



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

**Case No: 003361/GP/2019
3367/GP/2019
3369/GP/2019
3365/GP/2019
3053/GP/2019
3368/GP/2019
3051/GP/2019
3042/GP/2019
3360/GP/2019
3069/GP/2019
3363/GP/2019**



In the matter between

**CAROLINE BLOSE (VALIDITY OF MOI)
DG LAHTI (VALIDITY OF MOI)
RENE TRYTSMAN
NOKUTHULA NHLAPO
TK PANAS
LN TYOPO (BACKDATING OF HOA LEVY)
N PHALADZI (VALIDITY OF MOI)
LN TYOPO (VALIDITY OF MOI)
N PHALADZI (BACKDATING OF HOA LEVY)
DG LAHTI (BACKDATING OF HOA LEVY)
CAROLINE BLOSE (BACKDATING OF HOA LEVY)**

**(FIRST APPLICANT)
(SECOND APPLICANT)
(THIRD APPLICANT)
(FOURTH APPLICANT)
(FIFTH APPLICANT)
(SIXTH APPLICANT)
(SEVENTH APPLICANT)
(EIGHTH APPLICANT)
(NINTH APPLICANT)
(TENTH APPLICANT)
(ELEVENTH APPLICANT)**

AND

RIVERVIEW ESTATE HOMEOWNERS ASSOCIATION

(RESPONDENT)

ADJUDICATION ORDER

EXECUTIVE SUMMARY

This is an application for dispute resolution in terms of the following section of the Community Schemes Ombud Service Act:

- Section 39 (3) (d) in respect of scheme governance issues;
- Section 39 (1) in respect of financial issues;

Applicants seeks an order in the following terms:

- (a) The Applicants disputes the validity alternatively the fairness of the new MOI;
- (b) The Applicant seeks a reversal of an HOA levy, that was recovered from the Applicants.

The order is in line with Section 39 (3) of the CSOS Act No.9 of 2011 (the CSOS Act).

FINDINGS

The relief sought by the Applicant is .

INTRODUCTION

THE PARTIES

1. The First and Eleventh Applicant is CAROLINE BLOSE the registered owner of Unit 7, Riverview Extension 111, Erf 1673, Ally Way, Portion 16, Lonehill Farm, Lonehill, Sandton, GAUTENG PROVINCE.
2. The Second and Tenth Applicant is DAYLEEN GOODMAN LAHTI the registered owner of Unit 22, Riverview Extension 111, Erf 1649, Ally Way, Portion 16, Lonehill Farm, Lonehill, Sandton, GAUTENG PROVINCE.

3. The Third Applicant is RENE TRYTSMAN the registered owner of Unit 29, Riverview Extension 111, Erf 1671, Ally Way, Portion 16, Lonehill Farm, Lonehill, Sandton, GAUTENG PROVINCE.
4. The Fourth Applicant is NOKUTHULA NHLOPE the registered owner of Unit 12, Riverview Extension 111, Erf 1673, Ally Way, Portion 16, Lonehill Farm, Lonehill, Sandton, GAUTENG PROVINCE.
5. The Fifth Applicant is TK PANAS the registered owner of Unit 18, Riverview Extension 111, Erf 1673, Ally Way, Portion 16, Lonehill Farm, Lonehill, Sandton, GAUTENG PROVINCE.
6. The Sixth and the Eighth Applicant is LN TYOPO the registered owner of Unit 24, Riverview Extension 111, Erf 1649, Ally Way, Portion 16, Lonehill Farm, Lonehill, Sandton, GAUTENG PROVINCE.
7. The Seventh and the Ninth Applicant is N PHALADZI the registered owner of Unit 20, Riverview Extension 111, Erf 1649, Ally Way, Portion 16, Lonehill Farm, Lonehill, Sandton, GAUTENG PROVINCE.
8. The Respondent is the Riverview Estate Homeowners Association, a community scheme as defined in the CSOS Act No. 9 of 2011 and to which it would be convenient to refer to as the "HOA". The Respondent made written submissions.
9. This is an application for dispute resolution in terms of Section 38 of the Community Ombud Services Act No.9 of 2011. The application was made in the prescribed form and lodged with the Gauteng Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.
10. This application is before me because of a referral sent by the Gauteng Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.
11. The parties entered an appearance in terms of the Notice of Set Down as contemplated in Section 48(4) of the Community Schemes Ombud Service Act No.9 of 2011.

