



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

Case Number: CSOS287/WC/17

IN THE MATTER BETWEEN

**Karen Bruckner  
(Applicant)**

and

**Marian Da Gama Homeowners Association  
(Respondent)**

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**ADJUDICATION ORDER**

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**PARTIES**

1. The applicant is Karen Bruckner, an owner of a property situated in the Marina Da Gama Estate. She acts in her capacity as a member of the Marian Da Gama Homeowners Association. The Respondent is Mariana Da Gama Homeowners Association. A Home owners Association is community scheme as contemplated in the CSOS Act, 2011. The definition of "community scheme" means any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings.

2. The Respondent was represented by Boudje Giljam, who was the Chairperson of the Marina Da Gama Homeowners Association (hereinafter referred to as the MDGHOA) at the time the dispute arose. He is currently a member of the Executive Committee.
3. The Respondent was also represented by Geraldine Goldblatt, a member of the Executive Committee (hereinafter referred to as Excom).

### **INTRODUCTION**

4. This is an application for dispute resolution in terms of Section 38 of the Community Ombud Services Act No.9 of 2011. The application was made in the prescribed form and lodged with the Western Cape Provincial Ombud's Office. The application includes a statement of case which sets out the relief sought by the applicant.
5. The adjudication hearing took place on 15 November 2017 and 11 December, 2017. 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.

### **APPLICABLE PROVISIONS OF THE ACT**

6. 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”.*

7. 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”*

8. 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’.*

9. 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”.*

## SUMMARY OF EVIDENCE

### APPLICANT'S VERSION

1. Marina Da Gama is a development comprising some 1,300 properties situated in an area that is surrounded by high crime statistics which also affects the homes in the Marina da Gama (MDG) estate. Security is a priority for the owners who have formed a number of Neighbourhood Watches known as the "Guardians". These Guardians patrol their respective precincts within the MDG Community. The members are volunteers.
2. The Applicant is a member of one of the Guardians, the Uitsig Neighbourhood Watch, an informal forum which does not have a Constitution. They exchange ideas and intelligence regarding security with other Guardians of the MDG.
3. The Applicant has been a member of the MDGHOA since 2005 when she purchased a house in the MDG Development. She has not had much contact with the MDGHOA until 2016 when the Uitsig Neighbourhood Watch (UNW) interacted with the MDGHOA. She has no history with them.
4. She became the Chairperson of UNW in 2017 but does not represent the UNW in this hearing. At the time of the incident which is the subject of the dispute in this hearing, Derrick Ross was the Chairperson. The other members were Mario Katz, Bryan Smith, Kayin Scholtz, Mandy Fourie, Charles van Rooyen. Mike Ryder, who will feature prominently in this Order, was not a member at the time, and Bryan Smith had just been co-opted in January 2017. So there were seven members of the UNW.

5. On 12 January, 2017, the UNW received an email from Robin Carlisle, the Convenor of the Guardians, which was addressed to the Guardians, entitled "Notice of the Guardians meeting on Tuesday, 31 January, 2017 at 18h00 at the San Marina Clubhouse."
6. Item 2 on the Agenda was named a Consultancy Proposal. This was to be the main focus of the meeting. The proposal was attached. The email went on to say that it was very important to appreciate that this is a matter for the Guardians to decide. Further, that if they approved the proposal, the Consultant would report to the Guardians and not to Excom. It added that Boudje, Dieter and the consultant-Renford Brand-will brief them on the proposal, and deal with all the comments and questions and that they would then take a formal decision on the matter. The Consultancy proposal ended by saying, "Please go carefully through the proposal before you come to the meeting".
7. One of the members of UNW, Bryan Smith, who was very involved in the funding of the cameras had numerous questions about the proposal which was attached to the email. On 13 January, Bryan Smith sent a letter to the UNW raising many important questions and the UNW met on the 14<sup>th</sup> January to discuss his concerns. At the meeting on the 14<sup>th</sup>, Bryan Smith mentioned that R.Brand was on the donor list of the "Friends of Park Island", one of the NGO's operating in the MDG. They assumed that this was the same R. Brand who was to be the Consultant, Renford Brand. It was decided that the UNW would draft and send a letter to the MDGH Excom with various questions seeking clarity on the proposal.
8. On 16 January, 2017, the UNW Committee sent a letter with many questions, one of which related to the Consultant, R. Brand who was to analyse the risks

and point a way forward, at a fee of R38,000. Robin Carlisle was included in the email as a courtesy as he had sent the email which initiated the questions. He was not a member of Excom at the time.

