



**ADJUDICATION ORDER IN TERMS OF SECTION 54  
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Ref: CSOS458/WC/20

IN THE MATTER BETWEEN

**JACOBUS CHARL OLIVIER**

**Applicant**

and

**LA PARADIS LOFTS CC**

**First Respondent**

**MANHATTAN PLACE BODY CORPORATE**

**Second Respondent**

**TRUSTEES OF THE MANHATTAN PLACE  
BODY CORPORATE**

**Third Respondent**

---

**ADJUDICATION ORDER**

---

**EXECUTIVE SUMMARY**

Submission copy – 7/10/21.

1. The property of the Applicant, unit 164 Manhattan Place, has been subjected to damp seepage from the property of the First Respondent, unit 186 Manhattan Place, and possibly the adjacent common property since acquisition in 1999.
2. Several fruitless attempts to remedy the situation have failed, partly because the First Respondent denied access to its property so that the cause of the damp seepage could not be determined. The First Respondent did not cooperate because it submitted that the common property in the form of the ledge on the outer wall above the Applicant's property contributed to the damp seepage that cause the damage in section 164 but was not taken into account.
3. During 2010 the issue was referred to arbitration with only the First and Second Respondents as the parties thereto. However, the First Respondent failed to attend the hearing. The arbitrator nevertheless decided that the property of the First Respondent be inspected by waterproofing experts to determine the source of the damp seepage but the First Respondent denied them access for such purpose. It also refused to comply with the enforcement order obtained by the Second Respondent.
4. The Second Respondent attempted to effect the repairs necessary to address the problem repeatedly but the seepage continued to affect the Applicant's property. Waterproofing experts appointed by the Applicant in 2019 found that these repairs were ineffectual as the slab/ceiling dividing his property from section 186 above remained too damp to effect any repairs thereto.
5. Eventually, with no progress to resolve the damp seepage problem, the Applicant lodged this Application with CSOS. The responses of the First and Second Respondents to the Application were a repeat of what had gone before.
6. It was found that the legal framework, after commencement of the Sectional Titles Schemes Management Act ("ST SMA") and the Community Schemes Ombud Service Act ("CSOS Act"), dictated that the actions set out in paragraph 33 should take place.

## **INTRODUCTION**

1. The Applicant is Jacobus Charl Olivier. He is the registered owner of unit 164 by virtue of Deed of Transfer ST15560/1999 in the sectional title scheme known as Manhattan Place, scheme number SS514/1998<sup>1</sup>. He is therefore a member of the Body Corporate of Manhattan Place and has standing as a party to this dispute because he has a material interest in this community scheme by virtue of his ownership of section 164 ("the affected property") and as the Applicant he is materially affected by this dispute<sup>2</sup>.
2. The First Respondent is La Paradis Lofts CC (registration number 199706562223), the registered owner of unit 186 by virtue of Deed of Transfer ST19214/1998 in the sectional title scheme known as Manhattan Place, scheme number SS516/1998<sup>3</sup>. It is therefore a member of the Body Corporate of Manhattan Place and has standing as a party to this dispute because it has a material interest in this community scheme by virtue of its ownership of section 186 ("the top property") and as the First Respondent it is materially affected by this dispute.<sup>4</sup> The First Respondent is herein represented by its sole member, Peter Ulrich Fischer, in terms of section 54(1) of the Close Corporation Act<sup>5</sup>.
3. The Second Respondent is the Body Corporate of Manhattan Place. It also has standing in this dispute because it qualifies as a community scheme as defined

---

<sup>1</sup> When the scheme number of Manhattan Place regarding the description of the Applicant's property is compared with the scheme number of the First Respondent's property, it will be noted that the first part of each such number is different. These differences are attributable to the different amending sectional plans of extension to the original sectional plan on which these properties are delineated. The differences are therefore not errors.

<sup>2</sup> The Trustees of the Avenues Body Corporate v A Shmaryahu 2018 (4) SA 566 (WCC). See par. 19 on p. 10, "Both requirements must be satisfied for standing as an applicant in terms of section 38 of the Community Schemes Ombud Service Act". Although the main ratio of this decision was overturned by Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another 2020 (1) SA 651 (GJ), this finding was not affected by the latter judgement. Although the Avenues case involved a sectional title property, Binns-Ward J considered the provisions of the CSOS Act, which apply to all community schemes.

