



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

Case Number: CSOS 02308/KZN/18



**ADJUDICATION ORDER**  
DATE: 17/12/19  
Community Schemes Ombud Service  
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Website: www.csos.org.za  
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**IN THE MATTER BETWEEN**

**BRAM CLIVE SMITH**

**(Applicant)**

**And**

**TRUSTEES OF LILYVALE ESTATE BODY CORPORATE**

**(Respondent)**

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**ADJUDICATION ORDER**

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**EXECUTIVE SUMMARY**

Category of dispute S39(1): in respect of financial issues.

1. The Applicant seeks an order:

For the payment or re-payment of contribution or any other amount.

**INTRODUCTION**

2. The Applicant is Bram Clive Smith an adult male and who is the owner of unit 44, at Lilyvale Estate Body Corporate which is situated in Bloemfontein.

3. The Respondent is the Trustees of Lilyvale Estate Body Corporate, a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011 (“ST SMA”) which is situated at Bloemfontein.
4. The application was brought in terms of s 39 of the Community Schemes Ombud Service Act No 9 of 2011 (“the CSOS Act”) which provides that:

“An application made in terms of section 39 must include one or more of the following orders:

(6) In respect of financial issues—

For the payment or re-payment of contribution or any other amount

5. This is an application for dispute resolution in terms of the CSOS Act. The application was made in the prescribed form and lodged with CSOS.
6. The application was considered and the adjudication process was conducted in terms of Section 51(b) which is invite persons, whom the adjudicator considers able to assist in the resolution of issues raised in the application, to make written submissions to the adjudicator within a specified time. The Trustees submitted their statement on 4 December 2019 as stipulated.

### **RELEVANT STATUTORY PROVISION**

7. The hearing was conducted in terms of section 38 of the CSOS Act which provides that –

“Any person may make an application if such person is a party to or affected materially by a dispute”.

8. 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

  
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at any time before the ombud refers the application to an adjudicator”

9. 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.”



10. 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”.

11. Accordingly, a certificate of Non- Resolution was issued in terms of Section 48(1) of the CSOS Act. The Ombud therefore, referred the matter to adjudication, in terms of Section 48.

12. The Respondent has raised a point *in limine* regarding the citation of the parties

13. **SUMMARY OF RELEVANT EVIDENCE** (That relating to the issues in dispute)

**Respondent’s Submissions**

The Respondents submissions were as follows:

- 13.1 The Respondent submits that the applicant did not cite the Directors and Lilyvale Estate Homeowners Association who have a direct and substantial legal interest in the issues involved in the present application.

13.2 The respondent is cognisant of the fact that the National Real Estate which was cited by the applicant in the application form exercise enormous power as it is vested with substantial responsibility, which they strive to discharge lawfully, rationally and in procedurally fair, unbiased manner to date.

13.3 The Respondent prays that the application be dismissed.

#### 14. **APPLICANTS SUBMISSIONS**

The Applicant was provided with the Respondents submissions and given an opportunity to respond to it. The applicant did not deal with the issues raised *in limine* regarding the citation but dealt directly with the merit of the case.

#### 15. **EVALUATION OF INFORMATION AND EVIDENCE OBTAINED**

- 15.1 In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
- 15.2 The general rule is that only evidence, which is relevant, should be considered. Relevance is determined with reference to the issues in dispute. The degree or extent of proof required is a balance of probabilities. This means that once all the evidence has been tendered, it must be weighted up and determine whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.
- 15.3 The Applicant is a lay person who relies on the expertise of CSOS to guide him regarding proper citation on the matter from inception. Unfortunately, this guidance was not provided which would have afforded the applicant an opportunity to cite the correct party. It is correct that from the inception the Managing agent was cited as the Respondent and the Trustees of Lilyvale Estate Body Corporate and not the Lilyvale Homeowners Association or the Directors thereof.



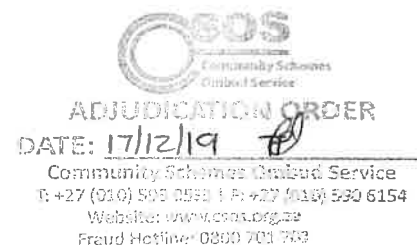
- 15.4 It is true that the Manging Agent has an enormous power vested in it by the Directors of the Lilyvale Estate Homeowners Association and would expect them to convey the dispute which in this instance they did. However, informing the Directors does not mean they are obliged to jump on the wagon of litigation when they have not been cited or joined. In this matter the Directors of Lilyvale Estate Homeowners Association should have been cited and it was incorrect to cite National Real Estate from inception.
- 15.5 The question is whether a party which was not party to initial proceedings can be joined as a party purely for the purposes of an enforcement of an order or judgment already granted. A similar question came before the Court in *Wallejee and Another v FCSA Organisation Service (Pty) Ltd and Another* (2015) 36 ILJ 1943 (LC). Molahlehi J had agreed that a judgment or order cannot be enforced against a party that was not cited as a party in the proceedings which led to the granting of the order. The basis of that conclusion, and further placing reliance on *Ngema and Others v Screenex Wire Weaving Manufacturers (Pty) Limited and others* (2012) 33 ILJ 681 (LC) was that a party sought to be cited in those proceedings must have been afforded the opportunity to be heard in relation to its potential liability to the applicant. Generally, in all fairness the *audi alteram partem* rule applies, namely, give the other side the opportunity to have his or her say.
- 15.6 It is for the above reason that I agree with the Respondent and accordingly dismiss the application.

#### **ADJUDICATION ORDER**

- 16 In the circumstances the application is dismissed.

#### **RIGHT OF APPEAL**

17. The parties' attention is drawn to – Section 57(1) of the CSOS Act of 2011 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 thirty (30) days after the date of delivery of the order of the adjudicator. ”

DATED AT DURBAN on <sup>17</sup>December 2019



ADJUDICATOR  
MS T.P QWABE