9. One of the questions was worded as follows: "Firstly, we wish to clarify that other quotations (three of which are necessary to satisfy the treasurer of the MDGA/EXCOM) have been obtained, and kindly ask to be furnished with the details of such, in order to pre-empt and/or dismiss any possible future claims of conflict of interest as it is noted that Renford Brand is a sponsor of the NGO run by EXCOM Chair (Boudje Giljam)'s family, the Friends of Park Island (noted Marina Newsletter, Friday 20 May 2016.)"
10. Robin Carlisle found the questions very offensive and replied in a strongly worded email. At that stage the UNW still did not know that they had mistakenly identified Renford Brand with the R. Brand on the donor list. So they did not know what he meant when he stated "Let me make it clear to the UNW committee members that I want nothing to do with defamation by innuendo, nor has it any place in the Guardian's group."
11. He ended his letter by saying that the other items can be raised at the meeting on the 31<sup>st</sup>.
12. On 25 January, at a meeting arranged by Derek Ross, the applicant, Karen, Bryan Smith and Mario Katz met with Boudje Giljam but Derek Ross did not attend. The meeting was chaired by Boudje Giljam and Cheryl from EXCOM volunteered to write the minutes. The applicant wrote her own minutes. She requested that the proceedings be recorded but this did not happen.
13. She thanked Boudje for clarifying that Renford Brand was not the same person as R. Brand, the donor. She understood the offence and indignation felt by Boudje. However, he demanded an apology and she was not

comfortable with this as she had no intention of offending him by asking an innocent question which at the time seemed valid, given that the Guardians had been requested to look at the proposal and approve the appointment of the Consultant.

14. At the meeting, Boudje told her to “shut up” and two of the young men, Mario Katz and Bryan Smith jumped up, as they were offended by Boutje’s treatment of her. She managed to pacify them.
15. She realised that she had become associated with issues that did not concern her and she regretted that the question was interpreted in that way.
16. On 3 February, Excom emailed its minutes. The applicant replied on 18 February as she had had a death in her family. The minutes written by Cheryl were presented in a way that made her look like she was part of a certain group.
17. On 22 February she received an email from Mike Ryder, whom she did not know. She had only heard of him from Cheryl. In his email he referred to an anonymous sms received by Latif Gaffoor, one of the EXCOM members, accusing EXCOM of being hopeless and/or pathetic.
18. She thereupon decided to refer a dispute to CSOS. She realised that she had volunteered for something that was taking away her energy.
19. She took issue with the one-sided way in which information was published by the MDGHOA and the way she was portrayed as being part of a group.
20. The donor list was not published by the UNW. It had been placed on the Marina Notice Board.
21. She has still not received a written response to the letter dated 16 January, 2017. Apart from the questions around the identity of R. Brand, which were addressed at the meeting, the other questions have not received an official

response though some were referred to in the minutes. The requests were made on 16 January and were followed up by another request for a reply on 18 January.

22. Her other grievance was that she should have a right to respond to the minutes which were published in order that she may place it in the correct context.
23. The issues which she raised were trivialised and the MDGHOA became very defensive. She believes she has a right to ask questions and have them answered. The responses so far are unacceptable. Instead, she was asked to "shut up".
24. The members are afraid to raise any questions as they would be threatened with legal action. The authors of the letter dated 16 January, 2017 received a letter from Boutje Giljam's attorneys, accusing them of defamation and demanding an apology failing which they would be taken to the High Court.
25. She cited examples of many subsequent minutes which were published to 1,200 members which present an inaccurate account and interpretation of what transpired and what is going on with regard to the CSOS case. She submitted documentary evidence to support her claim. The details are too extensive to record here. Suffice to say that the published information is based on an interpretation which is different to the Applicant's. My task is to deal with the prayers, details of which appear below, so I will not assess the substance. The applicant has asked for a right to reply, which if granted, will give her an opportunity to articulate her interpretation.
26. Another issue which has arisen is the proposal to pay half of the cost of training of the Guardians on how to deal with a hostage situation. She requested that the HOA not confine the contribution to the Guardians only, but



to contribute to the training of all members requesting same. Robin Carlisle rejected this request. In the Portfolio report dated 11 May, 2017, the issue was presented in a way that was not accurate.

