

Julia Sehunelo

From: Julia Sehunelo
Sent: Tuesday, 22 October 2019 11:20 AM
To: judy@judyhunter.co.za; Sanjeev@raa.co.za; joe.moodley@gmail.com; girisha88@gmail.com; monique@clusterconsultants.co.za; cluster@iafrica.com
Cc: Julia Molupi
Subject: ADJUDICATION ORDER 2572
Attachments: CSOS 002572 GP 18.pdf; CSOS newPractice Directive on Dispute Resolution v2 21052019 (002).pdf

Tracking:

Recipient

Delivery

judy@judyhunter.co.za

Sanjeev@raa.co.za

joe.moodley@gmail.com

girisha88@gmail.com

monique@clusterconsultants.co.za

cluster@iafrica.com

Julia Molupi

Delivered: 2019/10/22 11:20 AM

Dear All

Attached hereto please find adjudication order.

Kindly note clause 25, 26, 31, 32, 34 and 35 of the practice directive attached hereto



ADJUDICATION ORDER

DATE: 22/10/2019

Community Schemes Ombud Service
T: +27 (0)11 593 6122 / +27 (0)11 590 154
Website: www.csos.org.za
Fraud Hotline: 0800 701 701



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

Case Number: CSOS002572/GP/18

IN THE MATTER BETWEEN

JUDY-ANN HUNTER

APPLICANT

and

LA GARITTA BODY CORPORATE

RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

This is an application for dispute resolution in terms of the following sections of the Community Schemes Ombud Service (CSOS) Act:

- Section 39 (3)(d) – *in respect of the 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;
 - (i) *to remove the provision*
- Section 39(7) - *In respect of general and other issues*
 - (b) *any other order proposed by the chief ombud*

Applicant seeks an order in the following terms:

- Permission to change the body corporate rules to allow the installation of one air conditioner per unit subject to certain requirements.
 1. It must be an inverter air conditioner with a maximum capacity of 1200 BTU.
 2. If it is visible on an area of wall to other units it must be covered in keeping with the look and feel of the complex.
 3. Any water drip outlet pipe must be directed into the gutter or down pipe and concealed.
 4. Each resident that wishes to install an air conditioner must make written request to the Trustees of the Body Corporate

The order is in line with Section 39 (3)(d)(i) and Section 39(7)(b) of the Community Schemes Ombud Service Act No.9 of 2011 (the CSOS Act).

FINDINGS

The Application be referred to the Chief Ombud in terms of section 6(9) of the Sectional Title Schemes Management Act, 8 of 2011.



INTRODUCTION

1. The Applicants are the registered owners and trustees or tenants of La Garitta Body Corporate, 12 Mafusa Road, Sunninghill, Johannesburg, GAUTENG.
2. The Respondent is La Garitta Body Corporate, a body corporate as defined by Section (2)(1) of the Sectional Title Schemes Management Act No. 8 of 2011, a scheme situated at 12 Mafusa Road, Sunninghill, Johannesburg, GAUTENG.
3. 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.
4. The adjudication hearing took place on 25 September 2019. This application is before me as a result 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.

5. The parties were duly served as contemplated in Section 48 of the Community Schemes Ombud Service Act No.9 of 2011.
6. The Respondent was represented by Monique Spronk, the managing agent of La Garitta Body Corporate.
7. Four Applicants lodged the same application against the body corporate, it was decided that the matters be combined, the applicants were Judy Hunter, Sanjeev Bhana, Sameshen Moodley, and Girisha Maharaj, the parties were not legally represented.

