



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

Case Number: CSOS 805/WC/17

IN THE MATTER BETWEEN

NICHOLAS MARTIN SINGER
(Applicant)

and

THE MARINA DA GAMA HOME OWNERS' ASSOCIATION
(Respondent)

ADJUDICATION ORDER

PARTIES

1. The applicant is Mr Nicholas Singer, the registered owner of a property described as No 18 Admirals Walk, being erf number 93517, Muizenberg, Cape Town, situated in the Marina da Gama housing estate ("the Estate").
2. The Respondent is the Home Owners Association of the Estate ("the HOA").
3. The hearing was held on 24 April 2018. The Applicant attended the hearing. The Respondent was represented by Messrs Allan Hepple and Eduardo Nunes, both members of the Architectural Committee of the HOA ("Archcom"). Mr Hepple is the chairman of Archcom, whilst Mr Nunes is an architect serving as such on Archcom.

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INTRODUCTION

4. 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 Western Cape Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.
5. This application is before me as a result of a referral sent by the Western Cape Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.

APPLICABLE PROVISIONS OF THE ACT

6. 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”.
7. 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”
8. 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”.
9. 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”.

10. **SUMMARY OF EVIDENCE**

The dispute between the Parties arose on account of the non approval by Archcom of the plans for the extension of his property by the Applicant. The Applicant is of the view that the HOA, as represented by Archcom, does not have the authority to deny approval of his plans on the grounds stated by them as they are restricted by the provisions of the governance documents of the HOA. The HOA (represented by Archcom) is of the view that the plans submitted by the Applicant significantly and negatively influences the streetscape of Admiral's Walk and that they have the jurisdiction to deny approval on those grounds.

11. **APPLICANT'S VERSION**

11.1 The Applicant confirmed that he is the owner of a property in the Estate and a member of the HOA. During the early part of 2017 he submitted plans to Archcom for their approval. The plans indicated a studio to be constructed on top of a “double” garage and implied the encroachment of the building line set by the local authority.

11.2 According to the Applicant, Archcom initially rejected the plan and insisted that the plan be referred to the City of Cape Town. The response to the plans was as follows: “Your drawings do not indicate building lines/setback. We have been instructed by the building development department of the City of Cape Town to refer any plans requiring building line setback departures to them, as a preliminary submission, in order that the departures be cleared before submission to the Marina da Gama Association for approval.”

11.3 The Applicant contended that he thereafter had his plans rectified by his architect to indicate the necessary building lines and setbacks whereafter he submitted same to the local authority's building department just to be told by them that plans are to be screened and approved by the HOA prior to submission to the City. The Applicant indicated that that had been the modus operandi beforehand in any event.

11.4 Subsequent to the referral by the City, the Applicant re-submitted his plans to Archcom, but was again denied approval. This time on the following grounds: “we cannot consent to the construction of a studio

built over the garage on the street boundary over the building line as it affects the streetscape.”

11.5 The Applicant stated that attempts by him thereafter to discuss the matter with Archcom and the HOA did not resolve his problem. He then formally lodged an appeal against the Archcom decision with the Executive Committee of the HOA (“Excom”). The appeal was turned down by Excom.

11.6 In the view of the Applicant:

11.6.1 The HOA (and Archcom) are governed by the Promotion of Administrative Justice Act, no 3 of 2000 (“PAJA”) and that the actions undertaken by them are administrative in nature. As such, Archcom is obliged to provide reasons for its decision;

11.6.2 Archcom is bound by the provisions of the constitution of the Marina da Gama Home Owners’ Association (“the Constitution”), which includes a design manual (“the Design Manual”) and the Marina da Gama Design Regulations (“the Design Regulations”);

11.6.3 The alleged adverse affect of the Applicant’s proposed alteration to his property on the streetscape of Admirals Way is not a factor that they can lawfully take into account or rely on in their decision as it falls outside the ambit of the Design Manual or the Design Regulations;

11.6.4 Decisions with respect to building line encroachments fall within the jurisdiction of the local authority and not the HOA or Archcom;

11.6.5 Neither Archcom nor Excom applied their minds to the application and both committees acted in a way which is unlawful and unreasonable;

11.6.6 Neither Archcom nor Excom has any authority to rule on aesthetic aspects outside of the Design Manual and the Design Regulations and in rejecting his plans, they are acting outside of their mandate and ultra vires;

11.6.7 Archcom and Excom cannot make up standards as they go along;

11.6.8 Archcom jumped from streetscape as a criterium to parking provision and use of the proposed extension.

11.7 In support of his contention that Archcom and Excom do not uniformly apply rules, the Applicant referred to the case of his neighbour, a Mr Lees (whom also had a plan rejected on, in the view of the Applicant, factors that fall outside of the Constitution).