27. Under cross-examination, Mr Boudje stated that most of the facts were not in dispute. What seems to be in dispute is the interpretations and perceptions.

28. The applicant rejected the claim by Boudje that he and Derek had agreed that the minutes of the meeting arranged between him and Derek would serve as the HOA's response to the letter dated 16 January, 2017.

29. The applicant rejected the assertion that one phone call could have clarified the question of the correct identity of R. Brand and Renfred Brand. She said that in the interests of transparency, an official response to not only that question but to all the questions is necessary.

30. It was put to her that she is the only person of the seven UNW Committee members in the group of 8 (including Mike Ryder) who have been cited as Respondents in a defamation suit threatened by Mr Giljam's lawyers, who is still pursuing the questions raised in the letter dated 16 January, 2017. It was put to her that the others have either retracted their statements or apologised. The applicant argued that she had a duty of care to perform as a member of the UNW which had to perform the necessary due diligence for a proposal it had been requested to respond to. The questions were posed with this duty in mind and she had no idea that there was an association between Boudje and R. Brand. She argued further that she is one of 1,300 members, and a phone call might have given her the clarity but the other members needed to know as well. She is guided by principles of good governance and transparency. The UNW was one of many precincts which raised issues around the proposal, and the response has to be on record for all to see.

31. It was put to her that Boutje's request to Robin Carlisle was to get buy-in from the Guardians and he, Boutje, phoned Robin requesting him to get sufficient consensus but Robin got it wrong. It was further put to her that Mike Ryder is not a member of the Guardians but that he was instrumental in causing the problems around the security Consultant proposal. The applicant did not dispute this, but countered by saying that he, Boudje, had asked her to "shut up". Boudje conceded that he had lost his cool and reminded her that he did apologise. She argued that his apology was given under "duress", only after her husband approached Boudje at a meeting some time later about his treatment of his wife. She said she accepted it as it was given but that he did have an opportunity to apologise at the CPF and at the Guardians meeting prior to the meeting with her husband.
32. It was put to her that her freedom of speech impacted on his, Boutje's right to dignity and that he engaged a lawyer because of Mike Ryder and Bryan Smith, not because of her, but she ended up with collateral damage. It was put to her that Mike Ryder provided incorrect information to the UNW because he had an agenda and she "got sucked into it."
33. The question of duty to disclose was put to her, that she believed that Boudje had a duty to disclose the fact that he cycles with R. Brand. She said that she did not know that R. Brand was part of the cycling association which Boutje belongs to.
34. She was asked what is the value of her dispute and she replied that the value is in transparency and accountability. That they were not part of a club so a phone call from her to him does not achieve this value. Secondly, if consensus could not be reached, then she wanted it to be part of a question

and answer form, not a MDG published report on the interpretation that she was part of a group.

35. In response to a question by Geraldine Goldblatt, she explained that the UNW has not withdrawn from the Guardians, that only she has withdrawn as she was not comfortable to be sponsored in her capacity as a Guardian while other less fortunate people who needed the hostage training were not sponsored.

36. Geraldine asked her why she walked out of a meeting with the City Council. She replied that they were there only to observe and that Bob Crest had ended the meeting and that was why they left.

37. It was put to her that she is grouped with some vexatious people. She replied that she is surprised that she has been grouped with others. She further argued that she required a response based on merit, not on the identity of the person who raised the question. The HOA has issues with Mike Ryder and they had a history. These were their issues, not hers. She did not know Mike Ryder when the letter dated 16 January was sent by UNW.

### **APPLICANT'S PRAYERS**

1. In her referral to CSOS, the applicant prayed for the following orders:
2. Prayer (1) that CSOS investigate the validity of her concerns raised by the UNW Committee and by herself relating to the Governance practices and subsequent actions of the MDGA Excom. Should these requests be valid, she required an official response from the MDGA Excom.
3. Prayer (2) was for a personal written apology to the UNW and to her from each of the Executive members involved in the intentional compilation and

distribution of the prejudicial presentation of the facts to third parties via MDGA publications and at meetings:-to be distributed to MDGA members. These apologies are to be placed on public record with the UNW, CPF nad SAPS.