APPLICABLE PROVISIONS OF THE ACT

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 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. Section 50 provides that - *“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

APPLICANTS SUBMISSIONS



The Applicants were duly sworn in and testified as follows;



Judy-Ann Hunter

12. The Ms Judy-Ann Hunter had no objection in taking the prescribed oath and was duly sworn in. The Applicants were not legally represented.
13. The Applicant testified that she is the registered owner of unit 14, La Garitta Body Corporate and a trustee on the Board of the Respondent. The trustees received continuous requests from residents to install air-conditioners in their units due to extreme heat during the summer months. The trustees considered the applications in light of the body corporate rules. There were some objections raised by some residents that the air conditioners would be too noisy and would spoil the aesthetics of the complex.
14. Ms Hunter submitted that it was agreed at the trustee meeting that a test unit be installed in the unit of Ms Hunter. An inverter air-conditioner was installed and covered to compliment the look and feel of the complex. The air-conditioner was installed in October 2017, and subsequent to the installation no complaints were received regarding the aesthetics or noises as a result of the air-conditioner. She stated that her health has improved significantly since the installation of the air-conditioner.
15. Ms Hunter further mentioned that it was agreed at the next Annual General Meeting that the relevant changes to La Garitta Body Corporate Rules would be put to a vote, as a result a "round-robin" vote was conducted, the required 75% (seventy five percent) could not be reached.

Girisha Maharaj

16. Ms Girisha Maharaj had no objection in taking the prescribed oath and was duly sworn in.
17. The Applicant testified that she is the registered owner of Unit 2, at La Garitta Body Corporate and a trustee. Ms Maharaj shared the same sentiments that an air-conditioner would improve her quality of life and health. She mentioned that her unit was on the ground floor, the complex was extremely hot during the summer months and susceptible to insects such as Parktown Prawns. The installation of the air-conditioner would definitely make a difference. The Applicant further mentioned that she suffers from migraine and the heat does not assist her condition.

18. Ms Maharaj submitted that the installation of the air-conditioner will be paid for and maintained by the relevant owner.



Sameshan Moodley

ADJUDICATION ORDER
DATE: 22/10/2019
Community Schemes Ombud Service
T: +27 (0)10 590 6154 | F: +27 (0)10 590 6154
Fraud Hotline: 0800 701 701

19. The Applicant, Mr Sameshan Moodley had no objection in taking the prescribed oath and was duly sworn in.
20. Mr Moodley testified that he was a tenant at Unit 2 at the Respondent's scheme. He mentioned that he has an incurable skin condition which causes his skin. The condition is exacerbated by the extreme heat conditions. He indicated that the owner of the Unit was aware of his predicament and had no objection to the installation and maintenance of the air conditioner.
21. The Applicant further stated that he worked from home thus the installation of the air-conditioner will alleviate the itchiness and discomfort associated with his condition. He believed that his working environment will improve if an air-conditioner is installed.

Sanjeev Bhana

22. The Applicant, Mr Sanjeev Bhana had no objection in taking the prescribed oath and was duly sworn in.
23. Mr Bhana testified that he was the registered owner of Unit 34 and Chairman of the Board of Trustees of the Respondent. The Applicant stated that the main objective of lodging the dispute with the Community Schemes Ombud Service was to give residents of La Garitta and opportunity to give residents an opportunity to install air-conditioners. He indicated that following a previous resolution to install an air-conditioner at Ms Hunter's Unit, as a test case, the project was successful. There were no complaints about noises, or the aesthetics being affected by the air-conditioner.
24. The Applicant submitted that the matter was discussed at an AGM, with the intention to amend the rules to grant residents an opportunity to install air-conditioners. A resolution could not be reached, a round-robin resolution was proposed, again a resolution could not be reached due to the non-participation of some members.

25. The Applicant mentioned that a study was conducted which showed that an efficient air-conditioner was the best means of preventing heat-related illnesses. The circulation and filtered air were beneficial for asthmatic and allergy sufferers.
26. Mr Bhana alleged that he personally experienced the effects of extreme heat when his wife was pregnant with their son. She suffered sleep deprivation and their son also suffered the effects of the heat. He stated that their unit was northward facing, and the bedrooms get sunrays throughout the day.
27. The Applicant presented the proposed amendments and stated that the proposed amendment would enable residents to enjoy the benefits of air-conditioning their units in a way that minimises potential adverse visual and noise impacts to other residents at La Garitta.

