



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

Ref: CSOS7536/WC/22

IN THE MATTER BETWEEN

MARINA DA GAMA HOME OWNERS ASSOCIATION

Applicant

And

CHERYL PHILLIP

Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act: In terms of section 39(2)(a) of the CSOS Act in terms of which the Applicant seeks an order in the following terms:
 - The Applicant demands a full retraction and apology from the Respondent for the unsubstantiated and unfounded personalised attacks on Excom.
 - The Applicant further seeks an acknowledgement for the unconstitutional appointment of 2 people to Excom by the now ex-chairperson (the Respondent).

- An acknowledgement of the unconstitutionality of the now ex chairperson to allow the continuance in office of Excom beyond the constitutionally mandated 5 years and the clear breach of conflict of interests in the Respondent's interaction with the new chairperson.
 - The Applicant seeks an acknowledgment from the Respondent as ex chairperson of the transgressions of good business practice and conflict of interest.
- Date Adjudication conducted: 15 May 2023.
 - Name of the Adjudicator: Zama Matayi
 - Order: As per paragraph 36
 - Circulate: No
 - Authority: **De Charmoy v Day Star Hatchery (Pty) Limited 1967 (4) SA 188 (D) at 192D-E, Trustees, Avenues Body Corporate v Shymarahu 2018(4)SA 566 (WCC), PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk 2008 (2) SA 428 (SCA) para 9**
 - Legislative Provisions: CSOS Act no. 9 of 2011
Land Use Planning Ordinance 15 of 1985
 - Date issued: 25 May 2023.
 - Date sent to parties: 25 May 2023

INTRODUCTION

1. The Applicant is Marina Da Gama Homeowners Association situated at Eastlake Centre, Eastlake Drive, Marina Da Gama, Cape Town. The scheme is represented by Marcia Fritz in her capacity as the Portfolio Manager of the scheme.
2. The Respondent is Cherryl Phillip owner of unit 7 Tower Quay, Marina Da Gama situated at Eastlake Centre, Eastlake Drive, Cape Town.
3. The community scheme is the Marina Da Gama Homeowners Association, a scheme established in terms of section 29 of the Land Use Planning Ordinance 15 of 1985 (LUPO).
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).

5. The applicant is seeking relief in terms of section 39 of the CSOS Act, is in respect of-
 - o The Applicant demands a full retraction and apology from the Respondent for the unsubstantiated and unfounded personalised attacks on Excom.
 - o The Applicant further seeks an acknowledgement for the unconstitutional appointment of 2 people to Excom by the now ex-chairperson (the Respondent).
 - o an acknowledgement of the unconstitutionality of the now ex chairperson to allow the continuance in office of Excom beyond the constitutionally mandated 5 years and the clear breach of conflict of interests in the Respondent`s interaction with the new chairperson.
 - o The Applicant seeks an acknowledgment from the Respondent as ex chairperson of the transgressions of good business practice and conflict of interest.

6. This matter is adjudicated in terms of the CSOS Act and Practice Directive on Dispute Resolution of 2019 (as amended), and 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 matter was referred to adjudication after the parties were requested to make written submissions in support of their respective versions.

PRELIMINARY ISSUES

7. No preliminary issues raised.

RELEVANT STATUTORY PROVISIONS

8. Section 1 of the CSOS Act defines-

8.1 "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".*

8.2 "dispute" as *"a dispute regarding 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."*

9. 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".

10. 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".

11. 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".

12. 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".

13. In terms of Section 50 provides-

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

14. 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”.

15. If the dispute has not been resolved through conciliation, the matter may be referred to an adjudicator. Accordingly, a Certificate of Non-Resolution and referral to adjudication was issued in terms of Section 48(1) of the CSOS Act. Applicants seeks an order declaring that as fully described in the executive summary.

SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

16. The Applicant submitted that the Applicant is brought by the executive committee of the scheme against the Respondent as the former chairperson of the Association. The Applicant submitted that the Respondent directed personal attacks against Richard Midgley as well as immediately past and current executive committee members. The Applicant submitted that the Respondent continued for pages to personalize and attempt to drive a wedge between past and current executive members.

