



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

Case Number: CSOS02558/KZN/18



IN THE MATTER BETWEEN
ALEXANDRA JANE MIDDELHOVEN
(Applicant)

ADJUDICATION ORDER
DATE: *17th March 2019*
Community Schemes Ombud Service
T: +27 (010) 593 0533 | F: +27 (010) 590 6154
Website: www.csos.org.za
Fraud Hotline: 0800 701 701

And

TRUSTEES OF OYSTER COVE BODY CORPORATE /
UNLIMITED TOWNHOUSES
(Respondent)

ADJUDICATION ORDER

EXECUTIVE SUMMARY

Category of dispute: in respect of general and other issues

1. The Applicant seeks an:

declaring that the Applicant has been wrongfully denied access to information or documents and requiring the Body Corporate to make such information or documents available within a specified time.

INTRODUCTION

2. The Applicant Alexandra Jane Middelhoven an adult female and who is the owner of Unit 201, 41 North Beach Road, Oyster Cove Body Corporate, Umdloti Beach, Ethekwini, KwaZulu-Natal,4319.
3. The Respondent is the Oyster Cove Body Corporate a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No. 8 of 2011(STSMA) which is situated at the Oyster Cove, 41 North Beach Road, Umdloti Beach; alternatively the Respondent is Unlimited Townhouses (UTH) (Managing Agents), situated at Block B Teichman Building, 1 Flamboyant Avenue, Glen Anil.
4. The Applicants are the registered owner of Unit 201 in the sectional title complex of the Respondent in terms of Section 1 of the Act.
5. The application was brought in terms of s 38 of the Community Schemes Ombud Service Act No. 9 of 2011 (CSOS Act).

Section 39 of the CSOS Act provides that: "An application made in terms of section 39 must include one or more of the following orders:

(7) In respect of general and other issues—

(a) An order declaring that the applicant has been wrongfully denied access to information or documents and requiring the association to make such information or documents available within a specified time."

6. 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. The application includes a statement of case which sets out the relief sought by the Applicants.

7. A Notice of Set Down was sent out on 09th September 2019 and it was communicated to all parties. The adjudication hearing took place on 01st October 2019 and only the Applicant was present.
8. The Applicant represented herself and there was no person representing the Respondent.

RELEVANT STATUTORY PROVISION

9. 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”.

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

11. 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.”



12. 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”.

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

14 SUMMARY OF RELEVANT EVIDENCE (That relating to the issues in dispute)

Applicant’s Submissions

- 14.1 The Applicant states that they (she and her husband) their flat 201 Oyster Cove off plan in 1995/6. The Applicant states her husband (she stands to corrected) was the first chairman of the body corporate and was the chairman for several years.
- 14.2 The Applicants states that they have a long history with UTH, especially with the founder of UTH, Basil Smith, who unfortunately has since passed away. The Applicant submits that the communication issues essentially began when they received a letter from UTH, dated 24th January 2018 with the subject matter written “OYSTER COVE BODY CORPORATE – UNIT 201- CONCERNS ABOUT YOUR UNIT
- 14.3 The Applicants states that essentially the concerns were that their flat had been let out as a “holiday let” and there were concerns about the “comings and goings of unknown persons”. The Applicants submits that the letter further stated that “holiday letting “is against current body corporate rules. The Applicant states that the “complaint was received at the end of January 2018, month later after the “holiday season”.
- 14.4 The Applicants submits when she enquired as to who had laid the complaint (apparently three (3) persons) no response or communication was received

neither from the UTH, or the trustees, thus not affording the tenants or we an opportunity to respond or reply.

- 14.5 The Applicants submits that they had moved to their house in Bantry Bay, Umdloti at the end of 2004 and that necessitated that the flat be rented out. The Applicant submit that the tenant in question took occupation of flat 201 Oyster Cove as of the 1st December 2017 and as with the body corporate rules, forwarded to UTH, the name and ID numbers of the persons authorised to have access to the flat.
- 14.6 The Applicants submits that on 17th August 2018, the en suite bathroom of flat 201 Oyster Cove was completely flooded, the water emanating from the floor above. The Applicant states that, if it had not been her domestic worker, serious damage would have occurred to the newly laid laminated flooring.
- 14.7 The Applicant submits that the email correspondences dated 19th, 22nd and 26th August 2018 and further on 03rd and 04th September 2018 regarding that incident was sent to UTH and the trustees. The Applicant states that, once again no response was forthcoming.
- 14.8 The Applicant submits that on 07th September 2018 received an email from Gavin Kuiper with letter attached having the following heading, "process for communication at the Oyster Cove body corporate". The Applicant submits that the essence of the email was *"owners should reduce all their concerns to writing and forward their communications to the trustees via UTH, for the purposes of perpetuity and proper historical record keeping. The letter further stated that UTH will in turn facilitate all communications between the body corporate and the owner as part of our secretarial service we render on the body corporate behalf"*.
- 14.9 The Applicant states that she sent a response regarding the aforesaid via her email dated 10th September 2018 where she stated the following, *"further to our earlier 9h00 telephonic conversation this morning, your emailed response was received at 15 h41. May I bring to your URGENT ATTENTION that all*



correspondence – documentation attached, was emailed to Pam Govender, portfolio manager, as well as the trustees that I am aware of. The UTH secretarial service (which your claim to render) has been severely lacking in that I still await clarification as to the issues raised – 19/08/2018 to 10/09/2018. Your emailed response clearly shows you have no clue as to what has transpired since the 19th August 2018.”

