Ormeau Body Corporate v Evenpoel

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS SS0/WC/17
Adjudicator: Nomonde Keswa
Date: 14 February 2018
Applicant: Neil Lavin (Ormeau Body Corporate)
Respondent: Luc Johan Maria Evenepoel

PARTIES

[1] The parties in this matter are:

a. the Applicant, the Body Corporate of Ormeau Sectional Title Scheme represented by its Trustees assisted by their Managing Agent;

b. the Respondent, Dr Luc Johan Maria Evenepoel, who owns unit 8/section 10 (the cottage) in Ormeau Sectional Title Scheme.

Present at the hearing:

• for the Applicant were two members of its Board of Trustees, namely the Chairperson, Dr Annette Hurbschle and Mr. Haydin Ellis, a Trustee, assisted by Mr Neil Lavin, the Managing Agent of the Body Corporate.

• for the Respondent was Dr Evenepoel.

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 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) 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 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) 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] The parties are in dispute firstly about their understanding of the events which led to the Respondent to "acquire or encroach" on two pieces of land attached, or next, to Respondent's cottage the total square meterage of which is also in dispute. The Respondent refers to these two pieces of land as "his courtyards" while Applicant refers to them as "common property". Related to this is how the building works the Respondent undertook were authorized to incorporate the two "courtyards/common property" into his unit. The Applicant maintains that the Respondent neither obtained the unanimous resolution of the members of the Body Corporate to incorporate two parts of the common property into his unit nor compensated the Body Corporate for acquiring these two pieces of land. The Respondent on the other hand maintains that these two pieces of land were actually his "courtyards" allocated to his unit from the date the development was first registered at the Deeds Office. He further maintains that when he purchased the section/ cottage, these "courtyards" formed part of the sale.

[8] Secondly, the Applicant accuses the Respondent of failing to adhere to the conditions of sale of the rights to exclusive use of one of the gardens. These conditions include that the Respondent should not erect buildings or structures on the exclusive use area without a unanimous resolution of

all the members of the Body Corporate. The Respondent disputes that he erected buildings and/or structures on the exclusive use area in question. He maintains that the wooden garden tool shed he erected on this area cannot be classified as either a building or a structure because of its size. Therefore, the Respondent maintains the Applicant is wrong to say that he violated the conditions of the sale to him of the rights to exclusive use of "garden 3".

[9] Thirdly parties are in dispute about the Applicant levying the Respondent a contribution towards the Administrative Fund for repairs and maintenance of the gardens on which the Respondent enjoys exclusive use. The essence of the parties' arguments lies in the way they interpret the provisions of the Sectional Titles Act, 95 of 1986 (STA) which was applicable at the time the events in dispute began as well as the Sectional Titles Schemes Management Act, 8 of 2011 as it applies now to the obligations of owners of sections in a sectional title scheme to contribute to the Administrative Fund. Applicant maintains the provision of the legislation on contributions by owners who have rights to exclusive use areas must be applied to such owners while the Respondent interprets these legislative provisions as non-mandatory and dependent on costs actually incurred by the Body Corporate to maintain his exclusive use areas (EUAs).

APPLICANT'S VERSION

The Applicant submitted as his first claim that:

[10] The Respondent unlawfully appropriated common property thereby unlawfully increased the extent of his unit/section and built on it. Respondent did not seek a unanimous resolution of the members of the Body Corporate to incorporate common property into his unit/section. The Respondent's section is bigger by 32m2 and is registered at the Deeds Office without the authorisation of the Body Corporate. According to the Amending Sectional Plan of the Extension of Section 10, the floor area of the Respondent's section increased to 135m2 (refer to pages 78 and 99 of the file). It did not cost the Respondent anything to increase the extent of his section this much because he did not compensate the Body Corporate for such appropriation and extension of his unit at the expense of other owners. This is unfair because such an increase to the extent of the Respondent's section means an increase in the value of his property for which he will gain unfairly and unduly when he sells his property. The rest of the common property on the other hand is reduced to the extent the Respondent's Section is unlawfully increased.

