



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

Ref: CSOS 6902/WC/22

IN THE MATTER BETWEEN

EXECUTIVE COMMITTEE OF MARINA DA GAMA HOA

APPLICANT

and

MIKE RYDER

RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:

Section 39(1) (e) In respect of financial issues— (e) an order for the payment or repayment of a contribution or any other amount.

Section 39 (6) in respect of private and common areas - (b) an order requiring the relevant person – (i) to carry out specified repairs, or have specified repairs made

- Date Adjudication conducted:

03 FEBRUARY 2023

- Name of the Adjudicator:

MALUSI MBULI

- Order:

The relief sought in terms of section 39(1) (e) & 39 (6) (b) (i) of the CSOS Act is upheld.

The relief sought by the Applicant is for an order directing the respondent / owner to pay the levies on the due date not later than the 01st of March each year and that he must paint his walls white only in compliance with the Design Manual of the applicant.

The relief sought by the Applicant against the Respondent is upheld.

For the reasons provided add paragraphs 21 to 34 of this order.

No order as to costs.

INTRODUCTION

1. The Applicant is **EXECUTIVE COMMITTEE OF MARINA DA GAMA HOA**, a community scheme as defined in the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act), and to which it would be convenient to refer to as the “Home Owners Association”.
2. The Respondent is **MIKE RYDER**, of unit 28 Battle Ridge Road, Marina Da Gama, Muizenburg, Western Cape Province 7945.
3. A letter requesting final submissions was sent to the parties on the 19th of December 2022, confirming that due to the current situation regarding the Covid-19 pandemic, the CSOS is taking the appropriate precautions against the further spread of COVID-

19 (Coronavirus) and is adjudicating disputes on documents submitted, without the need to meet parties face to face.

4. This is an application for dispute resolution in terms of section 38 of the Community Schemes Ombud Service Act 9 of 2011 ("the CSOS Act"). The application was made in the prescribed form and lodged with the Community Schemes Ombud Service (CSOS) by way of email.
5. This matter is adjudicated in terms of the CSOS Act and Practice Directive on Dispute Resolution, 2019 as amended and more specifically the amended Practice Directive dated 23 June 2020 which provides under paragraph 8.2:- "Adjudications will be conducted on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator". The parties were requested to make written submissions not later than the 15th of January 2023. The adjudication was conducted on the 03rd of February 2023 and an order is now determined.

PRELIMINARY ISSUES

6. No preliminary issues were raised.

RELEVANT STATUTORY PROVISIONS

7. Section 1 of the CSOS Act defines-
 - "community scheme" as "any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing cooperative and "scheme" has the same meaning".
 - "dispute" as "a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly".

8. Section 38 of the CSOS Act provides-

“Any person may make an application if such person is a party to or affected materially by a dispute”.

9. Section 45(1) provides-

“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”.

10. Section 47 provides-

“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”.

11. Section 48 (1) provides-

“If the conciliation contemplated in section 47 fails, the Ombud must refer the application together with any submissions and responses thereto to an adjudicator”.

12. In terms of Section 50-

“The adjudicator must investigate an application to decide whether it would be appropriate to make an order.

13. Section 51 provides for the investigative powers of the Adjudicator:

“(1) When considering the application, the adjudicator may-

(a) require the applicant, managing agent or relevant person-

(i) to give to the adjudicator further information or documentation;

(ii) to give information in the form of an affidavit or statement; or

(iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview;

(b) invite persons, whom the adjudicator considers able to assist in the resolution of issues raised in the application, to make written submissions to the adjudicator within a specified time; and

(c) enter and inspect-

(i) an association asset, record or other document;

(ii) any private area; and

(iii) any common area, including a common area subject to an exclusive use arrangement”.

14. Accordingly, a certificate of Non- resolution was issued in terms of Section 48(1) of the CSOS Act. The Ombud referred the application together with any submissions and responses thereto to an adjudicator on the 23rd of January 2023.

SUMMARY OF RELEVANT EVIDENCE

Applicant's Submissions

15. The Applicant submitted that the respondent / owner has in the last 4 years failed to pay his subscriptions on the due date as stipulated in the constitution of Marina Da Gama Home Owners Association page 19 clause 12.3.

