

ADJUDICATION ORDER
DATE: 12/07/2020
Community Schemes Ombud Service
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**ADJUDICATION ORDER IN TERMS OF SECTION 53 AND 54
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Case Number: CSOS002091/GP/19

IN THE MATTER BETWEEN

HAROLD GERALD JOOSTE

(APPLICANT)

and

DIRECTORS OF BRONBERG RETIREMENT ESTATE

(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 (6) in respect of works pertaining to private and common areas;

Applicant seeks an order in the following terms:

The Applicant seeks an order to convene an SGM to table and discuss enclosures of common property.

The order is in line with Section 39 (6) of the CSOS Act No.9 of 2011 (the CSOS Act).

FINDINGS

The relief sought by the Applicant is denied.

INTRODUCTION

1. The Applicant is Harold Gerald Jooste the registered owner of Unit 132, Bronberg Retirement Estate, 47 Midas Avenue, Olympus, Pretoria, GAUTENG PROVINCE. The Applicant made written submissions.
1. The Respondent is the Bronberg Retirement 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 failed to make written submissions.
2. 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.
3. 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.
4. 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.

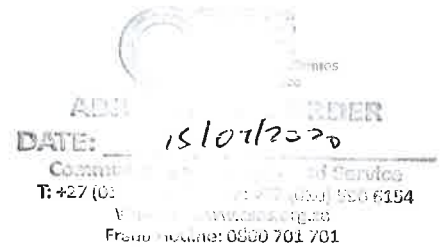
APPLICABLE PROVISIONS OF THE ACT

5. 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"*
6. 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"*.
7. 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"*.

8. Accordingly, a certificate of Non- Resolution was issued in terms of Section 48(4) of the CSOS Act No.9 of 2011. The Ombud therefore, referred the matter to adjudication, in terms of Section 47 of the Act.

SUMMARY OF EVIDENCE

Applicant's Submissions



9. The Respondent submitted that despite the parties concluding a settlement agreement on the 10th of June 2018, the Directors of the Respondent have continued to approve enclosures of the common property without following procedures as per applicable legislative framework.
10. To support his submission, the Applicant has forwarded several photos of enclosures to the CSOS.
11. According to the Applicant, the Directors had stated in correspondence, that no gates of enclosures should be locked. Yet the Applicant discovered several gates locked in contravention of the directive from the Directors of the Respondent.
12. The Applicant further submitted, that he sought a ruling from CSOS confirming that only owners by a unanimous resolution may approve the enclosures of common property.
13. The Applicant therefore seeks an order that an SGM be held where owners can either vote in support of the enclosures or against.
14. According to the Applicant should a unanimous resolution not be supported by the owners, all the enclosures at the estate be removed.

APPLICANT'S PRAYERS

- (a) The Applicant seeks an order to convene an SGM to table and discuss enclosures of common property.

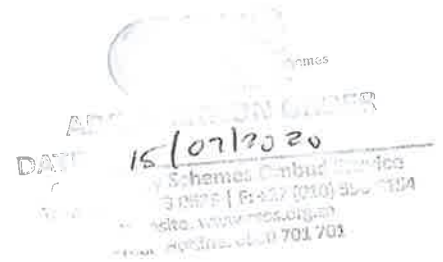
Respondent's Submissions

15. The Respondent failed to make submissions when requested to provide same to the Adjudicator on or before the 29th of June 2020, the Respondent's version is therefore not before the adjudicator.

16. The Respondent for whatever reason failed to make submissions despite the notice calling upon parties to make final submissions.

RESPONDENT'S PRAYERS

None submitted.



EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

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

18. 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

19. I have perused all written submissions and taken into consideration all submissions stated before me at the day of the hearing.

20. **Section 39 (2) (d) of the CSOS Act 9 of 2011**, provides as follows:

(d) An order for the removal of all articles placed on or attached illegally to parts of a common area or private area”.

21. **Section 13 (1) (g) of the Sectional Title Schemes Management Act** states that, “an owner must not use or permit his section or exclusive use area to be used for any other purpose as indicated on the Sectional Title Plan. Provided that with the written consent of all owners such section or exclusive use area may be used for the purpose as consented to”.