11.8 The Applicant stated that he is of the view that Archcom are interpreting the guidelines to which they are bound, broadly and not in the specifics required by the Design Manual and the Design

Regulations. The Applicant expressed the view that Archcom can only be guided, very specifically, by the provisions of the Design Manual and the Design Regulations. They, according to the Applicant, are limited to overseeing standards in terms of the Design Manual and the Design Guideline.

- 11.9 The Applicant furthermore contended that the minutes of the meeting of Excom held on 14 November 2017, clearly state that the Design Guidelines should be amended to include a reference to streetscapes as a factor to be taken into account in approving building plans. The Applicant stated that he saw this as an admission on the part of Archcom that streetscapes is not currently one of the expressed criteria against which building plans can be measured.
- 11.10 The Applicant stated that he is of the opinion that the plans submitted by him comply in all respects to the Design Manual and the Design Regulations and should be approved. With regard to section 8 (8) of the Constitution (which refers to waivers), the Applicant stated that, in his view, these waivers can only refer to waivers of the explicitly stated terms of the Design Manual and the Design Regulations. The Design Manual, according to the Applicant, contains "suggestions" whereas the Design Regulations are more instructive. The Applicant confirmed that the garages are intended to house 4 cars and that the full bathroom on ground floor is required in case he wishes to accommodate someone upstairs. He stated that the studio is meant to be a work space for him.
- 11.11 The Applicant made reference to a number of transgressions of the Design Guidelines visible throughout the Estate (in particular the height of boundary walls which in many cases exceed the stipulated height). He expressed the view that, whilst Archcom is incapable of enforcing those very specific instructions, they want to enforce a standard that does not exist in the Constitution. In this regard, the Applicant also presented photo images of a neighbouring house pre and post renovation/addition. In this case, according to the Applicant, the owner significantly increased the size of the building on the erf, yet was allowed to do so.
- 11.12 Insofar as the role of the City of Cape Town ("the City") is concerned, the Applicant expressed the view that they are the ultimate authority in respect of departures, including a building which goes over the building line. As such, according to the Applicant, Archcom has no discretion in not allowing his plan when he had complied with the Design Regulations. The Applicant stated that there are many examples on

the Estate of buildings which are similar to the alteration reflected on his plans and that he wishes to build.

12. **APPLICANT'S PRAYERS**

12.1 The Applicant demands that:

- 12.1.1 Archcom and/or Excom approve the building plans submitted by him;
- 12.1.2 this order be made known to other members of the HOA.

13. **RESPONDENT'S VERSION**

- 13.1 The Respondent, in the person of Mr Nunes, stated that the Estate consists of 1 350 houses in that in 95% of cases, owners abide by the Constitution, including the Design Manual and the Design Regulations. They view it as their responsibility to protect these complying owners against the small percentage which are not complying.
- 13.2 Mr Nunes explained that the Archcom had had a meeting with the representatives of the City of Cape Town in the Fish Hoek town hall on or about May 2017 at which meeting the concerns of the HOA with respect to building line transgression and other departures were discussed. The meeting, according to the Respondent, agreed that plans which involve departures, would in future be sent to the City first to enable Archcom to have the benefit of the City's view on a particular departure before it has to consider it. For that reason they initially did not look at the Applicant's plans as they were going to consider it following feedback from the City. Unfortunately, in an about turn, according to the Respondent, the City referred the Applicant back to the HOA before considering his plans.
- 13.3 Mr Nunes explained the the large number of departures which are allowed by the City ruins the aesthetic theme of the Estate, which envisaged sufficient open space to allow maximum light, views and privacy to neighbouring dwellings.
- 13.4 With respect to the Applicant's complaint about the allowing of boundary walls which exceed the prescribed height restriction, the Respondent explained that those walls were not built in accordance with approved plans. Whilst it does constitute a transgression of Building Regulations, Excom can, practically, not act on every transgression and their aim is to control those aspects which are in

their view more important and likely to negatively effect other owners (wall heights do not really affect anybody).

13.5 With respect to the proposed introduction of the streetscape reference in the Design Manual, Mr Hepple explained that they do not see this as necessarily introducing a new rule, but that they felt that it would nevertheless be inappropriate to attempt to amend the Constitution in the run up to this hearing. Both Messrs Nunes and Hepple expressed the view that the consideration of effects of building plans on streetscapes is very much part of the task and responsibility of Archcom-their sole authority is aesthetics. In their views, streetscapes is an important aesthetic and architectural consideration and forms part of the discretion to be exercised by Archcom when adjudicating applications for building plan approvals.

