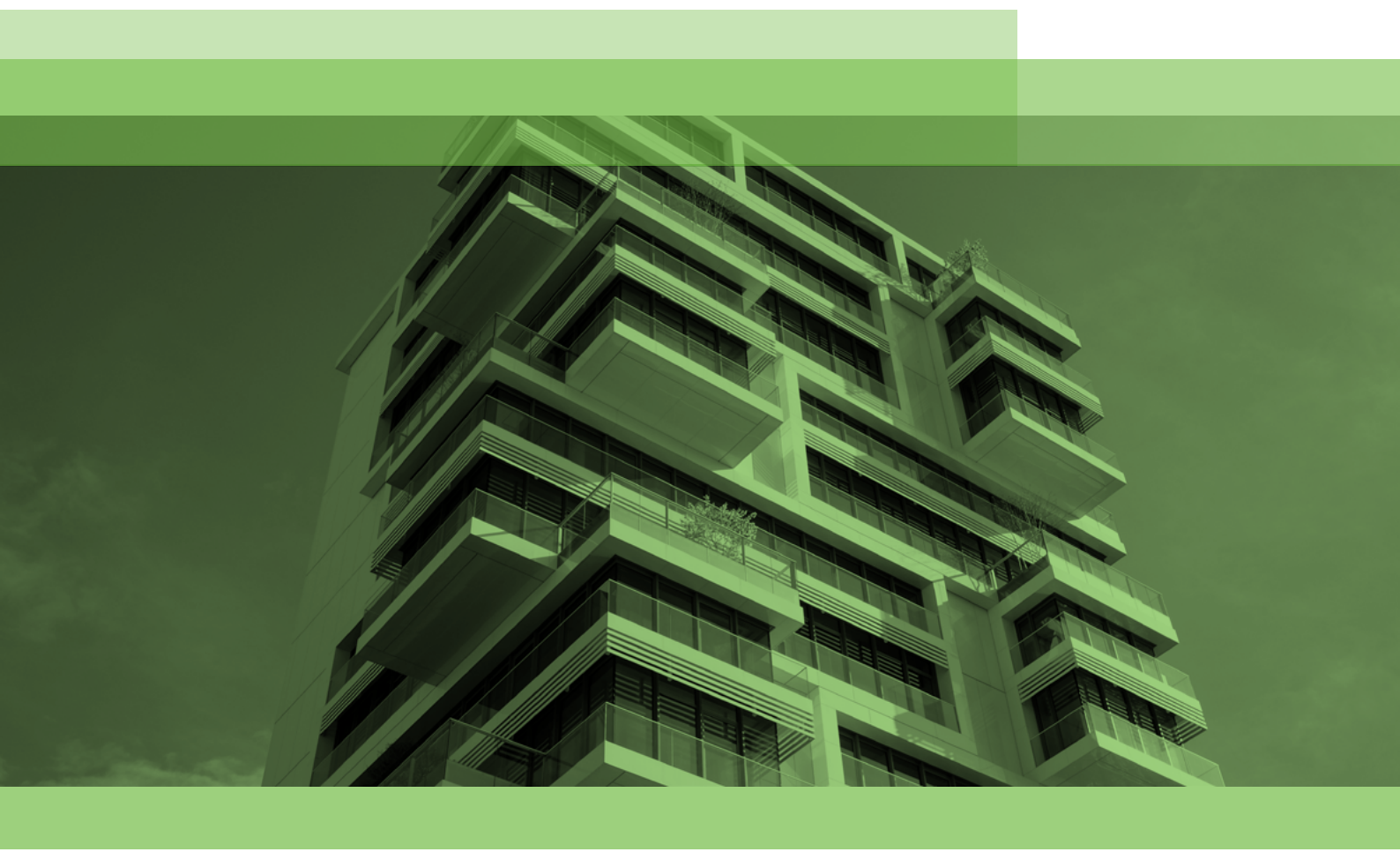


# Fogell and St Martini Gardens Body Corporate v Johnson Family Trust

Community Scheme Ombud Service - Adjudication Order

---

**Case Number:** CSOS 404/WC/17  
**Adjudicator:** Nomonde Keswa  
**Date:** 27 November 2017  
**Applicant:** Glyn Lee Fogell and Trustees of St Martini Gardens  
Body Corporate  
**Respondent:** Johnson Family Trust (Brian Johnson)