APPLICANTS' PRAYERS



28. The Applicants prayed for the amendment of the Conduct Rules of La Garitta Body Corporate Rule 5.7 of the Conduct Rules.
29. Permission to change the body corporate rules to allow the installation of one air conditioner per unit subject to certain requirements. The proposed specifications were:
- 29.1 It must be an inverter air conditioner with a maximum capacity of 1200 BTU.
- 29.2 If it is visible on an area of wall to other units, it must be covered in keeping with the look and feel of the complex.
- 29.3 Any water drip outlet pipe must be directed into the gutter or down pipe and concealed.
- 29.4 Each resident that wishes to install an air conditioner must make written request to the Trustees of the Body Corporate

RESPONDENT'S SUBMISSIONS

The Respondent was duly sworn in and testified as follows:

30. Ms Monique Spronk had no objection in taking the prescribed oath and was duly sworn in.

31. Ms Spronk from Cluster Consultants & Administrators stated that she is the managing agent of La Garitta Body Corporate. She confirmed that she had the authority to represent the Respondent in this adjudication hearing.

32. The Respondent submitted that the concerns of the members related to the noise and changing the aesthetics of the scheme as a result of the air-conditioning installation. She stated that those concerns were addressed. Ms Sprout alleged that members of the body corporate were confused, they assumed that they will be obliged to install air-conditioners.

33. The Respondent indicated that the required 75% (seventy five percent) could not be attained to amend the rules. She mentioned that there were no written objections save for one objection that was submitted to CSOS. The Respondent believed that the value of the properties will appreciate in value if air-conditioners were installed.

RESPONDENT'S PRAYERS

34. The Respondent prayed that the proposed amended rules should address concerns raised such as noise and aesthetics.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

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

36. 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

37. I have perused all written submissions and taken into consideration all submissions stated before me.

38. The Applicants are trustees of the body corporate, save for Mr Sameshen Moodley. The Respondent is La Garitta Body Corporate. The scheme has five trustees, it is alleged that there was a resolution to test the viability of an air-conditioner was done in one of the units. Ms Hunter, a trustee of the body corporate agreed to the installation at her own costs. No complaints were received regarding noises or aesthetics as a result of the installation.

39. Clause 5.7 of the Body Corporate Rules state as follows:

"No air-conditioners are permitted to be installed. Any existing air-conditioners are to be removed immediately."

40. The Applicants sought to amend the clause referred to above but could not reach the required number of votes.

41. In terms of the STSMA definitions *"the quorum and the vote for a special resolution is counted, it is counted in number as well as vote value. At least 75% of members in number and value must vote in favour of the resolution or 75% of members agree to the resolution in writing, calculated in both number and value."* The Applicants could not reach the required number of votes.

42. The Respondent submitted that there were no written objections save for the submission to CSOS. The written submission related to matters which according to the parties were addressed.

43. Section 6(9) of the STSMA provides that – *"A body corporate or an owner who is unable to obtain a special or unanimous resolution may approach the chief ombud for relief."*

44. It is the finding of the Adjudicator that based on the evidence led together with supporting documents the matter should be referred to the chief ombud for relief in terms of Section 6(9) of the STSMA.

POWERS AND JURISDICTION OF THE ADJUDICATOR

45. 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



ADJUDICATION ORDER

DATE: 22/10/2019
Community Schemes Ombud Service
T: +27 (0)10 593 6154 | F: +27 (0)10 590 6154
Website: www.csos.org.za
Fraud Hotline: 0800 701 701

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

46. Accordingly, the following order is made;

(a) The Application be referred to the Chief Ombud in terms of section 6(9) of the Sectional Title Schemes Management Act, 8 of 2011.

(b) No order is made as to costs.

RIGHT OF APPEAL

47. 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 DAY OF OCTOBER 2019.



ML BULO

ADJUDICATOR

