Stephen Barrick v Knightsbridge Mansions Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 102/WC/2017
Adjudicator: Adv. Block
Date: 18 October 2017
Applicant: Stephen Barrick
Respondent: Knightsbridge Mansions Body Corporate

RULING

Before Adjudication at 9:00am on the 25th - 28th of September 2017 at the offices of CSOS on the 8th Floor Constitution House, Adderley Street, Cape Town.

THE PARTIES

[1.1] The Applicant by virtue of being -owner of Unit No. 503 at Knightbridge Mansions, Sea Point, Cape Town, hereby represented by Gary Michael Durst due to Applicant being indisposed (see letter from physician attached) and Mr Richard Michaelmore.

[1.2] The Respondent is Knightsbridge Mansions Body Corporate, a Body Corporate established in terms of Act, Act No. 95 of 1986, herein represented by the Managing Agent, Fiona Dimio and the Chairperson of the Body Corporate, Mr Phillip Lourandos.

BACKGROUND

[2.1] This is an application for dispute resolution through adjudication in terms of Section 38 of the Community Schemes Ombud Service Act, Act No 9 of 2011(hereafter referred to as the "CSOS Act") after the matter failed to be resolved through conciliation and after determining that all the prescribed requirements of Section 38 have been met. The dispute was lodged on 24 February 2017 with the Western Cape Provincial Ombud, 8th Floor Constitution House, Adderley Street, Cape Town;

[2.2] The application includes a statement of case which sets out the relief sought by the Applicant which relief is within the scope of prayers for relief contemplated in Section 39 of the CSOS Act as will be more fully described in the submissions made;

[2.3] This application is before me as a result and pursuant to Section 48 of the CSOS Act and meets all provisions of Section 48 including that of Section 48(4) of the Act. On the 24th of July 2017 the matter was then set down for adjudication at the offices of the Community Schemes Ombud Service, 8th

[2.4] The Respondent was duly served with the Notice of Set down.

SUBMISSIONS

3.1 SUMMARY OF DISPUTE AND APPLICANT'S STATEMENT OF CASE

The Applicant's contentions can be categorized into five areas which are set out below and are summarized as follows -

Applicant submitted that -

1. The raising of the funding payable by Applicant through a Special Levy, authorised through a Special General Meeting (SGM) on 8 February 2017 at the Premier Hotel in Sea Point is invalid for the following reasons:

1.1 The repairs that gave rise to the special levy do not qualify as an emergency situation because:

1.1.1 The roof condition was noted at a Trustee Meeting on 30 March 2016 in which the Trustees discussed the possible cost of repairs, i.e. 600.000 to R 700,000 and the "need" to do the whole roof without having any contractors and to do

1.1.2 Though the afore-mentioned Minutes stated that the Trustees needed to build up reserves to cover this expense, this was not done [See **Addendum A**];

1.1.3 This extensive roof maintenance programme was also not built into the Budget for 2016 to be approved by the members of the body corporate at the AGM which took place shortly thereafter;

1.1.4 The AGM that was to be held shortly, within a matter of weeks, and had been scheduled to discuss roof maintenance which was a budgeted item, and should have been considered in the proper forum, as part of the annual budget;

1.1.5 The agenda of the AGM did not accurately or reliably describe the purpose of the Special Levy, in that both the amount to be raised and the purpose thereof

was not made available to the owners who voted by proxy and It was only at the SGM that the actual quotation for the roof work became apparent and was only R 580,000 and not the R 750,.000 as was stated in the Agenda for "Waterproofing" [See **Appendix H**];

1.1.6 Applicant furthermore averred that these Minutes of 30 March 2016 did not seem to be part of the Minute Book when Durst visited the IHFM office on 27 February 2017;

1.1.7 Applicant also contended that if the roof work was an emergency, it must be asked why it took 11(eleven) months to get three contractors' quotes where after the funding had to be raised through the mechanism of a Special Levy;

1.1.8 Applicant also averred that it should be noted that the "winter rains" were also imminent in March of 2016, last year;

1.1.9 Applicant submitted that out of six units on the 5tt, floor, only two owners reported some non-emergency ingress whilst for Unit 502 the source of ingress is still to be determined, but it is likely to be not from the roof but from i.e. overhang, adding glass enclosure, etc.;

1.1.10 Applicant, furthermore, contended that the ingress into Unit 504 was likely to have come from a pipe in the lightwell [See **Addendum B1 and B2**) and that these areas had been noted by the Trustees in Minutes many months ago, and should have been repaired from the regular maintenance budget;

1.1.11 Applicant also contended that the circumstances that would have warranted the Trustees do have the raised a Special Levy were conditional on two requirements, i.e. (a) the Special Levy had to be "necessary" which "meaning that a special levy could not be raised for an expense that could wait for inclusion in the budget for the subsequent financial year" and (b) the special levy could not be raised to pay an expense that was already included in the budget [See **Addendum C**];

1.1.12 Applicant, therefore, submitted that afore-mentioned conditions for special levy was pointed out to the Trustees and Managing Agent prior to the SGM, by Applicant and Durst's attorney, Chris Fick & Assoc in a written email of 3 February, 2017 [See **Addendum E**] and at the SGM by Dr Durst and that this had repeatedly been raised both verbally and through handouts from Anton Kelly, Graham Paddock & Assoc, Marina Constas, Director of BBM, and Michael Baurer, MD of IHFM [See **Appendix E1, E2, E3, E4**];

1.1.13 Applicant contended that some of the funding which had to be raised through the special levy was intended to be used for luxury items such as installation of fibre optic cables, internet connection and DSTV cabling, as noted in the transcription of the SGM on 8 February 2017 [See **Appendix F**] and where some money was also earmarked for electrical work;

1.1.14 Applicant submitted that Knightbridge Mansions already had an Electrical Compliance Certificate from Atlas Electric for the common areas (See **Appendix G**] and that therefore, the fear tactic used that the insurance company, namely Addsure, would be likely not to cover fire damage, was a deliberate misrepresentation to the members of the body corporate;

2. The Trustees and Managing Agent misrepresented the past maintenance and condition of the roof as it pertained to the need to redo the entire roof as evidenced hereunder:

2.1.1. Applicant submitted that the roof is not one roof, but rather consists of several sections of roof and elevations with some parts already having been attended to, namely the concrete section forming part of Applicant's balcony, including the Jacuzzi area, as well as a portion of the London Road side as noted in the 27 July 2016 Trustee Minutes [See **Addendum I**];

2.1.2 Applicant averred that it has been a pattern of the Trustees of the Body Corporate to blame all maintenance problems on Durst and the Applicant, the roof being just one example, as the erroneous statements at the Special General Meeting on 8 February 2017 and the true facts of the maintenance programs both on the roof and the

waterproofing and painting of the exterior building can be shown in Addendum J and Addendum K;

2.1.3 Applicant further alleged that there has been a pattern of misrepresentation and, as such, said conduct was defamatory and slanderous to Applicant and Durst;

2.1.4 Applicant contended that the Trustees started this defamation in 2012 and it became so pervasive that the attorney for the BC, Jacques Maree, sent Mr Ed West, Mr Johnny Snyman and Mr Chris Simpson, a defamation warning (See Addendum L) where-after Mr West apologised and stated that he would never repeat it. (See Addendum M);

2.1.5 Applicant alleged that the past Managing Agent, Mr Cornell Wagenaar of Top Notch, told Applicant and Durst that the newly elected Trustees in 2012, openly stated that it was their intent to make Applicant and Durst so miserable, and living at Knightsbridge so expensive, that they would have to move and Wagenaar stated that he would be happy to testify to this effect;

2.1.6 Applicant also averred that Mr. West was so blatant in his quest to make the Applicant and Mr Durst miserable that he actually communicated this to the two former Co-Chairmen Mr. Garth Hammer and Dr de Villiers (See Addendum N and Addendum O);

2.1.7 Applicant also submitted that the Trustees West, Steenkamp and MacKenzie were joined by Mr Niedermayer who became a Trustee in 2016 and that an outburst by Niedermayer at the AGM in 2016 formed part of the AGM Minutes for 2016 [See Addendum P] and that Niedermayer had shown himself to be vindictive and had loudly threatened to do physical harm to Applicant as was noted by the security guard and others who overheard him [See Addendum Q];

2.1.8 Applicant alleged that Niedermayer boasted that he was using his position to influence the Trustees to side with him to take Applicant's garage so that he would not only have the use of a garage but could build a flat on top of the garage in exchange for him refurbishing the side yard at Knightsbridge [See Addendum R];

2.1.9 Applicant submitted that the slander perpetrated against Applicant culminated by a statement made by the Managing Agent, Ms Dimio, who asked Applicant to remove his nomination to be a Trustee for not being eligible to be a Trustee, allegedly for having a "criminal record" for "illegally" built structures at Knightsbridge [See Addendum SJ and that this was a deliberate and clandestine attempt to take away Applicant's rights as a member of the body corporate and to demean him in the eyes of the members of the body corporate and that to make matters even worse, the Trustees then published these AGM minutes with Niedermayer's and Dimio's slanderous statements on the Knightsbridge website for anyone in the world to see;

2.1.10 Applicant objected to this vindictive stand against Durst and Applicant, who are both elderly gentlemen, and Applicant who is nearly blind, and that this type of conduct is against human rights and the Constitution of South Africa, which states that the elderly must be treated with "dignity and respect" especially by those who are in a position of trust;

2.1.11 Applicant also submitted that there are numerous statutory provisions, regulations and rules that indicate that roof maintenance should be part of the annual budget which were brought to the Trustees' and MA's attention prior to the SGM, i.e.