APPLICABLE PROVISIONS OF THE ACT

12. The hearing was conducted in terms of section 38 of the CSOS Act No,9 of 2011 which provides that – *“Any person may make an application if such person is a party to or affected materially by a dispute”.*
13. 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.”*
14. Section 47 provides that – *“on acceptance of an application and after receipt of any submissions from affected 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’.*
15. 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”.*
16. Section 50 of the Act provides as follows: *“The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator –(a) Must observe the principles of due process of law; and (b) Must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and (c) Must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.”*

SUMMARY OF EVIDENCE

Applicant’s submissions

VANESSA DU TOIT (DULY MANDATED BY APPLICANTS)

17. The Applicants submitted that while the MOI of the HOA was redrafted to ensure it was fair to all parties, there are still specific clauses in the new MOI which the Applicant deem unfair to a particular group of members, more particularly the Sectional Title Unit owners.
18. According to the Applicants, members of the HOA who own sectional title units are seemingly treated differently notwithstanding the fact that each member has equal access to the HOA common property facilities.
19. The Applicant further submitted that some of the clauses which they deemed unfair includes amongst others, the unfair weighting/participation value allocation, and the unfair allocation of HOA levies towards common property which is enclosed on freehold private properties for the exclusive use by the owner.
20. According to the Applicant these concerns were voiced at the AGM held on the 18th of September 2019. A request was made for an SGM to be convened which was not accepted by the Directors of the HOA. A vote was passed in favour of the new MOI.
21. The Applicants submitted that the old MOI worked perfectly in governing the HOA, there were no specific problems or issues raised prior to the new MOI being voted in at the AGM held in September 2019.
22. According to the Applicants the weighting/participation value system that was introduced by the new MOI, gives an unfair advantage to members who own "freehold stands".
23. The allocation of voting rights is unfairly skewed in favour of owners of freehold properties, and owners of Sectional Title Units are allocated voting rights per block.
24. The Applicants submitted that the increase of HOA levies is attributed to expenses as it relates to common property.
25. According to the Applicants the riverfront freehold additional land has been registered as common property and should as a result be accessible to all members of the HOA.

26. As a result of the excessive levies (which were backdated), members are finding it difficult to sell or rent their units, since the levies are not proportionate to the size of the units in question.
27. The Applicant further submitted that they sought the old MOI reinstated, since there is no valid reason why it had to be amended/redrafted.
28. Further the Applicant sought to have one vote per unit as opposed to the current voting rights allocation which is skewed in favour of the freehold property owners, as well as participate in amendments made to the MOI of the HOA.
29. The Applicant's further sought and Umbrella EXCO, with equal representation of both freehold members and unit members, with all members of the HOA governed by the same MOI.
30. According to the Applicant they sought the Sectional Title Unit members to be governed by the STSMA and seek exemption from certain clauses of the MOI.

APPLICANT'S PRAYERS

- (a) The Applicants disputes the validity alternatively the fairness of the new MOI;
- (b) The Applicant seeks a reversal of an HOA levy, that was recovered from the Applicants.

RESPONDENT'S SUBMISSION

YOGANDRAN NAICKER (CHAIRPERSON)

31. The Respondent submitted that the Directors of the HOA together with the Managing Agent spent months consulting with their legal representatives and preparing a new MOI to ensure that it was fair/equitable and complied with the applicable legislative framework.
32. According to the Respondent the reason for updating the old MOI was to ensure equity and fairness in the manner that members paid levies, an example given was that of JG Williams who was paying R8977.42 monthly, as opposed to an owner of a Sectional Title Unit who paid R245.71 for the same infrastructure provided for by the HOA.



33. Mr Williams deposed to an affidavit confirming that prior to the adoption of the new MOI, he paid an amount of R8977.42 per month, which represented 10.6 percent of the Riverglades section of the HOA.
34. After the adoption of the new MOI Mr Williams levy has reduced to R5490.34 per month.
35. According to the Respondent the revised MOI was distributed to all the members of the HOA in good time prior to the Annual General Meeting.
36. The Respondent further submitted that the revised MOI was adopted by special resolution with 82.76 percent of the members voting in favour of the adoption of the new MOI.
37. The Respondent submitted that a large number of the Sectional title unit members did not vote in favour of the new MOI. To accommodate these members a meeting was arranged with the Directors of the HOA, where the concerns of the Sectional Title unit owners could be ventilated.
38. With regard to the levies the Respondent submitted that the HOA levy covers all common ground usage of the development (gardens, security, infrastructure, maintenance etc).
39. Further, the development is a mixed-use development of both freehold and Sectional Title units, which regardless of the capital expenditure all members are entitled to the same use of the common property, and as such the HOA levy should be applicable at the same rate to all members.
40. The Respondent further submitted that the Applicant has raised the issue of backdating of levies, in order to avoid the additional costs which, the HOA was under recovering for 3 months prior to the AGM being held.
41. According to the Respondent during these 3 months the Applicants had full usage of the common property and should therefore pay the additional costs.
42. The Respondent submitted that at a meeting held on the 17th of October 2019, the Directors of the HOA explained to the Sectional Title unit owners the reasons for the increase in levy was primarily to fund much needed maintenance and to build up a reserve fund.

43. The Directors further requested the owners of the Sectional Title units suggest other alternatives in order to comply with the legislative framework relating to maintenance and the creation of a reserve fund, but have to date not received a response from any of the Sectional Title Unit owners.

RESPONDENT'S PRAYERS

None submitted.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

44. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.

45. 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.

DISCUSSION

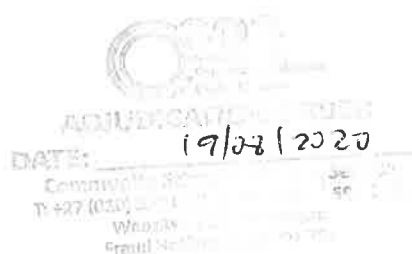
46. I have perused all written submissions and taken into consideration all submissions made by the parties.

