



Case Number: CSOS 44/WC/16

IN THE MATTER BETWEEN:

SUSAN HEESE

(Applicant)

and

TRUSTEES OF THE RIVERSONG FARM BODY CORPORATE

(Respondents)

ADJUDICATION ORDER

1. The Applicant is the owner of Unit 8 that forms part of the Riversong Farm Body Corporate, in the Ceres area, Western Cape.
2. The Respondents are the Trustees of the Riversong Farm Body Corporate ("Riversong"). The trustees that were present at the hearings were Mr Harry Bell, Mr Anton Malan and Mr Andrew Kendall.

3. Riversong is a Sectional Title Scheme with 19 sections and roughly 35 'owners with some ownership held through close corporations.
4. This is an application for dispute resolution in terms of Section 38 of the Community Schemes Ombud Service Act No.9 of 2011 ("the CSOS Act"). The application was made in the prescribed form and lodged with the Western Cape Provincial Ombud Office.
5. The adjudication hearings took place over a long period, namely on 28 June 2017, 24 August 2017, 26 October 2017 and on 14 December 2017 at the CSOS offices in Cape Town.
6. The Adjudicator is empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the 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.
7. This matter has a long history that I do not propose to repeat herein. I have to commend the Applicant for the effort she put in in preparing her case that comprised in excess of four (4) large lever arch files.
8. While this order might appear to be short in length in comparison to the documents filed and submissions made, the current fee structure for adjudicators does not allow for a more detailed order. However, this does not

mean that I have not considered them all but I will not be repeating them all in this order.

9. Some of the past events and history have been overtaken by time and it is therefore not necessary to deal with all of these in this order.
10. At the outset the Applicant requested that the adjudicator order that the body corporate place Riversong under administration so that it can be managed properly and according to the Sectional Titles Schemes Management Act (8 of 2011) ("the STSMA") with impartiality and without incurrence of further legal action/costs. Alternatively that the Body Corporate be instructed to appoint an Executive Managing Agent ("EMA") to replace trustees as detailed in the STSMA Management Rules 28 (1) - (4).
11. As adjudicator, I am not in a position to place or order that the scheme be placed under administration. Section 16(1) of the STSMA provides as follows:

"16. (1) A body corporate, a local municipality, a judgment creditor of the body corporate or any owner or other person having a registered real right in or over a unit may apply to a Magistrate's Court for the appointment of a suitably qualified and independent person to serve as the administrator of the body corporate."
12. From the above it is clear that such an application will have to be lodged at the Magistrate's Court and not at CSOS.
13. Fortunately, a resolution was passed at the Annual General Meeting (AGM) held on 11 December 2017 to appoint an Executive Managing Agent

("EMA"). The EMA will take the place of the trustees and this should minimise any personality issues that may arise in the running of the scheme going forward. The EMA can also look into and deal with any past and current financial issues.

14. At our last hearing on 14 December 2017, the parties put forward a list of seven (7) outstanding issues for me to decide. These were as follows:

- a. A refund to the Applicant for repairs to her swimming pool;
- b. A refund to the Applicant for legal fees incurred by her;
- c. A refund of the amount of R604,95 that was attached to the Applicant's levy;
- d. The insurance schedule to be corrected and the amount of R96 000,00 for the pool and solar panel to be removed;
- e. Whether the swimming pool can become an exclusive use area (EUA);
- f. To consider the conduct rules regarding short-term letting and the maximum amount of people allowed per unit;
- g. The financial management of the scheme.

15. I have considered the issues carefully and will deal with them below:

- a. The Applicant has submitted that the costs for the repair to her pool came to R43 875,00, but she has indicated that she would be prepared to accept an amount of R20 000,00. I am satisfied that she is entitled to

this amount and that it is a reasonable amount. Until the pool becomes part of an EUA to the Applicant's unit it remains common property and it is the duty of the body corporate to maintain it and to keep it in a state of good and serviceable repair (section 3(1)(l) of the STSMA).

