

# Di Leva v Baronetcy Home Owners' Association

Community Scheme Ombud Service - Adjudication Order

---

**Case Number:** CSOS 377/WC/17  
**Adjudicator:** Hannchen Elizabeth Louw  
**Date:** 01 November 2017  
**Applicant:** Anthony Mark Di Leva  
**Respondent:** Baronetcy Home Owners' Association



## PARTIES

**[1]** The applicant is Mr Anthony di Leva, the registered owner of an erf in the Baronetcy Estate, situated in Platteklouf 4, Parow, Cape Town. Mr di Leva attended the hearing in his personal capacity.

**[2]** The respondent is the home owners' association of the aforesaid Baronetcy Estate. The Respondent was represented at the hearing by Mr Mark van Heerden, trustee, Mr Jose James, trustee and former chairperson and Mr Ilario Orlandi on behalf of the Managing Agent (Rippel Effect Property Management).

## INTRODUCTION

**[3]** 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 Office. The application includes a statement of case which sets out the relief sought by the applicant.

**[4]** 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

**[5]** 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".*

**[6]** 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"*

**[7]** 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".*

**[8]** 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

**[9]** The dispute between the Parties arose on account of the implementation of building levies in the Baronetcy Estate ("the Estate") by the trustee committee of the Baronetcy Home Owners' Association ("Baronetcy HOA"), applicable to owners who embark on improving their respective erven in the Estate by the building of a dwelling unit thereon. Whilst the Respondent, in accordance with professional advice obtained by them, is of the view that these levies were correctly and lawfully charged to owners in the Estate, the Applicant contends that the procedural requirements for the implementation of the levy set by the Constitution of the Baronetcy HOA were not followed and that, as such, the levy was not lawfully charged and should be refunded.

## APPLICANT'S VERSION

**[10.1]** The Applicant is a builder, but also the owner of at least one erf in the Estate. The Estate boasts approximately 300 residential erven of which roughly 50% have completed housing units. At the date of the hearing, approximately 42 houses were under construction. He explained that the Estate administration suffered from a number of problems in the 2016/2017 financial year and that, generally speaking, owners were unhappy with various management issues on the Estate, one of which was the implementation by the trustee committee of a fixed amount building levy on a monthly basis. Following a letter in this regard to the Managing Agent, this matter was extensively discussed at

the Annual General Meeting of the Baronetcy HOA which was held in August 2016. At this meeting, the matter of the building levies was put to the vote and, given the general dissent, it was concluded that the chairperson obtains legal advice on the legality of the building levies.

**[10.2]** Following the receipt of the advice from Paddocks Attorneys, the trustee committee refunded a portion of the collected building levies to owners and, in November 2016, decided to continue charging the building levy, at R1 000 (one thousand Rand) per month, from 1 January 2017. Mr Di Leva contends that the refund to owners of collected levies entailed the deduction of an amount of R650.00 (six hundred and fifty Rand) per month in respect of architect's fees as well as administration charges in an amount of R120.00 (one hundred and twenty Rand). He is of the view that no invoices were received from the architect to support these claims and furthermore claims that the Managing Agent's mandate is to collect all levies and provide general managerial support to the Estate in terms of its appointment, which, in his view, does not support an additional claim in respect of building levies and its collection.

**[10.3]** The Applicant contends that no invoices are issued to owners indicating the services rendered to them for which they are being charged. Further, that the financial statements of the Baronetcy HOA do not adequately and correctly in terms of the requirements of the Constitution of the Baronetcy HOA reflect the collection of building levies and the expenditure to the architect and Managing Agent. He is furthermore of the view that building levies can and should be budgeted for as part of the normal levy budget of the Baronetcy Estate and in fact indicated that the Baronetcy HOA is indeed at this stage budgeting for these income and expenses.

**[10.4]** Mr Di Leva provided evidence to the effect that, in his experience as a builder on other estates, professional charges are levied against owners directly and not via the home owners' association. In these cases, should an owner not engage the architect and pay for his or her services, his or her building plans will not be signed off. He also noted that he has not yet seen the Estate appointed architect on his building site on the Estate. It is also his contention that the balance of the building levies repaid by the Baronetcy

HOA following the advice from Paddocks, constitutes "profit" which indicates that the entire fee is not made up of professional fees and administration. He noted that the Baronetcy HOA is for all intents and purposes a non profit entity.

