



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

Ref: CSOS7226/WC/22

IN THE MATTER BETWEEN

HAROLD LEONARD BASSON

Applicant

And

HARBOUR ISLAND MASTERS HOMEOWNERS ASSOCIATION

Respondent

ADJUDICATION ORDER

1. EXECUTIVE SUMMARY

1.1. Relief applied for in terms of the CSOS Act: **Section 39(3)(c)(d)** In respect of scheme governance issues-

- (c) an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision,
- (d) 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;
 - (ii) if appropriate, to restore an earlier provision;
 - (iii) to amend the provision; or
 - (iv) to substitute a new provision.

Section 39(7)(a) in respect of General Issues.

-an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association to make such information or documents available within a specified time.

1.2. Date Adjudication conducted:

14th of FEBRUARY 2023.

1.3. Name of the Adjudicator:

MNINAWA BANGILIZWE.

1.4. Order:

In the circumstances, the following order is made:

1.4.1. The relief sought in paragraph 5.2.1 is granted.

1.4.2. The relief sought in paragraph 5.2.2 has been rendered moot and is refused.

1.4.3. No order made as to costs.

2. INTRODUCTION.

2.1. The Applicant is **HAROLD LEONARD BASSON**, owner of unit 10 within the Harbour Island Masters Homeowners Association, situated at San Juan Close, Harbour Island, Gordons Bay, Western Cape, appearing in his own capacity as an owner within this section.

2.2. The Respondent is the **HARBOUR ISLAND MASTERS HOMEOWNERS' ASSOCIATION**, a community scheme in terms of the Community Schemes Ombud Service Act 9 of 2011 (CSOS Act), located at Beach Road, Harbour Island, Gordons Bay, Western Cape.

2.3. 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.

- 2.4. The application seeking relief in terms of section 39 of the CSOS Act, **Section 39 (3)(c)(d)** in respect of Scheme Governance Issues and **Section 39(7)(a)** in respect of General issues.
- 2.5. 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 virtually or 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. The adjudication was conducted on the 14th of February 2023 and an order is now determined.

3. PRELIMINARY ISSUES

- 3.1. No preliminary issues were raised.

4. RELEVANT STATUTORY PROVISIONS

- 4.1. Section 1 of the CSOS Act defines-

4.1.1. "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” .

4.1.2. "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” .

- 4.2. 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” .

4.3. 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”.

4.4. 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.

4.5. 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.

4.6. In terms of Section 50-

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

4.7. 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”.

4.8. If the dispute has not been resolved through conciliation, the matter may be referred to an adjudicator. 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 27th of January 2023.

5. SUMMARY OF RELEVANT EVIDENCE

Applicant's Submissions

5.1. The Applicant submits that:

5.1.1 The Respondent unilaterally changed the building guidelines without holding any meetings or informing the residents. The 2019 Building Guidelines include a clause 10.2 which prohibits building a double story in the San Juan Precinct. This was included in the building Guidelines without any notifications.

Relief sought by the Applicant:

5.2. The Applicant seeks an order in the following terms:

5.2.1 An order requesting that CSOS should insist to remove clause 10.2 which now prohibits residents to exercise their Constitutional rights.

5.2.2 An order requesting that the Respondent provides them with written proof in the form of meetings held, voting and proof that residents have been consulted to include clause 10.2.

Respondent's Submissions

5.3. The Respondent did not sufficiently respond to the initial application, but merely stated that the allegations made by the Applicant are incorrect.

Relief sought by the Respondent

5.4. None.

6. EVALUATION & FINDING

- 6.1. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
- 6.2. 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 determined whether the Applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

Prayer 1

- 6.3. The Applicant alleges that the Respondent unilaterally changed the building guidelines without holding any meetings or informing the residents, and seeks an order that CSOS removing clause 10.2 which now prohibits residents from erecting double story buildings.
- 6.4. The ability to self-govern is the cornerstone of community schemes. **The Memorandum of Incorporation for The Harbour Island Masters Homeowners Association (MOI)** states as follows:

12. MEMBERS

- 12.1 As contemplated in item 4 of Schedule 1 of the Act, the Company has members*
- 12.2 Members may be juristic persons, including profit companies.*
- 12.3 A person shall be a member if such person is*
- 12.3.1 A residential owner; or*
- 12.3.2 A non-residential owner; or*
- 12.3.3 An Associated Homeowners Association.*

- 6.5. It follows that the Applicant as an owner within the scheme is thus a member of the HOA and is bound by the MOI, the Estate Rules and Architectural Guidelines of the scheme.

