

# Bailey v The Blouberg Heights Body Corporate

Community Scheme Ombud Service - Adjudication Order

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**Case Number:** CSOS 335/WC/17  
**Adjudicator:** Adv. Louis van Wyk  
**Date:** 17 May 2018  
**Applicant:** Shirley Ann Bailey  
**Respondent:** Blouberg Heights Body Corporate



**[1]** This dispute has been referred to the office of the CSOS Western Cape for dispute resolution in terms of section 38 of the Community Schemes Ombud Services Act of 2011. The applicant is Shirley Ann Bailey, a member of the Body Corporate. The application is for an order in terms of section 39(6)(c) alternatively Section 39(7)(b) of the Act. The application is for an order compelling the Body Corporate of Blouberg Heights to install handrails on the fire escapes of the building.

In terms of section 43(1) of the Act all affected persons and associations were informed of the application and requested to provide written submissions in response to the application within 7 days.

On 14 August 2017 the parties attended a conciliation session, in terms of Section 47 of the CSOS Act 9 of 2011, at the offices of CSOS Western Cape. No settlement could be reached at the conciliation session and the matter was referred to adjudication for 22 September 2017 in terms of Section 48(4) of the CSOS Act 9 of 2011. The parties were all notified of the date.

On 22 September 2017 neither Mrs Bailey or the respondents were present at the offices of the CSOS, Western Cape. However the matter could not proceed as another hearing was booked for the same date and it was expected to occupy the full day. The respondents informed us telephonically that they were not informed of the hearing, They could also not attend the hearing due to prior arrangements. The matter was then by agreement postponed to 17 October 2017.

Present at the hearing on 17 October 2017 were the portfolio manager from Trafalgar Property managers, Lesley-Ann van Howelingen and the mandated representative of the trustees, Mr Werner Buys. Me Bailey was involved with a matter in Johannesburg and could not attend the hearing. Me Bailey confirmed that she provided all the information supporting her application to the CSOS prior to the conciliation. She stated that all the facts were common cause and was in agreement that I proceeded with hearing the case of the respondent in her absence.

Due to the nature of the dispute and that none of the facts seemed to be in dispute I elected to introduce Section 50(b)

of the CSOS Act, Act 9 of 2011 to the parties. The parties were in agreement about the issues in dispute and that evidence would not need to be presented in the formal manner.

In terms of Section 50(b) of the Community Schemes Ombud Service Act of 2011 the adjudicator has the power to conduct a hearing "quickly and with as

little formality and technicality as is consistent with the proper consideration of the application, and (c), must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts."

At the end of the hearing on 17 October 2018 I indicated that I will arrange a further hearing with the applicant and that I will have a further meeting with Lesley Ann Van Howelingen at her office in order to inspect their insurance policies. The respondents were not interested in attending the meeting with the applicant. They also confirmed that the information and events were seen as common cause and therefore not in dispute.

On 17 October 2017 the applicant and I met to hear her presentation. The following information was provided by the applicant. The background to-, and motivation for the application is set out in essence below.

The applicant points out that she has, over the last 10 years approached the trustees on numerous occasions about this request and attempted to motivate the necessity of the safety precautions. To illustrate and summarise her motivation I quote extracts from one of her emails to the members of the Body Corporate:

"Some of us are most concerned about the lack of safety of the fire escapes. The Trustees once again have stated that they don't think them necessary.

The steps are not deep enough, and some are of irregular height. They, as well as the balustrade walls on each side, get slippery with the moisture which is prevalent close to the beach. The balustrades are also too wide (13cm) to allow one to hold on.

There are many different ages of people living here, as well as people of different walking abilities.

It would be in the interest of the residents to have properly installed handrails on each side, so that in the event of a fire, when the lifts may not be used, residents can escape as uneventfully as possible and with a minimum risk to themselves, and to others walking behind them.

The lack of handrails could potentially be a public liability risk as well, should any one injure themselves."

