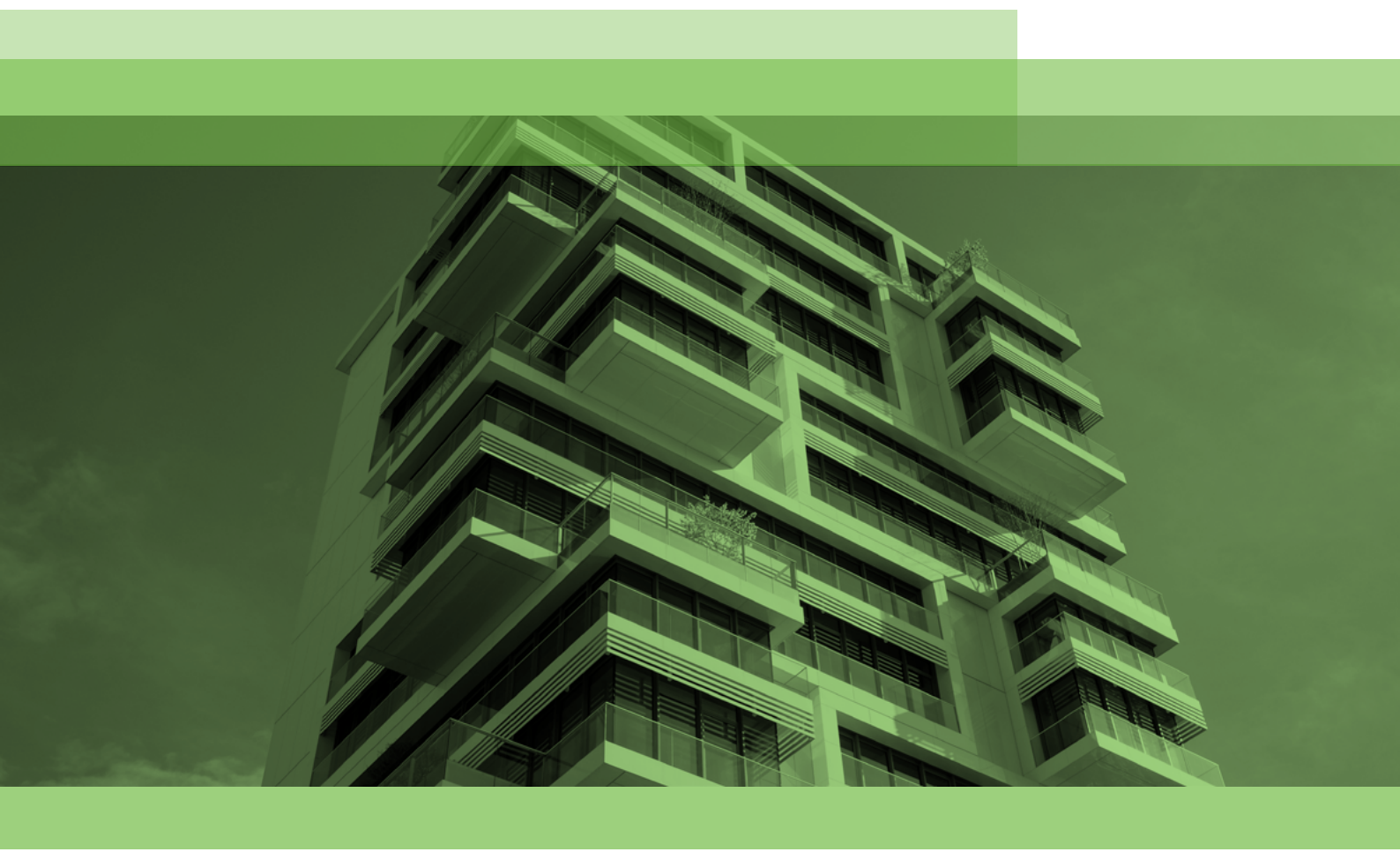


# Opperman v Pearl Gardens Body Corporate

Community Scheme Ombud Service - Adjudication Order

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**Case Number:** CSOS 00926/KZN/17  
**Adjudicator:** Ms Zinhle Precious Tenza  
**Date:** 14 September 2018  
**Applicant:** Barend Jacobus Opperman  
**Respondent:** Trustees of Pearl Gardens Body Corporate



## EXECUTIVE SUMMARY

**[1]** The Community Scheme Ombud Service is in receipt of an application for a dispute resolution from Barend Jacobus Opperman regarding allegations pertaining to private and common areas.

