



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

**Ref: CSOS 4333/WC/22**

IN THE MATTER BETWEEN

**TRUSTEES OF KLEINBRON ESTATE  
HOMEOWNERS ASSOCIATION**

**APPLICANT**

and

**THEO FITCHAT**

**RESPONDENT**

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**ADJUDICATION ORDER**

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**EXECUTIVE SUMMARY**

Relief applied for:

**Section 39 (2)**, in respect of behavioural issues- (d) “an order for the removal of all articles placed on or attached illegally to parts of a common area or private area”.

**Section 39(1) (e)**, in respect of financial issues-

Date Adjudication conducted:

7 NOVEMBER 2022.

Name of the Adjudicator:

N FOCA.

Order:

- (a) The relief sought by the Applicant against the Respondent in terms of sections 39(2)(d) and 39(1) (e) of the CSOS Act, is dismissed.
- (b) The relief sought by the Applicant is dismissed, in terms of **section 53(a)of the CSOS Act.**
- (c) No order is made as to costs.

**INTRODUCTION**

1. The Applicant is the **TRUSTEES OF KLEINBRON ESTATE HOMEOWNERS ASSOCIATION**, 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 “HOA”. The Applicant is represented by **(ALEX VAN NIEKERK)**, in his capacity as the scheme’s Estate Manager, as duly authorised. The letter of mandate is on file.
2. The Respondent is **THEO FITCHAT**, the registered owner of unit number 91 Frangipani Street, Kleinbron Estate, Brackenfell, Cape Town, Western Cape Province.
3. A letter requesting final submissions was sent to the parties, 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. The application seeking relief was in terms of section 39(2)(d) and 39(1) (e) of the CSOS Act.
6. 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". Parties were requested to make written submissions. The adjudication was conducted on the 7<sup>th</sup> of November 2022 and an order is now determined.

### **PRELIMINARY ISSUES**

7. No preliminary issues were raised / (legal representation, points in limine).

### **RELEVANT STATUTORY PROVISIONS**

8. 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".

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-

“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. Accordingly, a certificate of Non- resolution was issued in terms of Section 48(1) of the CSOS Act on 8<sup>th</sup> of December 2021. The Ombud referred the application together with any submissions and responses thereto to an adjudicator on **18<sup>th</sup> of October 2022**.

## **SUMMARY OF RELEVANT EVIDENCE**

### **Applicant’s Submissions**

16. The Applicant submitted that the Respondent was issued a written request to remove his cameras within 30 days, due to them being PTZ cameras with di-directional

communication which is illegal in terms of the scheme's rules as approved by CSOS on the 6<sup>th</sup> of May 2022.

17. The Applicant further submitted that at the time of approval, the rules were communicated to all members including the Respondent.
18. According to the Applicant, the Respondent was afforded an opportunity to appeal the Applicant's decision by way of submitting a written appeal, to which he declined the offer, and instead he denied any wrongdoing and invited the Applicant to proceed with their legal action.
19. The Applicant further submitted that the Respondent has no intention of adhering to the scheme's rules and as such has left the Applicant with no choice but to lodge a dispute.

### **Relief sought by the Applicant**

20. Wherefore the Applicant seeks relief in the following terms:
  - (a) In terms of section 39(2) (d) of the CSOS Act, an order for the removal of the cameras.
  - (b) The Applicant further seeks relief in terms of section 39(1) (e) of the CSOS Act, an order that the Applicant shall be entitled to recover from the Respondent all legal costs incurred by the trustees, including attorney and own client charges in pursuant of rectifying the Respondent's breach, as per the HOA's constitution paragraph 23.2.