22. It is common cause that the parties at a Conciliation hearing convened in 2018. Agreed that the HOA would convene a Special General Meeting following the AGM, where the approval of the alterations to Unit 90 will be tabled for a special resolution. The Respondent further undertook to draft guidelines that will be tabled for approval at the AGM by special resolution that specifically pertains to alterations of common property.

23. **The Sectional Titles Schemes Management Act of 2011 defines special resolution as:**

“Special resolution means a resolution (a) passed by at least 75% calculated both in value and in number; of the votes of the members of a body corporate who are represented at a general meeting; or (b) agreed to in writing by members of a body corporate holding at least 75% calculated both in value and in number, of all the votes;

24. **Unanimous resolution** is defined as “a resolution (a) passed unanimously by all the members of the body corporate at a meeting at which (i) at least 80% calculated both in value and in number, of the votes of all the members of a body corporate are present or represented; and (ii) all the members who cast their votes do so in favour of the resolution; or (b) agreed to in writing by all the members of the body corporate.

25. At an Annual General Meeting held on the 15th of August 2018, the following special resolutions were adopted by members of the Respondent.

26. Special resolution 1, “to approve the alterations and improvements effected to the common property by unit 90”. The reason and effect were described in the minutes as follows, “The owner made improvements and alterations to the patio area situated at unit 90. The owner installed aluminium windows and extended the paving for the patio area. The alterations and improvements were done at the owner’s expense and the owner is liable for any maintenance, repairs or replacements required to the area”.

27. Special resolution 2, “it is resolved that the Directors of the Homeowners Association have the authority to deal with the approval of picket fences and enclosures of patios on common property. Should approval be granted all improvements will be subject to guidelines contained in the application forms and will be for the owners expense. All alterations that would affect the PQ of the property or the alienation of common property will be subject to **the requirements as pertained in the Sectional Title Act** as well as approval by owners by Special Resolution, with the support 75% of the voting rights exercised on the resolution”. The reason and effect are described in the minutes as follows, “The reason for the proposed Special Resolution is to authorise the Directors to approve improvements/alterations to the

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common property requested by and paid for by individual owners. The process will aid in limiting unnecessary delays and contribute to the harmonious running of the HOA”.

28. The MOI of the HOA at clause (8.17) makes provision for the following, “No owner or occupier shall alter or add anything to or on the Common Property (including balconies, patios and gardens) which in the discretion of the Directors is aesthetically displeasing or undesirable when viewed from the outside of the unit. All applications have to be submitted to the HOA for approval first”.
29. Looking at the evidence as a whole, the adjudicator finds that the Respondent acted reasonably within the powers of the Respondent to ensure compliance with the applicable legislative framework.
30. Accordingly, it is the finding of the adjudicator that the Respondent have not acted outside of their powers as conferred on the Respondent by the Act nor has the Respondent failed in their fiduciary duties nor been wilfully negligent in the exercise of their fiduciary duties.
31. There is nothing before the adjudicator to prove that the Respondent had not acted in the best interests of the scheme.
32. It follows that the Applicant has not succeeded in the Applicant’s case against the Respondent and is not entitled to the relief sought.

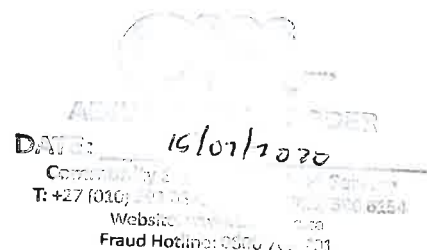
POWERS AND JURISDICTION OF THE ADJUDICATOR

33. 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.

ADJUDICATION ORDER

34. Accordingly, the following order is made;

- (a) The relief sought by the Applicant is denied.



(b) The Respondents have not acted outside of their powers as conferred on the Respondents by the applicable legislative framework.

(c) No order is made as to costs.

RIGHT OF APPEAL


35. 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 at SANDTON on this 17th OF JULY 2020.



AJ ANDREAS

ADJUDICATOR



ADJUDICATOR

DATE: 15/07/2020

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