



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

Case Number: CSOS 366/WC/17

IN THE MATTER BETWEEN

**NORMAN MARSH
(Applicant)**

and

**BLUE WATERS HOME OWNERS ASSOCIATION
(Respondent)**

ADJUDICATION ORDER

PARTIES

1. The applicant is Mr Norman Marsh, the registered owner of erf (unit 41) in the Blue Waters Home Owners Association development, situated in the district of Clanwilliam Western Cape. Mr Marsh attended the hearing in his personal capacity.
2. The respondent is the home owners' association of Blue Waters (also described as Blue Mountain Home Owners Association as per certificate of non-resolution issued) as represented by Mr John Mountain in his capacity as developer and chairperson (also known as John Mountain Property CC). Mr Mountain was also assisted by Mr T Chase on behalf of John Mountain Property CC. Blue Waters 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

3. 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.
4. This adjudication hearing was set down for 5 December 2017, upon which date the matter was postponed to 30 January 2018 again for purposes of adjudication. 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.
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6. Blue Waters was established as an Association in terms of the then applicable legislation on approval of the rezoning and subdivision of the land upon which it is situated and is governed by a constitution, the latest version of which is dated 23 May 2006 ("the Constitution"). It is noted that certain amendments to the Constitution still need to be approved by the relevant authorities.
7. Blue Waters consists of approximately two sections consisting of 84 plots including 20 houses.

APPLICABLE PROVISIONS OF THE ACT

8. 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".

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

10. Section 47 provides that –

"On acceptance of an application and after receipt of any submissions from the affected persons or responses from the applicant, if the ombud considers that there is a reasonable prospect of negotiated settlement of the disputes set out in the application, the ombud must refer the matter to conciliation".

11. 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 DISPUTE

12. Applicant alleges that respondent (who is the developer and chairperson of the scheme) is liable for the payment of levies with regard to the five(5) properties (plots) that he repurchased from other owners during 2014/2015. Respondent acknowledges that he repurchased the five properties, but contests that he is liable to pay levies in the circumstances.

APPLICANT'S VERSION

13. Applicant is the owner of Unit 41 in the abovementioned scheme and bought his property about two years ago and is aware of the Constitution governing the development.

14. Applicant resolved most of the issues in an amicable manner and retracted all other issues in this matter, except for the concern regarding

the non-payment of levies or building penalties by Mr. Mountain with regard to the five properties repurchased during the 2014/2015 period on the pretext that he had the same rights as when the Home Owners' Association was originally established in 2006.

15. A Special General Meeting was held about four months ago where applicant was also voted off the board of trustees and no Annual General Meetings have apparently been convened for the past five years.
16. Applicant's response to the Resolution passed on 29 January 2018 to *inter alia* amend clause 9.2 of the Constitution clarifying the issue if the Developer is responsible to pay levies – is that his proprietary rights have been affected thereby.
17. Applicant feels in general powerless in the circumstances and therefore turned to CSOS Offices' for assistance.

APPLICANT'S PRAYERS

18. Applicant's prayers as per Application for Dispute Resolution Form;
 - 18.1 To place Blue Waters Home Owners' Association under administration.
 - 18.2 Alternatively to arbitrate the matter and recover monies paid or unlawfully written off.
 - 18.3 To institute criminal charges if the facts support any unlawful acts.

RESPONDENT'S VERSION

- 19 Mr Tim Chase (on behalf of John Mountain Property CC) states that John Mountain is the developer in the scheme and that Applicant's contention that the developer repurchased the five properties during mentioned period is correct.
- 20 Reference is made to a Deed of Sale, more specifically par 24.2.4 stating

that; *"If the purchaser fails to comply with the provisions of this clause the seller shall be entitled, without prejudice to any other rights which it may have in terms of this agreement and/or at law and at its election to –*

24.2.4.1 *repurchase the property from the purchaser for an amount equal to the original purchase price paid by the purchaser in terms of this agreement; or*

24.2.4.2 *sell the property to any third party for an amount of not less than the original purchase price paid by the purchaser in terms of this agreement. The purchaser hereby irrevocably and in rem suam appoints the seller as his duly authorised agent for purposes of such sale, provided that all costs of transfer shall be for the account of the purchaser in either case."*