The Applicant further submitted that:

[11] At a meeting on 4 April 2017 called to discuss the dispute and at which both parties and their legal representatives were present, the Respondent admitted that he did not obtain the prior authorisation from the Body Corporate to appropriate common property. He "had not obtained a unanimous resolution of the members of the Body Corporate as required in terms of Section 17 (1) and (2) of the Sectional Titles Act nor the Special Resolution of the members of the Body Corporate in terms of Section 24 (3) of the Sectional Titles Act nor any approval of the Applicant's Trustees … " (vide page 79 of the file).

The Applicant submitted on the second claim that:

[12] The Respondent owns rights to exclusive use of two adjacent gardens. He was sold the exclusive use rights on one of the gardens in 2007. One of the special conditions of the sale was that "no buildings or structure shall be erected in the exclusive use area without a unanimous resolution of all the members of the Body Corporate" (vide clause 6.3 of the Deed of Sale on page 103 of the file). Notwithstanding this special condition, the Respondent erected a wendy house on this exclusive use area. He also has a wendy house on the other garden as well.

The Applicant further submitted that:

[13] At the meeting referred to in paragraph 10 above, the Respondent admitted that he did not obtain prior written authorisation of the Body Corporate to erect the wendy house on garden 3. The Respondent requested to keep these wendy houses. The parties agreed at this meeting that his request would be considered if he provided proof that these wendy houses were compliant with the requirements of the local authority relating to such structures and that they did not pose fire risks to the rest of the buildings.

To that end he was asked to submit to the Trustees the following:

a. "Approved council plans;

b. "Occupation certificate which will include compliance with applicable gas, electric, plumbing installations, etc and must be assessed by the local building control officer;

c. "compliance with all regulations/legalities in terms of the City's zoning scheme".

[14] Respondent was given ten (10) days within which to submit the documents requirement at paragraph 12 above failing which the structures would have to be removed (vide page 82 of the file). Approval of the Respondent's request referred to above would still be contingent upon resolution of all other disputes (paragraph 8.2.12 of the Applicant's affidavit on page 82 of the file). The Respondent did not comply with these requirements.

The Applicant submitted in his third claim that:

[15] In contravention of Section 37 (1) of the Sectional Titles Act the Respondent refuses to make an additional contribution to the Administrative Fund of the Body Corporate in respect of the parts of the common property on which he has exclusive use. The levy determined for the Respondent's EUAs was initially pegged at R6 per m2. This was later reduced by 50% after the Respondent made representations that the amount charged per m2 was high (vide minutes of the AGM on page 25 of 11 the file) but the Respondent ignored numerous requests to pay. As a result, his levy account is in arrears and compounded interest is being charged calculated at prime rate plus 2%. He is also "liable for all legal costs including costs as between attorney and client, collection commission, expenses and charges incurred by the Body Corporate in obtaining the recovery of arrear levies … "The amount owing as at 1 August 2017 is one hundred and three thousand, five hundred and thirty six rands and eighty cents (R103 536.80) (vide page 85 of the file)

APPLICANT'S PRAYER

[16] The Applicant prays for:

a. An order that declares that the Respondent's conduct in building upon common property constitutes an unlawful appropriation of common property and/or unlawful extension of his unit;

b. An order that directs the Respondent to compensate the Applicant for the common property he so appropriated into his unit failing which to demolish the extension of the building onto the common area and restore the building to its original condition;

c. An order that directs the Respondent to obtain at his expense the report of a suitably qualified structural engineer confirming the common property is structurally safe and sound after the demolition;

d. An order that directs the Deeds Registrar to expunge the registration of the extended section plan;

e. An order that directs the Respondent to give full access to the Body Corporate or any person authorised by the Body Corporate to inspect the section to ensure compliance with the above orders;

f. An order that gives the Applicant the right to take all necessary steps to give effect to the orders above if the Respondent fails to comply within 90 days of the order;

g. An order that directs the Respondent to submit the certificates of compliance which were requested from him at the meeting of 4 April 2017, failing which to remove the wendy houses within 15 days of the date of the order. If the Respondent fails to do so, to authorise the Applicant to remove the wendy houses and to recover such costs from the Respondent.