47. The relief sought by the Applicant is provided for in Section 39 (3) (d) of the CSOS Act which states that, "In respect of scheme governance issues, an order declaring that a scheme governance provision, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable and requiring the association to approve and record a new scheme governance provision...".

48. The Applicants as part of their final submissions to the Adjudicator conceded, that at the Annual General Meeting, which was held in September 2019, they were outvoted.


ADJUDICATOR ORDER
DATE: 19/07/2020
Community Scheme Ombudsman Services
T: +27 (0)21 295 6255 F: +27 (0)21 295 6256
Website: www.csos.org.za
Fraud Hotline: 021 295 7005

49. The Minutes of the Annual General Meeting held on the 12th of September 2019 under clause (8) Special Business Approval of the New MOI, states under further discussions, “It was noted that owners who were negatively impacted financially by the new MOI would naturally not be in favour of it, but were urged to understand the implications and unfairness of other owners who have in fact carried an abnormally high and unfair share of the costs for many years”.
50. The above minutes states that the Directors of the HOA undertook to convene a further meeting to discuss issues raised by owners which included amongst others the participation quota, specifically where the Body Corporate block only has 2 sections, and clause 22.1 of the MOI which potentially gives the HOA too much power.
51. With regard to the levies, the following was noted in the minutes, “The Directors were of the view that the main increase in the Body Corporates levies was not due to the changed MOI but due to the maintenance budgeted for them for the current year, to attend to annual roof maintenance which has not been attended previously as well as external building maintenance and paint required”.
52. To conclude the discussion under this particular item of the minutes the following was recorded, “It was noted that 75% of the meeting quorum needed to vote in favour of the new MOI in order for it to be adopted. Adoption of the new MOI was put to the vote and results, as counted by the Managing Agent and verified by Bartho van Tonder, In favour – 82.76%, Not in favour – 17.24%. The new MOI was adopted and will be lodged as necessary”.
53. The North Gauteng High Court, in the matter of **Wilhelm Schreck Croucamp and Others v Hazeldean Retreat Partnership and Another Case No 15860/2018**, considered the lawfulness of the exercise by a Developer of a sectional title scheme of its weighted voting power in the passing of a resolution to reappoint a particular healthcare provider, for the purposes of providing frail care services to the residents of the scheme. In considering the reappointment of the healthcare provider, the Developer determined that the claim against the HOA would be gravely prejudicial to its members and the development at large. The



developer utilised its weighted vote, the resolutions were adopted, and the damages claim settled.

54. The Court held that the purpose of Section 60 of the Companies Act had to be taken into account, which is to obtain the same result that a normal shareholders meeting would have achieved but in an informal manner. The Court held that the Developer was acting within its rights in terms of Section 60 of the Companies Act.
55. Members of the Hazeldean community scheme argued that the resolution be declared oppressive or prejudicial conduct that unfairly disregards the rights of the owners in terms of Section 163 of the Companies Act. The Court held that the focus should be on whether the result of the resolution was oppressive or unfairly prejudicial to the interests of the members of the HOA, and whether the conduct was unlawful.
56. The court further held that it is a **fundamental principle of corporate law that by becoming a shareholder, members undertake to be bound by the decisions of the majority. A minority shareholder cannot seek relief merely because it was outvoted on a certain issue.**
(my emphasis)
57. It is the Adjudicator's finding that the abovementioned High court decision sufficiently demonstrates that the Court's regard the exercise of weighted voting power by a particular group or members in a Sectional Title Scheme as lawful provided that it is exercised in moderation.
58. There is no evidence before the adjudicator proving or suggesting that the Respondent has not acted in the best interest of the scheme.
59. It follows that the Applicants has not succeeded in their case against the Respondent and is not entitled to the relief sought.
60. For all the reasons which have been set out above, I can find no justification for the relief sought in respect of the Applicant's prayers for relief.
61. Accordingly, the Applicants complaint against the Respondent is hereby dismissed.



POWERS AND JURISDICTION OF THE ADJUDICATOR

62. The Adjudicator is empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the Community Schemes Ombud 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.

ADJUDICATOR'S ORDER

63. Accordingly, for the reasons stated above, I make the following order:

- (a) The relief sought by the Applicants against the Respondent is dismissed.
- (b) The Applicant's prayers for relief, is hereby dismissed for the reasons provided add paragraph 47 to 61 of this order.
- (c) No order is made as to costs.

RIGHT OF APPEAL

64. The parties' attention is drawn to – Section 57(1) of the CSOS Act of 2011 refers – “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”

SIGNED AND DATED ON THIS 7TH DAY OF AUGUST 2020.


AJ ANDREAS
ADJUDICATOR


ADJUDICATION ORDER
DATE: 19/08/2020
Community Schemes Ombud Service
T: 427 (020) 192 0525 • F: 427 (020) 192 0526
Website: www.csos.org.za
Fraud Hotline: 0800 705 705