**[10.5]** With respect to the opinion received by the Baronetcy HOA from Paddocks, the Applicant expressed the view that the opinion hinges on the fact that the building levies are regarded as punitive by the advisors. In his view, the levies are not in the nature of "fines" as it covers alleged expenses by the Baronetcy HOA. As such, he is of the opinion that the interpretation of the opinion by the trustees that they, generally speaking, are able to impose building levies without having to have same approved by owners at a general meeting is incorrect.

**[10.6]** The Applicant is of the view that building levies should be part of the "normal" levy budget and thus approved by owners at a general meeting (being either the annual general meeting or a special general meeting). He expressed the view that it can never be seen as only a temporary income as it applies on an ongoing basis to alterations by owners. It is his view that the trustees, following receipt of the original opinion, sent a misleading letter to all owners in which it (incorrectly in his view) explained the consequences of the opinion. He believes that the correct procedure for the trustees would have been to call a special general meeting at which the raising and rationale for building levies should have been debated and voted upon. It is his interpretation of the constitutional documents of the Estate that building levies cannot lawfully be raised by the trustees without the sanction of the owners. The Applicant approached an attorney in July 2016, who wrote to the Baronetcy HOA expressing an opinion that the levies can only be raised by members and also in 2016 requested that the dispute with regard to the building levies be resolved by arbitration.

#### **APPLICANT'S PRAYERS**

**[11]** 11.1 The Applicant claims:

11.1.1 a full refund of all building levies paid by owners in the Estate, including that portion of the levy not refunded following implementation of the legal opinion by the

Baronetcy HOA;

11.1.2 correct reflection of building levies in financial statements of the Baronetcy HOA.

### RESPONDENT'S VERSION

**[12.1]** The Respondent's representatives confirmed the outcome of the general meeting of the Baronetcy HOA held on 23 August 2016 to the effect that general unhappiness amongst owners also expressed itself in the vote against the building levies. The Respondent expressed the view that the Applicant, being a builder for several owners on the Estate, has a conflict of interest in bringing the application.

**[12.2]** The Respondent explained that the trustee committee took a decision on 2 March 2015 to implement building levies to those owners embarking on building works on their erven. According to Mr Orlandi, a schedule of costs was circulated to all members of the committee prior to the meeting. Following the meeting, a letter was sent to all owners on 31 March 2015, confirming the implementation of the building levy, the information was also placed on the Baronetcy HOA website, however, no formal amendment was made to the building agreement or the Rules of the Baronetcy HOA. The levy was to be collected monthly in advance for a period of 8 (eight) months from 1 April 2015. As the Applicant took transfer of his property in June 2015, the building levy also applied to him. The Respondent confirmed that the period was an estimate of the building period applicable to owners and that, should an owner complete his works earlier, he or she would be refunded. Mr Orlandi testified that the decision was based on a detailed cost analysis at the time (being the schedule that was circulated to member of the committee prior to the meeting, which was tabled at the hearing), also indicating the additional fee that would be due to the Managing Agent on account of the collection of these levies and the additional administration for the Managing Agent that went along with the building works (and which, according to him, did not form part of the original mandate and fee applicable to the Managing Agent). He also confirmed that the trustees at the time collected evidence from other estates to compare building levies before they implemented the levy in the Estate. The Respondent produced a list of

extra administration and works that each building project require of the Baronetcy HOA over and above its normal administration and management responsibilities-such as an increased burden on security, damage to common property, damage to pavers, etc which cannot be traced to a particular builder. As such, they believe that the balance of the monthly levy (after deduction of the architect's fee and the Managing Agent fee) fairly compensates the Baronetcy HOA for their (increased) costs pertaining to the building works of owners.

**[12.3]** The building levy was initially set at R1 000 (one thousand Rand) per month. There was evidence to the effect that it was changed to R1 500 (one thousand five hundred Rand) at some stage and then changed back to R1 000 (one thousand Rand). The levy is increased to R5 000 (five thousand Rand) after two years. This, the Respondent explained, is to encourage owners to complete building works timeously. The Respondent furthermore referred to the Building Contractor's Code of Conduct Agreement ("Building Agreement") that each owner enters into with the Baronetcy HOA when commencing building works. This document sets out the "rules" with respect to contractors entering the site, noise and dust control, etc.

