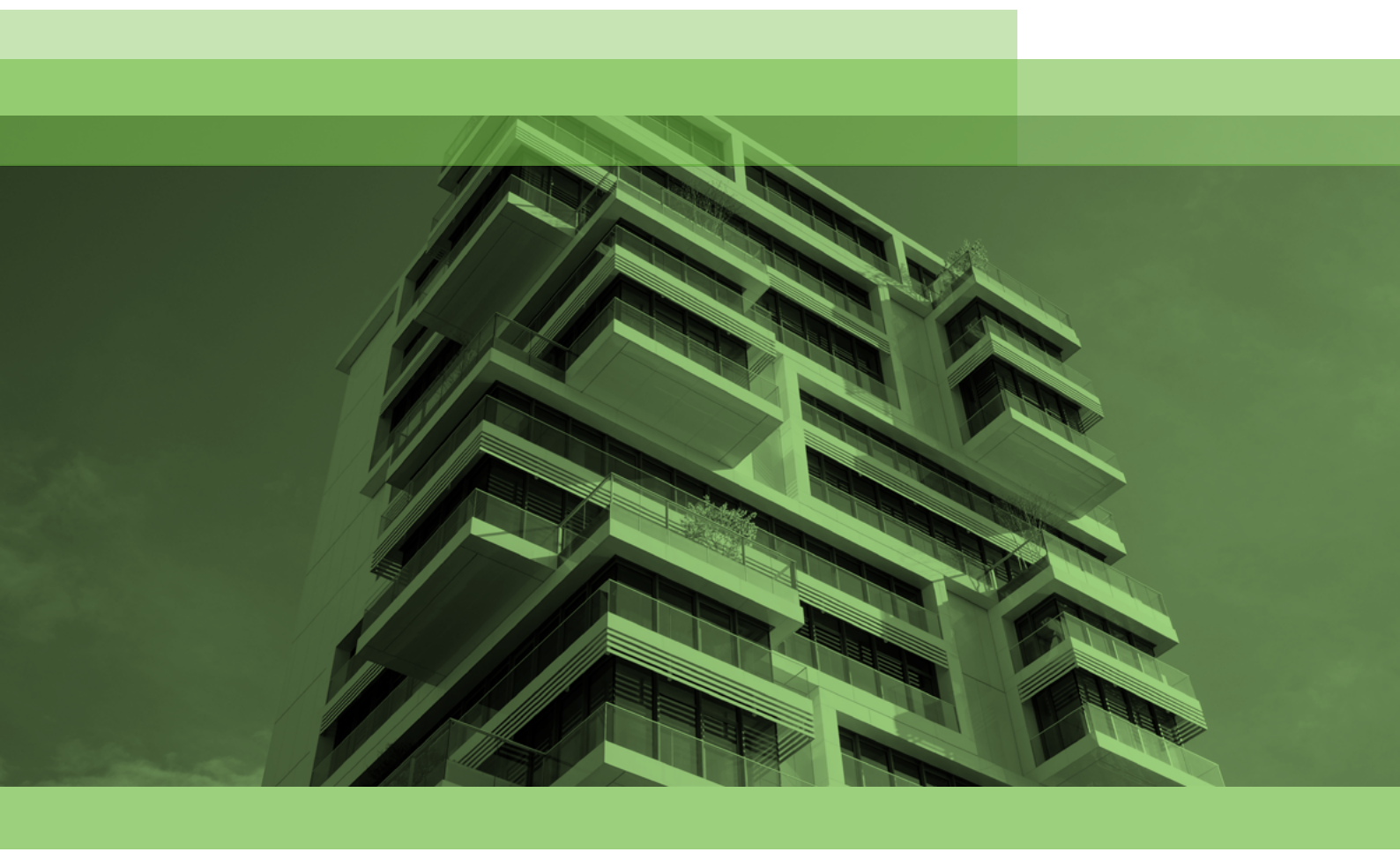


# Pretorius v Tel Hai Body Corporate

Community Scheme Ombud Service - Adjudication Order

---

**Case Number:** CSOS 642/WC/17  
**Adjudicator:** Nomonde Keswa  
**Date:** 4 April 2018  
**Applicant:** Christopher Johan Pretorius  
**Respondent:** Body Corporate of Tel Hai Sectional Title Scheme



## PARTIES

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

- a. The Applicant is Mr Christopher Johan Pretorius. He owns section 7 of Tel Hai Sectional Title Scheme in Vredehoek, Cape Town .
- b. The Respondent is the Body Corporate of Tel Hai Sectional Title Scheme represented by its Trustees.

## 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]** The Applicant purchased section 7 from the previous owner, Ms Karen Mary Johnson. Ms Johnson is reported to have enjoyed exclusive use of the common property adjacent to and around her unit. On transfer of the property to the Applicant, the exclusive use areas (EUAs) were not transferred with the unit.