2.1.14.1 PMR 31(4B) which states that the special levy must be necessary and cannot be raised for an expense that can wait for inclusion in the budget for the next financial year;

2.1.14.2 Section 37(2B) of Act 95 which states that a special levy cannot be raised to pay an expense that was already included in the budget approved at the last AGM as a special levy could not be used to pay a maintenance expense because maintenance must be included in the budget.

2.1.14.3 Section 3(4)of Act 95 which provides that the expense paid by a special contribution cannot be an item in the budget.

2.1.14.4 PMR 21(3)(a) which provides that it must be necessary to pay the expense and that it cannot wait to be included in the next budget and that Rule 2(i) which provides that maintenance of major capital items such as roofing must be accommodated in the maintenance, repair and replacement plan.

3. The conduct of the SGM itself was problematic in that:

3.1 Applicant observed that the notice of the SGM, held on 8 February 2017 was late, in that it was given on 1O Janua1y 2017 without any request for condonation;

3.2 The Special Levy already appeared to have been carried, whilst the actual budget determining how it was to be spent was not done;

3.3 Applicant averred that only at the end of the meeting was it made clear that, despite the agenda, the waterproofing cost would be R530,000 (five hundred and thirty thousand rand) plus R50,000 (fifty thousand rand) contingency for additional work and that the remaining R170,000 (one hundred and seventy thousand rand) was to be used for electrical work, plumbing, for wiring tor DSTV and fibre optical internet connection, new intercoms, metal and aluminium pipes on the root and other miscellaneous items;

3.4 Applicant objected to the process that was followed as it was problematic in terms of the statutory, regulatory and rule provisions listed above and because all proxy votes would be null and void on the basis that the votes were cast without knowing the purpose of the raising of the special levy;

3.5 Applicant, therefore, submitted and since the decision to raise the Special Levy had evidently all ready been made, that no practical debate or discussion took place as the Trustees defended their position and avoided any real engagement of concerns, such as comparison of quotes [which were not made evident to the members of the body corporate], the scope of work, substantiated past experience with wooden roofs, insurance coverage, written guarantees, or professional guidelines such as the one created by Paul Koning of KVA- used in the past for roof work or even the hazards of fire risk that could occur;

3.6 Applicant averred that for the most part during aforementioned meeting the Trustees and MA focused on dismissing the concerns of owners, even to the point of misrepresenting the need for the work to be done and that his contention was aided by the MA, who, by way of example, stated, "*Whether it is from a procedural point of view and from a payer's point of view, I will have that R750,000.00 in the Budget... the only difference is I need it now., not in 14 days time. We need to raise it. We need to do the paper work and we need to start collecting it. I can tell you that three owners have already paid*.";

3.7 Applicant averred that when asked about the hardship of special levies, the MA stated "*If people can't afford it, they should sell and get out. OK?...*; and

3.8 Applicant, therefore, contends that at the time that the R 2,400,000 (two million four hundred thousand rand) Special Contribution was raised three years ago, the Body Corporate should have raised the money for the waterproofing of the roof as it was part of the previous R 2,400,000 million Special Contribution, as presented for the owner's approval in 2013 whilst the Body Corporate acted as if, until the SGM, the Trustees evidently cancelled that roof maintenance programme which had already been paid for and approved;

3.9 Applicant contended that despite the members of the body corporate being asking for a complete accounting of how the R 2,400,000 (two million four hundred thousand rand) Special Levy had been spent, this was not forthcoming, this despite the Trustees having vowed that the R2,400,000 (two million four hundred thousand rand) would be kept separate from the operating budget and that they would report back to the members of the body corporate on how this was utilised, every six weeks [See **Addendum V**], which never happened;

3.10 Applicant submitted that the Trustees were merely getting a ratification of their decision at the SGM and that due to statements being made at the SGM meeting that the body corporate was "flat broke", Durst and Applicant had asked to see the body corporate records related the finances and other issues that had been brought to the attention of the owners in public forums;

3.11 Applicant submitted that notwithstanding aforesaid request , the Trustee Meeting Minutes and the financial records were not forthcoming which forced Applicant and

Durst to resort to their legal counsel having to demand it again, as they did in March 2017 [See **Addendum W**]; and

3.12 Applicant, as part of the relief sought with this Application demanded that all of the information that they had requested be sent to them which included an audited and detailed accounting of the last Special Levy of R2,400,000 million, showing the bank statements and all money transfers noting date and recipient.

4. The actions by the Trustees constitute gross negligence in that:

4.1 The Supreme Court of Appeal in the matter between *MV Stella Tingas Transnet Ltd Ila Portnet v Owners of MV Stella Tingas, 2003 (2) SA 473 (SCA) 480-481 explained the meaning of gross negligence to be as follows: "... to qualify as gross negligence the conduct [or omission] in question must involve a departure from the standard of the reasonable person to such an extent that ii may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care."*

4.2 Applicant, therefore, contended that the conduct by two of the Trustees, namely West and MacKenzie, clearly proves negligence as when Applicant sent a detailed action plan and specifications of roof maintenance and repair work required after reading Tim Hard/e's "Roof Report" [See *Addendum X*] the responses by the Trustees showed a total disregard for the members of the body corporate and the use of their money and that Applicant continued making the trustees aware of the unlawfulness of raising the roof maintenance from a Special Levy and concurred by the attorneys;

4.3 Applicant submitted that the Trustees were devious in that they hid the actual purpose of the levy, and solicited votes from absent owners based on their omission, and that the intent and purpose of the special levy was so that they could raise the 25% (twenty five percent) maintenance reserve demanded by the new legislation;

4.4 Applicant averred that the Sectional Titles Schemes Management Act, Act No. 8 of 2011 placed a more onerous duty on the Trustees to know the legislation and rules that pertain to the management of the Sectional Titles Scheme, particularly in view of having the assistance of the Body Corporate attorneys, and the ST "experts"; IHFM as their Managing Agent;

4.5 Applicant also alleged that safety and health risks of the torch on practice as proposed, were not reasonably assessed by the trustees to ensure that the removing of the existing bitumen applied would not lead to health risks associated with asbestos and that the Body Corporate had not satisfied itself that asbestos were not present and would be released in the process of the removing the present layers torched on many years ago;

4.6 Applicant, therefore, contends that the Body Corporate, or its expert witness, could not proof on a balance of probability that the old bitumen product would not have any asbestos content;

4.9 Lastly, Applicant, contended that the Body Corporate failed to take cognisance of the recommendation of Mr Phil Llewellyn, Chairman of Damp Proofing & Waterproofing Association, who expressly discouraged the practice as posing a health risk and hazardous in a letter dated 02 May 2017, and who further recommended that anyone applying torch on membranes had to comply with the Health & Safety requirements, one of which would be the provision of adequate fire safety equipment;

5. Applicant submitted that the actions by the Trustees in raising the special levy were questionable and amount to:

5.1 The Trustees having failed to fulfil their fiduciary responsibility to the owners of Knightbridge Mansions;

5.2 The contravention of Section 40(3) of the Sectional Titles Act, Act No. 95 of 1986, which provides that a trustee of a body corporate who acted with mala fides or grossly negligent had breached the duty arising from his/her fiduciary relationship, and shall be liable to the body corporate for any loss suffered as a result thereof by the body corporate;

5.3 That the fiduciary responsibility implies that every trustee must act honestly, in good faith and in the best interest of the body corporate and that taped transcript of the SGM as well as other documentation show that the trustees did not act according to their fiduciary

responsibility;

5.4 The pattern of the failure to act in a fiduciary manner had been shown to continue since these Trustees and the Managing Agent assumed their roles in 2012 with a list of these negligent and mala fide behaviours illustrated in **Addendum Y**;

5.5 Because of the trustees' complete failure in their fiduciary responsibility, Applicant would ask for the relief sought in terms of **Paragraph 7** below.

Applicant hereafter called 1st Witness, Rodney Mathe, who after having been duly sworn in, submitted that-

- He was the caretaker of Knightsbridge Mansions for 4.5 years since 2012 and whilst on duty observed that certain visitors had been denied access to the Applicant's property and that Kim Steenkamp, a trustee, gave him strict instructions not to deny Hendrik, and employee of the Applicant, access to Applicant's property;
- He was aware of guests of Mr Olinski, the owner of Unit 3, who were refused
- He was continuously insulted and victimised by Kim Steenkamp warning him of his association and conversations with the Applicant and Durst would lead to his dismissal;
- Mrs Steenkamp mentioned that Applicant and Durst were dangerous and stole money from the body corporate, and that this was deliberately said as she knew that 1st Witness would convey it to Applicant;
- He used to assist Mrs Steenkamp with odd jobs during his working hours;
- Whilst receiving complaint about rubble blocking the stairs when Ed West was doing renovations at his Unit he informed Mr West to remove it, but was ignored whilst Applicant was obliged to adhere when they had similar complaint;
- Mr Niedermayer once told him that the garage of Applicant and Durst belong io hirn and ihai he iniended io buiid on iop of ihe garage alter he took legal actions against Applicant;
- All along he was convinced that the water leak originated from Unit 303 and not Unit 503 as always intimated by Kim Steenkamp who dismissed this presumption as being unfounded and unsubstantiated;
- He had various altercations with Mr Johnny Snyman, a flat mate of Mr Ed West, who on numerous occasions swore at him and insulted him;
- He was surprised to learn that the contractors who he found at Knightbridge Mansion were all replaced by the new Body Corporate;
- He was also questioned by Mr West about the where-about of the marble desks that Applicant bought whilst he was the Chairperson of the Body Corporate;
- Security personnel at the mansions were use to spy on Applicant's in respect of tampering with the dye tests conducted;
- Mr Snyman called customs when he obseived 2 (two) vehicles, one belonging to the Applicant, at the mansions which were not having SA used registrations; and
- Lastly, that his work life became unbearable as a result of the relationship he had with Applicant and Durst and that he subsequently was dismissed by the Body Corporate on vexatious charges whilst his objection to the Managing Agent being the chairperson of his disciplinary hearing being ignored.