She motivates her proposal with the following reasons for her request:

- 1) The size of the steps causes it to be unsafe to walk down the staircase.
- 2) The balustrade is approximately the width of a brick wall and therefore too wide to hold onto and is painted with a shiny paint, that makes it difficult to hold onto in order to support oneself.
- 3) The conditions on the waterfront are conducive to moisture, causing the balustrades and the steps to become slippery.
- 4) In some instances one would like to use the stairs to walk up or down one or two storeys, but the condition of the stairs and the absence of hand rails make it too dangerous to do so.
- 5) In case of an emergency it would be too dangerous to use the steps.
- 6) In case of the lifts being out of order the residents will need to make use of the stairs, and it would be sensible to provide handrails to provide safe stairs.
- 7) The risk of someone slipping and injuring themselves could expose the Body Corporate to public liability.
- 8) A large number of the residents are elderly, sickly, frail and have difficulty keeping their balance walking. They

would be particularly vulnerable in case of an emergency or in case of the lifts breaking down, and they have to make use of the stairs.

9) Handrails have been installed on the one flight of stairs between the ground floor to the first floor, which begs the question why it was not installed for the rest of the building.

She motivates this application further by making reference to the Sectional Title Schemes Management Act of 2011. She argues that the following sections of the act compel the Body Corporate to adhere to her request.

Section 23(6) A body corporate must take out public liability insurance to cover the risk of any liability it may incur to pay compensation in respect of:

(a) Any bodily injury to or death or illness of a person on or in connection with the common property;"

Section 4(c) to purchase or hire or otherwise require movable property for the use of owners for their enjoyment or protection of the common property.

In October 2017 she reported the following incident to the management of Blouberg Heights illustrating the necessity of handrails on the staircases. I quote from her email to the trustees

I reported this incident telephonically on 6/10/2017 to Mel, and now wish to place it on record:

The passage has been washed around 9am, and some of the water washed down the stairs. It is not awash, just wet.

A tall, thin man (probably a holiday maker) as few residents use the steps because they know that they are slippery, was walking down with his children. Right outside my door he slipped and landed on the ground. The children were alarmed and as I heard them shout to their father and the commotion, I went to ask him if I could assist. He was quite shaken but he said he was ok.

I did ask him to report this to the office, and I phoned Mel and told her what happened, He had not come in then, (but maybe he did so later), but she did confirm that she saw him walking out of the building.

This man was neither infirm, overweight, or older - and he still slipped. And bearing in mind that the steps are slippery anyway, let alone when they are wet from rain, mist, sea moisture or cleaning.

In reference to this report I need to mention that, according to Lesley-Ann, the portfolio manager from Trafalgar Property managers, the man in question did not report the incident to the management.

On 2010/12/14, the following report was obtained from Mr Clifford Marks, Building Control Officer (District B), Department: Planning & Building Development Management, Directorate: Strategy & Planning.

He wrote as follows to the chairman of the body corporate:

Good day Mr Von Geusay

"With reference to the notice served on the Body Corporate (dated 18 November 2010), relating to the provision of handrails to the escape staircases, please note the following:

According to the information provided by yourself, the building was erected in 1969. The building consists of 16 floors with 128 units. There are 2 lifts to provide access to the units. In the event that these lifts are out of order, the 2 external staircases (which serve as fire escapes as well) are the only means of exiting the building.

I am unable to locate a copy of the applicable National Building Regulations to check whether the provision of the handrails were a requirement at the time of construction. I am aware that you are in possession of 2 documents issued by the City of Cape Town stating that *"the building complies with the approved plan and the minimum requirements of the Fire Department and "at the time that Blouberg Heights was built, it was not a requirement and the building was approved with the existing concrete balustrade".*

As District Building Control Officer, it is my responsibility to ensure that the safety of occupants/visitors is in order at all times. Every person in this country has a right to safety and previous incidents relating to the above staircases serves as proof that the safety of residents/visitors is compromised. I am aware that the current regulations are not retrospective, but where a safety risk exists, it cannot be ignored.

