



**ADJUDICATION ORDER IN TERMS OF SECTION 53 AND 54
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Case Number: CSOS 292/WC/17

IN THE MATTER BETWEEN

MS DARLENE VAN DIEMEN

(Applicant)

And

THE MARINA DA GAMA HOME OWNERS' ASSOCIATION

(Respondent)

ADJUDICATION ORDER

PARTIES

1. The applicant is Ms Darlene van Diemen, an owner of a property in the Marina da Gama and as such a member of the Marina da Gama Association ("MDGA").
2. The Respondent is the Marina da Gama Association.

INTRODUCTION

3. This application is for dispute resolution in terms of Section 38 of the Community Ombud Services Act No. 9 of 2011. The applications were made in the prescribed form and lodged with the Western Cape Provincial Ombud Office. The applications include a statement of case, in each case, which sets out the relief sought by the applicants.
4. An attempt was made to settle the matters, but it was unsuccessful. This application is before me as a result of a referral sent by the Western Cape Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.
5. The hearing took place on 12 February 2018. The Applicant was present and she was assisted by Mr Robert van Vuuren. The Respondent was represented by Ms Cheryl Philip, the chairperson of the MDGA and Mr Bedingham, an employee of the MDGA.

6 APPLICABLE PROVISIONS OF THE ACT

The hearing was conducted in terms of section 38 of the CSOS Act No 9 of 2011 which provides that –

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

Section 45(1) provides that –

"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”

Section 47 provides that –
“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”.

Section 48 provides that –
“If conciliation contemplated in section 47 fails, the ombud must refer the application together with any submissions and responses thereto to an adjudicator”.

7 SUMMARY OF EVIDENCE

The dispute between the Parties arose on account of alleged unconstitutional behaviour of the MDGA and, in particular, the Executive Committee (“Excom”) of the MDGA, especially insofar as the actions in anticipation of the 2017 annual general meeting and the meeting itself is concerned. According to the Applicant, the Exco did not follow the procedures prescribed in the constitution of MDGA (“the Constitution”) and in general acted without observing the requirements of proper governance applicable to administrative actions of this nature and not in the best interests of the owner body of the Association as a whole. As such, the Applicant wants the meeting to be declared invalid along with all resolutions taken at such meeting. The Respondent is of the view that they complied with all requirements and at all times acted correctly and in the best interest of all of the owners.

8 APPLICANT’S VERSION

8.1 The Applicant claimed that he MDGA did not follow the correct procedures in calling for the Annual General Meeting which was held on 5 June 2017, in that:

8.1.1 proxy forms were not in a standard or acceptable format and were, in her view, already constituting early voting forms. In

addition, whilst the Constitution in paragraph 10 calls for proxy forms to be handed in 3 (three) days prior to the meeting, proxy forms were still accepted at the meeting itself and emailed proxy forms were also accepted.

- 8.1.2 the opening and organising of proxy notices on the day before the Annual General Meeting were irregular in that some of the candidates standing for positions on the Excom were present and "organizing" proxies. This included Ms Philip and Mr Robert Carlisle. Members of the community was told to go to the office, but were not allowed inside. Upon asking Ms Philip what she was doing there, she responded that she was not looking at anything, but merely sorting. Similarly, she asked Mr Bedingham what he was doing and he responded that he is acting on telephonic instruction from Mr Philip to open envelopes. According to the Applicant, this amounted to counting votes before the meeting and, in her view, this constituted an irregular practice;
- 8.1.3 a "tea lady" was present in the offices of the MDGA along with Marsha Fritz and Mr Bedingham when the alleged counting of votes in respect of the proxy forms took place and, in the view of the Applicant, this person was not necessarily qualified for this task;
- 8.1.4 the verifying of eligibility for voting (in other words, ensuring that levies are paid up) should not have been done by staff members, but by an independent body;
- 8.1.5 nobody knows how the vote counting process worked and what happened to proxy forms; results were only made public a day after the meeting; no voting took place at the meeting and nothing was counted at the meeting;
- 8.1.6 the meeting notice that appeared on the notice board of the MDGA contained incorrect and/or false information. In this regard she stated that despite the notice indicating that members who are paid up to 31 May 2017 will be eligible to vote, monies were still accepted at the meeting itself;
- 8.1.4 the actions of Ms Philip and other Exco members in the run up to the Annual General Meeting smacked of favouritism and marginalized some members to the extent that these actions were not in the interest of the MDGA as a whole. In this regard,