After the 1st Witness was excused Applicant called its 2nd Witness, Mr Richard Michaelmore, who was a tenant of Applicant and also the godson of Durst, and who after duly been sworn in, submitted that-

- He was 44 years old and rented a room at Unit 503 for almost 12 (twelve) months;
- Whilst he had been a tenant he had first- hand experienced antagonistic and heavy handed behaviour, from particularly Mr West;
- The owners of Unit 503 had been the victims of continuous slandering and victimisation for frivolous conduct such as their water usage which according to him was unacceptable conduct by the Body Corporate;
- He had become concerned with privacy of him and his landlords and that the actions were culpable;
- He believed that he and his landlords had been treated with disdain and blatant disregard and disrespect and that it was scandalous the way elderly people the Applicant and Durst, had been treated by the Body Corporate;
- The Body Corporate did not discharge their fiduciary responsibilities to the benefit of all owners by raising a special levy for roof "maintenance" which already had been assessed and paid for 3 (three) years back;
- Afore-mentioned repairs should and ought to have been conducted in respect of and in accordance with

the annual budget approved at the AGM meeting;
- He was not convinced that torching was the appropriate solution in waterproofing the root and that the Body Corporate had overlooked the safety and health concerns of Applicant in this regard;
- An alternative roofing solution should have been considered by the Body Corporate as it already omitted to have taken advise from the Heritage Council in respect of the proposed repairs;
- The Heritage Council already raised their concerns to the Body Corporate in proceedings with repairs without their input and guidance;
- The proposed waterproofing solution would pose serious health and safety risks, not only to 2nd Witness and Applicant but to all owners of Knightbridge Mansions as the practise already discouraged and outlawed in the UK and US;
- The Body Corporate did not follow correct procedures in obtaining consensus of owners for ihe raising of the special ievy and the resultant implementation of the water proofing solution ;
- The previous chairman of the Body Corporate, Mr West, ran the show and that the other trustees were oblivious and condoning the unbecoming conduct of Mr West;
- 2nd Witness and the Applicant were the victims of victimisation in the arbitrary enforcement of the rules of the Body Corporate;
- The Body Corporate's conduct amounted to the character assassination of the Applicant;
- The situation at Knightbridge Mansions had caused significant emotional trauma and stress to the Applicant who's health had been seriously affected as a result of the incidents at Knightsbridge Mansions; and
- The trustees of the Body Corporate had demonstrated extreme disregard for the rule of law and failed to discharge their fiduciary duties with utmost care and diligence.

RESPONDENT'S VERSION AND STATEMENT OF CASE

[6.1] Respondent called her Expert Witness, Mr Craig Adendorff, who managed the waterproofing and roofing section at Blackland Industries one of the contractors who submitted bids for the work on the roof and who after having been duly sworn in, submitted that-

- His company was one of the 9 companies who tendered on the waterproofing scope of work prepared by THC;
- His company submitted a proposed solution to the problem indentified in 2016 and scoped by THC;
- Evidence show that the torching-on solution is the more viable and tested solution as it had been used in the past to treat waterproofing problems at Knightbridge Mansions and because the NHBRC still recognising it as the standard practise;
- They did consider other options such as steel roofing, but that it was found to be very expensive and would had required the replacement of the whole wooden roof structure;
- The roof sheeting option would amount to significant modifications to the roof structure;
- Safety and health considerations though not completely eliminated, would be mitigated through a process of structures guidelines followed during the application process and procedures;
- According to Expert Witness initial evidence illustrated that regular repairs and maintenance on previous occasions were not adequate to effectively address the waterproofing problem;
- His company submitted a quotation for R 490,000 (four hundred and ninety thousand rand) for the proposed repair work in terms of the scope of work which encompassed the roof area and general repair work and which included a guarantee of workmanship of 5 (five) years and 10 (ten) years the product supplied by ABE; and
- His company had not been awarded the tender yet.

[6.2] Respondent submitted the allegations levelled against 1st Witness were warranted as 1st Witness wilfully recorded the wrong starting times, started work late , brought his children with him to work, etc, and that all these charges were proved during the hearing of the 1st Witness and to this effect 1st Witness entered pleas of guilty on all charges;

[6.3] Respondent also conceded that it was evident that Mr Strydom and West wanted to get rid of 1st Witness;

[6.4] Respondent also admitted that whilst certain comments in relation to specific incidents made by 1st Witness were true others were totally unfounded;

[6.5] Respondent also, by her own admission, conceded that there existed animosity amongst the owners;

[6.6] Respondent also rejected 1st Witness' contentions

that he only assisted Mrs Steenkamp during working hours as she would disprove this in her main submissions;

[6.7] Respondent acknowledge that blame be apportioned to all who contributed to the acrimonious situation that existed at Knightbridge Mansions;

[6.8] Respondent also re-iterated that the water usage of Unit 503 was charged R175/I (one hundred and seventy five rand per litre) which is at level 6 and that this will be supported by further evidence which will be adduced by Respondent in her submissions;

[6.9] Respondent also denied the contention that the security contractors, Pro Exec's agreement was unfairly terminated citing the non-payment of contractor staff as the main reason for said termination;

[6.10] Respondent admitted that the tender for the waterproofing had not been awarded yet, but that this was due to the fact that despite meetings by the trustees with all contractors they elected to allow Tim Hardie of THC to make the recommendations on the successful bidder;

[6.11] Respondent also submitted that although having preferred and requesting Tim Hardie to testify as expert witness, he was indisposed;

[6.12] Respondent together with the trustees also decided to revisit other alternatives to the torch on method as proposed in the THC technical specification and scope of work, before awarding the tender;

[6.13] Respondent conceded that torching on had been done intermittently on the roof over the years, but that it was done in different areas of the roof and not addressing the waterproofing problems adequately;

[6.14] Respondent, furthermore, gave background to the relationship between IHFM and the trustees of Knightsbridge Mansion since 2011 at the time that Applicant and Durst were trustees of Knightbridge Mansions;

[6.15] Respondent elaborated on the manner in which Applicant and Durst treated her at the time, their unfettered powers, dictatorial management style and disrespect displayed to other owners, i.e., having full control over the bank account of the Body Corporate at the time, not allowing the Managing Agent to communicate with the owners without their censure and contravening the Sectional Titles Act by insisting that a 10% (ten percent) increase be applied annually and not per quarter;

[6.16] Respondent, as a result of the aforementioned unsatisfactory relationship, decided to terminate the contract with Knightbridge Mansions;

[6.17] Respondent, however, was contacted by Kim Steenkamp around 2012 informing her that they are in the process of voting Applicant and Durst off the Body Corporate and elect new trustees;

[6.18] Respondent also confirmed that Applicant and Durst were ousted at the AGM in 2012 with new trustees being elected and that Mrs Kim Steenkamp contacted her numerous times requesting information as Respondent had been contracted by Body Corporate, for many years;

[6.19] Respondent also averred that as soon as the new trustees came into office they instituted an informal audit into the financial statements of the Body Corporate which audit highlighted some irregular expenditure made by the Applicant and Durst and that they also withdraw R 1500, respectively monthly which could not be supports by any receipts;

[6.20] Respondent also confirmed that she advised the new trustees that aforementioned expenditures could not be disputed by the new trustees as said payments were approved my owners at AGM's;

[6.21] Respondent also submitted affidavits deposed off by staff working for the Body Corporate during the time Applicant and Durst were trustees illustrating the behaviour and conduct displayed by Applicant and Durst during their tenure as trustees;

[6.22] Respondent, further averred that she at all times remained neutral in the altercation between Applicant and the new trustees;

[6.23] Respondent also averred that PDS conducted a survey (Exhibit E) of the building and roof condition on 18 Aril 2012 immediately before the AGM of 26 April 2012 where Applicant and Durst were still the trustees;

[6.24] Respondent contended that the trustees who took office in 2012, on analysing

[6.25] Respondent further submitted that the quotation that was submitted for the scope of work amounted to R 4,100,000 (four million one hundred thousand rand) and declined the quotation for being too expensive for the owners to foot the bill where-after trustees approached Sty/is to provide a finance model for the 1st phase which amounted to R 2, 400,000 (two million four hundred thousand rand);

[6.26] Respondent submitted that soon after approval of the contractor it staried pressure blasting the building and it became obvious that significant additional work was required to repair the building and waterproofing with no sufficient reserves accumulated to effect such work, as evidenced in the audited financial statements and monthly Body Corporate accounts in Exhibit K;

[6.27] Respondent rejected Applicant's contention that the trustees did not fulfil their fiduciary duties stating that-

6.27.1 Trustees ensured that they familiarised themselves with their fiduciary duties and their duties in respect of meeting OHS requirements as evidenced in Exhibit G;

6.27.2 Trustees to this extend also investigated the existence of an electricity compliance certificate which had never been produced by Applicant and Durst during their tenure;

6.27.3 Trustees re-appointed IHFM in November 2014 as managing agents who replaced Top Notch as managing agents and who immediately set out to obtain the required electricity compliance certificate for fear of insurance claims being repudiated;

6.27.4 Due to water restriction having been in place since 2005 trustees did everything possible to comply with said water restriction conditions and even considered installing water meters for all owners due to excessive water use by certain owners such as the Applicant;

6.27.5 Trustees did a full assessment to detect water leaks but could not find any leaks in the building and also monitored and reprimanded owners who used hose pipes such as the owners of Unit 503;

6.27.6 Trustees started monitoring water usage over extended periods and was in a position to pinpoint usage trends as illustrated in the graphs Exhibit I;