### **Respondent's Submissions**

21. In refuting the Applicant's claim, the Respondent submitted that he installed his cameras on the 15<sup>th</sup> of January 2022 and that at the time, the scheme did not have rules that prohibited the installation of cameras.
22. The Respondent further submitted that despite not being required to obtain approval, prior installation, he informed the Estate Manager and further requested him to be present during installation, to which no response was received. **(In this regard, the Respondent attached a copy of his email to the Applicant's estate manager.)**

23. According to the Respondent, not only was there no response to his communication, but there was also no indication that he required the Applicant's permission to install cameras.
24. The Respondent submitted that it was only after numerous complaints from some residents to the scheme's Estate Manager regarding his cameras, did the Applicant convene a meeting on the 14<sup>th</sup> of February 2022 to discuss the same.
25. According to the Respondent, after consulting various municipal departments, law enforcement and legal advisors, the Applicant confirmed that he was not transgressing any of the estate's rules. (In this regard a copy of the minutes of the trustee's meeting held on 14<sup>th</sup> of February 2022 was attached).
26. The Respondent further submitted that the rules which prohibits the installation of PTZ cameras were only approved on the 20<sup>th</sup> of May 2022 which was four months after he had installed his cameras.
27. According to the Respondent, Article 36 of the HOA's constitution provides, "...no regulation made by the Association in general meeting shall invalidate any prior act of the Trustee Committee which would have been valid if such regulation had not been made.", therefore the new HOA rule relied upon by the Applicant cannot be retroactively enforced and as such it is not applicable in his case.

### **Relief sought by the Respondents.**

28. None submitted.

### **EVALUATION & FINDING**

29. I have perused the parties' written submissions.
30. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
31. 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 weighed up and determined whether the Applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

32. In prayers (a), the Applicant seeks an order directing the Respondent to remove cameras installed on his property, as they are in contravention of the scheme's new rules.
33. Section **39 (2) (d) of the CSOS Act** makes provision for the following competent order to be handed down by an Adjudicator, "an order for the removal of all articles placed on or attached illegally to parts of a common area or private area".
34. To enable the writer to make a finding relating to the relief sought by the Applicant against the Respondent, it is prudent to establish whether there is a lawful or alternatively a reasonable basis on which the relief prayed for by the Applicant may be granted.
35. Both parties have confirmed that the rules relied upon by the Applicant were approved on the 20<sup>th</sup> of May 2022 after the Respondent had installed his cameras.
36. In issuing this order, readers are referred to the Article 36 of the HOA's constitution as correctly cited by the Respondent which provides, "...no regulation made by the Association in general meeting shall invalidate any prior act of the Trustee Committee which would have been valid if such regulation had not been made."
37. The view adopted by courts has been that in the following authority, generally, and unless the contrary appears by express or necessary implication, legislation and amendments to legislation apply with prospective effect only, the following authority confirmed the same position, **TRANSNET LTD V NGCEZULA 1995 3 SA 538 (A); S V VENTER (CCT109/10) 2011 ZACC 22 (14 JUNE 2011); NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V CAROLUS 2000 1 SA 1127 (SCA); BAREKI V GENCOR LTD 2006 1 SA 432 (T); S V KOUKOULAS 1970 2 SA 477 (T).**
38. In **CURTIS V JOHANNESBURG MUNICIPALITY 1906 TS 308,** the court held legislation applies prospectively specifically so that vested rights are not taken away, and in **KRUGER V PRESIDENT INSURANCE CO LTD 1994 2 SA 495 (D),** it was

held that a court is more likely to rule in favour of retroactivity **where vested rights are not affected negatively by the retrospective operation**, or where the purpose of the legislation is to grant a benefit or to ensure equity in the operation of law. **(Own emphasis.)**