4. Prayer (3) was for the opportunity to respond personally and on behalf of the UNW via the same communication channels used by the MDGA Excom to distribute this misinformation.
5. Prayer (4) was that the Ombudsman arrange for a CSOS appointed observer to attend the MDGA AGM on the 5<sup>th</sup> June, 2017 at Masque Theatre at 19h00.
6. CSOS accepted and classified the referral to adjudication in terms of Section 39 (3)(b) in respect of scheme governance and in terms of Section 39 (7)(b) in respect of general and other issues.
7. Section 39(3)(b) is for an Order requiring the Association to record a new scheme governance provision. I checked this with the applicant and she prayed for an order as stated above and did not require a new scheme governance provision.
8. I will therefore deal with the prayers in terms section 39(7) (b) in respect of general and other issues.

### **RESPONDENT'S VERSION**

1. Much of the Respondent's version was alluded to in the cross-examination.
2. There was no significant dispute of facts.
3. Boudje testified that his actions were driven by the advice which he got based on the letter from his attorney, a copy of which was handed in as evidence.
4. After the meeting with Aimee Kuhl, they felt "vexated".

5. He believed that Karen Bruckner was duped by two people, Bryan Smith and Mike Ryder.
6. The letter from his attorney was done without the knowledge of the case referred to CSOS.
7. He had a problem with the negligent way in which it (the question) was asked.
8. The attorney for Mike Ryder and Bryan Smith retracted on their behalf.
9. In his view, he acted correctly. He might not have acted perfectly but he acted in good faith.
10. He called a meeting to kill off a nasty letter, based on their perception of what was being alluded to.
11. It was their intention that the minutes would be circulated.
12. An anti-Excom spirit is prevalent in the Whatsapp group which Keran administers.
13. The problem is that they get a bad vibe from this group.
14. They are not privy to the whatsapp messages, as Karen claims that the chat group has the right to "freedom of speech".
15. He provided some background. Mike Ryder got hold of the minutes from Mario Katz. Cheryl and Mike exchanged emails. Mike wanted them to apologise. They said that it was the alternate minutes (Karen's minutes). Karen was blind cc'd. That's when she took the matter to CSOS.
16. Latief Gaffoor works very hard but there is nothing one can do to stop people from sending an anonymous sms.
17. To this Karen agreed that there are lots of good things happening at MDG but that the concern is how it is handled. They feel under fire. Younger people have new ways of doing things.
18. He complained that 80% of the emails to MDG Excom comes from one person. To this she asked whether the emails were relevant. Boutje responded that their communications are not perfect and that they need a system to deal with Community emails.
19. He added that they get annoyed when so many emails come from one person. To this Karen asked whether there was merit in the questions raised in the emails. Boutje conceded that many questions are fair but some of them are not urgent.

20. The volume of emails imposes a burden on the MDG Excom. They need a CRM customer relationship management system to deal with the volume of emails.
21. The MDG Excom work very hard to fulfil their duties. Excom took over a chaotic system. They had offered Karen the opportunity to write a manual for governance but she has not taken up the offer.

### **EVALUATION OF EVIDENCE SUBMITTED**

1. With regard to prayer 2, I informed Karen (the parties agreed to use first names) that I do not have the powers to order anyone to apologise and she accepted this.
2. I further informed her that I could not deal with prayer 4 as CSOS does not provide observer services at AGMs and that the time had gone by in any event. She accepted this.
3. With regard to prayer 1, there are two questions that need to be considered.
4. Firstly, with regard to the validity of the concerns raised by the UNW committee and Karen relating to Governance practices and the subsequent actions of MDG Excom, it is unfortunate that there was a mistaken identity of R. Brand. However, the question is whether it was reasonable for the UNW Committee to request clarity on the potential conflict of interests if Renford Brand was indeed the same R. Brand on the donor list.
5. The UNW Committee was requested to approve a Consultancy Proposal to pay R38,000 to a Consultant to survey the area and determine the security needs. They needed to satisfy themselves that the funds would be wisely spent and raised many questions around this. They also needed to satisfy themselves that they acted diligently by asking questions regarding the identity of the person named R. Brand as there appeared to be a conflict of interests.
6. Karen has argued convincingly that when dealing with funds belonging to the Association, any persons approving the use of the funds need to exercise due diligence to ensure that what they approve has been properly scrutinized and evaluated. They had specifically been requested to "go carefully through the proposal before you come to the meeting". Furthermore, Robin Carlisle stated clearly "It is very important that we all appreciate that this is a matter for the Guardians to decide. If you approve the proposal, the Consultant will report to the Guardians and not to EXCOM.