[6.28] Respondent further averred that due to the findings in respect of the owners of Unit 503 it might have appeared to the Applicant and Durst that they were targeted;

[6.29] Respondent furthermore averred that safety and health considerations were duly taken into account in determining the solution for the roof work as THC prescribed specific procedures for the torch-on application;

[6.30] Respondent also rejected Applicant's contention that the trustees had no maintenance plan as required in term of the Sectional Titles Act as evidenced in Exhibit L which sets out the 1O(ten) year maintenance plan, starting 2017;

[6.31] Respondent also defended the disciplinary hearing and ultimate dismissal of 1st Witness for being done in accordance with legal prescripts and not as a result of vendettas by Mr Ed West, with Respondent also indicating that she recommended to trustees to give 1st Witness a second chance, even after being found guilty on the charges levelled against 1st Witness and that 1st Witness was given a warning and subsequently dismissed being found guilty by IR Insights who was appointed to conduct a disciplinary hearing for similar offences;

[6.32] Respondent also denied that Applicant was ever prejudiced in the application of the insurance policy of the Body Corporate pointing out that the claims history (Exhibit N) proved that the claims emanating from Applicant were dealt with in the same manner as for any other owner of Knightbridge Mansions;

[6.33] Respondent furthermore confirmed that Applicant as part of a settlement agreement (Exhibit 0) admitted and conceded that moneys were owed to the Body Corporate and that Applicant always perceived the rules of the Body Corporate not apply to apply to Applicant as illustrated in the letter from Applicant's attorneys (Exhibit P) or that Applicant's rights were violated in respect of the Older Persons Act, Act No. 13 of 2006;

[6.34] Respondent also contended that contrary to advise offered to the trustees that a SGM was not required for

the raising of the special levy, trustees proceeded to have a SGM believing it to be in the interest of fairness and transparency;

[6.35] Respondent, fu1ihermore, and in rejection of Applicant's contention that the special levy never formed pali of the annual budget, submitted Exhibit Q demonstrating that the R750,000 (seven hundred and fifty thousand rand) special levy was included in the budget approved at the AGM and therefore validated the special levy read together with the 1O (ten) year maintenance plan;

[6.36] Respondent also submitted Exhibit S as prove that the trustees did address and is still in the process of addressing the recommendations of the fire inspection conducted by the fire chief of Cape Town City in February 2012;

[6.37] Respondent also denied that the Body Corporate went behind the back of the Chairperson of the Heritage Society in obtaining the necessary permits for the roof repairs stating that an architect , Hester Potgieter of Hester Hanna Potgieter Architecture and Design was approached formally and procedurally obtain the required permit as evidenced in Exhibit T;

[6.38] Respondent further rejected the contention by Applicant that Mrs Steenkamp be held liable for legal costs incurred by the Body Corporate pointing to the fact that the attorneys appointed in the arbitration matter (Exhibit U) were appointed by and on behalf of the Body Corporate and not by Mrs Steenkamp; and

[6.39] Lastly, Respondent conceded that the trustees prior 2012 and those post 2012 had all been subject to extreme abuse and vilification as evidenced by the communiques from contractors in Exhibit S.

In closing, Respondent admitted that-

- The veracity and magnitude of the barrage of correspondence between Applicant and the trustees had become very overburdening to the trustees and that the trustees believed that the detail and historical nature of said emails were not in the interest of either the Applicant nor the trustees;
- Ed West did not act in the interest of the owners an d that his conduct was regrettable and not expected of a trustee,, but that Ed West recently sold his Unit and would therefore no longer be a trustee of the Body Corporate;
- The trustees accepted and conceded to the fact that they had been "bossed" by Ed West;
- The building's state of condition was suffering as a direct result of the dispute and animosity that continued to exist between Applicant , Durst and the present trustees;
- During and after conciliation by CSOS both disputing parties believed that the dispute had been effectively resolved; and
- Managing Agent, after the spate of disputes had insisted that she be present at all trustee meetings in future and that such meetings would only be duly constituted if she is present.

PRAYERS / RELIEF SOUGHT

Now, therefore, Applicant seeks the following relief:

[7.1] The Trustees would have to report to the members of the Body Corporate that they had acted illegally in making a resolution for a Special Levy on 8 February 2017;

[7.2] The Trustees would have to report to the members of the Body Corporate that they had deliberately misrepresented the condition of the roof and building and the prior maintenance that had been done in the past;

[7.3] That because collusion at the Special General Meeting, at the AGM in 2016 and her misrepresentation of Applicant's ability to exercise his rights as a member of the body corporate, that the Managing Agent resign her post and the body corporate seek alternative managing agents without further notice or compensation;

[7.4] That a reasonable schedule of repairing part of the roof work this year on the most needed areas, and a schedule for the remaining parts of the roof next year and then for the roof to receive regular maintenance with torch-on and aluminium paint, and that a regular maintenance programme be adhered to in the future and

[7.5] That all of the Trustees resign their positions and not be Trustees at Knightsbridge Mansions again.

[7.6] That due to gross negligence that all costs associated with the Trustees' actions be born, jointly and severally by

said Trustees, out of their own accounts.;

[7.7] That the Body Corporate's budget not be spent on the Trustees soliciting legal advice on their personal positions, as they may be in relation to these allegations, but that this too should be kept expressly as a personal expense which would include-

7.7.1 The legal expenses that Applicant and Durst suffered.

7.7.2 The cost of the replacement of a skylight that Applicant had to pay for because the Trustees had threatened to cement them over [See Addendum 21 , Addendum 22 and Addendum 23],

7.7.3 The cost of replacing and/or removing a pipe that supplies water from a geyser on the side wall on the roof, which does not interfere with the roof work and for which Applicant has been paying rent for 20 years to use that area of common property;

7.7.4 the cost of repairs to Applicant's unit because the Trustees totally ignored the damage had occurred in Unit 503 based upon lack of maintenance and using invasive methods to remove tiles from the portion of the roof which forms part of Applicant's section as the Trustees failed to act to prevent such damage in a timely manner and to act with full fiduciary responsibility.

7.7.5 A forensic audit of all finances of Knightsbridge Mansions since the year 2012 be conducted; and,

7.7.6 Mrs Steenkamp reimburse the Body Corporate for the legal and related expenses regarding the waterproofing of Applicant's balcony section, since this was a matter that should have been between the two owners whilst she did not recuse herself from the decision making of said actions and personally benefitted from those actions [See Addendum 3]

EVALUATION OF SUBMISSIONS AND EVIDENCE ADDUCED

Section 38 of Act 95, the body corporate may exercise the powers conferred upon it by or under the Act, or the rules, which powers includes, to do all things reasonably necessary for the enforcement of the rules and for the control, management and administration of the common property. This, together with the fact that Respondent at all times engaged with the Applicant in respect of the complaint lodged, with a view to resolve the problem, and timely intervened in this matter, point to the Respondent inextricably involving itself with the merits of the Applicant's allegations and carrying out its responsibilities as intended by the Act. Section 37 (1) provides that a body corporate referred to in section 36 shall perform the functions entrusted to it by or under this Act or the rules, and such functions shall include-

(a) to establish for administrative expenses a fund sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the common propeliy (including reasonable provision for future maintenance and repairs), for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building or buildings and land, and any premiums of insurance, and for the discharge of any duty or fulfilment of any other obligation of the body corporate; (b) to 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 No. 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, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs; and that the body corporate shall, for the purposes of effecting any insurance under subsection (1) (f), be deemed to have an insurable interest for the replacement value of the building and shall, for the purposes of effecting any other insurance under that subsection, be deemed to have an insurable interest in the subject matter of such insurance.

Section 37 of Act 95, furthermore provides that a body corporate referred to in Section 36 of Act 95 shall perform the functions entrusted to it by or under this Act or the rules, and such functions shall include-

- the establishment for administrative expenses a

fund sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the common property (including reasonable provision for future maintenance and repairs), for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building or buildings and land, and any premiums of insurance, and for the discharge of any duty or fulfilment of any other obligation of the body corporate;

- to properly maintain the common property (including elevators) and to keep it in a state of good and serviceable repair;
- subject to the rights of the local authority concerned, maintain and repair (including renewal where reasonably necessary) pipes, wires, cables and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property; and
- in general, to control, manage and administer the common property for the benefit of all owners.

The trustees manage the affairs of the body corporate on a day-to-day basis, subject to the limitations set by section 39 (1) (read with management rule 30 prescribed under the regulations of the Act) of the Sectional Titles Act 95 of 1986 ("the Act"), which states; "The functions and powers of the body corporate shall, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules." According to section 40 of the Act, despite the abovementioned limitations, each trustee of a body corporate also stands in a general fiducia1y relationship towards the body corporate "*shall imply that a trustee shall in relation to the body corporate act honestly and in good faith, and in particular. shall exercise such powers as he may have to manage or represent the body corporate in the interest and for the benefit of the body corporate; and shall not act without or exceed the powers aforesaid; and a trustee of a body corporate whose ma/a fide or grossly negligent act or omission has breached any duty arising from his fiduciary relationship, shall be liable to the body corporate for any loss suffered as a result thereof by the body corporate or any economic benefit derived by the trustee by reason thereof*. "Therefore, subject to the provisions of section 39(1) of the Act, the trustees shall act in the utmost good faith when exercising their conferred administrative powers. The duty of trust or fiduciary duty really means that the person responsible will exercise his powers in good faith and he will not act in his own interest or for another's gain, but for the members (the owners of the sectional title units) he represents. Trustees must disclose any conflicts of interest. Section 40(b) of the Sectional Titles Act states that "... a trustee shall avoid any material conflict between his own interests and those of the body corporate, and in particular-

"shall not derive any personal economic benefit to which he is not entitled by reason of his office as trustee of the body corporate, from the body corporate or from any other person in circumstances in which that benefit is obtained in conflict with the interests of the body corporate;

shall notify eve,y other trustee, at the earliest opportunity practicable in the circumstances, of the nature and extent of any direct or indirect material interest which he may have in any contract of the body corporate."

