and attractive condition.)

36.2 Respondents relief sought in terms of par. 33.1 is accordingly refused.

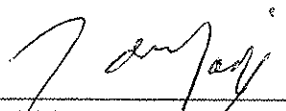
36.3 Both parties need to adhere to the terms of the Settlement Agreement (by Adv E Fagan made an award) as agreed upon and resolve all outstanding levies/payments due amongst themselves on a fair and reasonable basis.


36.4 No order is made as to costs herein.

RIGHT TO APPEAL

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.


ADV DRIES DU TOIT
ADJUDICATOR
12 January 2018


ADJUDICATION ORDER
DATE: 12 January 2018
Community Schemes Ombud Services
T: +27 (010) 590 6154 | F: +27 (010) 590 6154
Website: www.csos.org.za
Fraud hotline: 0800 701 701