



**ADJUDICATION ORDER IN TERMS OF SECTIONS 53 AND 54 OF
COMMUNITY SCHEMES OMBUD SERVICE ACT 9 OF 2011**

Reference No: CSOS-02363/KZN /18

IN THE MATTER BETWEEN

ABRI PRELLER

APPLICANT

AND

THE FORMER TRUSTEES OF BALKFONTEIN DEELTITEL

RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

1. The adjudication hearing was heard on 3 October 2019 in Bloemfontein. The Applicant is an owner of a unit within the Sectional Title Scheme and is the current Chairperson of the Body Corporate.
2. The Respondents are the former Trustees of the Balkfontein Deeltitel.
3. The dispute raised regards payment of R 649 921.40 for Residential Property Taxes that was made by the former Trustees to the Nala Municipality for years 2010 to 2016 the amount was paid in 2017.
4. The dispute and relief were filed as an application in terms of Section 39(1) (e) of the Community Scheme Ombud Service Act 9 of 2011, (herein referred to as "the CSOS Act").



ADJUDICATION ORDER

DATE: 25/10/19

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THE PARTIES

5. The Applicant is an owner of a unit in Balkfontein Deeltitel and the current Chairperson of the Body Corporate but for the purposes of this dispute he is the applicant in his personal capacity.
6. The Respondents are former Trustees of the Balkfontein Deeltitel and were the ones who made payment to NALA Municipality for the period 2010 to 2016.

PRELIMINARY ISSUES

7. The Respondents raised a point *in limine* in that the Applicant did not have locus standi in the dispute as he was not an owner of any property in his personal capacity during the period in question that is 2010 to 2016.
8. It was submitted that Applicant was not materially affected by the dispute and was not a party to the dispute.
9. It was submitted that the Applicant was a Trustee of Palmiet Rivier Trust during the time in dispute and was not an owner of any unit in the scheme in his personal capacity he would therefore have to bring an application for dispute in that capacity under the auspices of the Trust or so instructed by the Trustees.
10. If the argument is that he is bringing the application as the current Chairperson of the Body Corporate than the citation would have to change, and a new application completed in that capacity as the Trustees of the Body Corporate if so instructed to do so.
11. The applicant indicated that the application is brought in his personal capacity for the purposes of the dispute, the issue does affect the body corporate and he is acting in the best interest of the Body Corporate.

12. The second issue that was raised by the Respondent is that they will be prejudiced if proceedings proceed in the absence of an Afrikaans interpreter or an adjudicator who understands Afrikaans as they will struggle to converse in English and the dispute has implications.
13. The Applicant submitted that he was acting in his personal capacity. He stated that the payment that was made with Balkfontein Sectional Titel funds has a huge material influence on any new owner of units in Balkfontein Sectional Title. It affects the value of all units and puts a great financial burden on the Sectional Title which affects the owners now and in future. If there is a shortage of money, that money will have to be collected from all owners, old and new. This will then be as if owners are footing the bill of the personal accounts that has been paid.

APPLICABLE PROVISIONS OF THE ACT

14. The hearing was conducted in terms of section 38 of the CSOS Act which provides – *“Any person may make an application if such person is a party to or affected materially by a dispute”*.
15. Section 45(1) provides – *“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”*
16. Section 47 provides – *“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’*.
17. Section 48 provides – *“If conciliation contemplated in section 47 fails, the ombud must refer the application together with any submissions and responses thereto to an adjudicator”*.

18. Accordingly, after conciliation a certificate of Non- Resolution was issued. The Ombud therefore, referred the matter to adjudication, in terms of Section 48 of the Act.

EVALUATION OF EVIDENCE

19. Section 38(1) of the CSOS Act states that, "Any person may make an application if such person is a **party to** or **affected materially** by a dispute."
20. In the appeal case of Trustees for the Time Being of the Avenues Body Corporate v Alain Shmaryahu and another 2018(4) SA 566 it was stated, *"An individual's right to claim relief in terms of the Act is dependent on his or her being materially affected by one or other of these community scheme related matters. Even then the individual's right to avail of the special statutory dispute resolution mechanism is also dependent on him or her having 'a material interest in the scheme'. Both requirements must be satisfied for standing as an applicant in terms of s 38 to be established.*
21. In the Supreme Court of Appeal judgement of Gabrielle Lupacchini NO and Rochelle Condradie NO v Minister of Safety and Security, Case No 16/2010 the court quoted Land and Agricultural Bank of South Africa v Parker Cameron JA elaborated: '[A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them - and it is only through the trustees, specified as in the trust instrument, that the trust can act . . . It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.'
22. I agree with the Applicant that the material interest in this matter is that of the scheme and not him as an individual but the case of Shmaryahu clearly stated

that both the requirements of Section 38 (1) must be satisfied. The Applicant was a Trustee of a Trust at the time of the cause of action and although he has the Power of Attorney to act on behalf of the Trustees that empowers him to bring an application in the name of the trust only and not in his personal capacity. The Community Scheme Ombud Service (CSOS) unfortunately does not have jurisdiction to hear this matter.

23. The Constitution of the Republic of South Africa, 1996 (the Constitution) under Chapter 2 states that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
24. Section 30 of the Constitution provides that, everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

POWERS AND JURISDICTION OF THE ADJUDICATOR

25. 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.

ORDER

26. Accordingly, for the reasons stated above, I make the following order:
The applicant does not have locus standi for this application and therefore the application is dismissed.

RIGHT OF APPEAL

27. The parties' attention is drawn to Section 57 of the CSOS Act which provides:
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 within 30 days after the delivery of the order of the adjudicator.

SIGNED AND DATED ON THIS 25th DAY OF OCTOBER 2019.

T.P QWABE
ADJUDICATOR



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