h. In the event of the Respondent failing to comply with orders at paragraphs (b) and (c) above, an order that authorises the sheriff of the court to obtain access to the Respondent's section through the services of a locksmith for the purposes of removing the wendy houses;

i. An order that directs the Respondent to pay the Applicant the amount of R103 536.80 plus interest thereon at the prime rate plus 2% per annum compounded, calculated from the dates when the contributions were imposed;

J. An order that directs the Respondent to pay the Applicant's legal costs on a scale as between attorney and client; and

k. Any other order considered prudent

RESPONDENT'S VERSION

Respondent submitted that:

[17] The section/cottage is positioned in the sectional title scheme as a building separate from the rest of the sections. He purchased the section/cottage with what he understood to be courtyards and they were transferred to him as such when the section/cottage was transferred to him when he bought it The way the courtyards were designed, roofed and their floor coverings, suggested that they were not part of the garden (common property) but rather a part of the section/cottage.

[18] When his application for alterations of his section were brought before the AGM in February 2005, the plans for the alterations were scrutinised by the Managing Agent and six of the members of the Body Corporate who attended the meeting, two had not attended. Nobody raised an objection at the time because everyone believed that the two courtyards belonged to the section. No one knew that these two "courtyards" were in actual fact common property. When the application for alterations of the unit were brought before the Body Corporate at its AGM the understanding was that they were authorising the building works not the extension of the limits of the section, thus incorporating common property into his section. The then Chairperson of the Body Corporate signed off the plans. After that he submitted the approved plans to the City Council and they were duly approved.

[19] He only started building eight months later, even then nobody raised an objection. An objection was only raised on 21 September 2016 by the current Trustees none of whom were present in 2005. When this objection was raised, Respondent submitted that he referred the Managing Agent to the minutes of the inaugural AGM of the Body Corporate on 5 November 1987 during which rights of exclusive use of common property were awarded to all the sections. The "cottage"(Respondent's section) was awarded as follows:

> "It was Resolved by unanimous resolution that the owner of the "cottage" be and hereby granted the right to extend that section into the exclusive use garden area awarded to such section, subject to the plans for such extension being approved by local authority; and that the owners of the exclusive use garden area have a right to install a swimming pool in such exclusive use garden area should they so desire"(vide page 35 on file).

Respondent submitted that he finds these minutes to be the only source of the authority why the "cottage" was sold to him incorporating what he thought were the "cottage's" courtyards which the Applicant refers to as common property. He submitted that he did not violate the law relating to "subdivision, consolidation and extension of section" and rules promulgated thereon. The extension of the section/cottage had already happened by the time he purchased the cottage. All what he did was to reposition and redesign these "courtyards".

This submission was not accepted by the Managing Agent because he said that the minutes were not signed and therefore cannot be admissible as evidence. Respondent took issue with the Managing Agent because not all the minutes of the meetings of the Body Corporate which are circulated among members are signed and that does not make them invalid.

Respondent indicated that he has in his records a copy of the signed minutes.

[20] Respondent further submitted a copy of the consent for his building plans signed by former Chairperson of the Body Corporate at the AGM of 7 February 2005 (vide page 60 of the file). He said these building plans were signed in the presence of other Trustees and six of the eight owners plus Respondent's proxy who attended the AGM. Respondent submitted that the Chairperson of the Body Corporate would not have signed the building plans if there was an objection to them at the meeting.

[21] Respondent also refuted that his section has increased its floor area by 46m2 because the total floor measurement of the two "courtyards" is 28.3 m2 . One "courtyard" measures

9.4 m2 and the other 18.9 m2. Respondent referred to Applicant's attachment AH4B on page 99 of the file in which the Land Surveyor, Mr K. A Hodge, determined the increase to the size of the "cottage"/Respondent's section to be 32 m2 and the participation quota to be 17, 6010% as at 23 June 2009 for which Respondent submitted he pays levy on the increased size. This increase was approved by the Surveyor-General.