**[8]** The parking bay was confirmed as an EUA assigned to the Applicant's section. The garden was reported to have never been allocated to the section as an exclusive use area. Compromise was reached between the parties to lease the garden to the Applicant with conditions. The Applicant understood the lease agreement for the garden to include the pathway which is alongside the wall of the unit. The Respondent understood the agreement to exclude this pathway because some residents need the pathway to access their units from their parking bays through the back staircase of the building and other residents to access the area where the refuse bins are kept.

**[9]** Applicant again applied to the Respondent to grant him exclusive use of all the common areas adjacent to and around his unit to stop other residents from walking on his property at any time of day or night. The Respondent rejected his application because the Applicant sought permission to take away other owners' rights to enjoy common property in which they share a part.

## APPLICANT'S VERSION

Applicant submitted that:

**[10]** He bought the section at Tel Hai Sectional Scheme in May 2016. At the time he bought the section, the previous owner enjoyed exclusive use of the common property adjacent to

and around his section namely, the parking bay, the garden and the pathway (vide an affidavit from the previous owner, Ms Karen Mary Johnson on pages 5-6 of the file).

**[11]** On transfer of the property, the exclusive use rights were not transferred accordingly. This became a subject of several email correspondence between the attorneys who facilitated the transfer of the property and the Trustees. The result was that only the parking bay was confirmed to be an EUA.

**[12]** Compromise was reached with the Respondent to lease the garden to the Applicant on condition that access will be provided to owners to access the refuse bins. The Applicant understood the access to this area to be limited to certain days only when residents needed to access the refuse bins but the Applicant's tenant reported that residents used the pathway along the wall of the Applicant's unit at any time of day or night. The Applicant and his tenant found this intrusion on the tenant's privacy unacceptable. The free access to the pathway along his unit by other residents became a nuisance to his tenant. The Applicant again approached the Respondent to apply for the entire area to be declared his EUAs thereby restricting access to other residents but the Respondent declined his application.

#### **APPLICANT'S PRAYER**

**[13]** The Applicant seeks an order that will:

- a. grant him the right to the exclusive use of the common areas adjacent to his section as it was enjoyed by the previous owner namely the pathway, the parking bay and the raised garden; or alternatively
- b. restrain the residents from being a nuisance to his tenant by restricting their access to the pathway close to his section especially at night; and
- c. compel the Respondent to pay his costs of bringing this matter to the Community Scheme Ombud for resolution.

#### **RESPONDENT'S VERSION**

The Respondent submitted that:

**[14]** The affidavit from the previous owner is inaccurate in that it omits an important fact that the pathway was never set aside for her exclusive use. Other residents had access to the pathway whenever they needed to. The previous owner enjoyed exclusive use of the parking bay by a decision taken by the Body Corporate years back (vide the Section 27 (A) allocation of EUAs on pages 1-3 of the file). The parking bay, however, is the demarcated part not the entire area on the north side or back of the unit. The rest of that area is common property for use by all residents. The pathway along the wall of the unit was never an EUA. The previous owner also had the garden area for her exclusive use (raised area on the west of section 7) annotated GA1 in the sectional plans (vide page 31 on file). The previous owner paid additional levies only for the parking bay and the garden.

**[15]** The pathway alongside the unit wall is for use by all residents who need to access the refuse bins or the back staircases. It was never allocated to the previous owner of the unit as an EUA. As a courtesy to the resident of the unit, other residents used to announce themselves when they were passing through. However, this was never intended to curtail the movements of other residents. This is evidenced by the levies the previous owner paid only for the parking bay and the garden and never for the pathway (vide the invoice dated 23 March 2016 on page 4 on file).

**[16]** Respondent submitted that after installing a gate to the Applicant's unit to improve security, all residents were provided with keys to enable them to access this area whenever they needed to. The Respondent submitted that it is not in a position to recommend to the owners of sections in the scheme that the Applicant should be granted exclusive use of the entire common property he wants. Doing so would inconvenience other residents and possibly endanger their lives when they have to access their units from their parking bays via the streets. There have been increased reports of muggings in the streets bordering the building from where other entrances are accessible. The Respondent said that the Body Corporate cannot curtail the freedom of movement of other owners and/or residents to satisfy the Applicant and/or his tenant.

#### **EVALUATION OF EVIDENCE**

**[17]** 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 because the issues in dispute continue to date.

**[18]** "... the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar (my emphasis): Provided that notarial attestation shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond" (vide section 16 of the Deeds Registry Act 47 of 1937 as amended). There is no evidence submitted by the Applicant that the common areas he wants to be for his exclusive use are a real right mortgaged together with the unit.