<sup>3</sup> See footnote 1.

<sup>4</sup> See footnote 2.

<sup>5</sup> Section 54(1) *Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation...*

in section 1 of the Community Schemes Ombud Service Act, 9 of 2011, ("the CSOS Act") and as such is one of the parties against whom the legal relief set out in paragraph 7 is sought by the Applicant, hence it is materially affected by this application.

4. The Third Respondent are the trustees for the time being of the Second Respondent and has standing in this matter because it is vested with the obligation to perform and exercise the functions and powers of the Body Corporate in terms of section 7(1) of STSMA and because most of the interaction regarding this dispute took place between the Applicant, the First Respondent, and the Third Respondent.
5. This dispute was referred to conciliation by the Ombud in terms of s 47 of the CSOS Act but was not resolved and consequently this matter was referred to the adjudicator for adjudication of the dispute<sup>6</sup> pursuant to the notice issued by the Ombud Service of such referral and service thereof on the parties.
6. This is an application for dispute resolution in terms of section 38 of the CSOS Act. The application was made in the prescribed form and lodged with the Community Schemes Ombud Service (CSOS).
7. The Applicant has chosen to set out in the application form the practical relief<sup>7</sup> he sought. He did not attempt to link his formulation of such relief with the specific formal legal relief prescribed in section 39 of the CSOS Act but merely stipulated that the following orders be issued:
  - 7.1. "a professional waterproofing company like SIKA be appointed to attend to the waterproofing";

---

<sup>6</sup> Section 48(1) and (4) of the CSOS Act.

<sup>7</sup> The application form requires an applicant to set out the relief he/she is seeking. Relief, in this context, is a legal, technical term with which most applicants are not familiar. So, they invariably respond in practical terms to the clarifying question on the application form below the heading reading: "How do you want the problem to be solved?". Relief, in its legal technical sense, that can be ordered by an adjudicator is set out in section 39 of the CSOS Act. However, adjudicators are often called upon to assess how the Applicant wants the problem to be resolved ("the practical relief") with the evidence deduced in the adjudication, by matching such evidence with the appropriate order/s in section 39 of the CSOS Act.

- 7.2. "unit 901 to be repaired professionally as per the SIKa report";
- 7.3. "damage to the slab and window frames be repaired professionally as per the SIKa report";
- 7.4. The practical relief sought by the Applicant above aligns best with the following orders contained in section 39, which reads as follows:
- 7.4.1. *39(6)(a) In respect of works pertaining to private areas and common areas – an order requiring the association to have repairs and maintenance carried out;*
- 7.4.2. *39(6)(b)(i) In respect of works pertaining to private areas and common areas – an order requiring the relevant person – (i) to carry out specified repairs, or have specified repairs made, (ii) to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the Applicant.*
- 7.5. The remaining relief sought by the Applicant, i.e., "claim for loss of rental income for the duration of the repairs, of at least one month" does not align with any of the orders that can be granted in terms of section 39.
8. This matter is adjudicated in terms of the CSOS Act and Practice Directive on Dispute Resolution, 2019, as amended by Practice Directive dated 23 June 2020, which provides under paragraph 8.2:- "Adjudications will be conducted virtually or on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator." No adjudication was conducted virtually herein and the parties made further written submissions as requested by the Adjudicator in terms of section 51 of the CSOS Act.