On the second claim that he built unauthorised structures on the exclusive use areas (gardens), Respondent submitted that:

[22] He differs with the Body Corporate on the definition of the term "structure" because he believes that a garden shed is too small to be classified as a wendy house thus qualifying to be called a "structure". He submitted that the structures referred to by the Applicant are garden tool sheds which have been on his premises for more than ten years without their existence being queried. The garden tool shed on exclusive use garden 2 was erected before he bought the property. He found it there when he bought the section in 1997, twenty (20) years ago. He does not know if the previous owner received authorisation from the previous owners and Body Corporate to erect it. It was a condition in his offer to purchase the section/cottage. It is invisible to any of the sections in the scheme. It is not a nuisance to anyone.

[23] The tool shed on exclusive use garden 3 was built about ten (10) years ago, on a concrete slab he found in the garden when he purchased the rights to exclusive use of garden 3. No plants could ever grow in the spot where the tool shed is built. The wooden tool shed actually enhances the aesthetics of the place against the blind wall that would be visible if the shed were not there. It does not obstruct anybody's view since it is of a single level dimension. It is visible only from one single window on the first floor of the main scheme building. He asked way back in 2014 to be allowed to keep these garden tool sheds once the requirements of the Local Authority on such structures have been complied with. The Trustees agreed on condition that he complies with the requirements of the Local Authority and submit to them proof of application to the Local Authority. He, however, has been struggling to get proper direction from the City Council because the officials of the City Council he has been directed to could not agree on the classification of these sheds. Therefore, they could not provide him with the regulated requirements to comply with. He is still prepared to pursue this matter if the Body Corporate will allow him to keep these tool sheds. The Applicant agreed to this request on condition that the wooden structures are compliant with the rules and by-laws of the Local Authority, that these structures do not pose a fire risk to the rest of the buildings of the sectional title scheme.

On the third claim the Respondent submitted that:

[24] He had submitted a copy of minutes of the AGM of the Body Corporate in 1998/99 in which a decision was taken that owners will maintain their EUAs. He submitted that this is from where he derived the authority to maintain his EUAs himself. The Body Corporate changed this decision at its AGM of 23 February 2011 after being told that it is the requirement of the law that owners should be levied for their EUAs and that not to do so is contravening the STA He submitted that the way the Body Corporate interprets section (37)(1)(b) of the STA is inaccurate because this clause is not mandatory but provides a means for the Body Corporate to defray costs it has incurred in the event that it did so. In the event that no costs are incurred then no contribution should be required. He says "if A then B, if not A, then not Bin this case, if no costs, then no contribution" (vide page 45 of the file). He argued that there is no reason for him to contribute to the fund when he carries the cost of maintenance of his exclusive use areas (EUAs). He refuses to contribute to the levy for his EUAs because he maintains these himself. He questions the reason to be called on to pay for costs that have never been incurred. He avers that the Body Corporate seeks to double dip from him by levying a contribution to the fund while he maintains his own EUAs. He considers this as unlawful and unfair. He also accused the Body Corporate/ Trustees of being slow to attend to needs for maintenance or repair work required on the EUAs when such needs arise.

[25] The Applicant countered this argument by pointing out that levying the owners of EUAs an additional contribution to defray costs is a budgetary requirement for future needs for repairs, maintenance, rates and water. The Applicant submits that the costs to be defrayed are not for costs already incurred but for what may happen in future. The Applicant further submits that this is a requirement of the law unless the Body Corporate resolves that owners maintain their EUAs themselves. In this case, at the 2011 AGM the Body Corporate reversed the decision of the

AGM of 1999 and all owners of the EUAs were required to contribute to the administrative fund as provided for by the Sectional Titles Act. The Applicant also submitted that making a rule such as this is within the powers and duties of the Body Corporate and once decided by a unanimous resolution of the Body Corporate, it becomes applicable to all owners without exception.