17. The Applicant submitted that the Respondent maligned the executive committee members by assuming that they had no power nor voice and were merely bystanders. The Applicant submitted that the Respondent’s conduct is insulting towards the executive members by holding them in such low self esteem and making defamatory statements and personalised attacks against Executive committee (Excom) members. The Applicant submitted that the statements made by the Respondent unsubstantiated and unfounded.

18. The Applicant submitted that during the 2020 Annual General Meeting the Respondent the unconstitutionally appointed Scott A. and Angus H into the

Executive Committee. The Applicant questions whether the appointment was duly signed by the proposer, the seconder and the chairperson and placed in the nomination box by midnight on the 11 June 2020.

19. The Applicant submitted that Excom chairperson was allowed to act as chairperson beyond the constitutional mandate of 5 years, thus rendering all decisions taken by the Excom as unconstitutional.
20. The Applicant submitted that the Respondent left the Association's bank account in shambles by allowing people who had stood down from Excom years before to still be signatories and still receive Marina Da Gama Association bank statements. The Applicant submitted that under the Respondent's regime, he was the top beneficiary in the account. The Applicant submitted that the Respondent used her personal account to pay the Association's suppliers and claim refund from the Association. This habit or practice the Applicant submitted was poor business practice and amounted to a conflict of interests. The Applicant submitted that the Respondent also paid the Association's staff from his personal account and claim refund from the Association.
21. The Applicant further submitted that the Respondent on behalf of his family member acted as a landlord of the Association's employee by deducting rent directly from the employee's earnings before paying to him.
22. The Applicant submitted that the current Excom members put the Association's account through a deep cleaning by putting an end to the practice of using Excom personal bank accounts to pay creditors then claiming refund from the Association. The current Excom also made sure that only current Excom members are signatories to the account and are the only ones receiving bank statements.

Relief sought by the Applicant.

- The Applicants seeks an order in the following terms:
 - The Applicant demands a full retraction and apology from the Respondent for the unsubstantiated and unfounded personalised attacks on Excom.
 - The Applicant further seeks an acknowledgement for the unconstitutional appointment of 2 people to Excom by the now ex-chairperson (the Respondent).

- An acknowledgement of the unconstitutionality of the now ex chairperson to allow the continuance in office of Excom beyond the constitutionally mandated 5 years and the clear breach of conflict of interests in the Respondent's interaction with the new chairperson.
- The Applicant seeks an acknowledgment from the Respondent as ex chairperson of the transgressions of good business practice and conflict of interest.

Respondent's Submissions

23. The Respondent submitted that all the prayers contained in the submissions do not fall within the jurisdiction of CSOS. The Respondent submitted that CSOS does not manage the ethical conduct nor any procedure in the scheme's operation other than those provided for in section 39 of the Act.

24. The Respondent submitted that the conduct complained of does not amount to nuisance as envisaged in section 39(2)(a) of the Act. The Respondent submitted that none of the claims made by the Applicant falls under section 39 of the CSOS Act. The Respondent further denies any personal and unfounded attacks on the Excom members. The Respondent further submitted that the same application was previously submitted under CSOS6901.WC.22 and was rejected.

25. Regarding the decisions made, the Respondent submitted that in terms of the CSOS Act any application to declare a decision of the Association or trustees to be void may not be made later than 60 days after such decision has been made. The Respondent submitted that the decisions sought to be set aside were taken some time in 2020 and no condonation application was made.

Relief sought by the Respondent.

26. The Respondent seeks an order dismissing or refusing the Application.

EVALUATION & FINDING

27. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered. The general rule is that only evidence, which is relevant should be considered.

Relevance is determined with reference to the issue in dispute. The degree or extent of proof required is on a balance of probabilities. This means that once all the evidence has been tendered, it must be weighed up and determined whether the versions before me are probable. This involves findings of fact based on an assessment of credibility and probability.

