



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

Ref: CSOS8440/WC/21

IN THE MATTER BETWEEN

MARINE FRANKEN

APPLICANT

And

THEO FITCHAT

RESPONDENT

ADJUDICATION ORDER

1. EXECUTIVE SUMMARY

- 1.1. Relief applied for in terms of the CSOS Act: Section 39(2)(a)- in respect of Behavioural issues-
-an order that a particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way.
- 1.2. Date Adjudication conducted:
4th JULY 2022
- 1.3. Name of the Adjudicator:
MNINAWA BANGILIZWE
- 1.4. Order:
 - 1.4.1 The relief sought by the Applicant is refused.
 - 1.4.2 No Order as to costs.

2. INTRODUCTION

- 2.1. The Applicant is **MARINE FRANKEN**, the registered owner of a unit in Kleinbron Estate, situated at Frangipani Street, Kleinbron, Cape Town, Western Cape.
- 2.2. The Respondent is **THEO FITCHAT**, the registered owner of unit 91 Kleinbron Estate, situated in Frangipani Road, Kleinbron, Cape Town, 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 Applicant is seeking relief in terms of section 39 of the CSOS Act, in respect of- **Section 39(2)(a)**- in respect of Behavioural issues.

-an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way.

- 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 4th July 2022 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-

(l) 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 on the 18th March 2021. *In terms of clause 21 of the Practice Directive on Dispute Resolution, 2019 as amended, the Ombud referred the application for dispute resolution directly to adjudication in that the Ombud considered the dispute as being not appropriate for conciliation. The Ombud referred the application together with any submissions and responses thereto to an adjudicator on the 4th April 2022.

5. SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

- 5.1. The Applicant submits that the Respondent has installed cctv cameras around his house that have 360 degrees angles with full view into the Applicants garden, children’s bedroom and the main bedroom.
- 5.2. The Applicant submits that the cameras constitute a violation and invasion of the Applicants right to dignity and privacy.
- 5.3. The Applicant submits that she has raised the issue of the cameras with the Respondent and the directors of the Homeowners Association on a number of occasions, but no resolution has been reached.

Relief sought by the Applicant:

5.4. An order directing the Respondent to remove the cameras.

Respondent's Submissions

5.5. The Respondent submits that his cameras have a PTZ (pan, tilt and zoom) function which means that the Respondent can be able to change their angle from inside his house.

5.6. The Respondent submits that his cameras are only installed for security and safety reasons and are positioned to focus on his property.

5.7. The Respondent submits that there was no rule that prohibited the installation of cameras in the complex at the time that he installed the cameras and that he informed the directors of his intention to install the cameras

5.8. The Respondent submits that he consulted the municipal department, law enforcement and legal advisors prior to the installation of the cameras and was informed that he was not transgressing any rules and by-laws.

5.9. The Respondent further submits that the new rules of the complex prohibiting the installation of cameras are not enforceable to him as they are not retrospective.

Relief sought by the Respondent

5.10. 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.

- 6.3. The Respondent has installed CCTV cameras in his unit and the Applicant is of the view that the cameras are infringing on her right to dignity and privacy. The Applicant seeks a relief to have the Respondents cameras removed.
- 6.4. The issue to be decided is whether the Applicant's actions constitute a nuisance in terms of section 39(2)(a) of the CSOS Act. Section 39(2)(a) of the CSOS Act 9 of 2011, makes provision for the following competent relief:

“An order that a particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way”

- 6.5. **Wikipedia** defines nuisance, “as any form of interference or encroachment on a person's right to the use and enjoyment of their property, particularly immovable property.
- 6.6. Owners in a community scheme have by virtue of the most comprehensive right, the right of ownership, the general freedom to fully exercise his/her real right in respect of their property. Similarly, these rights are extended to other owners who live within the scheme.
- 6.7. In *casu*, the Applicant is complaining about the Respondent's cameras that are facing her property and invading her privacy. However the Respondent disputes that his cameras are invading the Applicant's property. The Respondent has stated that his cameras are not directed into anyone's property but are used for security reasons.
- 6.8. In **De Buys Scott and Others v Scott [2018] ZAFSHC 205 (22 November 2018)**, the court found that the conduct of the parties in general shows a real disturbance of order that has not been managed; neither by the appellants nor by some of their legal representatives. The parties are also neighbours. The fundamentals of this

case entail more than mere economic interests. Here it is about safety of persons and property, peace and order; and more.

6.9. In the case quoted above, the court noted with diligence that where an Applicant seeks an order for nuisance, there must be a real disturbance of order that has not been managed.

6.10. In the case of **Rand Waterraad v Bothma en andere 1997 (3) SA 120**, the court held that,

“Neighbour law seeks to harmonise the property interests of neighbouring property owners. Reasonableness and fairness dictate that in exceptional circumstances the exercise of property rights must be restricted to the extent that such exercise causes a neighbour prejudice”

6.11. In accordance to the reasoning of the court above, reasonableness and fairness may warrant the restriction of an owner’s rights to property in favour of one owner.

6.12. Furthermore, in the case of **De Charmoy v Day Star Hatchery (Pty) Ltd 1967 (4) SA 188 (D)**, the court held that:

“the test . . . 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”.

6.13. From the above quoted cases, one can note that the courts have applied the standard of a “reasonable man” in ascertaining whether the infringement on an owner’s right to the peaceful enjoyment of their property can be justified in light of one neighbour exercising their own property rights. The courts also agree that such test is an objective test and not a subjective one.

6.14. In the case of **Gien v Gien 1979 2 SA 1113**, the court held that in ascertaining the standard of a “reasonable man”, of great importance is the steps taken to mitigate the nuisance.

6.15. Consequently, the mere installation of cameras does not automatically amount to nuisance or wrongdoing, the actual illegal or wrongdoing must be proven.

6.16. **Section 14 Of The Constitution Of The Republic Of South Africa, 1996**

states that:

14. Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

6.17. It is noteworthy that the Applicant has not argued nor submitted evidence to suggest or prove that the Respondent is utilizing his cameras to record activities in the Applicant's household. The Applicant has merely stated that at some point the cameras were facing her backyard and her daughters window. In turn, the Respondent submits that during that time a technician was working on the cameras and had left them facing on random direction, and one of those directions happened to be the Applicant's backyard. However, at the time, the cameras were off and were soon thereafter corrected to face the correct direction away from the Applicant's backyard.

6.18. Therefore, in line with the above reasoning, it is my considered view that the Applicant has not proven on a balance of probabilities that the Respondent's behavior constitute nuisance in accordance with Section 39(2)(a) of the CSOS Act.

6.19. The Applicant, although being an owner exercising her rights of ownership, is still restricted by rules and regulations in which she has to tolerate certain behaviours of her fellow neighbours.

6.20. It should be noted that the Applicant has not successfully demonstrated that the Respondent has been utilising his cameras in a manner that amounts to nuisance.

6.21. It follows that the Applicant has not succeeded in the case against the Respondent and is not entitled to the relief sought in this regard.

6.22. In the circumstances the relief sought by the Applicant is hereby refused.

7. ADJUDICATION ORDER

In the circumstances, the following order is made:

7.1. The relief sought by the Applicant is refused.

8. COSTS

8.1. No order is made 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 4TH DAY OF JULY 2022.



MNINAWA BANGILIZWE
ADJUDICATOR