If you act on behalf of another you have a duty to act with care. If you do not do this, you can be held liable for the loss suffered by members," he said. The trustees must, therefore display reasonable care and skill in managing the affairs of the body corporate. The steps trustees can take to ensure they are qualified to execute their duties are to:

(i) familiarise themselves with the Sectional Titles Act and their schemes management and conduct rules;

(ii) read one of the many how-to guides about sectional title;

(iii) appoint a competent managing agent on whom they can rely for advice;

(iv) appoint a company that can help ensure that levies are raised correctly and that levy debt is collected without fear or favour.

As evidenced from the submission by Applicant "*the Trustees refurbished the Caretaker's unit, without the approval of the body corporate and spending funds not in the budget, in order to allow a friend of the two of the Trustees, to reside in that flat. Sectional Title Law states that such common property rental should only be available to owners of the scheme, and yet this was ignored by the Trustees even after the relevant*

sections of the Act and PMR had been sent to them. Thus members of the body corporate were deprived the possibility of renting the space for a fam11y member. (See Appendix 17 Use of Caretaker's Unit)"

Furthermore, that the trustees ignored Conduct Rules when doing construction in their own units, e.g. where, Mrs Steenkamp had workmen take over the common property area in front of the lift on the 5th floor creating noise, dirt and debris and a hazardous condition for other owners and members of the public and Mr West blocking the back fire escape stairway with debris and materials when he did construction to his unit. There is also no evidence that he had his refurbishing plans submitted to the Trustees for approval or submitted a deposit even though the construction involved removing walls and other major work. The trustees evidently also failed to keep accurate records with regard to Minutes, nor do they show records in which votes have been recorded or motions passed. Repairs in Unit 503 had not been attended to even though the owner followed the steps of having quotations done and submitted same to the trustees, but when repairs were needed in Trustee units or their friends' units, they were done almost immediately. The owner of Unit 404 who rented an extra storage area less that 6 (six) square metres that was no longer used because it had been a toilet for the maids when they were resident on the property was rented from the previous trustees for R50 (fifty rand) per month, which was consistent with other areas such as parking bays. The current trustees increased the rent to R500 (five hundred rand) per month. Unit 3 had suffered ingress of water from the balconies above for a number of years and the trustees failed to resolve the issue which led to the owner stop paying levies and which property is now being auctioned by the trustees.

Unit 205 had a leak coming into the bathroom from Unit 305, which was owned by one of the trustees which was left like that until the tenant of Unit 205 finally left, but the trustees failed, at any time, to contact the owner of Unit 205 or attempt to resolve the issue.

Misrepresentation in respect of roof maintenance programme:

Misrepresentations were used to justify the fact that the Trustees had already decided to impose a levy of R 750,000 (seventy hundred and fifty thousand rand) special levy for waterproofing the roof. It was only at that meeting that owners found out that almost one-third of the money was for other miscellaneous repairs. This information was not disclosed in the Notice of the SGM that was sent as the Agenda for the Special Meeting and so owners issuing their proxies had no way of properly directing their proxy and for that reason alone, the meeting was not valid. Be that as it may, the following is the reality and only evidence as it pertains to the roof maintenance programme for the past seven years:

2010 - 2013

In 2010, a contractor, Rainbow Nations was used to remove the old flashing around the parapet walls which had been shown to be a source of water ingress and reinstated the overlapping torch-on to create waterproof seals. Rainbow Nations contractors assessed the roof in 201Oas follows:

"I have assessed the entire roof structure and in my opinion have found 80% of the roof structure to be soundly waterproofed. I found a few areas of concern being three gutter valleys, one parapet and one internal overhang above 501 and 502. The areas above 501 and 502 are fairly sound and any repairs to the internal structures can commence. I have submitted quotes for these repairs and they have been approved by the body corporate. We will commence with repairs starting 17 January 2011. I will periodically be testing and assessing the roof followed by reports to ensure long term maintenance to the roof'

In 2011, Skysite was contracted to refurbish the torch-on sections of the roof. They removed the old torch-on and resealed all sections to provide a water-tight membrane and then put two coats of aluminium paint to further provide protection from the elements. This had been the most extensive work done on the entire roof in decades. Skysite stated unequivocally that the roof would have to be monitored every year for possible ingress points and resurfaced every two years to maintain its waterproofing. It is important to note that all roof contractors since the year 2002 have stated emphatically that the roof should be repaired and possibly resurfaced every two years. This issue was addressed in directives for the newly elected trustees suggested by the out-going trustees in 2012 which evidently was ignored by the trustees. In fact, it now seems that only re-active repairs were carried out, rather than the regular roof maintenance required. The work by Skysite

and Rainbow Nations were clearly noted in the Property Diagnostic Surveyors report in the first quarter of 2012 show that the roof was "in good order". This clearly does not support the assertion of the trustees that the torch-on is in deplorable condition and is possibly was 50 (fifty) years old. In fact, it seems of all the trustees were familiar with the PDS survey, having raised the R2.2 million (two million two hundred thousand) later R 2.4m (two million four hundred thousand rand)) special levy on it, which meant that the trustees ought to have known as early as 2012 that the roof had just been redone and was in good condition. However, during the same year, in 2012, the newly elected trustees cancelled the remainder of the contract with Skysite which was to finish the other areas of the roof, such as the Water Tower which had been noted by the Managing Agent as "The Tower of Death" because it was designated as potentially dangerous. In 2013, the trustees imposed a R2,200,000 (two million two hundred thousand) special levy (which became R2.4 million(two million four hundred thousand rand)) to resurface and paint the exterior of the building, as well as other maintenance repairs, which included the roof. In fact, the first five items of the Scope of Work were to have Paintmaster attend to the maintenance of the roof by servicing and maintenance of the flat roofs, full-bores and outlets reinstatement, counter flashing reinstatement, or replace with seamless aluminium gutters and down pipes, or reinstate existing fascias. The Minutes of the AGM of June 24, 2013 show PDS advised the trustees that a complete scope of work has been provided to the Trustees and advised that certain of these items, if left unattended, would continue to deteriorate and more specifically if the spa/ling was left unattended could cause a safety risk. They furthermore advised that the ingress of water experienced in certain units was severe and this also posed further deterioration if left unattended.

The trustees on being questioned at the Special General Meeting on 8 February, 2017, why Paintmaster had not been held to a 1O year guarantee for the work they had done in 2013, the owners were informed by the Managing Agent that because of increased spalling at the top of the building, the trustees decided NOT to have Paintmaster attend to the root, other than to assist with repairs with no guarantee.

This, effectively, meant that work that the owners had approved in the Scope of Work and as part of the special R2,400,000 million rand Levy was apparently not done on the root and led to the two year maintenance programme, as prescribed by Skysite and previous contractors, not being adhered to. Other than remedial repairs, it therefore appears as if no major preventative work was done on the entire roof since the major work that was done in 2010 and 2011.

2016 to date

When work was being done on the concrete roof area of the balcony for Unit 503, the waterproofing contractor from "Waterproofing Solutions", noted that there were points of possible ingress. This contractor was able to source problematic areas and repaired the ingress problems into 503, 403, 303, and 504 and perhaps other units on the fifth floor. As a result of work done in 2016, there was no urgency regarding water ingress which could not wait until the regular budget was approved at the AGM, which the Managing Agent promised the members of the body corporate would be before the end of April 2017. Notwithstanding the background, the trustees subsequently passed the resolution imposing the R750,000.00 Special Levy anyway and without proper guidance on what happened to the R 2,4m approved 3 years ago as most of the owners present were not given the true historical information, but were given potentially misleading information with the trustees and the Managing Agent stating to the owners that "nothing" had been done for 15 to 17 years to the roof and that it and the building had been "neglected." As evident from the historical trail above, this simply was not true. The trustees also created the impression that the roof required total replacement when one trustee said "*We had three waterproofing companies come it who stated we cannot patch up the roof. People would just roll their eyes and so the quotes were to replace the entire roof."* At the AGM of 07 July 2016 the following was also recorded verbatim as a statement from Mr Eric Niedermayer: "*It is hereby recorded that Eric Niedermayer voiced his opinion in respect to the un-cooperative manner in which Barick and Durst 503 have reacted when being asked to attend I respond to certain requests. Eric spoke directly to Messrs Barick and Durst at the meeting and advised them that if they have in fact been the direct cause of the Body Corporate having to incur legal costs as they have been less than accommodating in attending to matters which are in fact their responsibility such as the balcony. He went on to state that he will not let the matter rest and has evety intention of doing whatever is possible to ensure that Barick and Durst pay back "evety cent" that the Body Corporate have had to*

pay on legal costs 'Just because they (Barick/Durst) have had no consideration nor conscience in their actions and he (Eric) feels that they have been solely responsible for unnecessaty costs that have had to be incurred. Eric also mentioned that they should have done the right thing and fixed their balcony he said that 15 years ago he told them to fix the roof and they did nothing!."

Trustees also intimated that Paintmaster had done no torch-on on the roof [in 2013] and that "*the torch-on is very old and could actually be 50 years old*." This was blatantly an attempt to mislead the owners as all the trustee were aware of the work that had been done by Skysite in 2011 and the Property Diagnostic survey in 2013 which stated that the roof was recently reinstated and was in good order.