39. It is common cause that the Respondent's cameras were installed prior the amendments to the HOA's rules, and accordingly, the revised rules cannot be retroactively enforced in his case.
40. It is rather unjust and unfair for the Applicants to seek to enforce the amended rule to the Respondent.
41. In instances where decisions taken by schemes are not public in nature, they are subject to review by the courts under the principles of legality, reasonableness and lawfulness.
42. In the matter of **LAGUNA RIDGE SCHEME, NO 152/1978 V DORSE 1992 (2) SA 512 D**, which was decided prior to the promulgation of PAJA, the court held, that in the absence of contentions to the contrary from the parties, that the decision of a body corporate affecting a member was potentially reviewable under the common law".
43. In **NORTH GLOBAL PROPERTIES (PTY) LTD V BODY CORPORATE OF SUNRISE BEACH SCHEME AND OTHERS [2013] JOL 30400 (KZD)**, Pillay J held as follows at para (9), "Trustees decisions must be objectively reasonable when they are not, they are reviewable under the common law read consistently with, in my respectful opinion, the STA, Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").
44. It is clear from the authority referred to above, that the decisions of the Applicant must be reasonable and not be prejudicial to the members of the scheme.
45. Accordingly, the relief sought by the Applicant against the Respondent is dismissed, in terms of section **53(1) (a) of the CSOS Act**.
46. Turning my attention to the Applicant's second prayer for relief, which is an order that the Applicant shall be entitled to recover from the Respondent all legal costs incurred by the trustees, including attorney and own client charges in pursuant of rectifying the Respondent's breach, as per the HOA's constitution paragraph 23.2.



47. The relief sought by the Applicant, is not relief that is competent for an Adjudicator to grant in terms of Section 39 of the CSOs Act.
48. Section 38(3)(a) of the CSOS Act specifically states that the application to CSOS for dispute resolution must include statements that set out the relief sought by the Applicant, **and in addition, the relief sought must be within the scope of one or more of the prayers for the relief contemplated in section 39 of the Act.**
49. Should any of the relief fall outside of the scope of the prayers of the relief as set out in section 39 of the Act as aforesaid, then the Adjudicator is not empowered to grant an order in terms of the Act.
50. The Western Cape High Court in the case of **Trustees for the Time Being of the Avenues Body Corporate vs Shmaryahu and Another (A31/2018) [2018] ZAWCHC 54 2018 (4) SA 566 (WCC) (10 May 2018) add paragraph [17]**, held that “the character of the various types of substantive relief that an Adjudicator is empowered to grant in terms of the Act appears from the provisions of Section 39”.
51. The court further held at paragraph [18] that “It provides for the possibility of a number of different types of orders being made in respect of seven expressly specified categories of issues; viz (i) financial issues, (ii) behavioural issues, (iii) scheme governance issues, (iv) issues in respect of meetings, (v) in respect of management services, (vi) in respect of works pertaining to private and common areas and (vii) in respect of general and other issues. It is evident from the character of each of the categories of issues that they pertain primarily to matters germane to the community schemes, and only incidentally to related personal or individual interests or rights”.
52. From the evidence on record, and the submissions made by the Applicant it is evident that the relief sought, does not fall within any of the categories as set out in Section 39 of the CSOS Act.
53. The Court in **Evergreen Investment (Pty) Ltd v Messerschmidt 2019 (3) SA 481 (GP)** quoting from the **Road Accident Appeal Tribunal v Gouws 2018 (3) SA 413 (SCA)** held that: “*Repositories of power can only exercise such power as had been conferred upon them by law*”.

54. The Adjudicator is not empowered in terms of the applicable legislative framework to make an order as per the relief sought by the Applicant.

55. CSOS is a creature of statute, and the Adjudicator is bound to make orders that are competent and enforceable in terms of the Act.

56. Accordingly, the Applicant's prayer for relief in (b), is dismissed in terms of **section 53(1) (a) of the CSOS Act.**

### **COSTS**

57. No order is made as to costs.

### **ADJUDICATION ORDER**

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

- (a) The relief sought by the Applicant against the Respondent in terms of sections 39(2)(d) and 39(1)(e) of the CSOS Act, is dismissed.
- (b) The relief sought by the Applicant is dismissed, in terms of **section 53(a) of the CSOS Act.**
- (c) No order is made as to costs.

### **RIGHT OF APPEAL**

59. 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 11<sup>TH</sup> DAY OF NOVEMBER 2022.

A handwritten signature in black ink, consisting of several loops and a long vertical stroke.

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**N FOCA  
ADJUDICATOR**