7. It is unfortunate that Robin Carlisle worded his email in this way when Boutje's request was merely that they get the Guardian's to buy-in.
8. The email from Robin Carlisle placed a huge responsibility on the Guardians. Not only were they asked to approve the appointment, they were also informed that the Consultant will report to the Guardians and not to EXCOM. This meant that the Guardians needed to fully understand the magnitude of the responsibility placed on their shoulders regarding a crucial issue of security which is of grave concern to all the residents in the estate.
9. If they approved the proposal without exercising due diligence, they would be held personally liable, as their participation in the Guardians is on a personal volunteer level, and they did not act in any official capacity.
10. Karen did not know about the history and dynamics between Mike Ryder and the MDGHOA Excom. She was an innocent member trying to do the right thing. There is no evidence to suggest that she had any intention to be malicious. Boutje stated that she had been duped by Mike Ryder and Bryan Smith. She did not know Mike Ryder until the saga was over, but it could well be that she was indirectly and unwittingly influenced to exercise her duty of care by asking one of many questions which hit a raw nerve.
11. The offending question was asked in a respectful way, for clarity. It did not accuse anyone. It was a reasonable and valid question, as were the other questions. If the intention of any other person was in bad faith, it is not fair to brand all the members of the UNW in the same category, even if they were part of the same group of Guardians.
12. I therefore find that the questions raised were valid.
13. The response from the MDGHOA has not been given in writing in any official way. Boutje claims that he and Derek had agreed that the minutes of the meeting would serve as a response. However, Derek was not at the hearing in person to testify nor is there any written record of this agreement. As such, this evidence is hearsay. Be that as it may, good governance requires that the information be recorded in some official way in case of future questions arising. Any one on one agreement between Boutje and Derek to use the minutes to serve as a response does not ideally serve as a record.
14. I therefore find that the MDG Excom needs to respond to the letter in writing on an official letterhead to put this matter to rest.
15. On the question of an opportunity to respond, Karen wants the opportunity to respond personally and on behalf of the UNW via the same communication channels used by the MDG EXCOM to distribute information, which she claims is misinformation.
16. It is not my task to comment on the details of the information which was conveyed to the members of the MDG community in the distribution channels available to the MDG Excom. However, a glance at the content

of the various publications does convey a narrative that is not consistent with the actual content, because much of the published information is based on perceptions and interpretations.

17. The rules of natural justice dictate that both sides of the narrative must be heard. In legal parlance, it is called the "audi alteram partem" (hear the other side) rule.
18. It is only fair that Karen should be afforded the opportunity she sought in her application. It is up to the members of the Association and Community to make what they like of information that is disseminated in an accurate way.
19. In the same way, the MDG Excom must have an opportunity to counter-publish anything published by Karen should they see things differently.
20. It is unfortunate that this order is necessary. It is hoped that this will not exacerbate an already polarised situation. However, Karen must have the choice to publish her version. This Order will also be a matter of public record and any Association is required by the CSOS Act to keep any Order as part of their records. Karen could if she so chooses, see this Order as sufficient vindication of her position, but she has a right to respond.

### **POWERS AND JURISDICTION OF THE ADJUDICATOR**

10. 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. 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.

### **ADJUDICATION ORDER**

In the circumstances, the following order is made –

- A. The concerns raised by the UNW Committee and Karen Bruckner relating to governance practices are valid. The MDG EXCOM is ordered to respond in



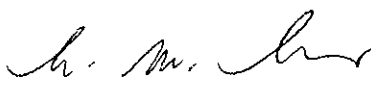
writing on an official letterhead to the letter dated 16 January, 2017, to the UNW Committee.


- B. The prayer for an apology to the UNW and Karen is dismissed.
- C. Karen Bruckner must be afforded the opportunity to respond personally and on behalf of the UNW via the same communication channels used by the MDG Excom to distribute information. The MDG is ordered to accede to a request made by Karen Bruckner to respond to the publications made by the MDG EXCOM. The MDG Excom has the right to respond to anything published by Karen Bruckner or the UNW which it may disagree with.
- D. The request for a CSOS Observer to be present at an AGM of the MDGHOA is dismissed.

**RIGHT OF APPEAL:**

In terms of Section 57 (1) of the CSOS Act, 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. In terms of section 57(2) such appeal must be lodged within 30 days of delivery of the order of the adjudicator. In terms of section 57(3), a person who appeals 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 14 December, 2017.

  
Kamlesh Ker  
CSOS Adjudicator.

  
**ADJUDICATION ORDER**  
DATE: 11/1/2018  
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