## **SUMMARY OF RELEVANT EVIDENCE**

### **Applicant's Submissions**

Submission copy – 7/10/21

9. The Applicant acquired his affected property in 1999. The affected property is directly below the top property. The top property contains a balcony above the affected property. A jacuzzi has been installed on the balcony of the top property that, the Applicant claims, sometimes overflows, and so causes the damp seepage<sup>8</sup> in the affected property.
10. The Applicant further submitted that the Second Respondent had decided in April 2006 to initiate arbitration proceedings against the First Respondent who had failed, notwithstanding numerous requests, to maintain and repair waterproofing in the top property causing damp seepage to cause damage to the concrete slab between the top and the affected property as well as the rust damage on the lounge windows thereof. He was not a party to the arbitration proceedings. A copy of the summary of these proceedings, compiled by the then chairman of the Second Respondent, was furnished to the Applicant, who then submitted it to the adjudicator during the investigation phase of this adjudication. According to this summary, an award was handed down by the arbitrator, Mr. Graham Paddock, on 2 May 2006. In terms of the award the Second Respondent was ordered to –
- 10.1. *as soon as reasonably possible after publication of the award to enter into such contracts and to do all such other things as are reasonably necessary to waterproof the section owned by the First Respondent to prevent the future passage of water;*
- 10.2. *inquire from its technical advisors whether there was any part of the common property adjacent to the section that should be simultaneously repaired;*
- 10.3. *carry out the work recommended;*
- 10.4. *raise special levies payable only by the First Respondent to cover the amount expended by the process of carrying out the work in the apartment;*

---

<sup>8</sup> "Damp seepage" will be used throughout the order to describe the process which, it is claimed, caused the damage to the affected property. It best describes the slow penetration of water molecules through walls and concrete slabs appropriate to this situation.

- 10.5. *allow representatives and employees of the Second Respondent, its managing agent, and any persons employed to carry out the inspection to grant him immediate and unimpeded access to the apartment during normal working hours until the works were completed, and all required inspections attended to; and*
- 10.6. *pay the cost of the Second Respondent to the arbitration, costs of the technical reports and also the legal costs as between attorney and client.*
11. According to the summary, this award was served on the First Respondent's attorneys on 8 May 2006. An enforcement order of the arbitration award was obtained and although several attempts were made to have that order served on the First Respondent, all failed. Eventually, an application for contempt of court against the First Respondent was lodged. Such application was opposed by the First Respondent and its member, Mr. Fischer. A settlement agreement was negotiated between the parties in terms of which the First Respondent was to pay the cost of the Second Respondent as awarded in terms of the arbitration award. An alternative dispute resolution process was set in motion in terms of which experts employed by the Second Respondent and by the First Respondent were to agree upon the causes of the water damage and the scope of the remedial work. The experts were unable to reach agreement as to the causes of the water damage. The principle difference was the proportion for which the First Respondent was liable for the cost of repairs and the proportion to which the Second Respondent was liable.
12. The view of the Third Respondent in terms of this summary was that the Second Respondent had taken all such steps it could reasonably have done to carry out its obligations both in terms of the award and in its capacity as body corporate. It does not believe that it is within its interest to incur further costs. The Third Respondents however intended to perform the Second Respondent's obligation in respect of the common property in terms of the award to the extent that such obligation exists and to the extent that performance of any such obligation is possible.

13. The Applicant further submits that towards the end of 2019 he was considering selling his property and got quotes to repair the seepage damage to his property. On the 7th of February 2020 he informed the First Respondent that the contactors he had employed to determine the work required to repair the seepage damage of his property had indicated that the concrete slab between their sections is still wet and it would therefore be pointless to repair it. Mr. Fischer, on behalf of the First Respondent, responded that he would cooperate and he then contacted one of the contractors, Mr. Jacques Lloyd, for that purpose. Mr. Lloyd arranged with a professional and reputable waterproofing company called SIKA to do an inspection and write a report. Mr. Fischer sent a repairman to assist with inspection, alongside SIKA. The subsequent report from SIKA was quite damning, according to the Applicant, stating that the current waterproofing in the top property was insufficient and setting out the damage caused to the Applicant's property ceiling and the metal frame windows in his lounge, plus the damage\ weakening of concrete structure of the building. On the 26th of February 2020 he informed both Mr. Fischer and Mr. Tupper, the previous chairman of the Second Respondent of his concerns, included the report and requested that it be addressed. On 10 March 2020 the Second Respondent emailed the Applicant and Mr. Fischer stating that the Third Respondent is of the opinion that the top property is the cause of the seepage damage and that this must be addressed by First Respondent. The Applicant's last email was on the 10th of March 2020 informing both parties that it seems that these repairs done by the Second Respondent were not properly done according to the recent SIKA report, and that has caused the ongoing damage to the slab and his property and any further attempts to repair should be done by a professional waterproofing company with the standard 10 to 15 years industry guarantee. On the 24th of March 2020 the Applicant informed both the First Respondent and the Second Respondent that he would still like to resolve this matter amicably but after 20 years of inconvenience he has decided to submit the matter to CSOS for resolution.
14. The Applicant had furnished two sets of reports from contractors regarding the water damage to his section and the possible causes thereof. The first report was commissioned by the Second Respondent from professional engineers in