When an owner from the fifth floor enquired why the resurfacing was not previously done on the roof, a trustee, stated, "*The bottom line is that we didn't have the money' and "At that time, it wasn't as bad as it is now*." This comment appears to be a misrepresentation of the facts as the condition of the roof with regard to water ingress problems was far less problematic now than what it was in the recent past.

In **Body Corporate of the So/idatus Scheme No SS23/90 v De Waal and others [1997] 3 All SA 91 (T) Transvaal Provincial Division** The body corporate failed to obtain the co-operation of some of these owners to whom the exclusive rights were allocated. Others paid the additional levy under protest, and the trustees thereupon decided to bring an application for a declaratory order instead of suing each of the recalcitrant owners in a separate action. It must be emphasised that this application was brought as a direct result of the refusal of the exclusive-use owners to pay the special levy in respect of their units. The controversy which has arisen is whether the method adopted by the body corporate of allocating liability for the repairs to the exclusive-use areas was correct in terms of the act and rules. The body corporate contends that it is obliged to apply section 37(1)(b) and that the concept "maintenance" in the proviso thereto includes repairs and remedial work to preserve the structure of the building. The exclusive-use owners object to this interpretation and maintain that the expenses incurred or to be incurred in rectifying the bad workmanship and faulty construction cannot be classified as "maintenance". They contend that as a consequence the whole body of owners must share the burden of these expenses. The crisp question for decision is whether the concept "maintenance" in the proviso to section 37(1)(b) includes the remedial work which the resolution of 10 November 1993 authorised the body corporate to put in hand. The nudum dominium which vests in the body corporate and which enables it to enter, inspect, maintain and repair the exclusive use area (section 44(1)(a)). In the work of Roland Burrows, Words and Phrases Judicially Defined, vol 3, the following reference occurs. It is said that Bowen LJ in the case of **Leek Improvement Comrs v Stafford JJ (1888) 20 QBD 794 (CA) 796 at 797** said the following of the word "maintenance" as it occurred in the Highways and Locomotives (Amendment) Act: "It seems to me that the term 'maintenance' as used in section 13 (of the said act) is equivalent to 'repair'."

Brandon LJ in the case of **ACT Construction Ltd v Customs and Excise Commissioners [1981] 1 AER 324 (CA) at 329-330**, held as follows in respect of the word "maintenance": *"it is possible to take up two extreme positions on the meaning of the expression 'maintenance'. One extreme position is to say that, if the work done involves an improvement to the building, it can never be maintenance. The other extreme position is to say that, if the work has the purpose of remedying an existing defect in the building or preventing a future defect from developing, it must always be maintenance. In my view, neither of these extreme positions is correct. The expression 'maintenance' should be given its ordinary and natural meaning. In regard to the first extreme position, there mav well be cases where the work done, although it involves some degree of improvement (for instance, because it involves the use of modern or better materials or methods), is neve11heiess maintenance in the ordinary and natural meaning of that word. For example, if metal gutters which are liable to decay in time, are replaced with plastic gutters which are not liable to decay however long they remain there, that is an improvement to the building, but I would still regard that work as maintenance. With regard to the second extreme position, there may well be cases where, although the purpose of the work is to remedy existing or to prevent future defects in the building, it is nevertheless not within the expression 'maintenance' in the ordinary and natural meaning of that word. For example, if a building has a flat roof which leaks continuously and the owner decides to replace the flat roof with a pitched roof so as to eliminate that defect, then, although that word was designed to eliminate a defect, it would not in my view be maintenance in the ordinary and natural meaning of that word."*

Legal basis for special levies and validity of the special levy raised

To understand where special levies come into the picture, we should turn to the management rules - in particular, PMR 31(4B), which states: "The trustees may from time to time, when necessary, make special levies upon the owners or call upon them to make special contributions in respect of all such expenses as are mentioned in rule 31(1) above (which are not included in any estimates as are mentioned in rule 31(2) above), and such levies and contributions may be made payable in one sum or by such instalments and at such time or times as the trustees shall think fit."

The expenses "mentioned in rule 31(1)" are those detailed in section 37(1) of the Act. (The rule also refers to sections of tl1e Act that stipulate the proportion in which each owner must pay levies, but that issue is outside the scope of this article.)

The reference to rule 31(2) is important. This rule states: "At every annual general meeting, the body corporate shall approve, with or without amendment, the estimate of income and expenditure referred to in rule 36, and shall determine the amount estimated to be required to be levied upon the owners during the ensuing financial year." (The amount referred to is the regular "normal" levy.) At this point, it is worth pausing to look at some key words and phrases that tell us what special levies are, who is authorised to raise them, and when it can be raised:

(i) PMR 31(4B) empowers trustees to raise special levies "when necessary". This authority is also given to trustees in section 37(2A) of the Act, which states that any special contribution becomes due on the passing of a resolution to this effect by the trustees.

(ii) The trustees may raise a special levy to cover any of the administrative expenses described in section 37(1), not only repairs and maintenance; although repairs and maintenance are usually why special levies are raised.

(iii) Crucially, a special levy is to cover an expense that was not included in the estimate of income and expenditure (that is, the budget) approved at the AGM. This point is underscored by section 37(2B) of the Act, which defines a special contribution as any contribution other than that which results from the approval of the budget at an AGM.

There are two types of levies (what the Act calls "contributions"): those that arise out of a budget approved by the members of the body corporate (owners) at the AGM, and those that arise to cover unforeseen, or unbudgeted, expenses that, in the opinion of the trustees, are necessary. Special levies do not require the approval of all the members of the body corporate. However, in the case of both "ordinary" levies and special levies, the trustees must pass a resolution, which should be minuted, for them to be legally binding on owners (see sections 37(2) and 37(2B)). The conditions for a special levy are that it must be for a necessary and unbudgeted expense. Although "necessary" should be interpreted in the context of the obligations imposed on bodies corporate in section 37(1), owners and trustees may disagree over whether the expenditure has to be incurred immediately, or can wait until it is included in a budget approved at the scheme's next AGM.

PMR 31(2), quoted above, refers to PMR 36, which requires the trustees to draw up "*an itemised estimate of the anticipated income and expenses of the body corporate for the ensuing financial year*', which shall be put before the AGM (PMR 36(1)). PMR 36(2) states that the estimate "*shall include a reasonable provision for contingencies and the maintenance of the common property*". This rule echoes the requirement in section 37(1)(a) that, when determining contributions, the trustees must take a long· term view of the scheme's likely expenses. The Act itself does not mention special levies, however the management rules prescribed under the Regulations to the Act deal with special levies in prescribed management rule 31(4). Rule 31(4) gives the trustees the power to raise special levies from time to time provided that two requirements are met. Firstly the expense for which the special levy is raised must be necessary and secondly the expense must not have been budgeted for in the budget approved by the owners at the last annual general meeting. It seems from the wording of rule 31(4) that the trustees have been empowered with the ability to raise special levies for unforeseen and unexpected expenses.

In the Body Corporate of Fisheagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 WLD. An owner objected to the payment of a special levy which had been imposed by the trustees of the body corporate. Dealing with this objection Malan J said: "*It is the trustees, and not any individual owner, who are empowered to take a decision whether or not the imposition of a levy (which would include*

a special levy) is necessary as contemplated by Section 37(1) (b) of the Sectional Titles Act, and by Rule 31(4) of annexure ' " to the Regulations made in terms of the Sectional Titles Act. According to Section 37(1)(d) of the Sectional Titles Act one of the functions of a body corporate is to determine from time to time the amount to be raised for the purposes aforesaid. In accordance with Section 39(1) of the Sectional Titles Act and Rule 30 of annexure ' " to the Sectional Titles Regulations, the function of determining the amounts to be levied upon members of sectional title body corporates belongs to the trustees for the time being of the body corporate. No member of the body corporate is entitled to dispute liability for the payment of levies on the ground that it thinks those levies to be excessive."

The trustees, therefore, have the authority to exercise a sole discretion in the interpretation of "necessary" and "unforeseen" in determining whether or not a special levy can be raised or not, subject however, to the provisions of sections 39 and 40 of the Act. The legislation does however make the trustees' power to raise a special levy conditional on two requirements. The first is that the special levy must be "necessary" and the second is that a special levy cannot be raised to pay an expense that was already included in the budget approved at the last AGM. "Necessary" means that a special levy can't be raised for an expense that can wait for inclusion in the budget for the next financial year. The budget restraint means that a special levy can't be used, for example, to pay a maintenance expense because maintenance must be included in the budget. Special levies are therefore by nature intended for emergencies. It is also prudent to note that the 2017 Knightbridge Mansions budget for expenses show a budget for R 1 398 000 (one million three hundred and ninety eight thousand rand) with a revised budget of R 1 038 000 (one million and thirty eight thousand rand). Prof Graham Paddock also states that "*In my experience it is very seldom that expenses cannot wait to be included in the budget proposed by trustees to the annual general meeting. In other words many special levies are illegal because they are not truly necessary."* It does, however, seem that the trustees' intention was to comply with Section 3 (1) (a) (i) of Sectional Titles Schemes Management Act, Act No. 8 of 2011.This is also evident from the transcript of the SGM of 08 February 2017 where Mr Durst suggested "*It can wait until the AGM budget for the next financial year." The AGM is due any time within the next 2 weeks or 2 months" and Mr West responded by saying "The AGM has to have a budget that can be approved. It we can get this through now, we can begin the process. We need to prepare the roof. Take off. There are pipes all over the roof. All of that work has to be done and if we have to delay it for another two weeks or another three weeks, we are running into the rain*."The aforementioned is also emphasised as a concern by Chris Fick and Associates in a letter to the trustees of Knightbridge Mansions dated 03 February 2017 stating "

We would advise, as a point of urgent concern, the following excerpts from the Sectional Titles Act, the Sectional Titles Management Act, and the Prescribed Management Rules for your attention.