13.6 The Respondent referred to Section 4 (3) of the Constitution as well as 8 (4) (1) and 8 (4) (2) as support for the view expressed that Archcom is within its rights and responsibilities to consider the affect of a plan on the streetscape. With specific reference to the Applicant, Mr Nunes stated that he (the Applicant) is at the end of a cul de sac and that the proposed garages and studio would negatively effect the view of the neighbours if built across the building line. The proposed plan, if executed in its current form, will, according to Mr Nunes, mean that the car parked in the driveway in front of the new garages will be partially in the street. He questioned the provision of parking for the proposed extension.

13.7 With regard to the plans of the Applicant itself, the Respondent noted that the addition of full bathroom is questioned if the purpose of the building is purely to serve as a garage and studio. It was furthermore noted by the Respondent that the garage is very small for four vehicles and that the staircase actually makes it impossible for four vehicles to be housed.

13.8 Mr Nunes explained that Marina da Gama is a special place and in fact a special overlay zone within the City. The current tendency by owners to bulk up their properties with the addition of extra bedrooms to serve as short term letting or holiday opportunities has meant that the Estate is in danger of losing its character (which, according to the Respondent, requires minimal driveway space onto roads, sufficient landscaping and space for views). The Respondent showed photos of erven within the Estate where this over bulking and, what was referred to as the gradual stretching of the building line, had negatively influenced the streetscape and the views of other owners. The Respondent stated that it believed that the purpose of Archcom is to protect the character of the Estate

and the rights of those owners who bought with this vision in mind. With reference to the examples quoted by the Applicant, the Respondent replied that those are not comparable as the set back had been maintained.

- 13.9 In conclusion the Respondent stated that Archcom and the Respondent believe that the transgression of the building line is indeed an aesthetic issue and that they have the discretion in terms of the Constitution and the Design Manual to comment on a request for a departure as it effects the neighbours.

14. **EVALUATION OF EVIDENCE SUBMITTED**

- 14.1 Whereas there is clearly animosity between the parties, there is in fact little dispute between the parties as to the facts of the matter. The Applicant's plans have not been approved by the HOA and an appeal to Excom was unsuccessful. In terms of the feedback from the local authority, they require a decision by the HOA before plans will be evaluated by them.
- 14.2 The enthusiasm and love for the Estate was evident in the attitude of Mr Nunes. He clearly is passionate about maintaining the design ethos which originally underscored the development of the Estate and it is commendable. Serving on any committee of an estate is a thankless and difficult task, but serving on the architectural committee of any estate requires true commitment. The problem of over bulking is not restricted to Marina da Gama and all over Cape Town, home owners' associations are faced with this dilemma. The possibility of earning additional income from home ownership through AirBnB and the like has exacerbated this problem. It is indeed difficult weighing up of the rights of individual owners against that of estates as a whole. Naturally (and owners sometimes seem oblivious of this fact), an attractive neighbourhood where there is sufficient respect for sunlight, views and privacy of each owner ultimately find expression in the property values. It is often, however, hard for owners who are set on getting what they want to see this bigger picture, especially if they feel that others are allowed to get away with it.
- 14.3 The "what about" syndrome is alive and well on estates of the nature of the Estate and understandably so. It is only human and natural for people to feel that they should be allowed the same rights as others. However, it makes it extremely difficult for those who are tasked to look after the interests of all owners, especially as owners are not specialist and do not always understand what differentiates one case from another. They often were not party to any earlier waivers (which possibly should not have been allowed) and, as

expressed by the Respondent, it is virtually impossible for estates to constantly police transgressions. Generally, the fact that a transgression has been allowed in the past does not automatically mean that the authority is powerless to enforce it in future. Each case has to be considered on its own merits.