# Fogell and St Martini Gardens Body Corporate v Johnson Family Trust

---

## PARTIES

**[1]** Parties in this matter are:

- a. The Applicant is the Trustees of the St Martini Gardens Body Corporate under the signature of its Chairperson Mr Glyn Lee Fogell.
- b. The Respondent is the Johnson Family Trust represented by Mr Brian Johnson. The Johnson Family Trust owns unit 824 of the St Martini Gardens Sectional Title Scheme.

## INTRODUCTION

**[2]** After the parties failed to resolve the dispute amicably between themselves, the Applicant lodged the dispute for resolution by the Community Schemes Ombud Services (CSOS) in terms of Section 38 of the Community Schemes Ombud Services Act 9 of 2011 (CSOS Act). The conciliation process of resolving this dispute in terms of Section 47 of the said Act was unsuccessful. The matter was then referred for adjudication in terms of Section 48 (4) of the said Act.

## APPLICABLE PROVISIONS OF THE ACT

The hearing was conducted in terms of:

**[3]** Section 38 of the CSOS Act which provides that -

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

**[4]** Section 45(1) which 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".*

**[5]** Section 47 which 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".*

**[6]** Section 48 (4) which 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

**[7]** Brian Johnson in terms of the Conduct Rules applied to replace timber frames of the door in the balcony and the kitchen steel window with aluminium frames. He also applied to install air conditioners. These renovations were approved with certain conditions. The extent of the approval of the renovations and the conditions attached to that approval is in dispute. The Trustees submit that Brian Johnson violated the rules which seek to maintain the harmonious appearance of the building by going against the conditions of the approval of his renovations/alterations. Brian Johnson disputes that he flouted the rules because where the conditions of approval were not practical he negotiated with the Trustee responsible for buildings and got an understanding of what can be done.

## APPLICANT'S VERSION

Applicant submitted that:

**[8]** Respondent violated the Conduct Rules. He interfered with the uniformity of the appearance of the building by changing the module and configuration of his unit's door and window frames contrary to the appearance of other units in the building and in contravention of the conditions of the approval from the Trustees. He replaced the frames of the doors and windows in the balconies facing the garden and the street that do not match the appearance of the rest of the 8th floor (vide page 89 on file). He was given approval on condition that he installed black aluminium door frames, "the same as the rest of the 8th floor". He refused to rectify these violations even when they were brought to his attention.

**[9]** Respondent's application to install air conditioners was

approved on condition that the air conditioners were placed on the balcony below the height of the balustrades (vide page 89 on file). However, when the air conditioners were installed, they were placed in such a way that they protrude above the balustrade (vide photograph on page 91 on file) in contravention of Rule 5.3 which prohibits any storage of furniture or washing lines showing above the balustrades (vide pages 40-41 on file).

## **APPLICANT'S PRAYER**

**[10]** The Applicant seeks an order that will cause the Respondent:

*a. to rectify the appearance of his unit to be uniform with the rest of the units on the 8th floor; and*

*b. to place the air conditioners below the balustrade so that they are not visible when his unit is viewed from the garden.*

## **RESPONDENT'S VERSION**

**[11]** The Respondent vehemently denied that he contravened the rules because the procedure to apply for renovations and/or alterations was adhered to including the submissions of architectural drawings which show what was to be done (vide pages 80-85 on file). He accused the Trustees of chaotic record-keeping as he maintained that the renovations he effected were consistent with the rules and were approved by the Trustees who were in office at the time (vide page 89 on file).

**[12]** Respondent submitted evidence in the form of architectural drawings which proved that he did not alter the frame of the doors of the balcony facing the garden. This frame was identified as aluminium in the drawings submitted by the developer at the development stage long before he purchased the unit (vide page 94 on file). On viewing this evidence, the Applicant conceded that the Respondent was not at fault for the appearance of his unit on the side facing the garden.