The first condition is contained in PMR 31(48), and states that the special levy must be necessary. A special levy cannot be raised for an expense that can wait for inclusion in the budget for the next financial year.

The second condition is contained in section 37(28), and states that a special levy cannot be raised to pay an expense that was already included in the budget approved at the last AGM. A special levy should not be used to pay a maintenance expense because maintenance must be included in the budget."

Maintenance of major capital items must be accommodated in the maintenance, repair and replacement plan. The definition of a major capital item in PMR 2(i) specifically mentions roofing.

As such, the special levy for roof maintenance is, at best, contrary to statutory law. Should you proceed in trying to include the cost of maintenance as a Special Levy, we would have to assert that this is contrary to your fiduciary duties, and constitutes, again at best; negligence in discharging your fiduciary duty.

The Minutes of Trustee Meeting of 30 March 2016 illustrates the acknowledgement by trustees that waterproofing required urgent attention where it is stated under waterproofing "... *Tim sent a report on the defective areas of the buildings. It was agreed that certain areas of the buildings waterproofing were in dire need of attention. Pl to get 3 contractors to quote on areas discussed. It was also agreed that a reserve fund of R6-700000 needs to be built up so that we can do a complete revamp of the waterproofing of the whole building's roof area*." This is further emphasised in the Trustee Meeting of 13 September 2016 where it is

noted "*... EW said he wasn't happy with the figure Fiona put into the budget for the "Building Maintenance and Reserve" as it was too low, KS said you (EW) approved this budget, if you weren't happy with that figure you should have said so in the beginning....(Maintenance: Roof)... , it is evident that there is still a problem with the roof, we have had Pain/master and many other contractors out on the roof over the course of this year. All of them have stated that the roof should have been stripped entirely and waterproofed long ago, no contractor will give us any guarantees on the roof as it is in a shocking condition. It was agreed that EN would get hold of 3 companies and we would look at their quotes to address the problem areas like: 502 VERY URGENT, 501 and 504 Back section lightwell this could be one of the areas which is causing ingress into 304, as well as 503*". In another Trustee Meeting held on 27 July 2016 it is re-emphasised that "....*Going forward pertinent matters we need to look at for the balance of this year and for next year:*

- ***Maintenance we must get quotes on waterproofing entire roof***.- *"Eric handling*
- *Fix up the atrium Les can we get someone well priced to clean up for us there.*
- *Building up our reserves for the maintenance fund this is vital.*
- *We need to repaint the entire building in 2019!*
- *After the roof has been waterproofed and we have repainted the building we should look at upgrading the security cameras."*

Curbs on trustees' powers

On the face of it, then, it seems trustees have almost unfettered power to raise special levies. In 2003, the Soutl1 Gauteng High Court confirmed (**Body Corporate of Fish Eagle v Group Twelve Investments**) that the trustees alone can decide whether a levy, including a special levy, is necessary, and who determines the amount of that levy. Moreover, the court ruled that an owner is not entitled to dispute liability for the payment of levies because he or she thinks those levies are excessive. But at the AGM the body corporate l1as the power, in terms of section 39(1) of the Act, to impose restrictions on the trustees, or to direct the trustees to act in a certain way, provided these restrictions or directions do not contradict the Act or the PMRs. A restriction could be that the trustees may not spend more tlian a certain predetermined amount without convening a special general meeting to obtain authority to do so. In practice, although the body corporate may not prevent the trustees from fulfilling their statutory obligation to maintain and repair the building, it can require the trustees to call a special general meeting before they spend more than a certain amount of money, or undertake certain types of maintenance. Not only will this requirement prevent trustees from imposing a special levy on owners without consultation, but the body corporate will be able to interrogate whether the special levy is, in fact, necessary to cover an unforeseen expense.

That some bodies corporate have imposed section 39(1) restrictions on their trustees, with the result that special general meetings have been called before special levies were raised, may have created the impression that, by default, a special general meeting must be called in order to raise a special levy. However, unless owners deliberately exercise their section 39(1) rights, trustees are bound only by the Act and the PMRs.

Actions by the Trustees constitute gross negligence

In the case of Rosenthal v Marks the cowt stated: "*Gross negligence ..... connotes recklessness, an entire file to give consideration to the consequences of his actions, a total disregard of duty*".

In LAWSA 2nd Edition, Volume 8, Part 1 at paragraph 125, the following stands written on negligence of an expert: *"The general test of negligence is adapted to accommodate situations where skill, being a special competence which is the result of aptitude developed by special training and experience is acquired. A person who engages in a profession, trade, calling or any other activity which demands special knowledge and skill, must not only exercise reasonable care, but measure up to the standard of competence of a reasonable person professing such knowledge and skill. The diligens paterfamilias is placed by the reasonable expert and, in assessing the attributes required, the court will have regard to the general level of diligence possessed and exercised at the time by members of the branch of the profession to which the practitioner belongs." It states further: "The test has two components: the possession of necessaty knowledge and the exercise of necessaty care, skill and diligence."*

During the course of the adjudication proceedings the Applicant submitted various documents which were received into evidence.

Trustees failing to fulfil their fiduciary duty

Section 39(1) of Act 95, however, provides that the functions and powers of the body corporate shall, subject to the provisions of the Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules. The legislation fails to address "due diligence" specifications with regard to the handing-over of the body corporate's affairs from one set of trustees to the next. Granted, often a set of trustees serves for a long time, with possibly minor changes in the composition. However, it does happen that a set of trustees get replaced by a total new set. Especially when there had been strive among owners, or contestation among groups of owners who are instrumental in replacements.

Section 2(7) of the STSMA states clearly that "the body corporate has perpetual succession" and many aspects are long-lasting, regardless of the composition of the trustees, for example:

- The employment contracts of the employees of the body corporate.
- Long-term contracts with service providers, such as for the maintenance of lifts, the waterproofing of roofs, etcetera.
- Medium-term contracts, which require specified periods of termination notice should the incoming trustees wish to make changes, etc.

It, nevertheless, daunts on me that evidence adduced proof, that all roof contractors since the year 2002 have stated emphatically that the roof should be repaired and possibly resurfaced every two years. This issue was addressed in directives for the newly elected trustees suggested by the out-going trustees in 2012. It is also evident that trustees only needed to look at the Trustee Minute Book to ascertain the history of the waterproofing of the roof or ask IHFM which has been the managing agent for about nine years. Each trustee of a body corporate also stands in a general fiduciary relationship towards the body corporate: …" *shall imply that a trustees shall in relation to the body corporate act honestly and in good faith, and in particular. shall exercise such powers as he may have to manage or represent the body corporate in the interest and for the benefit of the body corporate; and ii. shall not act without or exceed the powers aforesaid".*

This brings into question whether one can deduce, on a balance of probability, particularly in respect of the current trustees in this dispute, strict compliance with Section 40 of Act 95 which prescribes that "*each trustee of a body corporate shall stand in a fiduciary relationship to the body corporate.*

(2) Without prejudice to the generality of the expression "fiduciary relationship", the provisions of subsection {1) shall imply that a trustee-

(a) shall in relation to the body corporate act honestly and in good faith, and in particular-

(i) shall exercise such powers as he may have to manage or represent the body corporate in the interest and for the benefit of the body corporate; and

(ii) shall not act without or exceed the powers aforesaid; and

(b) shall avoid any material conflict between his own interests and those of the body corporate, and in particular-

(i) shall not derive any personal economic benefit to which he is not entitled by reason of his office as trustee of the body corporate, from the body corporate or from any other person in circumstances in which that benefit is obtained in conflict with the interests of the body corporate". It must nevertheless be noted that where a trustee of a body corporate, in terms of Section 40 (3) (a) of the Act, acted with ma/a tides or grossly negligent or has breached any duty arising from his fiduciary relationship, such trustee shall be liable to the body corporate for-

(i) any loss suffered as a result thereof by the body corporate; or

(ii) any economic benefit derived by the trustee by reason thereof.

Sub-section (b) of Section 40 of Act 95 furthermore provides that where a trustee fails to comply with the provisions of this subsection and it becomes known to the body corporate that the trustee has an interest referred to in that subsection in any contract of the body corporate, the contract in question shall, at the option of the body corporate, be voidable: Provided that where the body corporate chooses not to be bound, a Court may on application by any interested person, if the Court is of the

opinion that in the circumstances it is fair to order that such contract shall nevertheless be binding on the parties, give an order to that effect, and may make any further order in respect thereof which it may deem fit.

The trustees are through their election placed in charge to manage, control and administer in a prescribed fashion ('*caretakers*'). The trustees must preserve (or enforce) the rules of the body corporate and maintain the collective property. By implication the trustees are the 'boss' for one year at a time. But they may not just do as they please. They are accountable to the collective of owners, who they serve. Trustees do not enjoy any special privileges. With respect to the evidence viva voce or written statements of Applicant and Respondent, the Adjudicator, found that the trustees failed to fulfil their fiduciary duty. I also find trustees negligent, by not fulfilling their obligations in terms of Section 37, therefore indirectly attributing and causing a special levy to be raised for maintenance and repairs that the owners already contributed to (R 2.4 m) 3(three) years ago. **De Sousa & Another v Technology Corporate Management (Pty) Ltd. & Others (2010/50723) {2017] ZAGP JHC, 3 ALLSA 47** as the case dealt with Section 252 of the Companies Act of 1985 which provides relief for a member, or part of the members of a company, from unfairly prejudicial, unjust or inequitable acts or omissions of the company or conduct of its affairs. The emphasis is upon the unfairness of the conduct complained of a company and a member seeking relief must show that the conduct is "unfairly prejudicial, unjust or inequitable" to that member or to some part of the members. The conduct must not only be prejudicial, but unfairly so. Fairness is thus the criterion by which a court must decide whether it has jurisdiction to grant relief. Appiicant, thus was misdirected in respect of the purported unfair abuse of power and an impairment in the probity with which companies' affairs are being conducted and where the majority voting power has been abused or unfairly used to the prejudice of shareholders (in a Company)(sic). The facts of aforementioned case therefore pertain to where the majority shareholders use their greater voting power in a manner which does not enable the minority to enjoy a fair participation in the affairs of the company *(Elder v Elder & Watson Limited (1952) SC 49 at 55 and 60; Aspek Pipe at 528D-H; Donaldson Investments (Pty) Ltd and others v Anglo Transvaal Colliers Limited: SA Mutual Life Assurance Society and another intervening 1979 (3) SA 713 (W); Elgindata Limited [1991) BCLC 959 at 984 and 1004).*

I also consequently find that in respect of the Applicant's prayers, i.e. -

[7.1] & [7.2] That the Trustees would have to report to the members of the Body Corporate that they had acted illegally in raising a Special Levy and that they had deliberately misrepresented the condition of the roof and building and the prior maintenance that had been done in the past.