In the interest of safety, the City of Cape Town is adamant that you are required to take the necessary steps in order to ensure that the risk elements are eliminated to an acceptable level.

The SANS 10400 code provides a "deemed to satisfy" method to satisfy the National Building Regulations which will ensure an acceptable level of safety. As the installation of handrails is specified under the rules, you are permitted to submit an alternative method of complying with the regulation. In this regard you are advised that you can submit a "rational design", ie. an alternative method to comply, which has to be designed by a competent specialist in order to resolve the safety risk on the above property.

I trust that you will accept that this action is in the best interest of all concerned and I further trust that we can rely on your cooperation in this regard."

The applicant was of the opinion that the body corporate was in a financial position to afford the safety measures she insisted on. She also referred to an email she sent to 40 different members of the body corporate, requesting their response to the question whether they would be in favour of handrails. She provided a copy of a hand written list of names and respective unit numbers. In summary the email was sent to 40 residents/owners. 8 emails were returned as "not delivered", marked address unknown. 21 members were in favour of handrails being installed on the stairs. Only 1 member was against handrails being installed

The facts on which the application is based and the report from Mr Marks was not placed in dispute by the respondents.



On behalf of the trustees Mr Buys and Me Van Howelingen responded that the trustees are of the opinion that the handrails are not required by law, and that it is not dangerous. They further claim that there has not been any reported incidents, and that the balustrade provides sufficient support for any person using the staircases.

They further stated that the trustees have entertained her requests in the past, but based on the feedback they obtained, it was not requested by the owners and that it was not a legal requirement. In support of their response they provided the following information, which was

also not disputed by the applicant. The respondents motivated their position further as follows.

As early as 2005 an owner, Dr Van Wyk requested that consideration be given to the fitment of handrails to the fire escapes. Based on this request a meeting was held with a certain Mr Wessels, the Director of Community Services, Office of the manager: Fire, Emergency, And Disaster Management Services, City of Cape Town. On 1 July 2005 the trustees obtained a report from Mr W Wessels, in which he reported that;

In terms of the national Building Regulations - SABS 0400 - 1990, handrails must be installed in any building which exceeds 30 m in height or where the travel distance to ground floor is more than 45 m.

We also recommend that any external staircase in any building of more than 18 m in height be provided with handrails (as per regulation).

As discussed, at the time that Blouberg heights was built, it was not a requirement and the building was approved with the existing concrete balustrade.

The national Building Regulations (Part A - Administration) states - where approval was granted before the date of commencement of the Act, alterations shall comply with the requirements of the Act, but where no changes was made alterations to the original building shall not be required.

We hope the above will clarify the requirements for handrails for all concerned.

The respondent provided another report provided by Mr P van Antwerpen, Station Commander, Fire and Safety North, for the Chief Fire Officer. He reported, on 5 August 2010, as follows:

### Re Building Inspection

Having completed an inspection at the above mentioned address, I would like to advise the following.

Please be advised that the above mentioned address comply with the approved plan and the minimum requirements of this department.

In a newsletter of Blouberg Heights dd December 2011 the issue of handrails was reported on. The report stated that the trustees were directed to obtain quotations for the installation of handrails and that the quotations amounted to R 35 000 and R 41 000 respectively. In the report mention was made of the letter from Mr Wessels (above) and the National Building Regulations. It was confirmed that the building was approved with the existing balustrade.

Owners that wished to pursue the matter further were referred to Mr G Bubb at Trafalgar. Dependant on the response the trustees would then proceed in terms of the Sectional Titles Act.

The respondents claimed that none of the owners pursued the issue.

Further mention was made that the applicant again raised the issue in question on 17 March 2017. During a subsequent Trustees Meeting, held on 10 April 2017, the request of the applicant was discussed and it was concluded that, having regard that the construction of the building complied with all regulations at the time of completion and that same was approved with the existing concrete balustrade, no further action was required. This conclusion was clearly based on the reports referred to above.