**[2]** Wherein the Applicant is seeking the following order in terms of Section 39 of the Community Scheme Ombud Service Act,

- *That the Trustees be ordered to cover all expenses for body corporate due to grossly neglected of their duties.*

**[3]** The issues giving rise to this dispute is the damages to the ceiling, cornice and walls of the Applicant's garage. The Applicant alleges these damages were caused by the Respondents' failure to maintain the roof which forms part of common property. The Respondents contend that Pearl Gardens was affected by hail storm and the insurance claims lodged by owners for the repairs to the roof were repudiated. The owners then repaired the damages at their own costs, this then sets a precedent in that owners will be liable for repairs to the roof. The Applicant in this regard contends that the roof top is the responsibility of the body corporate thus the Respondents' failure to maintain the roof was the main reason why the claim was repudiated. The Applicant is therefore seeking an order against the Respondents to repair in terms of Section 39 (6) (a) of the Community Scheme Ombud Services.

### *Finding(s)*

- *The Respondents are ordered to repair the damages to the Applicant's garage in terms of Section 39 (6) (a) of the Act.*

## INTRODUCTION

**[6]** The Applicant is Barend Jacobus Opperman, the registered owner of unit 22 of Pearl Gardens, Pentagon Park, Bloemfontein.

**[7]** The Respondents are the Trustees of Pearl Gardens Body Corporate, being a community scheme as defined by the Community Scheme Ombud Service Act No 9 of 2011.

**[8]** 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 KwaZulu-Natal Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.

**[9]** The adjudication hearing took place on 28th June 2018. This application is before me because of a referral sent by the KwaZulu-Natal Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.

**[10]** On 28th June 2018, the applicant and the Respondents were present at the hearing. The parties entered an appearance in terms of the Notice of Set Down which was sent out to them on 18th June 2018 as contemplated in Section 48(4) of the Community Schemes Ombud Service Act No.9 of 2011.

## APPLICABLE PROVISIONS OF THE ACT

**[11]** 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".*

**[12]** 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"*

**[13]** 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".*

**[14]** Section 39 provides that -

*"An application made in terms of Section 38 must include one*

or more of the following Orders;

39 (6) in respect of behavioural issues -

*(a) an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way;*

**[14]** Accordingly, a certificate of Non- Resolution was issued in terms of Section 48(4) of the CSOS Act No.9 of 2011. The Ombud therefore, referred the matter to adjudication, in terms of Section 47 of the Act.

## **SUMMARY OF EVIDENCE**

### **APPLICANT'S VERSION**

**[15]** The Applicant submitted that he is the registered owner of unit 22 at Pearl gardens. Further that his unit is currently being let out to a tenant. The Applicant alleges that he was notified by his tenant that there were damages to the garage ceiling, cornice and walls. The said report was forwarded to the body corporate and the managing agent for their attention and action. In this regard, the Applicant referred to numerous emails that were exchanged between the parties with regard to the issue at hand. Notwithstanding the Applicant having reported the problem, the repairs to the garage were not done. It is the Applicant's contention that the Respondents ought to repair the damages as the source of the problem can only be coming from the roof, of which maintenance was neglected.

### **APPLICANT'S PRAYERS**

**[16]** In the premises, the Applicant is requesting an order against the Respondent for the repairs to his garage.

### **RESPONDENT'S SUBMISSION**

**[17]** The Respondents are disputing the allegation based on the grounds that there was some misunderstanding when this matter was reported. The Respondents submitted that on or around October 2016, the area was affected by heavy storms and Pearl Gardens was amongst the affected properties. Due to this incident, the Respondents had

requested all owners affected to submit the list of all the damages so that the insurance claims can be processed.