- 14.4 Having said this, owners need certainty, fairness and reasonableness and they need to trust that every owner will be treated equally. What applies to the one, must apply equally to the other. They also need to be assured that the administrative bodies will at all times exercise their discretion based on sound objective principles which do not change at the will of the body. This is, inter alia, the aim of PAJA and it is clear that the HOA (thus including Archcom and Excom) are to comply with this Act as their actions and decisions are administrative in nature. Owners need to have the security that whatever discretion the HOA or Archcom has, is exercised in compliance with the Act. I have no doubt that there is nothing personal about the decision of Archcom to not approve the Applicant's plans. Archcom believed at all times that it is acting within the authority granted to it by the Constitution, the Design Manual and the Design Regulations and that it was acting in the best interests of the Estate as whole and more specifically those owners who live next to or near the Applicant.
- 14.5 In my view, Archcom did apply its mind, so to speak. Whilst it may appear to the Applicant that it was making up the rules as it went along, I am satisfied that they did in fact consider all relevant facts in coming to their conclusion. I also have no reason to doubt the evidence of Messrs Hepple and Nunes that they had struck an accord with the City in terms where they will be guided by City's approach on a specific departure request. I am furthermore satisfied that Archcom cannot be held responsible for earlier allowance of transgressions or granting of waivers and that it is in fact irrelevant. Mr Nunes was adamant that the other examples quoted by the Applicant are of a different nature and I have no reason to doubt his expert opinion in this regard. Whilst the design of the Applicant's garage (which clearly is a bit tight for the four (or later conceded three) vehicles he claimed to want to house there) and studio featuring a full bathroom understandably gave rise to some suspicion on the part of the Respondent as to his real intention with the addition, it is irrelevant. The intended usage of the building is not under consideration here.
- 14.6 The only question thus is whether or not Archcom (and thereafter Excom) has the authority to deny plan approval on account of, what they deem, a negative effect on a streetscape within the Estate on account of a building departure, being the encroachment of a building line set by the local authority? This brings one to the complexities of the relationship between the HOA and the

local authority and the question as to which of these parties have authority where when it comes to plan submissions and approvals. The intention is clearly that the City is unlikely to reject plans passed by Archcom (the sequence is that plans are to be submitted to Archcom first and thereafter to the City), but what is the authority of the City where Archcom has not approved a plan? Can the City overrule the decision of Archcom if it believes the plan should be passed and if so, can it do so in respect of all design aspects or only in respect of departures? This question goes to the root of the problem in this case.

14.7 One has to turn to the specific wording of the Design Manual and the Design Regulations to determine the extent of the discretion of Archcom. They derive their authority from the Constitution read with these documents.

14.8 The relevant provisions of the Constitution read as follows:

14.8.1 Paragraph 8.4: "Archcom shall have the following powers:

8.4.1 To prescribe the architectural style and the design criteria of, and the materials to be used in, all buildings erected or to be erected in the Township Area and, in particular to control the design of the exterior of such buildings and the materials and colours used on such exteriors, to ensure an attractive, aesthetic and pleasing character to the buildings in the Township Area;

8.4.2 To prescribe design criteria of, and the materials to be used in, other site works on the properties in the Township Area, including, but not limited to, fences, pergolas, walls and paved pathway;

8.4.3 To attain the objects set out above by *adopting and applying the aims and concepts as set out in the Marina da Gama Design Manual and the Marina da Gama Design Regulations* (my emphasis) which are annexed to this Constitution....."

14.8.2 Paragraph 8.4.4.1 states that the acts of Archcom shall include: "the examination and approval or refusal of building plans for all or any items *mentioned in paragraphs 8.4.1, 8.4.2 and 8.4.3 above* (my emphasis)...."

14.9 The introduction to the Design Manual reads as follows: "the developers of the Marina da Gama adopted an architectural and environmental theme to establish a character for the township." Furthermore it states: "the Association created and Architectural Committee to maintain control of all structures, site works and landscaped elements. It lastly states: "this manual consists of general guideline and mandatory restrictions which are essential to the

maintenance of the environmental character. It encourages variations within the theme and *only prohibits excesses in design* (my emphasis).

14.10 The Design Manual itself refers to the basic concept of the houses (the functional vernacular style), environmental design determinants and building design regulations as well as landscaping, water edge protection and general (which included provisions dealing with parking of caravans and the like). I find the Design Manual fairly detailed in respect of the design of houses and numerous sketches show exactly what is meant by a specific design guideline.

14.11 The Design Regulations state that “the Architectural and Environmental Committee reserve the right to require such changes in designs as may be needed in their opinion *to preserve the style of Architecture.*” The Design Regulations contain very detailed descriptions of building materials to be used.