[26] The Applicant further submitted that they find it curious that the Respondent at first did not challenge this decision except that he complained that the rate set of R6 per m2 he should pay was high. It was then reduced by 50% (vide page 26 of the file) consideration being given to the amount of maintenance work that is likely to be needed in the Respondent's EUAs such as felling of trees. The Applicant also added that the Respondent's gardens use a lot of water for which the Body Corporate must pay. The Respondent retorted that they should give him the water and electricity bills he will pay for them.

[27] Applicant submitted a comparative analysis of the rates paid for exclusive use gardens in other areas in Cape Town (vide page 12 of the file). These rates were not fully canvassed at the hearing and the Respondent complained that he was not given a copy of this submission to undertake his own research to provide the Adjudicator with a balanced view of what rates are charged elsewhere in the city.

EVALUATION OF EVIDENCE

The evidence submitted by the parties is evaluated in terms of the Sectional Titles Act, 95 of 1986 (STA) which was applicable at the time the alleged events occurred and the Sectional Titles Scheme Management Act, 8 of 2011 (STSMA) effective from October 2016 in so far as some of these issues in dispute continue to date:

[28] Section 24 (1) of the STA provides that "if an owner of a section proposes to extend the boundaries or floor area of his or her section, he or she shall with the approval of the body corporate, authorized by a special resolution of its members, cause the land surveyor or architect concerned to submit a draft sectional plan of the extension to the Surveyor-General for approval".

[29] Section 24 (7) of the STA provides that "When the requirements of this section and of any other relevant law have been complied with, the registrar shall register the sectional plan of extension of a section, and shall make an appropriate endorsement on the title referred to in subsection (6)(c), if the floor area of the section is increased by the extension, and such consequential endorsements against any deed registered against the title deed as may be necessary, and he shall furnish a copy of the sectional plan of extension to the local authority concerned and notify the Surveyor---General of the registration of the sectional plan of extension, and thereupon the Surveyor---General shall amend the original sectional plan and the deeds office copy of the sectional plan to reflect such extension of a section."

[30] Section 27 (2) of the STA provides that "A Body corporate, duly authorized thereto by a unanimous resolution of its members, may, subject to the provisions of section 5 (1), request an architect or land surveyor to apply to the Surveyor-General for the delineation on a sectional plan in the manner prescribed of a part or parts of the common property in terms of section 5 (3) (f) for the exclusive use by the owner or owners of one or more sections: Provided that no such delineation shall be made on the sectional plan in terms of this subsection if such delineation will encroach upon a prior delineation on the sectional plan of a part of the common property for the exclusive use by one or more of the owners".

[31] Section 27 (3) of the STA provides that "The body corporate, duly authorized thereto by a unanimous resolution of its members, shall transfer the right to the exclusive use of a part or parts of the common property delineated on the sectional plan in terms of subsection (2) to the owner or owners on whom such right has been conferred by the body corporate, by the registration of a notarial deed entered into by the parties and in which the body corporate shall represent the owners of all the sections as transferor".

[32] Parties submitted a copy of minutes of the inaugural general meeting of the Body Corporate held on 5 November 1987 (vide page 34 of the file). The minutes of this meeting recorded that the meeting quorated and was declared to be properly constituted. None of the parties at the hearing raised doubts about the proper constitution of the meeting.