reference was made to an email from Ms Philip to another owner, allegedly with the instruction that it should be circulated widely in the MDGA, which email indicated that some people are not suited for positions on the Exco.

- 8.2 With respect to the Annual General Meeting itself, the Applicant claims that she was, despite being told by Ms Philip that she would be afforded an opportunity to speak and air her views, given almost no time to make her point and that her microphone was switched off. In her view, the meeting was badly run and rather chaotic. Furthermore, in her view there was confusion as to voting by hand or by ballot. She also queried the fact that, in her view, there was no proper statement to declare the meeting quorate.
- 8.3 The Applicant referred to the Constitution of South Africa, stating that, as the supreme law, the Excom should comply with that and that the Constitution is subject thereto. She stated that she was traumatized by the events which led to the Annual General Meeting and the meeting itself, that she experienced it as having a racist undertone.
- 8.4 The Applicant stated that she relies on paragraph 7.6 of the Constitution as support for her prayer that the meeting itself be declared invalid. With respect to the election of Excom, it is her view that there was non-compliance with paragraph 10.11 of the Constitution and that, as such, the election is invalid and should be set aside. The Applicant testified that, in her view, the Companies Act is not relevant at all as the Association is not a company.
- 8.5 The Applicant contented that she experienced that Excom spread spurious information about some members, especially six named members of which she is one. In her view, the Excom operate only to serve a select group of people. She expressed the view that there was a campaign to discredit the said six members as a result of which not one of them was elected to the Excom at the Annual General Meeting. In this regard she specifically referred to, what she called the Annual General Meeting of Elisa (East Lake Island Association), in relation to an email, received by her from Brian Smith, but originally distributed by Peter Crate, which email allegedly constituted an "instruction" from Ms Philip to members not to vote for the aforesaid six members. The Applicant expressed her concern over the fact that her name and that of Karen Brackner and Mike Ryder appear on a notice to members with respect to matters referred to the CSOS, whereas there are also other matters being referred without naming the applicants. The Applicant stated that she was not aware of the meeting invite to Mr de Groot and in any event, he does not represent her.

8.6 Insofar as efforts to resolve the dispute are concerned, the Applicant testified that she sent numerous emails to express her concerns and to ask for the process to be clarified. She was invited to meet with Boudje Giljam. This did not render results and she was furthermore told that the process will not be changed and that Excom will not entertain any further correspondence from her. The Applicant expressed her concern over the alleged reference to a "shadow government" (ostensibly referring to her and the other members who stood for election).

8.7 Reference was also made by the Applicant to an attempt to arrange an ordinary general meeting, but claimed that the Excom did not support this and that they were asked to provide a resolution which, in her view, was not a requirement of the Constitution. According to the Applicant, Excom delayed the arranging of the proposed meeting such that it became non-sensical.

9 APPLICANTS' PRAYERS

9.1 The Applicant seeks the following relief:

9.1.1 That the Annual General Meeting of 5 June 2017 be declared invalid, including all resolutions taken at such meeting and the election of members of Excom.

