



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

Case Number: CSOS03204/KZN/19

IN THE MATTER BETWEEN

ANDREW GEORGE

(Applicant)

And

INKUNGU HOMEOWNERS ASSOCIATION (HOA)

(Respondent)



ADJUDICATION ORDER

EXECUTIVE SUMMARY

Category of dispute: in respect of scheme governance issues.

1. The Applicant seeks an order:
declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision.

INTRODUCTION

2. The Applicant is Andrew George an adult male who is the owner of Unit 13, at Inkungu Estate.

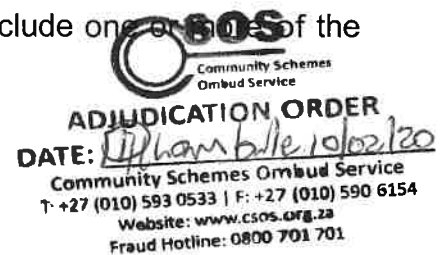
3. The Respondent is Anton Nieuwoudt who is the chairman of the Inkungu Homeowners Association, a company established in terms of the Companies Act, as amended.
4. The Applicant is the registered owner of one of the units in the Inkungu Estate sectional title complex in terms of Section 1 of the STSMA Act.
5. 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:

(7) In respect of 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 02nd December 2019 and it was communicated to all parties. The adjudication hearing took place on 19th December 2019, both parties were present.
8. The dispute between the parties is about the governance issues of the scheme. The Applicant alleges that the Inkungu Homeowners Association (Inkungu HOA) is interfering with the governance affairs of the Inkungu Body Corporate which is established in terms of the Sectional Titles Schemes Management Act No. 8 of 2011.



9. I note that the Respondent has raised a point in *limine* regarding the non-joinder of the Body Corporate as it is the interested party. I further note that the Applicant's reply to the point in *limine* raised is that "I do not have a dispute with the Inkungu Body Corporate, but I have dispute with the Inkungu HOA".

10. It must be noted that in his application for dispute resolution the Applicant articulated his prayer as follows in the section of the form headed 'Relief sought' :

"1. With respect to Clause (39)(3)(c) – that is an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision.

2. We want to receive a direct declaration issued from the legal and final authority of the office of the Ombudsman, to once and for all resolve our governance between the Body Corporate and the HOA, with regard to which of these two independent entities is legally responsible for, and should take precedence with respect to the management and daily control of the Inkungu Estate.

3. Should the Ombudsman's office define that the Body Corporate (and STSMA) is the entity legally responsible to manage and control the Estate, we would then additionally like a directive, giving authority to the Body Corporate to dissolve the present Body Corporate Board of Trustees, which were illegitimately and unilaterally installed by Mr Nieuwoudt and two owners, when all the other members of the Body Corporate who were present at the recent illegitimate "AGM" walked out of the meeting because of the legally unacceptable Body Corporate agenda. This will enable proper nominations and legitimate elections of Trustees to take place.

4. Finally, we would either like some confirmation or clarification supplied to us of our overview regarding our perceived future general function of the HOA." (My underlining)

11. It must be further noted that the Applicant is a lay person in law.

12. I now turn to the Respondent's submissions which are addressing the aforesaid relief sought by the Applicant, which are relevant and are point in *limine* in this dispute.

Ad item 1

14. The Respondent submits that the contents of this are noted, however in this regard the Applicant is seeking relief against the Body Corporate without notifying it. The Respondent respectfully submits that such relief would be improper and that any such application can only be made on formal notice to the Body Corporate.

Ad item 2

15 The Respondent note the contents hereof but again note that the relief is sought against the Body Corporate without notice and that as per the above, such relief without formal notice and the opportunity to make representations would be improper.

16 I think it is of paramount importance to mention at this juncture that our office received a correspondence dated 29 November 2019 from McGarvie & Associates who are representing the Respondent. The said letter was, amongst others addressing the issue of notices of set down of the matter, but of particular note is paragraphs 5, 6, 7 and 8 which respectively states the following: *“With particular reference to our letter of 07 October 2019 and our client’s submissions of 05 August 2019 we note that we believe that the matter is not ripe for hearing as relief has been sought against a party who has not been cited. We note that the Complainant seeks relief against Inkungu Estate Body Corporate but has brought this matter against Inkungu Estate Homeowners Association, two separate and distinct entities.*

Alternatively, the matter stands to be dismissed owing to the Complainant’s failure to notify the party against whom it seeks relief.

As per our previous submissions on this matter, we respectfully submit that the failure to notify a party against whom relief is sought is plainly prejudicial. Further, to have matter arbitrated without affording that party an opportunity to make representation would be grossly irregular and likely to cause a manifest injustice.”

17 During the adjudication hearing the Respondent submitted a viva voce evidence as follows: *“The relief has been sought against the incorrect party and the parties have not been afforded an opportunity to defend themselves.*

17.1 *The Respondent states that the Complainant (Applicant) has sought relief against Inkungu Estate Body Corporate and its trustees but brought its complaint against the Inkungu Estate Homeowners Association.*

17.2 *Community Schemes Ombud Service (CSOS) and Complainant the were made aware of this August as well as in several items of correspondence in the interim. To date the defect has not been remedied*



17.3 While CSOS has a broad range of power to address the issues facing communal living schemes the notion of seeking relief against parties who are unaware of the matter against them defeats any notion of fairness.

17.4 This defect is fatal to the application as it would be gross injustice to hear argument or reach a finding without affording the parties against whom relief is sought to defend themselves.”

18 Having heard the above, and in light of the relief sought by the Applicant, now the question arises; which is, can a party which was not party to initial proceedings 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.

19 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.

20. It is my considered view that after having considered both the documentary and *viva voce* evidence of both the Applicant and the Respondent and having considered the relevant case law, considering the relief sought by the Applicant as aforesaid. It is my judgment that the Body Corporate should have been cited as a party to this dispute. Failure to cite the Body Corporate renders this application defective and therefore stand to be dismissed.

21. **ADJUDICATION ORDER**

In the circumstances the application is hereby dismissed.



22 **RIGHT OF APPEAL**

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 10 FEBRUARY 2020



ADJUDICATOR

MR T KHAMBULE



ADJUDICATION ORDER

DATE: 10 February 2020

Community Schemes Ombud Service

T: +27 (010) 593 0533 | F: +27 (010) 590 6154

Website: www.csos.org.za

Fraud Hotline: 0800 701 701