- b. While an owner is entitled to obtain legal advice and assistance in a matter such as this, I am not of the view that the Body Corporate and/or the trustees, in this case, should be ordered to pay the costs that were incurred by an owner in this regard. This is not an absolute rule and will depend on the facts of each case.
- c. There was a debate as to whether the amount of R604,95 had in fact been repaid to the Applicant. I am satisfied that this amount needs to be repaid and the managing agent must provide proof in the event that it is maintained that it has been repaid.
- d. On the insurance schedule under cottage number 8 an amount of R96 000,00 is listed and added for what seem to be the replacement costs for the swimming pool and the solar panels. These items remain on common property and cannot be listed separately for the account of the Applicant. The amount of R96 000,00 needs to be removed from the separate column and any extra costs for the insurance in this amount will have to be calculated and be repaid to the Applicant.
- e. The Applicant expressed the desire to have the pool included in her section in terms of the Sectional Titles Act (95 of 1986) ("the STA"). The

option would be to confer exclusive use right in terms of sections 10(7) and (8) of the STSMA. The units are all in the process of being re-measured and in my view the only way to solve the issue of the swimming pool once and forever would be for the pool to become part of the Applicant's unit in terms of the Sectional Titles Act (the STA). On the authority of a unanimous resolution of its members, a body corporate can create new registered exclusive use areas that can be transferred to owners (see section 5(1)(e) of the STSMA. I can only suggest that this be considered by the members as soon as possible to allow the body corporate to create such an EUA in terms of the STA. In my view this would be a much better option than to deal with it in terms of the management or conduct rules.

- f. The issue of short-term letting and the amount of persons per unit will have to be placed before a next meeting of the body corporate for a proper discussion and a decision. While I am of the view that short-term letting should be allowed with a maximum of eight (8) persons per unit, I do not think that I am in position to make such a ruling at this stage.
- g. I have also considered the allegations of mismanagement of the finances by trustees and former trustees. I am not going to make any ruling in this regard. It is important to note that trustees do this kind of work voluntarily and without remuneration and it takes up a lot of a person's time. Trustees are in event indemnified in terms of Management Rule 8(4) provided they are not in breach of their fiduciary

obligations. While one may not agree with decisions taken by trustees this does not mean they are acting outside their fiduciary obligations.

16. The Applicant has asked whether she could add more recent events to the current application, but this will not be possible and she will have to launch a new application to CSOS or to take whatever other steps she may decide upon. Section 45 of the CSOS Act provides as follows:

“45. (1) 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.

(2) The applicant may withdraw the application at any time before the ombud refers the application to an adjudicator.”

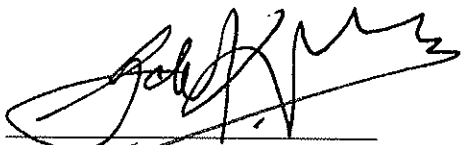
17. It is therefore clear that no amendment to the application is possible after it has been referred to an adjudicator.

18. I accordingly make the following order:


- a. the Applicant to be paid an amount of R20 000,00 for the repair of her swimming pool;
- b. the amounts of R604,95 (in whatever total) should be refunded to the Applicant in the event that there is no proof of payment of the amounts;

- c. the insurance schedule needs to be amended to remove the amount of R96 000,00 that is listed separately and the Applicant to be refunded any amounts raised for this extra amount;
 - d. the payments to the Applicant in terms of orders (a), (b) and (c) above must be made by no later than 29 March 2018;
 - e. the remainder of the relief sought is hereby dismissed;
 - f. no order as to costs is made.
19. In terms of section 57 of the Community Schemes Ombud Service Act, 2011 (Act 9 of 2011) a person who is dissatisfied with an adjudicator's order is entitled to appeal to the High Court, but only on a question of law. The appeal must be lodged within 30 days after delivery of the order.

Signed at Cape Town on the 12th day of February 2018.



ADV GPC DE KOCK
CSOS ADJUDICATOR



ADJUDICATION ORDER
DATE: 15/2/2018
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