- 21 The developer was forced to buy back these properties in the circumstances.
- 22 Mr Chase further submitted Minutes of a meeting held, representative of John Mountain Property Holdings CC, with reference to clause 9.2 of Blue Waters HOA Constitution dealing with the "Trustees Duties" and 'Levies' where it states *inter alia* that; *"All erven still registered in the name of the Developer or any entity that the developer owns shall not attract any levies."* This is used in support of respondent's argument that the developer does not need to pay levies as the words "still registered" indicate the intention not to pay levies. Respondent meanwhile realised that this may cause ambiguity that necessitated the need to amend the Constitution.
- 23 Minutes of said meeting (as mentioned above) and resolutions adopted herein indicate the following as signed by J Mountain on 29 January 2018;
- 23.1 *"...All erven registered in the name of the Developer, or any entity that the Developer owns shall not attract any levies (regardless of when acquired).*
- 23.2 *"To add a new clause 15.2 – It is recorded that the Developer has the right to amend the Constitution until such time (as reflected in the sale agreement signed by all members / as the Development has been completed in all its phases and subdivisions. After the Development is completed and the Developer no longer has this*

right, then all amendments must be by unanimous resolution as defined in the Sectional Title Schemes Management Act."

- 24 Reference was also made to clause 11.2.2 of Blue Waters Deed of Sale stating that; *"The seller shall maintain control of the HOA until Blue Waters has been completed in all its phases and sub-divisions and retains the right to constitute and promulgate rules for the HOA and to vary, add to or repeal any of the Rules or Constitution or Articles of Association of the HOA. The name of the HOA and the provisions of its Memorandum and Articles of Association shall be determined by the seller in its own and absolute discretion."* The purpose of the meeting (referred to above in points 22 and 23) seems to be to align certain provisions as contained in the Deeds of Sale with the Constitution of Blue Waters.
- 25 A sworn affidavit signed by Mr WJ Knoetze in his capacity as attorney and conveyancer from Miltons Matsemela Inc (attending to the conveyancing of this development) was further submitted as evidence. Mr Knoetze confirms that he was instructed to draft Blue Waters Constitution and that the intention has always been that the Developer will not be responsible to pay levies, even in the event of any repurchase of erven from existing owners.
- 26 Mr Mountain indicated that the repurchase exercise was as a result of monies outstanding and new owners failing to built within the prescribed period of time. The intension was to get these properties back into the market, despite the fact that the value is decreasing significantly due to a squatter camp located in the area, low water levels and the consequences thereof and difficult economic circumstances currently.
- 27 Lastly a statement of Steer & Co (acting as the managing agents of Blue Water HOA) indicating the financial health of the development, was submitted to form part of record.

EVALUATION OF EVIDENCE SUBMITTED

- 28 There seems to be no dispute between the parties as to the validity of Blue Water Constitution.
- 29 The actions and behaviour of the members of the executive committee are to be judged by the terms and the requirements of the Constitution. They have a fiduciary duty to the owners and members of Blue Water to comply with the Constitution and the Law in general. For any application to be successful against the executive committee, an applicant has to prove, on a balance of probabilities, that the Executive committee has failed to comply with the Constitution or the law and/or that trustees have not complied with their fiduciary duties.
- 30 Having considered the submissions made by both parties herein I am not convinced that applicant proved that respondent (*inter alia* Mr John Mountain the developer or any of its executive members) acted outside its mandate, do not comply with the Constitution or act in any way in contravention of their fiduciary duties or in their own personal interest as opposed to that of Blue Waters HOA.
- 31 I am further satisfied that respondent attempted to clarify and rectify any ambiguity in the Constitution by its amendment (as per par(s) 22, 23 & 24 above). In the circumstances it further seems clear that the intention has been all along that the developer should not pay levies in terms of the Constitution read in conjunction with the provisions of the Deed of Sale whilst owner of the property.
- 32 Cognisance should however be taken of the fact that compulsory annual general meetings should take place as prescribed by legislation and of the provisions of Prescribed Management Rules 12(2) stating that; "From the establishment of the body corporate (HOA also applicable) until the end of the first AGM, the developer or the developer's nominee is the chairperson of the trustees." Also sub clause (3) prescribing that; "At the commencement of the first meeting of trustees after an AGM at which trustees have been elected and whenever else necessary, the trustees must by majority vote

elect a chairperson from among their number." All trustees should also be very mindful and is obliged to avoid any material conflict between his or her own interests and those of the body corporate / HOA (as determined by Section 8(2)(b) of the Sectional Titles Schemes Management Act 8 of 2011).

ADJUDICATION ORDER

33 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;


33.1 Applicant's relief sought in this instance is refused and his claim is accordingly dismissed.


33.2 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
06 FEBRUARY 2017


ADJUDICATION ORDER
DATE: 2017/02/06
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