14.10 The Applicant states that in desperation as there was no communication, she then emailed Tracey Brown (Web Master and Quality Control Senior Manager) who on the 11 September 2018 emailed and requested Gavin Kuiper (carbon copied Jessica Sujana and Pam Govender to “*please give feedback on queries raised between 19th August and 10th September*”. To date no response.

14.11 The Applicant submits that on 27 September 2018 there was a problem with a geyser. The Applicant states that UTH was unable or willing to provide the relevant information requested. The applicant submits that the geyser is situated on “common property” and should therefore be covered by the body corporate insurance. The Applicant states that, that was initially denied, and several excuses were given as stated on the email correspondences dated 27 and 28 September 2018.

14.12 The Applicant states that on the email dated 28 September 2018 Jessica Sujana requested that in the light of “*breakdown in communication, please in future address all communications to myself and I will address same.*” The Applicant states that subsequently has been done.

14.13 The Applicant states that she sent an email correspondence dated 01 and 05 October 2018 to Jessica Sujana requesting clarification as to the reimbursement of the replacement of the geyser (essentially should be covered by the body corporate insurance as the geyser is situated in the common property). The Applicant’s email further states “*that the repair was carried out by Dolphin Coast Plumbers, the preferred service provider. Due to the uncertainty of the legality of the claim the amount of R 7500 was settled*

by ourselves, as we feel it is unfair that the service providers be held ransom to body corporate issues and need to be paid timeously for services rendered.”

14.14 The Applicant submits that R 4700 was refunded to them by the UTH after having to request reimbursement which was not immediately forthcoming. The Applicant states that it took UTH two (2) weeks to transfer the money paid out to them by the insurance company.

14.15 Lastly the Applicant states that issues regarding the minutes pertaining the AGM which was held on 6 October 2018 are either not responded to or an unsatisfactory response is provided. These are Applicant submissions in a nutshell, the detail submission can be found in the document titled “In Summary”.



15. **Respondent's submissions**

15.1 The Respondent did not submit their oral submission as they were not present at the hearing neither did they submit written submission regarding the allegations made by the Applicant against them.

15.2 Therefore there was no evidence tendered before me which prove to be contrary to the version of the Applicant.

16 **EVALUATION OF INFORMATION AND EVIDENCE OBTAINED**

16.1 In the absence of the Respondent disputing the version of the Applicants, the version submitted by the Applicants must prevail. In any event, there is no reason to believe that the applicant's claim is not plausible.

16.2 It is apparent that the dispute between the Applicant and the Respondent regarding access to information. This is evidenced by various email correspondences between the Applicant and the Respondent, which most of the time has been either ignored or not responded to timeously.

16.3 I have observed from the documentary evidence that the Applicant at some stage must go to length in order to get the Respondent to respond or to furnish her with the information she requires as the member of the Body Corporate.

16.4 It must be noted that the right to access to information is the constitutionally recognised right. It must be further noted that section 2 of the Constitution, 1996 (“the Constitution”) stipulates that, “this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

16.5 It must be noted that section 32(1) of the Constitution stipulates that, “everyone has right to access –

(a)

(b) any information that is held by another person and that is required for the exercise or protection of any rights.”

16.6 It is pertinent at this juncture to indicate that the Promotion of Access to Information Act 2, 2000 (Act 2 of 2000) (“PAIA”) was enacted in order to give effect to section 32 of the Constitution. It must be noted that the motivation for giving effect to the right of access to information is to foster a culture of transparency and accountability both in public and private Bodies; and to promote a society in which the people of South Africa have effective access to information, to enable them to more fully exercise and protect all their rights.

16.7 The PAIA defines persons as follows, “persons” means a natural or juristic person. It therefore follows that the Body Corporate and the Managing Agents in this case UTH are both juristic persons established under Sectional Title Schemes Management Act, 8 of 2011 (“STSMA”) and Companies Act, 2008 as amended respectively.

16.8 Notwithstanding that the Applicant did not request such information in terms of PAIA, the denial of her Constitutional right to access to information was invalid as there was no reason furnished for such refusal. It must be noted that in this

case the refusal was by the conduct of the Respondent not responding to the Applicant's requests which was submitted to them.

16.9 In addition section 39(7) gives the Applicant the ability to exercise her right to access to information and she has substantiated her application.

17 **ADJUDICATION ORDER**

In the circumstances, the following order is made:

17.1 the Applicant has been wrongfully denied access to information or documents.

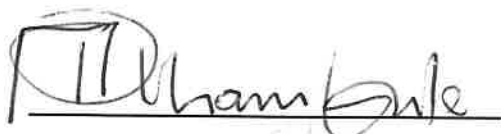
17.2 the Respondent must within fourteen (14) days of the delivery of this order provide the Applicant with all the information or documents she is entitled to or she may so request thereafter;

17.3 the Respondent must provide the Applicant with a response, information or document(s) requested by the Applicant within fourteen (14) days of her so requesting such information.

RIGHT OF APPEAL

18 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 31 October 2019



ADJUDICATOR: T KHAMBULE