**[18]** However, the Applicant did not submit any claim for damages resulting from heavy storms for the purpose of claiming to the insurance. The Respondents further submitted that during this process two (2) claims that related to the damaged roof were rejected by the insurance. As a result, the two affected owners who had lodged the claims had paid for the repairs to their unit. The Respondents in this regard contends that a precedent was therefore set, it was therefore understood that for future claims of damages to the roof, the owner will have to carry the costs. Hence the decision communicated to the Applicant advising him that he must pay for the costs of repairs to his garage. The Respondents contents further that the response to the Applicant was not properly conveyed, in particular the email stating that he must pay for the repairs. The Respondents alleged that this email was not the final decision in the matter, in fact there was some miscommunication between the parties.

### **RESPONDENT'S PRAYERS**

**[19]** The Respondents are willing to rectify the problem where the can and to abide by any suggestions from the Ombud's office.

### **EVALUATION OF INFORMATION AND EVIDENCE OBTAINED**

**[20]** As indicated, the dispute is regarding the repairs to the Applicant's garage. The Applicant has submitted that the Respondents are solely responsible for the repairs and maintenance of the roof. The Applicant's principal contention in this matter, is that the Respondents have failed to maintain the roof for the past 6 (six) years hence the insurance has rejected the claim. The Respondents did not however submit anything to the contrary in this regard.

**[21]** The question on whether the Respondents understands that the roof is part of common property, is not clearly. This is based on the fact that when the insurance claim was rejected the owners of the units were advised to cover the costs of repairs. The reason for such advice to be given

is unknown as the reason for rejection were also not submitted by the Respondents in evidence. It is further clear that the Respondents were somehow misguided in this matter, hence the decision taken that the Applicant should cover the costs of repairs to his garage because the other owners had paid for same.

### **DISCUSSION**

**[22]** Having considered all the submissions, it follows that the order that is sought by the Applicant is in terms of Section 39 (6) of the Community Schemes Ombud Service Act, No. 9 of 2011. Whilst it is the body corporate responsibility to repair and maintain common property, the owners are responsible for the maintenance of their units. In terms of Section 37 (1) of the Sectional Titles Act, this section provides that the body corporate is responsible for the repairs and maintenance of common property. Thus, it is further a legislative requirement that the common property be insured, thus that responsibility rests with the Respondents.

**[23]** The Applicant in this case had submitted evidence regarding the fact that the roof had not been maintained for the past six (6) years. This evidence was never contested by the Respondents, in fact there were no submissions put forward to prove otherwise. It is further commonly known that the insurance policy will reject insurance claims for a property that are not properly maintained. In this instance, the only inference that can be drawn is that the roof was not maintained hence the rejection of the two claims. The reasons why the body corporate as required by law must take the insurance for common areas is to protect the owners, especially in instances wherein the problem originates from the roof. In such cases, the claim for damages were lodged with the insurance company and any access payable is paid by the body corporate. However, in the present case the common property was indeed insured but the rejection of the claim suggest that the roof had not been maintained.

**[24]** The Applicant's submissions that the Respondents were grossly negligent and failed to carry their fiduciary responsibility. In my view, it will be unfair to judge the Respondents on this one incident alone and be said to

be gross negligent. It is evident that this incident was an isolated one as it was submitted that all the owners who were affected by the hail were indeed assisted with their claims and the insurance did cover all with the exception of the two claims that were rejected. I further would not want to comment on the conduct of the managing agent, the agent in my view acts on instructions of the Respondents and they don't take away the legislative responsibility of the Respondents.

**[25]** In view of my findings herein, the actions of the Respondents had caused the Applicant garage to be damage by failing to maintain the common property. The Respondents had a legal duty to ensure that whilst the common property is insured it is also maintained. In conclusion, the reason for the leak and all the damages to the Applicant's garage is as a consequence of the Respondents failure to properly maintain the roof.

### **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 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**

**[27]** Accordingly, the following order is made:-

- That Respondents are ordered to pay for the costs of repairs to all the damages in the Applicant's garage.
- No order to costs

**RIGHT OF APPEAL**

**[28]** The parties' attention is drawn to -

Section 57(1) of the CSOS Act of 2011 refers -

*"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"*