14.12 One has to seek the scope and limits of the mandate of Archcom in the wording of these documents. Much was made in the hearing of whether or not the consideration of the effect of a plan on the streetscape is in effect an “aesthetic” consideration. I believe it goes without saying that it is. However, is it an architectural consideration? Whilst Archcom, by the very nature of their position obviously do have some discretion, the documents quoted above nowhere provides a blanket authority to Archcom to decide on what is, in its view, aesthetically pleasing. Archcom is restricted to test the aesthetic acceptability of plans against the “criteria” set out in the Constitution, Design Manual and Design Regulations. This is made very clear in paragraph 8.4.4.1 of the Constitution which refers to paragraphs 8.4.1, 8.4.2 and 8.4.3 as the guiding principles. Notably, these refer repeatedly to architectural considerations and buildings (the style of architecture, the forms and shapes of buildings, the colours, the nature of finishes and the like). Paragraph 8.4.3 refers one back to the aims and concepts as set out in the Design Manual and Design Regulations. As such, it presents as somewhat of a circle argument – one has to find the meaning of the aims and concepts of the Design Manual and Design Regulations by reference to the Design Manual and Design Regulations. There is no reference to streetscapes in any of these documents and building set backs and building lines do not even feature.

14.13 In my view, and in order to maintain as much certainty as reasonably possible to owners, one cannot stretch the aesthetic authority or discretion of Archcom to include streetscapes. This would open the door to other possible criteria which a future Archcom may believe

negatively effects aesthetics. It is just too wide and invites subjectivity into the decision making process. With respect to those aesthetic aspects that involve a departure or potential departure (as that term is commonly used by planning authorities), I believe it is within the ambit of the local authority to decide on the desirability of thereof and they indeed generally do obtain the input from interested parties in doing so. The local authority on the other hand, does not have discretion insofar as the aesthetics of a building plan is concerned, as that discretion lies with Archcom to be exercised within the boundaries explained above.

14.14 Understandably this leaves the HOA, Archcom and Excom with a dilemma in its fight against over bulking: it can either give up on trying to control those departures which, arguably, do compromise the theme and character of the Estate and leave it entirely to the local authority or alternatively find a way of introducing a well defined streetscape design/architectural criterium into the controlling documents (naturally within the requirements set by those for amendments and additions). Probably the best option would be to work with the local authority to ensure a uniform approach.

14.15 Insofar as the Applicant's request that this hearing be made public is concerned, it is indeed envisaged by the Community Schemes Ombud Service Act No.9 of 2011 that all relevant parties should be made aware of an order which may effect them. There is, however, a danger of misunderstanding if this order is distributed to the entire Estate without background and context. As I have said before, every case has to be determined on its own merits and one cannot simply apply this ruling to any other building plan submitted to Archcom. I would recommend that the order is distributed with a covering note, explaining this.

15. **POWERS AND JURISDICTION OF THE ADJUDICATOR**

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, no 9 of 2011 ("CSOS 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.

16. ADJUDICATION ORDER

16.1 Sections 39, 53 and 54 and of the Community Schemes Ombud Service Act No.9 of 2011, determines which orders an adjudicator is competent to make.

16.2 In terms of section 39 (4) in respect of meetings, the adjudicator may make an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association, was – void or is invalid.

16.3 On the basis of my finding set out in paragraphs 14.12 and 14.13, I rule as follows:

16.3.1 the ruling of Excom on the Applicant's plans is invalid;

16.3.2 the Applicant's plans are to be reconsidered by Archcom for compliance with the Design Manual and the Design Regulations;

16.3.3 Excom may express its views on the desirability of the departure required by the Applicant in respect of the building line transgression and convey those to the local authority but may not reject the Applicant's plans purely on account thereof;

16.3.4 the order is to be made known to the owners in the Estate, bearing in mind the note of caution set out in paragraph 14.15;

16.3.4 each party is to carry its own costs.

16. Section 56 of the CSOS Act, 2011

The parties' attention is drawn to the status of the order made herein. In terms of Section 56, (which reads as follows:

'If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of a magistrate's court, the order must be enforced as if it were a judgement of such Court and a clerk of such Court must, on lodgement of a copy of the order, register it as order in such Court)

orders made under the CSOS Act are of the same status as that of an order made by either the Magistrate's Court or the High Court, depending on the amount of money or relief sought. As such, the order made herein may be enforced by a party in the same way as it would enforce a court order. Any party who wishes to enforce an order made in terms hereof, should approach the clerk of the relevant court (being the Magistrate's Court or High Court in the area where the Scheme is situated) to ensure that the order is registered with such court, whereafter it is capable of being enforced as a court order.

17. **RIGHT TO APPEAL**

- 17.1 The Applicant, the Respondent or any affected person who is dissatisfied by the order may appeal to the High Court on a question of law in terms of Section 57 (1).
- 17.2 An appeal against an order must be lodged within 30 days after the delivery of the order of the adjudicator.
- 17.3 A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.



**HANNCHEN ELIZABETH LOUW
ADJUDICATOR**



ADJUDICATION ORDER
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