10 RESPONDENT'S VERSION

10.1 The Respondent claimed that she failed to understand the problem with the format of the proxy document as the Constitution does not prescribe a form. She stated that it is not a voting form, but a proxy. In her view, the form that was used was adequate and understandable and they based it on a form that would be used for private and listed companies. It is furthermore a special proxy (in other words, completed specifically for the meeting) as opposed to a general proxy which would normally be valid for a year. As such, it gave the proxy holder specific instructions as to how to vote on certain subjects and where left blank, gave the proxy holder some discretion. Insofar as the submission of proxies after the cut off day (thus after three days) is concerned, she explained that:

10.1.1 the Annual General Meeting was held on a Monday, which meant that the last day for submission of proxies would be Friday at 19h00. However, the offices of the MDGA closes at 13h00 on a Friday and there would have been no way to determine when a proxy note was

placed in the letter box of the Association. She stated that she was unaware of proxy forms being handed in at the meeting;

- 10.1.2 communication to members are mostly, as far as possible, by email following a decision by Excom in 2016 to allow electronic communication. It was thus the interpretation of Excom that, as such, proxies could be submitted by way of email, fax or hard copy dropped in the letterbox;
- 10.1.3 Excom took notice of the recent judgement in the Clearwater case in which it was determined, with respect to a company, that any rule prohibiting proxies to be delivered at the meeting for which it was intended, was invalid.
- 10.2 With respect to the receipt of levy payments at the meeting, Ms Philip explained that in previous years, payments were accepted at the meeting itself. These days, levies are mostly paid by EFT and the reason the Excom made the 31 May 2017 arrangement was to give them an opportunity to verify EFT payments. She explained that it is in some cases difficult to match a payment with a member and, with reference to the Applicant's statement that she knows of somebody that paid, but was not eligible to vote, she said that it is possible that the payment is unallocated and in the suspense account.
- 10.3 Insofar as the email correspondence in the run up to the meeting is concerned, Ms Philip explained that she had sent a personal email from her private email account to members that she knows (which email admittedly did refer to the breakdown of trust between the Excom and certain members) and had not given any instructions for this email to be circulated. She stated that she had no control over people forwarding the email. She also made it clear that the reference to "delinquent" members follows the term used in the Constitution for those members whose levies are not paid up.
- 10.4 As far as the meeting of Elisa is concerned, Ms Philip explained that this meeting only involved the security contingent of the East Lake Island Association. It was not an annual general meeting of any nature. She stated that she was not at the meeting, but that, in her view and in response to the Applicant's reference to the views expressed by Mr Crate, Mr Crate can say what he wishes as he is a member, just as the Applicant is.
- 10.5 The Respondent handed in an affidavit by Marcia Fritz, an employee of the MDGA with respect to the activities at the MDGA offices on the

morning of the Annual General Meeting. This affidavit explained that Ms Fritz, together with the standards inspector, Mr Bedingham, opened proxy forms and separated them into three piles, alphabetically, according to the three voting categories, being election of Excom members, ordinary/special resolutions/amendments to the Constitution/resolutions submitted by members and amendments to the design manual. Given the volume, she (Ms Fritz) asked the supervisor at the Eastlake centre to assist them. Mr Fritz explained that they verified payments against proxy forms to ensure that all proxies are valid. She stated that all valid proxy forms were returned to proxy holders at the meeting whereas those of delinquent members were kept behind. She stated that, in the course of the day, some members came to the office and objected to a "cleaning lady" counting votes and proceeded to take video footage via cell phone.

- 10.6 With respect to the meeting itself, Ms Philip stated that she had to stop the Applicant from speaking at the meeting as, in her view, the fact that the Applicant introduced herself by her profession and then stated that she is making herself available for election was out of order. According to her, she did at a later stage give the Applicant an opportunity to speak. The meeting was recorded. She cannot recall actually declaring the meeting quorate, but it clearly was as the proxies alone was sufficient to make it such. With regard to the comment by the Applicant with respect to the voting by hand or ballot, she stated that only one item was decided by hand and that was whether or not the meeting should proceed. The other resolutions were taken by ballot. Ms Philip commented that she received a number of emails complimenting her on the running of the meeting.
- 10.7 The Applicant explained that it was a process to verify proxy forms against levy payments to ensure that members are eligible. They kept track of votes by numbering every voting form such that it could be verified for levy payment after the meeting if not possible to do before. It is a policy of the Excom not to divulge to the rest of members who the delinquent members are.
- 10.8 Insofar as the meeting notice is concerned, she stated that meeting notices were hand delivered by 28 April 2017 and not on the notice board. The notice stated that information is available on the website and on the notice board. When resolutions were circulated, members were invited to send queries. Besides that from the Applicant, one other query was received from Mr Ryder. The Excom, according to the Respondent, made themselves available to explain any misunderstanding. Ms Philip stated that the email correspondence to

which the Applicant referred only started on 23 May 2017, long after the meeting notice went out.