**[19]** 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 (my emphasis) in terms of section 27 (2) to the owner or owners on whom such right has been conferred by the body corporate, by registration of a notarial deed entered into by the parties (my emphasis) and in which the body corporate shall represent the owners of all sections as transferor. The Applicant did not provide any documentary evidence which shows that the previous owner possessed any real right to the Exclusive Use Areas registered as contemplated in Section 27 (2) of the STA as amended. The Body Corporate may make rules which confer rights of exclusive use and enjoyment upon members of the Body Corporate and notify the Registrar of Deeds accordingly (vide section 27 (A) of the STA. Such a right was unanimously agreed to, signed off on 13 February 2002 and registered at the Deeds Office. This resolution allocated EUAs to four sections of the scheme (vide pages 1-3 of the file). According to this resolution, section 7 was allocated as its EUA the parking bay only (vide page 2 of the file).

**[20]** The only evidence submitted by the Applicant to prove

that the previous owner enjoyed exclusive use of the garden is the invoice which indicates that an additional levy for the garden was charged. The record in the Deeds Registry only showed the parking bay as an EUA assigned in terms of the STA Section 27 (A). The small garden marked GA 1 is not included in this record. However, that the previous owner was charged an additional levy for the garden is an indication of the Respondent's intention to allow the owner of unit 7 to enjoy exclusive use of the small garden GA 1 albeit unregistered as such with the Deed's Registrar. The Respondent submitted that other residents had access to the common areas near unit 7. Respondent submitted that all residents had keys to the gate which gave them access to the common areas alongside the walls of unit 7.

**[21]** The question to answer at this stage is whether the Respondent is unreasonable to deny the Applicant the exclusive use of, and restrict other residents from using, the pathway along the North and West of his unit. The Respondent may not decide to grant exclusive use rights to any owner unless authorised to do so by a unanimous resolution of the body corporate to declare common property or part thereof an EUA for one of the members of the Body Corporate. In this instance, for the reasons given by the Respondent the Applicant is not likely to secure a unanimous decision to grant him the exclusive use rights he wants to the pathway to restrict other owners access to the back staircases.

**[22]** The next question to answer is whether the Applicant is being reasonable to want to restrict access to the pathway by other owners/residents. The Respondent submitted that to access the staircases to other units from parking bays is through the pathway next to the Applicant's unit. The design of most sectional schemes is such that access to some of the units is through passage-ways and/or pathways. Invariably, one owner passes by another owner's unit to access one's unit. It cannot be correct that one owner would seek to restrict the movement of others to use the passage ways and/or pathways. This is no different from the Applicant's experience. Therefore, the Applicant is unreasonable to require that access of other residents to the pathway should be restricted to afford him privacy.

**[23]** Applicant wants that the residents must be restrained

from being a nuisance to the occupier/s of his unit by continuously walking through the common areas around his unit. Walking through pathways and passage ways cannot be considered as nuisance unless there are unacceptably high levels of noise and disruption. Respondent submitted that provision already exists in the Conduct Rules of the Scheme which provides that “particular consideration must be observed to ensure that residents are not inconvenienced by undue noise or by any act which may, at the Trustees sole discretion, be considered an invasion of privacy ... regular activities should be kept to an absolute minimum between 22h00 and 07h00 Sunday to Thursday and between 23h00 and 07h00 on Fridays and Saturdays” (Tel Hai Conduct Rule 7.2). These provisions are considered adequate to provide the protection to the Applicant against noise and disruption. The Trustees must enforce the rule in the appropriate manner provided for in their procedures.

**[24]** Applicant seeks a cost order against the Respondent. There is no justification to grant this request because the Respondent acted reasonably, within its legal power and responsibility to consider and deny the Applicant's request after considering the needs of other residents. The Applicant engaged in the legal processes out of choice to assert what he considered to be his right to exclusive use of the identified common areas. Each party should carry its own cost in pursuing or defending this matter.

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

**[25]** 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**

**[26]** Based on the evidence submitted and the legal provisions applicable in this matter, the request by the Applicant for an order:

- a. to grant him exclusive use of all the common areas at the back of and adjacent to his unit is denied. Instead his exclusive use of the parking bay as registered in the Deeds Registry is confirmed. The agreement concluded with the Respondent to lease the Applicant the small garden reflected as GA 1 on the sectional plan is confirmed.

- b. declaring that the continuous walking through the common property by the Trustees of the Respondent and other members of the scheme constitutes a nuisance is denied. Only when Trustees and other members of the Scheme are noisy and therefore cause inconvenience to the occupier of unit 7 do they constitute nuisance. Such nuisance must be dealt with as provided for in the Conduct Rules of the Scheme. The Trustees are ordered to enforce this rule to ensure that the occupier of unit 7 is not inconvenienced by the noise.

- c. that the Respondent pay the costs and fees the Applicant incurred in pursuing this matter is denied.

#### **ENFORCEMENT OF ORDER**

**[27]** 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”.*

Tel Hai Sectional Title Scheme in Vredehoek, Cape Town is within the area of jurisdiction of the Magistrate of Cape Town.

#### **RIGHT OF APPEAL**

**[28]** 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 a/so apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal"*