[33] The minutes referred to in paragraph 30 above also recorded the adopted rules one of which was a unanimous resolution to repeal the rules contained in Schedule 1 and 2 of the Schedules submitted to the Registrar at the opening

of the register for this Scheme. A unanimous and special resolution was taken to substitute the repealed rules. (vide page 34 of the file being addendum 11 of the Applicant's submissions). Among the resolutions taken in the meeting referred to above was a unanimous resolution that the "owner of the "cottage" be and hereby is granted the right to extend into the exclusive use garden area awarded to such section (my emphasis), subject to the plans for such extension being approved by the local authority; and that the owners of the exclusive use garden area have a right to install a swimming pool in such exclusive use garden area should they desire to do so"(vide page 35 of the file). The Applicant objected to these minutes being relied on for purposes of deciding on the first claim because they are unsigned and therefore invalid. The Respondent denied that these minutes were invalid because there are numerous other minutes of meetings in the scheme that are unsigned and are relied on for decisions taken by the Body Corporate and/or its Trustees. The Respondent also indicated that he has a signed copy in his file. He was asked to submit the signed copy and he did so. (vide page 34A of the file).

[34] The Applicant did not raise an objection to the submission of the copy of the signed minutes which validated the unsigned copy to which the Applicant had objected. I therefore find that these minutes are acceptable to give guidance to the decision on the first claim.

[35] None of the parties submitted any other rules which were adopted in later AGMs of the Body Corporate which sought to repeal or amend the decision of the inaugural meeting of the Body Corporate on 5 November 1987 detailed in paragraph 31 above. In the absence of such a repeal or amendment it is reasonable to accept as valid the version of the Respondent of the building works he undertook in 2005 to alter or extend his section as shown in the sectional plans drawn by the Surveyor Mr K. A Hodge on 23 June 2009 and approved by the Surveyor-General on 26 November 2009 (vide pages 98-99 of the file). Relying on this evidence, I find that the first claim of the Applicant is without basis and must therefore be rejected.

[36] On the second claim, the Applicant agreed at the hearing to the request by the Respondent not to remove his garden toolsheds and to give him enough time to meet the requirements for compliance with building regulations failing which the wendy houses or garden sheds will have to be removed. The parties agreed that within a period of three months from the date of the order the Respondent will submit to the Trustees for endorsement the application to the City Council for approval of the structures in the manner required in terms of the relevant by-laws.

[35] Sections 35 (1) and (2) of the Sectional Titles Act, 95 of 1986 (STA) respectively provide 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** (my emphasis)"

"The rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property and shall comprise-

(a) "Management rules, prescribed by regulation … and which may be added to, amended or repealed from time to time by the body corporate as prescribed by regulation;

(b) "conduct rules, prescribed by regulation … and which may be added to, amended or repealed from time to time by special resolution of the body corporate… "

[36] Sections 35 (3) and (4) of the STA respectively provide that:

> "Any management or conduct rule made by the developer or a **body corporate** shall be reasonable, and **shall apply equally to all owners of units** (my emphasis) put to substantially the same purpose."
>
> "The rules referred to in subsection (2) shall … **bind the body corporate and the owners of the sections and any person occupying a section** (my emphasis)".

[37] Section 37 (1)(b) of the STA provides that the Body Corporate shall "require the owners, whenever necessary, to make contributions to such fund for the purposes of satisfying any claims against the body corporate: Provided that the body corporate **shall require the owner or owners of a section or sections entitled to the right to the exclusive use** of a part or parts of the common property, whether or not such right is registered or conferred by rules made under the Sectional Titles Act, 1971 (Act 66 of 1971), **to make such additional contribution to the fund as is estimated necessary to defray the costs of rates**

and taxes, insurance and maintenance in respect of any such part or parts (my emphasis), including the provision of electricity and water, **unless in terms of the rules the owners concerned are responsible for such costs** (my emphasis)."

[38] Section 3 (1) of the Sectional Titles Scheme Management Act 8 of 2011 (STSMA) provides for the functions of the Body Corporate which include:

a) "to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated (my emphasis) annual operating costs-

i. for the repair, maintenance, management and administration of the common property…

ii. for the payment of rates and taxes and other local municipality charges ..

b) "to establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repairs of common property…

c) **"to require the owners, whenever necessary** (my emphasis), to make contributions to such funds: Provided that the body corporate **must require the owners of sections entitled to the right to the exclusive use of a part or parts of the common property** (my emphasis), whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is **estimated necessary** (my emphasis) to defray the cost of rates and taxes, insurance and maintenance in respect of any such part or parts…

d) "to determine the amounts to be raised for the purposes of paragraphs (a), (b) and (c);

e) To raise the amounts so determined by levying contributions on the owners in proportion to the quotas of their respective sections".