- 10.9 The Respondent explained that it was impossible to count votes at the meeting. She stated that she invited members to assist or attend the counting process. Votes were counted the next day by Ms Fritz and Mr Bedingham whereafter the Excom election results (not the other resolutions) were sent to the external auditors for verification.
- 10.10 Insofar as attempts to settle differences with the Applicant and the other unhappy members, Ms Philip stated that she had approached Jan de Groot with an invite to meet, but that was declined.
- 10.11 With respect to the request for an ordinary general meeting, Ms Philip explained that the request came after the notice for the Annual General Meeting has already gone out. In the absence of a resolution tabled for the meeting, the Excom in any event did not see on what basis the meeting should be arranged.

11 EVALUATION OF EVIDENCE SUBMITTED

- 11.1 This case is clearly a result of the breakdown of trust between Excom and a section of the members of the MDGA. Any such breakdown is a pity and undermines the community spirit and co-operation that one would ideally see in a community of the nature of Marina da Gama. It is indeed sad that matters progress to CSOS instead of being resolved by discussion and negotiation between the parties. I am not in a position to blame any one party or person or to comment on the reason for the breakdown of trust as I simply do not have all relevant information and was not able to consult with any other interested parties - it is in any event not the specific purpose of this order- but I find the obvious suspicion with which the Applicant views the actions of Excom disconcerting. I urge the members of Excom and the Applicant to continue to find ways of co-operating in the interest of the community as a whole. I also urge members to bear in mind that being a member of the governing body of a community scheme is a rather thankless and difficult task (excuted in many instances by lay people in their valuable free time) and that one should, instead of finding every opportunity to criticize or "catch out" the members of Excom, rather support legitimate efforts by these volunteers to improve the living environment for everyone. Having said this, members should, of course, at all times, hold the Excom members accountable, but that too, can be done in a positive rather than a negative spirit.

- 11.2 The question here is whether or not the actions of the Respondent in the run up to the Annual General Meeting of 5 June 2017 and the meeting itself are in compliance with the Constitution. Whereas the Applicant is correct to state that the constitution of the Republic of South Africa is the supreme law in all instances, there has been no indication by her that any provision in the Constitution contradicts the constitution of the Republic and as such should be regarded as unconstitutional and thus unenforceable. The measure here is thus whether the actions of the Respondent, as represented by Excom, meet the standards and prescriptions of the Constitution. I will thus deal with each of the allegations made by the Applicant in this vein. In this case, one also has to take cognizance of the provisions of paragraph 18 of the Constitution which states as follows in 18.1: "Should any dispute or doubt arise as to the interpretation of meaning of this Constitution or any Rules and Regulations of the Association, Excom shall be the final arbiter and its decision shall be binding upon the members."
- 11.3 Insofar as the nature of the proxy forms is concerned, the relevant provision in the Constitution is paragraph 10.11.2 which states as follows: "The instrument appointing a proxy shall be in writing in the common form, or any form approved by Excom under the hand of the appointer, or of his attorney...." It is thus clear that the Constitution does not prescribe the form and that Excom is free to accept a format of their choice. It is indeed correct that proxy forms are usually either specific or general. The proxy form submitted at the hearing was specific-in other words, it indicated to the proxy holder exactly how he or should vote on any of the specific resolutions on behalf of the proxy giver (except where left in the proxy holder's discretion). As such, in practical terms, one can see why the Applicant viewed these forms as early voting forms as they already contain the choice of the member giving the proxy. However, that does not retract from the fact that the proxy form was noted as a proxy form (and not a vote) and that it complies with the requirement of the Constitution.
- 11.4 With respect to the time of submission of the proxy form, the Applicant's contention is that, given that the Constitution in paragraph 10.11.3 states that proxy forms should be delivered three days in advance of the meeting for which it is intended, anybody acting in respect of a proxy handed in later than that, acts unlawfully. It is indeed correct that that is the requirement of the Constitution, but I do follow the logic of Ms Philip to err on the side of caution and allow later proxies in the circumstances (given that Excom would not know when a proxy form was handed in at the office). Also, although it is correct that