In a letter from Mr A von Geusau he wrote on behalf of the trustees and concluded that; "the request for handrails is an isolated issue which has over time elicited no overall response from owners as indicated above. it is considered inappropriate to proceed with an improvement to the property at the behest of a single owner"

In considering the merits of the application I researched case law on the law of delicts, pertaining to the classic test for culpa. I refer to the following precedents.

In the matter of Kruger v Coetzee 1966 (2) SA 428 (A). In determining whether reasonable steps were taken by first defendant, the following dictum in Pretoria City Council v De Jager 1997 (2) SA 46 (A) at 551 is apposite:

*"Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgment."*

In the context of the duty to take care that the floors of a shopping mall were safe, the Supreme Court of Appeal said the following in Chartaprops 16 (Pty) Ltd & Another v Silberman,

*"Where, as here, the duty is to take care that the premises are safe I cannot see how it can be discharged better than by the employment of a competent contractor. That was done by Chartaprops in this case, who had no means of knowing that the work of Advanced Cleaning (the contractor) was defective. Chartaprops, as a matter of fact, had taken the care which was incumbent on it to make the premises reasonably safe."*

In Checkers Supermarket v Lindsay 2009 (4) SA 459 (SCA), the nature of the inquiry insofar as the floor of a supermarket is concerned, was explained,

*"The issue is therefore whether; on the particular facts of this matter; the appellant had in place a reasonably adequate and efficient system, in relation to discovering and removing dangerous spillages on the supermarkets floor; to safeguard persons who frequented the supermarket from harm. In other words, was harm to the respondent reasonably predictable?"*

It seems clear that the particular circumstances of a case determines if sufficient care was exercised by the controlling body or the person accountable where a court considers the liability towards an injured person. The awareness, of the representatives of a premises, of the danger/risk posed to the public and whether they were alerted to the danger, seems to be of crucial importance in determining liability.

It seems from the report of Mr Wessels Director of Community Services, Office of the manager: Fire, Emergency, and Disaster Management Services and the report from Mr P van Antwerpen, Station Commander, Fire and Safety North, for the Chief Fire Officer that the body corporate in this instance is not compelled by regulations, to install the balustrades. The act cannot be imposed retrospectively and Blouberg Heights was built before the legislation pertaining to safety measures in buildings. It only compels buildings built or altered after the implementation of the regulation. However, in this regard the body corporate relies on reports from 2005 and 2011. The trustees have not sought another (more recent) report.

The applicant presented a report from Mr Clifford Marks, Building Control Officer (District B), Department: Planning & Building Development Management in 2010. He states clearly that the body corporate has a duty to ensure the safety of the public. He is aware if the two reports provided by the respondents and concede that the body corporate might not be legally required to provide hand rails. However he insists on their co-operation in ensuring the safety of the public and the owners.

In considering the merits of this application one should distinguish between requirements in terms of regulations, as referred to above, and whether the body corporate will be covered by their insurer in the event of a personal injury claim against the body corporate. I have to regard the financial risk to the body corporate, and not only the risk of not complying to a regulation.

All bodies corporate nowadays are required to have liability insurance to cover personal injury claims. If any given person slips and falls on the staircase the potential liability of the body corporate could be financially crippling. The first question that comes to mind is whether the insurer would cover a specific claim. It is therefore a risk to each and every member of the body corporate, and needs consideration. In this matter the applicant has raised an issue that could potentially pose an enormous risk to the body corporate, and therefore the members/owners.

In this regard approached the Chief Ombud at the CSOS, Western Cape, requesting a report from an expert in the field of liability insurance. Mr Mike Addison was appointed by the Chief Ombud to provide me with an expert opinion on the risk to the body corporate. The following are extracts

from his report.

## **Insurance Aspect: Matter between Shirley Baillie and the trustees of Blouberg Heights Body Corporate - Slip and Fall Risk, lack of handrail**

We have been asked by The Provincial Ombud, CSOS to provide an insurance advisors opinion with regard to the matter of the lack of handrail and risk.