**[12.4]** The Respondent contended that, following the August 2016 Annual General Meeting (where it was resolved that the building levies should be cancelled, subject to legal advice), the newly elected trustee committee met in September of that year with the intention to resolve the building levy problem speedily. They considered a number of legal firms, but in the end resolved to seek legal advice from experts in the sectional titles field, being Paddocks Attorneys. They contend that they followed the advice in every detail. It is their interpretation of the advice that the decision to implement building levies taken by the trustee committee in March 2016 was lawful, but the fact that the rules of the Estate or the Building Agreement was not duly amended to reflect the decision, rendered the collection of levies since 1 April 2015 unlawful. Following the advice from the attorneys, they refunded building levies paid since 1 April 2015, but retained, in each case, the fee that was according to them due to the architect employed by the Baronetcy HOA (R650.00) and the Managing Agent (R120.00) resulting in small amount of R1 840 (one thousand eight



hundred and forty Rand) being refunded for an eight month levy payment.

**[12.5]** The Respondent further contended that they went back to the attorneys following the Applicant's advice to them that the levy, in his view, is not punitive and that, as such, the advice is incorrect. The attorneys confirmed to them that they stand by their opinion.

**[12.6]** The trustees of the Baronetcy HOA on 8 November 2016 resolved to continue charging building levies at R1 000 (one thousand Rand) per month. A letter was circulated to all owners on 16 November 2016, explaining the building levies. No objections were received following the letter. On 6 December 2016 a decision was taken by the Trustee Committee to amend the Conduct Rules of the Estate to provide for the charging of building levies from 1 January 2017. This is reflected in paragraph 3 (2) of the Conduct Rule of the Estate. In the period following the advice and 1 January 2017, only the architect's fee and Managing Agent portion of the levy were charged. The trustees engaged Paddocks Attorneys to review all of their documentation for compliance with laws and enforceability. Paddocks also, in a letter to the Trustees dated 9 February 2017, confirmed that, in their view, the correct procedures were followed for the implementation of the building levies.

**[12.7]** The Respondent explained that it is not practical for the architect to be "employed" by the owner/builder as it is the duty of the trustees to ensure that the interests of the Estate are protected at all times. It was explained that the Estate is of an upmarket nature and that houses are large and complicated with many issues relating to heights and the interpretation of the building guidelines. The trustee committee in fact spends most of its time on building related issues. A firm of architects was appointed to serve as the representatives of the Baronetcy HOA in respect of building works and the R650.00 (six hundred and fifty Rand) component of the levy translates into half an hour per building site per month for an architect seconded to the Estate by the firm. In reality, the architect spends significantly more time and statistics show that the architect spends, per month, 45 hours on queries and 52 on site visits. This, according to the Respondent, is common practice on estates of this nature-the architect is employed by the home owners' association and the costs for this service on behalf of the Estate are allocated to the respective owners. As such, it allows for disputes to be resolved speedily

(as the architect is tasked to mediate these), the many queries to be resolved and ensures that building works are executed in accordance with approved plans and in terms of the building agreement entered into with owners who commence building work. The Respondent gave examples of a number of estates and the amount of the building levy charged by these estates.

**[12.8]** The Trustees disputed the fact that the architect has not been present on the building site of the Applicant as a number of deviations were noted by the architect in respect of the Applicant's building works.

**[12.9]** The Trustees produced a confirmation by the accountants of the Baronetcy HOA of the entry of the building levies in the ledgers of the Estate. According to them, the income and expenditure are duly accounted for in the ledgers.

**[12.10]** The Trustees furthermore confirmed that they implemented the amendments to the Conduct Rule of the Baronetcy HOA to provide for the raising of building levies strictly in accordance with the advice provided by their attorneys. The attorneys advised that is not required to have building levies approved by owners at a general meeting. This question was specifically put to the attorneys.