the MDGA is not a company, I find it prudent of the chairperson to take notice of the requirements of the Companies Act and its interpretation. The message in the Clearwater case is clearly that, as far as reasonably possible, members of companies should be placed in a position to exercise their votes and that technicalities should not stand in their way. One should also bear in mind that the Companies Act (especially as interpreted by the latest King Code) does aim to stretch its applicability to entities wider than purely companies. In this case, the Applicant did not indicate how many proxies were in fact received late and as such, how many votes should be discounted for any particular motion. There is no authority in the Constitution or in law to declare an entire meeting invalid because, potentially, some proxy forms were received late. I am also satisfied that the fact that voting forms were in fact "named" meant that proxies received at the meeting were subject to the same scrutiny to ensure that the member in question was indeed eligible to vote.

- 11.5 On the basis of the above, and the need to verify proxy forms to ensure that the member is not a delinquent member for purposes of the Annual General Meeting, I find nothing untoward in the organizing of proxy forms prior to the meeting. The task was largely performed by staff members of the MDGA and the Applicant failed to table any evidence to suggest that proxy forms were tampered with. Her entire submission is based on the possibility that something unconstitutional took place prior to the meeting-there is, however, no evidence to support this contention. The notion that staff members should not check eligibility to vote, is also not understandable. This is the way it is done by most home owners' association or its managing agent (if there is one). In this case, the MDGA employs staff and there is no reason to doubt the truth of the contents of Ms Frits's affidavit or to conclude that the staff members had any reason to tamper with proxy forms. The assistance of the lady asked to help by Ms Fritz, is also of no consequence and in fact, if anything, lends more credence to the process. It is indeed sad that the Applicant found it necessary to take photos of the staff members doing their job in the offices of the MDGA.
- 11.6 With respect to the counting of votes, the position is much the same as that applying to the organizing of proxy forms-according to Ms Fritz, the two staff members counted votes and, in the case of the election of Excom members, these votes were sent to independent auditors for verification. In fact, the Constitution, in paragraph 10.8.5 determines that the chairman "shall count the votes." I fail to see what else the MDGA was supposed to do.

- 11.7 Lobbying is very much part of the life of home owners' associations. It is not necessarily negative as it indicates interest in the affairs of their association by members and counters apathy. The evidence led with respect to emails being forwarded and what's app groups is indicative of members trying to seek support for their respective candidates. I fail to see in what why this is not in the interest of the Association and how any action by Ms Philip undermined the Association to such an extent that she should give up her position as chairperson. Mr Bedingham lead evidence to the effect that everybody had the opportunity to make himself or herself available for election to the Excom. In fact, the Applicant did make herself available and so did others on the list of six alleged undesirable candidates.
- 11.8 I see no reason to make any ruling on the attempt by the Applicant and other members in support to have an ordinary general meeting arranged as it is academic. The Annual General Meeting notice had gone out to members by then and all matters intended for the ordinary general meeting could be tabled at that meeting. The same applies to the meeting notice and alleged misinformation contained in it. The Constitution does not state by when (in other words, how long before the meeting) a member should be paid up in order to vote at a meeting of the Association. I understand the difficulty with eft payments and the need to have a cut-off date. However, again, erring on the side of caution and giving members the opportunity to still pay on the night of the Annual General Meeting, in my view serves the Association as it made it possible for more members to actively take part in its decisions.
- 11.9 Insofar as conduct of Ms Philip at the meeting itself is concerned, I fail to see how the evidence provided by the Applicant in any way support a notion that the meeting was run unconstitutionally and should be declared invalid. It is clear that voting for tabled motions and the election of Excom did take place in the correct manner, else (in the latter case) the auditors would have had nothing to base their report on. There is furthermore no provision in the Constitution that requires the chairperson to declare a meeting quorate. If the Applicant had any reason to believe that a quorum was not present, she brought no evidence to support that.
- 11.10 I see no reason to rule on the allegation that the Applicant and other members are discriminated against on the basis of their cases against the CSOS being made public knowledge whereas in other cases this is not done as it does not relate to the Applicant's prayer for relief. I accept Ms Philip's explanation that the other matters referred to are