Neither Addsure, nor myself as writer, are the appointed intermediaries / advisors and as such do not advise on the specific policy held nor safety aspects nor compliance issues itself nor do we engage with the insurer. We merely provide an opinion in respect of our views on the risks based on the information provided. The trustees should themselves make any disclosures to the insurer via their appointed insurance advisors.

We comment from an insurance point of view and from our experience with insurance liability claims resulting from such instances: Most insurance policies have General Conditions for cover to exist, clearly stated in their policies.

Some examples from a community scheme specific policy wording:

### **EXAMPLE 1**

#### **"Alteration of Risk**

You must immediately advise us of any change in risk which may materially alter any of the facts or circumstances that existed at the commencement of this policy and its subsequent renewal. In particular, this applies to the use of or occupation of the building, as well as any changes that increase the risk of loss or damage or the likelihood of liability losses. You must also notify us of any change in your circumstances."

### **EXAMPLE 2**

#### **"Misrepresentation, misdescription and non-disclosure**

An item, section or sub-section of this policy or the entire policy will be deemed voidable in the event of any misrepresentation, misdescription, or non-disclosure of any material fact which could have influenced our

decision to insure you or the terms to apply when we agreed to insure you."

### **EXAMPLE 3**

#### **"National Building Regulations / Statutory Requirements**

You must take all reasonable steps to ensure that the insured property complies with the National Building Regulations and Building Standards Act (No 103 of 1977) as amended or substituted from time to time, or any similar applicable legislation, and the regulations thereto. You must also take all reasonable steps to ensure that plans were submitted to and approved by the local authority at the relevant time of construction. You must also comply with all statutory obligations, laws and bylaws, regulations, safety requirements and statutes and regulations thereto imposed for the safety of property or persons."

### **EXAMPLE 4**

#### **"Reasonable Precautions**

You as well as your employees, representatives and agents, must do all that you can do to prevent legal liability, or loss or damage to the insured property, and to maintain such property in a sound condition and in a good state of repair, including repairing faults or fixing defects to items such a (but not limited to) roofs, gutters, drains, water pipes and tiled areas when they leak or need repairs" Should an incident occur resulting in a loss which could have been prevented, particularly where resident owners have pointed out safety hazards and ignored and which can be proven, the insurance policy will most likely not respond.

In this case, the trustees appear to have deliberately and wilfully disregarded safety concerns.

According to minutes of a trustee meeting held in May 2017, it was confirmed that at an AGM dated 27 August 2011, the trustees were directed to obtain quotations for the installation of handrails. The quotations were obtained but no further action was taken owners, the trustees decided to again disregard the highlighted safety concerns.

In late 2017, the City of Cape Town's Building Control Officer

urged the body corporate to take recommended action. We are aware of cases pending where trustees have failed to take action to prevent potential losses where injury has resulted in the body corporate not having cover and likely to be held liable for millions of rands. This could be disastrous for owners.

From what I can determine, there seems to be a safety hazard which can be treated simply, with some professional oversight, by installing handrails. Even if the building regulations at the time, allowed lower safety standards, the risks have since been identified, noted, minuted and confirmed by the local authorities with a recommendation to remedy.

Let's look at some of the typical clauses in policies (refer previous page):

## Example 1

As soon as owners raise safety issues and these are confirmed as such (even if the trustees disagree), the insurer requires this information as there is clearly now an alteration in the risk. Basically, if someone "slips and falls" without anyone's prior knowledge or awareness of any safety issue, and the injured party sues the body corporate, the insurer will step in and protect the body corporate either by defending the action or negotiating a settlement with the aggrieved party. That is Liability Insurance. However, where a risk is pointed out to the trustees, especially if there is a "paper trail" which proves this, no matter how trivial it may seem, and it is ignored by the trustees, the insurer will not cover it where trustees have not taken action nor advised the insurer of the now highlighted liability risk.