**[12.11]** It is the contention of the Respondent that they are not able to budget for building levies as part of a "normal" levy budget as they do not know when owners are going to commence building and how long each project will take. The Estate is fully "bulked up" and no extension is possible under the current development rights applicable to the Estate. The Estate Rules and Constitution contain no requirement to build within a certain period of time as is common in estates of this nature.

**[12.12]** With respect to the arbitration requested by the Applicant, the Respondent contends that the arbitration in the building agreement is meant to disputes relating to plans and building works and that it was not the appropriate forum for a dispute over the building levy implementation. The Constitution, at the time, did not contain an arbitration clause.

## EVALUATION OF EVIDENCE SUBMITTED

**[13.1]** There is no dispute between the Parties as to

the current valid Constitution and Conduct Rules of the Baronetcy HOA. The parties are further ad idem on the concept of not burdening other owners with the costs occasioned by those that build at any given time on the Estate.

**[13.2]** In essence, the Applicant and the Respondent are generally in agreement on the facts of the case. The one or two small instances of disagreement (such as whether or not the architect appointed by the Baronetcy HOA has visited the building site of the Applicant) are not relevant to the matter. Whether or not the matter should have been referred to arbitration has also become academic. I accept that the legal advice was sought from Paddocks Attorneys and that the Trustees did everything in their power to implement the advice correctly.

**[13.3]** The crux of this matter is whether or not the trustees are empowered to lawfully raise building levies outside of the procedure required for the approval of a budget and raising of levies in terms of the Constitution. In summary, it is the view of the attorneys that:

13.3.1 the decision to implement building levies was lawfully taken in 2015, but, since no formal amendment to reflect this resolution was made to either the Building Agreement or the Rules of the Baronetcy HOA, the building levies were not correctly implemented (hence the advice to refund paid levies, less actual costs incurred).

13.3.2 The Building Agreement is aimed at governing the conduct of builders and building itself on the Estate and is not the appropriate document to contain building levies—these should rather form part of the Conduct Rules of the Baronetcy HOA.

13.3.3 A majority of trustees are able to amend the Conduct Rules in terms of clauses 14.1 and 16.3 and this would include a decision to impose building levies.

**[13.4]** The following paragraph in the opinion of Paddocks Attorneys is the essence of the Applicant's view that the opinion is incorrect:

"Furthermore, as the building levy is imposed as a punitive measure (my emphasis), same should not be included in the budget of the Association, as such levy is not intended to be of a permanent application within the HOA."

**[13.5]** It appears to be the Applicant's view that the levy can lawfully form part of the Conduct Rules if its sole purpose is to punish or serve as a deterrent to building owners. In this case, as he correctly points out, the levy is, on the version of the Respondent, imposed to cover the expenses of the Baronetcy HOA associated with building works.

**[13.6]** It is commonplace for home owners' associations to have various statutory documents governing management, administrative and conduct matters. It is also fairly usual to have different rules for the amendment of these documents. This is also the case in the Sectional Titles Schemes Management Act of 2011 and the reason is ostensibly to allow a certain nimbleness in the management of an association or a sectional title scheme. The Constitution of the Baronetcy HOA clearly empowers the trustees to amend the conduct rules (clause 16.3 states that "the Conduct Rules may be amended by a majority vote of the Committee"). Clause 14.1 also clearly states that "the management and administration of the Association shall vest in the Committee." The question is thus whether this authority extends to the implementation of certain types of levies, whether of a punitive nature or not. It is the view of Paddocks Attorneys, as expressed to the Respondent, that it does.

**[13.7]** I understand the reluctance of the Applicant to accept this interpretation as these powers may have far reaching implications and to remove any decision in this regard entirely from owners may seem risky. It is fair to ask whether the fact that these levies only affect some and not all owners and the fact that it is implemented in each case for a limited period, justify for it to be imposed by trustees without the sanction of owners.