It is trite law that a trustee would be negligent where he/she exercises his/her discretion on a legal matter, where he/she lacks knowledge on the legal position or consequences of his decision. It is incumbent on a trustee to act as a reasonable man. This common law requirement requires from a trustee to act with due care and diligence as a bonus et diligence paterfamilias, i.e. as a reasonable man. A trustee is required to be more careful and prudent with the affairs of the owners than he/she would be with his/her own affairs. Where a trustee can take personal risks he must take greater care when handling the interest of the Body Corporate or the affairs of others and should therefore avoid any business risk. It is evident that the trustees was advised and ought to have known that, if left unattended, the roof would continue to deteriorate and more specifically if the spalling was left unattended would cause a safety risk. The trustees were also fully aware that the ingress of water experienced in certain units was severe and this would cause further deterioration if left unattended.

[7.3] That the Managing Agent resign her post and the body corporate seek alternative managing agents without further notice or compensation.

It is common cause that the managing agent's portfolio manager responsible for a particular body corporate should be fully au fail with the requirements of the Act and should provide guidance to trustees in all their decision-making. Trustee meetings should be attended and managed by a managing agent who is capable of guiding the trustees in practicing good corporate governance and correct procedure and not by a clerk who has been sent there to take the minutes.

There have been many instances where the elected trustees and / or their managing agents were disinterested or ineffective. Managing Agent's lack of presence and input, almost invariably led to developments deteriorating

as a whole and losing their value and this applied almost as much to smart upper bracket projects as to those in the more affordable groups.

The Respondent failed to refute the Applicants' contentions that evidence existed that Mr West had his refurbishing plans submitted to the Trustees for approval or submitted a deposit even though the construction involved removing walls and other major work. The Applicant, however, should be commended for continuing to pay his levies despite believing that the body corporate did not fulfil its obligations.

[7.4] That a reasonable schedule of repairing for part of the roof work for this year be presented on the most needed areas, and a schedule for the remaining parts of the roof for next year, and then for the roof to receive regular maintenance with torch-on and aluminium paint, and that a regular maintenance programme be adhered to in the future-

The Applicant failed to proof on a balance of probability that there was ma/a fides on the part of the Respondent.

[7.5] and [7.6] That due to gross negligence that all costs associated with the Trustees' actions be born, jointly and severally by said Trustees, out of their own accounts & that all of the Trustees resign their positions and not be Trustees at Knightsbridge again-

In respect of the provisions in terms of Section 40 (3) (a) and the onus to proof that trustees acted with *mala fides* or grossly negligent or has breached any duty arising from their fiduciary relationship, it must be concluded that trustees are only liable for losses or damages incurred by the Body Corporate if they act in a manner that can be described as grossly negligent, fraudulent or wilful. In such instances where a trustee is found wanting said trustee must be liable to the body corporate for-

(i) any loss suffered as a result thereof by the body corporate; or

(ii) any economic benefit derived by the trustee by reason thereof.

It is also common cause that the provisions of the Act also provides that where a trustee fails to comply with the provisions of this subsection and it becomes known to the body corporate that the trustee has an interest referred to in any contract of the body corporate, the contract in question shall, at the option of the body corporate, be voidable: Provided that where the body corporate chooses not to be bound, a Court may on application by any interested person, if the Court is of the opinion that in the circumstances it is fair to order that such contract shall nevertheless be binding on the parties, give an order to that effect, and may make any further order in respect thereof which it may deem fit.

In conclusion, it is a pity that the special levy seemingly had been raised for administrative and/ or cash flow purposes, rather than it being a necessary or unforeseen expense, by definition. If for this reason, the trustees raised the special levy incorrectly due to cash flow reasons, rather than mala fides or gross negligence (which would contravene section 40 of the Act), given rise to the dispute arisen between the body corporate and Applicant. Furthermore, by the time many of the members (of the body corporate) become aware of the proposed special levy, it has already been raised and as a result thereof, the only way to challenge the validity of the decision is by instituting legal action during which the rights and interests of the body corporate (in its entirety) are measured against the individual member's rights and interests. As these decisions are seldom challenged by the members of the body corporate, due to mainly, the member's limited financial resources and the misconception and misnomer that the trustees have an unfettered right to raise special levies. It is also clear and evident that certain personal agendas had been followed and could only be sorted out between the parties involved and that the stalemate scenario at Knightsbridge Mansions did not provide a proper forum for this.

[7.7] That Body Corporate's budget not be spent on the Trustees soliciting legal advice on their personal positions, but that this should be kept expressly as a personal expense.

See Order below

POWERS AND JURISDICTION OF THE ADJUDICATOR

[9] Guided by Section 54 (1) of the Community Schemes Ombud Service Act, Act No. 9 of 2011 and the Regulations issued in terms of said Act, which provide that the adjudicator must make an order-

(a) granting or refusing each part of the relief sought by the applicant and in terms of Section 54 (2) allowing for an order requiring a person to act, or refrain from acting, in a specified way and the Adjudicator being empowered to investigate, adjudicate and issue an adjudication order in terms of Sections 50, 51, 53, 54 and 55 of the CSOS Act, taking due cognisance of the circumstances of the Applicant, the potential prejudice to the Applicant , the extent to which the trustees discharged their fiduciary duties and the relative intent demonstrated by the Respondent to amicably resolve the dispute. This dispute again underlines the role of CSOS in resolving disputes expeditiously and less costly.

The types of relief that may be applied for in terms of Section 39 of the Community Schemes Ombud Service Act are divided into seven categories, namely, (1) financial issues; (2) behavioural issues; (3) scheme governance issues; (4) meetings; (5) management services; (6) works pertaining to private areas and common areas; and (7) general and other issues.

ORDER

[10] In coming to the final Order I have taken cognisance of the provisions of Section 39 of the CSOS Act, firstly, in respect of Section 39 (4) (c) which provides for an order declaring that a resolution purportedly passed at a meeting of the executive committee(i) was void; or (ii) is invalid; or Section 39 (5) (b) providing for an order declaring that the executive committee does have the right to terminate the appointment of a managing agent, Section 39 (1)(c) which provides for an order deciaring that the way in which a contribution levied on owners was incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way; Section 39 (1) (d) providing for an order requiring the body corporate to have its accounts, or accounts for a specified period, audited by an auditor specified in the order; or Section 39 (3) (b) which provides for an order requiring the Body Corporate to approve and record a new scheme governance provision; or Section 39 (6) (c)(i) which provides for an order requiring the Body Corporate to carry out, within a specified time, specified works to the common areas tor the use, convenience or safety of owners or occupiers; or Section 39(7) (a) which provides for an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association to make such information or documents available within a specified time.

In terms of Section 54 (4) of the CSOS Act the following order is hereby made by the Adjudicator and which must be complied with within 60 days of the parties having been given notice of this order in writing:

10.1 To grant the Applicant's claim in respect of Applicant's prayers as set out in paragraphs 7.1& 7.2 by making an order declaring that a resolution purportedly passed at a meeting of the Trustees was invalid and declaring that the way in which a contribution levied on owners was incorrectly determined or unreasonable, and that such special levy contribution be adjusted to a correct or reasonable amount;

10.2 To dismiss the Applicant's claim in respect of Applicant's prayers set out in paragraph 7.3

10.3 To pa1iially grant the Applicant's prayers as set out in paragraph 7.4 by making an order requiring the Body Corporate to carry out, within a specified time, specified works to roof for the use, convenience or safety of owners or occupiers, in terms of a planned programme over two years, agreed to by members of the Body Corporate and meeting all required safety and health requirements;

10.4 To dismiss the Applicant's prayers as set out in paragraphs 7.5.and 7.6;

10.5 To dismiss the Applicant's prayers as set out in paragraph 7.7;

10.6 To order the Body Corporate to approve and record a new scheme governance provision limiting the trustees' powers to raise special levies; and

10.7 Make an order declaring that the Applicant has been wrongfully denied access to information and documents.

ENFORCEMENT OF ORDER

[11] The parties' attention is drawn to-

Section 56 (1) of the CSOS Act which 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 and

Sub-section (2) which provides that "if an adjudicator's order is for the payment of an amount of money or any other relief which is beyond the jurisdiction of the magistrate's court, the order may be enforced as if it were a judgment of the High Court, and a registrar of such a Court must, on lodgement of a copy of the order, register it as an order in such Court."

RIGHT TO APPEAL

[12] Parties are hereby reminded that in terms of Section 57 of the CSOS Act any Party or affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law. Said appeal against an order must be lodged within 30 days after the date of delivery of the order of the Adjudicator and the 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.