**[13]** Respondent further submitted that when he applied for alterations to the balcony facing the street, he attached the drawings which showed the module of the aluminium

doors and window he was applying to install (vide page 85 on file). The approval conveyed to him per email from Hilda (the supervisor) dated 13 April 2010 said that the Trustees "will allow the change if the aluminium used is black, in other words the same as the rest of the 8th floor". Nowhere in the conveyed approval was there any indication that the module of the frame proposed in the drawing was being rejected (vide page 89 on file). The Applicant indicated that the phrase "the same as the rest of the 8th floor" meant that he must maintain the module and configuration as is with the rest of the 8th floor. Applicant specifically referred to unit 825 next to the Respondent's unit 824 for uniformity.

Respondent referred Applicant to unit 815 at the opposite end of unit 825 on the same floor which had a different module and configuration.

Respondent asked why was unit 815 allowed to change the module and configuration of its frames? Applicant submitted that all owners who had changed the appearance of their units by replacing the door and window frames with aluminium frames that do not have uniform mallions and transoms same as the rest of the 8th floor have been asked to rectify this and have done so or are in the process of doing so.

**[14]** Regarding the air conditioning system, Respondent submitted that after discussing the challenges he was facing to comply fully with the request to install the air conditioners below the balustrade, he thought the approval he received took into account the difficulty of installing two air conditioners one on top of the other completely below the balustrade. He further submitted that the drawing he submitted with the application for the installation of the air conditioners indicated that the extent of the protrusion above the balustrade is a mere 190mm (vide page 93 on file). The fact that the supervisor did not object to this protrusion at installation and even after completion, Respondent submitted, he thought it was condoned.

**[15]** Respondent also submitted a photograph of an air conditioner that is mounted on the wall of the common property (vide page 90). This photograph according to the Respondent was an indication that the Trustees did not enforce the rules in so far as air-conditioning systems were

concerned. However, the Applicant rejected this argument as comparing incomparable circumstances. Applicant did not explain why the air conditioners placed on the balcony protruding above the balustrades is not comparable to air conditioners mounted on the side wall of the common property as both situations are not allowed in terms of the rules.

## EVALUATION OF EVIDENCE

The evidence submitted on this matter was evaluated in terms of the following:

**[16]** Section 35 (1) of Sectional Titles Act 95 of 1986 which was applicable at the time but has since been repealed provided that “a building and the land on which it is situated shall as from the date of the establishment of the body corporate be controlled and managed, subject to the provisions of this Act, by means of rules”.

**[17]** Section 35 (3) provided that “any management and control rules made by the developer or a body corporate shall be reasonable, and shall apply equally to all owners of units... ”.

**[18]** Rules 5 in Annexure 9 of the Sectional Titles Act 95 of 1986 provided that “the owner or occupier of a section used for residential purposes shall not place or do anything on any part of the common property, including balconies, patios, stoeps, and gardens which, in the discretion of the Trustees (my emphasis), is aesthetically displeasing or undesirable when viewed from the outside of the section”.

**[19]** The question to be decided is whether the Respondent violated the rules and that his violations are such that he should be ordered to:

- a. Reverse the appearance of his unit to be in uniform with the rest of the units on the 8th floor;
- b. Dismantle the air conditioning system and place it such that it is not visible from outside his unit?

**[20]** Respondent applied to undertake the alterations in his unit as per the drawings which accompanied the

application and Applicant acknowledged this fact (vide pages 80-85 on file). Respondent submitted that when his application was not approved at first, he asked for and was granted a site meeting with one of the representatives of the Trustees to discuss the proposed alterations (vide email on page 66 on file). The representative of the Trustees did not refute this evidence but could not remember the details of the discussions. After these negotiations, Respondent's application was subsequently approved with conditions (vide page 89 on file).

**[21]** Both parties acknowledged sending and receiving this communication.

What the parties, however, dispute is the message that was intended to be conveyed through this correspondence. Applicant wanted to convey that Respondent's installations should be similar to the rest of the units on the 3<sup>rd</sup> floor. Respondent understood the message to be that his application was being approved with specific instruction about the colour of the aluminium that he should install. He submitted that he did not interpret the message to be referring even to the module and configuration of the doors and windows reflected in the drawings that were submitted.