issues of standards, however, the Association is advised to be very circumspect in this regard. No Association is perfect and Excom should avoid a situation where an impression is potentially created that members who lay complaints are necessarily troublesome or wrong.

11.11 I also see no reason to rule on the evidence pertaining to attempts to communicate between the Applicant and Excom and meeting between the Applicant and Mr Giljam. It does not have a bearing on the relief that the Applicant seeks. I do, again, however, wish to encourage both the Excom and the Applicant to continue keeping the communication channels open and to, wherever possible, resolve difficulties by constructive discussion.

11.12 With reference to the Applicant's reliance on Paragraph 7.6 of the Constitution to render the actions of Excom invalid, I point out that this paragraph does not support rendering any of the alleged Excom actions invalid. In fact, its intention is the exact opposite, namely to render Excom actions valid despite a possible flaw in the election process.

11.13 Given my conclusions as set out above, I do not find any evidence or provision in the Constitution which supports a drastic measure such as to declare the Annual General Meeting of 5 June 2017 and decisions taken there, invalid.

12. POWERS AND JURISDICTION OF THE ADJUDICATOR

The Adjudicator is empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the Community Schemes Ombud Act, no 9 of 2011 ("CSOS Act"). The CSOS Act enables residents of community schemes including sectional title schemes to take their disputes to a statutory dispute resolution service instead of a private arbitrator or the courts. The purpose of this order is to bring closure to the case brought by the applicant to the CSOS.

13. ADJUDICATION ORDER

13.1 Sections 39 and 54 of the Community Schemes Ombud Service Act No. 9 of 2011, determines which orders an adjudicator is competent to make and in terms of Section 54 (1) "if the application is not dismissed, the adjudicator must make an order- (a) granting or refusing each part of the relief sought by the Applicant."

- 13.2 The Applicant's prayer is refused.
- 13.3 Each party is to carry its own costs.

14. **Section 56 of the CSOS Act, 2011**

The parties' attention is drawn to the status of the order made herein. In terms of Section 56, (which reads as follows:

'If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of a magistrate's court, the order must be enforced as if it were a judgement of such Court and a clerk of such Court must, on lodgement of a copy of the order, register it as order in such Court)

orders made under the CSOS Act are of the same status as that of an order made by either the Magistrate's Court or the High Court, depending on the amount of money or relief sought. As such, the order made herein may be enforced by a party in the same way as it would enforce a court order. Any party who wishes to enforce an order made in terms hereof, should approach the clerk of the relevant court (being the Magistrate's Court or High Court in the area where the Scheme is situated) to ensure that the order is registered with such court, whereafter it is capable of being enforced as a court order.

15. **RIGHT TO APPEAL**

- 15.1 The Applicant, the Respondent or any affected person who is dissatisfied by the order may appeal to the High Court on a question of law in terms of Section 57 (1).
- 15.2 An appeal against an order must be lodged within 30 days after the delivery of the order of the adjudicator.
- 15.3 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.


HANNCHEN ELIZABETH LOUW
ADJUDICATOR

CSOS 292/17


ADJUDICATION ORDER
DATE: 21/3/2018
Community Schemes Ombud Service
T: +27 (010) 593 0533 | F: +27 (010) 590 6154
Website: www.csos.org.za
Fraud Hotline: 0800 701 701