[39] Section 37 (1)U) of the STA states that "A body corporate … shall perform the functions entrusted to it by or under this Act or the rules and such functions shall include- properly to maintain the common property … and **to keep it in a state of good and serviceable repair**" (my emphasis).

[40] Section 44 (1)(c) of the STA provides that "An owner shall repair and maintain his section in a state of good repair and, in respect of an exclusive area, keep it in a clean and neat condition while contributing to the cost of maintenance of such exclusive use areas in terms of section 37 (1) (b). In terms of section 44 (1) (c) of the STA, the owners to whom EUAs are allocated are not responsible to ensure the EUAs are in a state of good repair but rather that they are kept clean and neat and contribute to the cost of maintenance thereof unless in terms of the rules the owners concerned are responsible for such maintenance (section 37(1) (b) of the STA) If no rule was formulated to specifically give the owners the responsibility to repair and maintain EUAs then such responsibility remains with the Body Corporate and the owner contributing to the cost of such repair and maintenance. Applicant submitted that there is no such rule in the Scheme. Only the maintenance of the fence in EUA garden 3 was included as a special condition in the deed of sale when the Respondent purchased the rights of exclusive use of this garden (vide paragraph 6.1 of page 103 of the file). Even if a decision was once taken that the owners would maintain their EUAs, that decision can be revoked in future if, in the opinion of the Body Corporate, such an arrangement is not in the best interest of the scheme buildings that are well-taken care of. The Body Corporate is empowered to take such decisions. Reportedly, a unanimous resolution was adopted that the Body Corporate will take over their duty of maintaining and repairing all common property including that which is allocated as EUAs. EUAs remain common property even though certain owners have exclusive use rights over them.

[41] The Respondent submitted that in his interpretation section 37 (1) (b) of the STA:

"*allows* the Body Corporate to charge levies on exclusive use areas if *need be*, but it does *not force* it to do so. Furthermore, it does not speak about levies, but about a *contribution*, and this contribution is *to defray costs*. If A, then B, if not A, then not B, in this case, if no costs, then no contribution" (vide page 45 of the file).

He submitted that he does not have to make any additional contribution to the fund for his EUAs because there is only soil, there is nothing to repair and maintain. All that the gardens require is to be kept clean and neat. There are no costs to be defrayed towards which he should contribute to the Administrative Fund, he argued. He submitted

that the Managing Agent also could not provide him with costs the Body Corporate incurred in the past for repairs and maintenance of the EUAs of his unit. This, according to him, is proof that there never was a need for the Body Corporate to maintain his gardens as there was nothing to be done. The Applicant countered this argument that the Body Corporate paid for the water Respondent used in his gardens and his swimming pool before the owners were billed directly by the Municipality. For this he needed to pay, Applicant submitted. The Applicant argued that the contribution that the owners with EUAs must make to the Administrative Fund is **as estimated** to defray costs when they occur in future not costs which have already been incurred or should have been incurred. Applicant indicated as an example that already they anticipate that they will have to fell trees that are overgrown as part of maintenance in the Respondent's EUAs.

[42] The Body Corporate has a duty in terms of sections 37 (1) of the STA and 3 (1) of STSMA to raise funds in the described manner to provide for future financial needs of the scheme. The argument the Respondent raises is flawed in that he surmises that if a particular owner does not need a particular service, then he/she should not make a contribution towards the cost of that service in the scheme. It is like an owner who stays in a unit on the ground floor of a sectional scheme who will refuse to contribute to the maintenance of lifts in the building because he/she will never need to use the lifts. Such an attitude does not bode well for communal living in a community such as a sectional scheme where owners assume collective responsibility to make their scheme work for the benefit of each one of them.