28. Any application in terms of Section 38 must include one or more of the orders as contained in Section 39. These orders include issues in respect of finances, behaviour, scheme governance, issues relating to meetings, issues relating to management services, issues relating to private areas and common areas, as well as other general issues, such as being wrongfully denied access to information. This position was confirmed in the case of ***Trustees, Avenues Body Corporate v Shymarahu 2018(4)SA 566 (WCC)***, where the court held that the orders which can be made by an adjudicator in respect of the different categories which are provided for in section 39 of the CSOS Act are primarily directed at, and pertain to the, matters which bear on the community scheme concerned as a whole, i.e. matters of the community scheme itself, and not of individual members. such orders will generally only be incidental to the personal interests or rights of individual members.
29. This is an application by members of the Executive Committee seeking an apology and acknowledgement of wrongfulness from the Respondent. The Application dates to the time when the Respondent was chairperson of Homeowners Association. The conduct complained of relates to the Respondent's financial management of the schemes bank account and personal attacks allegedly made by the Respondent to current Excom members. The complaint further relates to the allegation of unconstitutional appointment by the Respondent of two members to become Excom members and breach of good business practice by the Respondent. The Applicant now seeks an order compelling the Respondent to apologise for her conduct and to acknowledge her wrongful conduct.
30. The Community Scheme Ombud Service is a creature of statute and the powers of the adjudicator to adjudicate matters are derived from section 39 of the Act. As an adjudicator my powers to adjudicate are derived from section 39 of the Act. The relief sought by the Applicant relates to an apology and acknowledgement of

wrongfulness on the part of the Respondent. The relief sought by the Applicant is not covered under section 39 of the CSOS Act.

31. The complaint relates to the Respondent's ethical conduct as the former chairperson of the Homeowners Association. The Community Scheme Ombud Service does not manage ethical conduct of office bears. The Applicant tried to classify the Respondent's conduct as nuisance under section 39(2)(a) of the Act.

32. The word "nuisance" as a noun is defined as "*a person or thing causing inconvenience or annoyance*". In our law a nuisance occurs when someone interferes with a neighbour's use and enjoyment of his or her land or when events occurring on a particular property interfere with the comfort of human existence of a neighbour. In deciding whether a particular nuisance is actionable, our courts have over the years applied different tests and expressed the applicable principles in various ways. The appropriate test was recently authoritatively restated by the Supreme Court of Appeal in **PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk 2008 (2) SA 428 (SCA) para 9**, where Harms AP, writing for the court, quoted JRL Milton's summary with approval: "*An interference with the property rights of another is not actionable as a nuisance unless it is unreasonable. An interference will be unreasonable when it ceases to be a "to-be-expected-in-the-circumstances" interference and is of a type which does not have to be tolerated under the principle of "give and take, live and let live". The determination of when an interference so exceeds the limits of expected toleration is achieved by invoking the test of what, in the given circumstances, is reasonable. The criterion used is not that of the reasonable man but rather involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred. The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm. This is achieved, in essence, by comparing the gravity of the harm caused with the utility of the conduct which has caused the harm*".

33. In **De Charmoy v Day Star Hatchery (Pty) Limited 1967 (4) SA 188 (D) at 192D-E, Miller J** gave a useful summary of factors relevant to the enquiry relating to reasonableness:

'The factors which have been regarded as material in determining whether the disturbance is of a degree which renders it actionable, include (where the disturbance consists in noise) the type of noise, the degree of its persistence, the locality involved and the times when the noise is heard. The test, moreover, is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person who truthfully complains that he finds the noise to be intolerable is to be

decisive, but the reaction of "the reasonable man" - one who, according to ordinary standards of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not quite intolerable, a serious impediment to the ordinary and reasonable enjoyment of his property.'

34. In the circumstances and in the totality of the evidence and submissions made by both parties the conduct complained of does not amount to nuisance as fully described above. For the reasons stated above the applications stands to be dismissed for lack of jurisdiction.

COSTS

35. As far as costs are concerned parties to a dispute are required to meet their own costs. This includes the application fee, the fee for inspecting and obtaining copies of any submission or reply, any personal costs incurred to attend the adjudication and any legal costs incurred in making and responding to an application.

ADJUDICATION ORDER

36. In the circumstances, the following order is made in terms of Section 54(1)(a) read with Sections 39 of the Community Scheme Ombud Service Act 9 of 2011.

36.1 The Application are dismissed.

36.2 No order 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 AT Cape Town on 25 May 2023.



ADJUDICATOR

Zama Matayi



ADJUDICATION ORDER
DATE: 25.05.2023
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