- 6.6. **Section 8 of the MOI** under the heading “**Authority Of The Board Of Directors**” states as follows:

8.1 The business, administration and affairs of the Company shall be managed by and/or under the direction of the board of Directors, which has the authority to exercise all of the powers and perform any of the functions of the Company.

- 6.7. Further, **Section 9 of the MOI** under the heading “**Rules**” states as follows:

9.1 The board may, from time to time, propose to the members to make, amend or repeal any necessary or incidental rules (referred to as "Rules") relating to the governance and the administration of the Company, in respect of matters that are addressed in the Act or this MOI or in respect of any matter concerning the members interests in the Development and may after a majority vote by the members on such proposals, introduce and enforce such amended rules on all the members

9.2 The Company shall publish and make available a copy of all Rules as approved or amended as set out in clause 9.1, within 10 (ten) Business Days after being approved by the Members, by making the same available to Members at the Registered Office of the Company, or by publication on the Company's website, or by delivering a copy of the Rules and/or amendment(s) (as the case may be) to each Member.

9.3 The Directors may, from time to time, propose Rules in accordance with the procedure set out in clause 9.1 above in regard to 9.3.1 The architectural style and the design criteria of, and the materials used in, all buildings erected or constructed, or to be erected or constructed in the Development 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 aesthetically pleasing character to the buildings in the Development;

- 6.8. It is noteworthy that Rule 21 of the Estate Rules state as follows:

21.1. All improvements within the Estate, including private dwellings shall conform to the Architectural rules which are contained in Clause 10 of the MOI and the Architectural Design Guidelines as well as any rulings by Archcom.

21.2 The Board will impose fines for any contraventions of the provisions of Clause 10 of the MOI and the Architectural Design Guidelines as well as any rulings by Archcom.

- 6.9. Having perused the guidelines it is evident that the clause complained of, i.e. clause 10.2 stating that “no double story will be permitted”, did not exist in the 2004 and the 2016 Architectural Design Guidelines but only appeared later in the 19th January 2019 Architectural Design Guidelines.
- 6.10. The Applicant requested, to no avail, that the Respondent provide them with written proof in the form of meetings held, voting and proof that residents have been consulted to include clause 10.2. In this regard the Applicant has submitted that the correct procedure was not followed to propose and approve the said clause 10.2. Unfortunately, the Respondent did not genuinely participate in the adjudication process and has thus not offered any sound explanation to justify the inclusion of clause 10.2 in the January 2019 Architectural Design Guidelines.
- 6.11. Consequently, in the absence of the said explanation and or evidence to the contrary, from the Respondent it follows that that the Applicant has succeeded in the case against the Respondent and is entitled to the relief sought. The Respondent ought to have followed the provisions of Section 9 of the MOI to and obtain a majority vote prior to the inclusion of clause 10.2 in the January 2019 Architectural Design Guidelines.
- 6.12. Accordingly, the relief sought is granted and clause 10.2 is declared invalid.

Prayer 2

- 6.13. Further the Applicant sought an order in the alternative, i.e. An order that the Respondent provides them with written proof in the form of meetings held, voting and proof that residents have been consulted to include clause 10.2.
- 6.14. I am satisfied that the Respondent failed to follow the procedure as outlined in **Section 9 of the MOI** to consult members and obtain a majority vote prior to the inclusion of clause 10.2 in the January 2019 Architectural Design Guidelines.
- 6.15. Therefore, in light of the fact that the Applicant has been successful in declaring clause 10.2 invalid, the relief sought in this regard has thus become moot and issuing such an order will serve no purpose.

7. ADJUDICATION ORDER

In the circumstances, the following order is made:

- 7.1. Clause 10.2 is declared invalid and the Respondent is ordered to remove it from the Architectural Design Guidelines within 30 days of this order.
- 7.2. The relief sought in paragraph 5.2.2 has been rendered moot and is refused.

8. COSTS

- 8.1. No order as to costs.

9. RIGHT OF APPEAL

- 9.1. 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 14th DAY OF FEBRUARY 2023.



**MNINAWA BANGILIZWE
ADJUDICATOR.**