**[22]** It appears that there was miscommunication of what the Trustees approved. The Trustees (they) could not explain why the supervisor, who in terms of the approved application was designated by the Trustees to supervise the renovations (vide page 83 on file), did not report to the Trustees that what was being implemented by the Respondent was in violation of the Trustees' instruction. They could not explain why it has taken the Trustees seven years (my emphasis) after the completion of the alterations to raise the deficiencies in the appearance of the Respondent's unit.

**[23]** Rule 5 cited in paragraph 17 above indicates that the Trustees have a discretion in what they decide as displeasing or undesirable. It is considered reasonable on the part of the Respondent to expect that after negotiations at the site meeting convened by Respondent with a representative of the Trustees that the Trustees used their discretion to allow the alterations to go ahead because the Trustees did not raise any problems with the alterations for seven

years. The fact that there are units on the same floor as that of the Respondent's unit which appear different raised a legitimate expectation on the part of the Respondent that his unit's appearance is acceptable. Applicant indicated that the Trustees have approached all the owners who have units whose appearance is not the same as the rest to rectify them. They proposed and the Respondent accepted that "fake" mallions should be added to the window frames and transoms to the door frames such that the appearance of the frames of balcony doors and windows are aligned to those of unit 825 next to the Respondent's unit. This agreement was subject to the fines debited to the Respondent's account being reversed. The Applicant accepted this request and undertook to reverse the fines.

**[24]** The issue left to be decided is the air conditioners protruding above the balustrade which the Trustees consider as displeasing when viewed from outside the unit. The Respondent offered to eliminate the displeasure caused by the protruding air conditioners by placing greenery which will cover the protruding part of the air conditioners. The Applicant could not accept this offer because the Trustees are not empowered to change the rules, only the Body Corporate can do so. They submitted that allowing the Respondent to keep the protruding air conditioners would amount to changing the applicable rule for which they are not empowered.

**[25]** By not objecting to and demanding rectification of the protruding air conditioners at the time of installation leaving it for seven years to raise an objection, the Trustees created a legitimate expectation that the installation was approved. Therefore, it is considered unfair and unreasonable to demand that the air conditioning system should now be dismantled. It appears that what is reasonable at this stage is to find a way to cover the protruding air conditioners using such material that will not be displeasing when viewed from outside the section.

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

**[26]** 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 Service Act 9 of 2011.

#### **ADJUDICATION ORDER**

**[27]** Based on the tacit condonation demonstrated by the Trustees by never raising for seven years an objection to the placement of the air conditioners in such a way that they protruded above the balustrade, for the Applicant to apply that the air conditioners be dismantled now is considered unfair.

**[28]** Without creating a precedent for the violation of Rule 5 by other owners of sections in this scheme, the delay of seven years to raise an objection to the air conditioners justify that the only relief which is reasonable and fair is to find an appropriate mechanism to cover the protruding air conditioner in such a way that it is not aesthetically displeasing when viewed from outside the section. Therefore, it is ordered that:

- a. The Respondent applies and maintains greenery to cover the air conditioner which is protruding above the balustrade in such a way that it is not visible from outside the section. This must be implemented within ninety (90) days of the date of this order.
- b. The agreement that the parties reached to install transoms on the frames of the doors on the balcony and mallions on the window on the wall facing the street be implemented within ninety (90) days of the date of this order.
- c. The Applicant reverses the fines imposed on the Respondent as a result of the disputed matters which have now been resolved. This reversal must be implemented within thirty (30) days of the date of this order.

#### **ENFORCEMENT OF ORDER**

**[29]** The parties' attention is drawn to the following section of the Community Schemes Ombud Service Act 9 of 2011 for the enforcement of this order:

Section 56 (1) provides that -

*"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".*

St Martini Gardens Sectional Title Scheme in central Cape Town falls within the area of jurisdiction of the Magistrate of Cape Town.

**RIGHT TO APPEAL**

**[30]** The parties' attention is also drawn to the following legal provisions for appeal:

Section 57 of the Community Schemes Ombud Service Act 9 of 2011 provides that:

*57 (1) "An Applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.*

*57 (2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.*

*57 (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"*