## Example 2

This underlines the above, i.e. where such risk is not disclosed to the insurer, the insurer will likely reject such claim.

## Example 3

Compliance with emphasis on "all reasonable steps". I would consider it reasonable to expect trustees to try and adhere to more recent safety standards even if the law from decades gone by means that legally, they do not

technically need to comply. We live in a different world now where medical costs and litigation are order of the day. More importantly, there can be no expense spared on safety.

## Example 4

With reference to this clause, the trustees are clearly defaulting. I refer particularly to "must do all that you can do to prevent legal liability". By ignoring written reference to the risks places the body corporate at risk for huge liability claims without cover. From my experience in dealing with liability claims surrounding fire escapes and alternative exit routes, trustees should consider the event of fire, event of power failure (with consequent risk associated with darkness in the areas) and whether the steps are clearly visible in low light, perhaps strips or a bright colour on step edges. These are not always necessary, nor legislated, but can go a long way to improve safety in these areas. Taking into account the fact that the building is one tall building, there are water shortages in Cape Town (possible water fire extinguishing risks in future) and the age of the building, trustees should be taking extra care. Bear in mind that most importantly, trustees should be considering the safety and wellbeing of people using the common areas. With reference to "The Cascades case" see annexure A, the judgement made certain references/statements and a good guide in matters of safety and liability: E.g. it draws attention to the functions of the body corporate in the Sectional Titles Act, similarly worded in Section 3 of the STSM Act. It states among other things: "It is clear from the provisions of the Act (see in general sections 36 and 37), that first defendant, as the body corporate, is legally responsible for the control, administration and management of the common property at the development. The Act expressly provides that a body corporate shall manage, control and administer the common property for the benefit of all owners. In view thereof, one cannot quarrel with plaintiff's submission that first defendant is in virtually the same position as a landlord, hotel owner or shopkeeper, who, by virtue of his or her control over property, has a legal duty to take reasonable steps in respect of maintenance and supervision to ensure that the property is in a safe condition with reference to the type of person who may normally and reasonably make use of it." This confirms my view that the trustees should take reasonable steps, such as installing handrails where necessary, to ensure



that the property is in a safe condition with reference to the type of person who may normally and reasonably make use of it, for example, Ms Baillie.

I am satisfied that the trustees of the body corporate are not taking enough care to limit the risk of the members. The different reports, from different departments within the City of Cape Town, which demands different levels of safety measures should have at least initiated further investigation by the trustees. It is their duty to investigate what the actual requirements are in the City of Cape Town.

Even though it might still not be compelled to install handrails, the body corporate is exposed to the risk that their insurer might repudiate a personal injury claim. If such an incident occurs it could well be that the members could argue that the trustees was not fulfilling their fiduciary duty towards the members. In cases of gross negligence the body corporate or the owners might even have a damages claim against such trustees who were made aware of the danger, but still refused to obtain advice and/or ensure that the body corporate is covered by their insurer.

I therefore agree with Mr Addison and hereby make the following order.

1. That the trustees immediately attend to the issue of the handrail and if not remedied by way of installation of handrails, seek an alternative remedy in line with the "deemed to satisfy" rules.
2. That the Trustees disclose to the insurer/insurance advisors of the risk and have it confirmed by the insurers that cover remains intact or that the policy and/or premium is adjusted accordingly so that potential losses are definitely covered until the matter is attended to.
3. That the areas be checked by a competent person such as an architect or safety specialist prior to installing handrails for recommendations and then audit afterwards to check that the matter is suitably remedied. In addition the trustees must request a report on the current requirements from the Department of Planning & Building Development Management
4. Thereafter, the trustees should place on record with the insurers, that such has been remedied.

5. The plans and approval of the actions contained in this order should be complied with within 30 days. Any installation process should be finalised within three months from the date of this order.

It is suggested that a suitably qualified safety officer or architect provide some input regarding whether or not the said building pertaining to this body corporate complies with National Building Regulations.