16. The applicant also avers that the respondent has failed to comply with the applicants Design Manual page 8 clause 7.5.13.3 which states that the walls are to be painted white yet he has a blue surround painted on his street facing wall.

Relief sought by the applicant

17. The relief sought by the Applicant is for an order directing the respondent / owner to pay the levies on the due date not later than the 01st of March each year and that he must paint his walls white only in compliance with the Design Manual of the applicant.

Respondents' Submissions

18. The Respondent on the other side submitted the response and in his response he does not dispute that the date for the payment of levies is regulated by the applicants constitution but states that his levies account is up to date and that he has complied with the provisions of the constitution of Marina Da Gama as stated by the applicant.

19. The respondent also does not dispute that in terms of the applicants Design Manual page 8 clause 7.5.13.3 the walls are to be painted white yet he has a blue surround painted on his street facing wall.

20. His defence is that he is not the only one who has painted in different colour and in fact he has other units he owns that are painted differently.

Relief sought by the Respondents.

21. None submitted.

EVALUATION & FINDING

22. I have perused the parties' written submissions.

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

24. 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.

25. This means that once all the evidence has been tendered, it must be weighed up and determined whether the Applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

26. The relief sought by the Applicant is for an order directing the respondent / owner to pay the levies on the due date not later than the 01st of March each year and that he must paint his walls white only in compliance with the Design Manual of the applicant.

27. The Applicant submitted that the respondent / owner has in the last 4 years not paid his subscriptions on the due date as stipulated in the constitution of Marina Da Gama Home Owners Association page 19 clause 12.3.

28. It is disputed by the applicant that he has not paid levies on the due date and he states that relief of application is a retaliation to another application that he has filled against the respondent previously. There is no dispute about the due date for the payment of levies.

29. The applicant also avers that the respondent has failed to comply with the a Design Manual of the HOA page 8 clause 7.5.13.3 which states that the walls must be painted

white, yet he has a blue painted wall on his street facing wall. Also here there is no dispute that according to the respondent Design Manual walls are to be painted white and the respondents defence is that also others are painting them differently.

30. This does not make the conduct of the respondent correct and that the respondent can file an appropriate complaint against those who are not complying with the applicants Design Manual.

31. In the above matter, the Court referred to the 2019 Supreme Court of Appeal Decision in **Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others (323/2018) [2019] ZASCA 30; 2019 (4) SA 471 (SCA) (28 March 2019)** , where the following was stated with regard to the nature of the Rules of Homeowners Associations (which are regarded as similar, if not the same, as bodies corporates established in terms of the STSMA): *“When the respondents chose to purchase property within the estate and become members of the Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature. The conduct rules, and the restrictions imposed by them, are private ones, entered into voluntarily when an owner elects to buy property within the estate.”*

32. It is the Adjudicators finding that the Applicant is lawfully entitled to enforce the Conduct Rules against members of the Body Corporate such as the Respondent

33. It is the Adjudicator’s finding for the reasons provided at paragraphs 21 to 34 of this order that the respondent / owner should pay levies on the due date not later than the 01st of March each year and that he must paint his walls white only in compliance with the Design Manual of the applicant.

34. Accordingly, the Applicant’s complaint against the Respondent is upheld.

COSTS

35. There is no order as to costs.

ADJUDICATION ORDER

36. In the circumstances, the following order is made:

- (a) The relief sought by the Applicant against the Respondent is upheld.
- (b) The respondent / owner is ordered to pay levies on the due date not later than the 01st of March each year and that he must paint his walls white only in compliance with the Design Manual of the applicant.
- (c) The respondent must comply with this order not later than the 01st of March 2023.
- (d) For the reasons provided add paragraphs 22 to 40 of this order.
- (e) No order is made as to costs.

RIGHT OF APPEAL

37. Section 57 of the CSOS Act, provides for the right of appeal-

- (1) 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.
- (2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.
- (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.

DATED ON THIS 03rd DAY OF FEBRUARY 2023.



ADV. MALUSI MBULI
ADJUDICATOR