**[13.8]** However, one has to accept that the nature and purpose of building levies are different to that of "ordinary" levies: its purpose, generally speaking, is to compensate the Baronetcy HOA for actual costs incurred by it to ensure that building works comply with approved plans and that the interest of all owners are protected. This is a cost that may change at intervals unrelated to general meetings and require speedy adjustment in building levies. I furthermore accept the contention of the Respondent that it cannot be budgeted for as part of the ordinary levy fund of the Baronetcy HOA as it clearly cannot be predicted, whereas, although it remains a budget, there are very definite existing and future cost estimates which guide the setting

of “normal” levies. The Constitution of the Baronetcy HOA very much places building control matters in the hands of the trustee committee and it makes sense for these to include building levies to recover expenses of the Baronetcy HOA directly related to building works. Related to this, it is also not insignificant that these levies are of a temporary nature and has no bearing on a large proportion of the owners-it is simply not practical to only have those owners who are building or plan to build in any particular year to decide on building levies from time to time. The trustees are empowered to appoint an architect for the Estate at fees which they find reasonable and these costs, by and large, determine the building levy.

**[13.9]** The actions and decisions of trustees are governed by the Constitution of the Baronetcy HOA and the law. They cannot do as they please and owners have the powers to undo any unreasonable implementation of a building levy.

**[13.10]** Whilst I find the questions raised by the Applicant not unreasonable and do not believe that the application is frivolous, vexatious, misconceived or without substance, it is my view that the trustees are able to lawfully raise and collect building levies based on the appropriate amendment of the Baronetcy HOA Conduct Rules (contained in Rule 3.2) which entitles them do to so and that the levies currently raised are not unreasonable. As such, there is no problem with the building levies raised since the effective date of the amendment of the Conduct Rules of the Baronetcy HOA. I also have no reason to believe that the income and expenditure in this regard is not properly accounted for in the books of the Baronetcy HOA.

**[13.11]** The more difficult question here relates to the levies raised prior to the amendment of the Conduct Rules of the Baronetcy HOA. If one accepts the advice from Paddocks Attorneys as correct, in other words, that the implementation of the levy at the time was unlawful as it was not accompanied by the necessary formal amendment to the Building Agreement or the Conduct Rules of the Baronetcy HOA at the time, one cannot come to a conclusion other than that these levies should be refunded in full. I do not see on what basis the Baronetcy HOA is entitled to withhold repayment of that portion of the levy related to expenses it may have had to a particular owner's building works. If it was not justified to impose that levy or cost (whether a direct cost or not) on an owner, on what basis is it justified to retain it? There is no other mechanism,

provision in the Constitution of the Baronetcy HOA or rule through which the Baronetcy HOA is able to lawfully recover costs from owners other than through lawfully imposed levies. It is unfortunate that the Baronetcy HOA did have those expenses at the time (there is no evidence to suggest that this was not the case) and that the situation arose on account of an oversight (or as Paddocks Attorneys put it, “a bona fide technical error”).

The levying of costs and charges against owners are regulated by the Constitution of the Baronetcy Estate and its Rules and I have no powers to rule that owners should be retrospectively charged for costs related to their building works. The most logical source of funding for the refunds would be a special levy, but unless otherwise determined by the new Constitution of the Baronetcy HOA, this will apply to all owners and not only those engaged in building works. One can of course argue that all owners at some or other time has or will build and that it is not unfair to burden non building owners with this expense. Also, the cost is expended in the interest of the Estate as a whole.

In my view, a general meeting of owners will be required to discuss the source of the funding and the Baronetcy HOA may need the services of a mediator to resolve this problem.

### POWERS AND JURISDICTION OF THE ADJUDICATOR

**[14]** 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 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

**[15.1]** Section 39 of the Community Schemes Ombud Service Act No.9 of 2011, determines which orders an adjudicator is competent to make.

These orders include an order in terms of Section 39 (e) of the Community Schemes Ombud Service Act No. 9 of 2011 in terms whereof a party may be ordered to make payment to another. The subsection reads as follows:

*"An application made in terms of section 38 must include one or more of the following orders - an order for the payment of a contribution or any other amount".*

**[15.2]** Accordingly, the Respondent is ordered to pay the Applicant the following:

15.1 all building levies paid by him prior to amendment of the Conduct Rules of the Baronetcy HOA.

15.2 each party is to carry its own costs.

### **SECTION 56 OF THE CSOS ACT, 2011**

**[16]** 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.

### **RIGHT TO APPEAL**

**[17]** The Applicant, the Respondent or any person affected by the order may appeal to the High Court on a question of law in terms of Section 57 (1).