[43] The Respondent should have canvassed his objection to the Body Corporate's taking over its duty to maintain and repair common property (including EUAs) at the meeting of the Body Corporate whereat if the vote was against him, then the decision of the majority bound him particularly that the Body Corporate was not acting in contravention of the STA.

[44] The Respondent's refusal to contribute to the cost of maintenance of common property particularly his EUAs as decided by the Body Corporate at its AGM of 2011 effective from 1 April 2011 is in contravention of the provisions of sections 37 (1) of the STA and 3 (1) of the STSMA.

[45] The rate at which the contribution the Respondent must make for his EUAs is still to be determined for the reasons stated at paragraph 27 above. It is only fair that the Respondent be afforded time to research applicable rates for levies of exclusive use gardens. Such research together with the research undertaken by the Applicant will provide guidance to the Adjudicator on what a realistic rate charged per square metre should be. Therefore, a final order in this regard will be deferred An interim order will be made instead.

[46] Rule 31 (5) provides that:

"An owner shall be liable for and pay all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies, or any other arrear amounts due and owing by such owner to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act".

Based on the said provision the Respondent is liable to pay all legal costs incurred by the Body Corporate to enforce compliance with the Act and/or to recover the money owed to it.

POWERS AND JURISDICTION OF THE ADJUDICATOR

[47] 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

Based on the above evaluation, it is ordered that:

[48] The Respondent was authorised to extend his section to incorporate those common areas which were identified by the inaugural general meeting of the Body Corporate held on 5 November 1987 and allocated to his "cottage" as well as the special conditions attached to that allocation as reflected in the signed minutes of that inaugural general meeting. Therefore there is no basis for the Applicant to claim compensation for the extension of the Respondent's section/cottage. The Body Corporate must ensure that the Respondent paid from the date the extension was registered with the Deeds Register and continues to pay

such an increased levy as determined by the increased floor square meterage registered in the Deeds Registry as well as the registered participation quota as a result of such extension.

[49] There is no reason for the Deeds Registrar to expunge the registration of the extended section plan. The Applicant's request for an order in this regard is rejected.

[50] By agreement of the parties, the Respondent must submit to the Trustees of the Body Corporate for endorsement his application to the local authority to regularise the structures erected on the gardens on which the Respondent enjoys exclusive rights to ensure compliance with the requirements of the local authority. This must be done within thirty (30) days from the date of this order.

[51] The Applicant is responsible for repairs and maintenance of all areas in the building/s which are declared common property including EUAs provided that the owners of the rights of exclusive use contribute to the cost thereof. The Respondent must keep his EUAs clean and neat and contribute to the cost of their maintenance forthwith.

[52] The final order pertaining to the amount the Respondent must pay and whether to be backdated to the date at which the decision was taken that all owners with exclusive use rights must make a contribution to the administrative fund is deferred. Instead an interim order is hereby made that:

a. The Respondent must show cause, within thirty days from the date of this interim order, why the rate proposed by the Applicant in its addendum 1 on research into comparable exclusive use gardens dated 14 October 2015 should not be used to determine the rate at which the Respondent must contribute to the Administrative Fund for his EUAs.

b. The Applicant, on the other hand must show cause, within the same timeframe, why the contributions that the Respondent must pay for his EUAs must be backdated in the light of the submission the Respondent made and which the Applicant did not refute that he maintained the EUAs on his own up until now.

c. Both parties must copy each other on the arguments they submit to the Adjudicator on the issues in subparagraph (a) and (b) above.

[53] The Respondent is responsible only for the legal costs incurred by the Body Corporate to force him to comply with the STA and the prescribed rules to contribute to the maintenance and repairs of his EUAs. The Applicant must calculate these costs on the scale between attorney and client and supply the Respondent with the bill of costs within seven (7) days of this order. The Respondent must pay these costs within three (3) months of the date of this order.

ENFORCEMENT OF ORDER

[54] 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".

Oranjezicht falls within the area of jurisdiction of the Magistrate of Cape Town.

RIGHT OF APPEAL

[55] 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"