November 2005. It is not clear whether these engineers advised the Second Respondent during the arbitration proceedings and its aftermath. The second report was commissioned during 2019 by the Applicant when he decided to repair the water damage to his section because he wanted to sell his section. He portrayed his contractors as experienced and reputable contractors engaged in this field. Both reports identified certain sources of the seepage damage to his section, all of which emanated from the top property due to faulty waterproofing which allowed damp seepage to penetrate existing waterproofing materials and even the screed and penetrate into the slab between the top property and the affected property. The damage to the window of the affected property under the balcony of the top property was attributed to water that may have splashed out of the jacuzzi onto the balcony. The First Respondent, however, points to a ledge on the outside wall above the affected property as a source of the damp seepage. Neither of the reports mentioned the ledge as such a source, except that the engineers' report mentions a water pipe outlet that may funnel water onto the ledge.

15. Although these reports could be helpful in guiding new contractors in establishing the current active sources of damp seepage, they would seem to have no probative value in deciding the issue as it stands at present. The second report commissioned by the Applicant may also not be acceptable to the other parties.

### **Relief sought by the Applicant**

16. The relief sought by the Applicant is more fully set out in paragraph 7.

### **First Respondent's Submissions**

17. The First Respondent –

- 17.1. submits that it opposes the application brought by the Applicant, but it supports the relief sought against the Second Respondent;
- 17.2. denies that any legal action was taken against it by the Second Respondent;
- 17.3. admits that the Second Respondent had attempted to repair its property;
- 17.4. denies that the jacuzzi located on its balcony overflows;
- 17.5. denies that it had received any written demands by the Second Respondent in terms of rule 31(2) of the management rules and that as far as the Second Respondent is concerned internal remedies have not been exhausted.
18. The First Respondent also refers to the statement in the SIKa report that "it cannot be said that water is coming in now from unit 1001 above with 100% certainty". First Respondent asserts that the cause of the water damage can be attributed to defective workmanship and maintenance of the common property which in terms of management rules falls within responsibility of the Second Respondent.
19. The First Respondent undertakes in due course to tender a report from an independent, external waterproofing specialist that the ingress of water into the Applicant's unit is not caused by or does not emanate from the jacuzzi on its balcony.
20. First Respondent further submits that while the Third Respondent may be of the opinion that the First Respondent is responsible for causing the water damage, their opinion is irrelevant. He further submits there it is Applicant and Second Respondent who must establish the facts of the matter and not the First Respondent.
21. The First Respondent finally submits that until such time as the cause of the damage is established, he denies liability for any losses or damage that the Applicant has sustained.

**Relief sought by the First Respondent:**

22. The First Respondent denies liability for any losses or damages that the Applicant may have sustained and by implication requires the application to be dismissed.

**Second Respondent's Submissions**

23. The Second Respondent submitted in response to the Application a long description of the history in terms of the minutes of meetings the Third Respondent held regarding this matter in the date order it took place. For the rest, it submitted that further issues would be addressed at the hearing. When the Second Respondent was advised by CSOS that there was not going to be a hearing of the matter and the response to the application needs to be in writing, the second respondent submitted that the Third Respondents believed that the leak emanating from the property of the First Respondent is responsible for the seepage damage to the Applicant's property and so therefore the dispute is between the owners of the two properties concerned. The Second Respondent then requests that CSOS orders that the First Respondent allows access to its property to investigate the cause of the damage. This response by the Second Respondent was in an email to CSOS dated 18 November 2020. In response to a request from the adjudicator for a copy of the arbitration award in order to establish its relevance to this adjudication, the Third Respondent advised that no copy was available and instead furnished copies of the minutes of the meetings of the Third Respondent tracking the developments around the arbitration proceedings. Such minutes do not assist in determining how the issues were considered by the arbitrator, but it does reveal that the arbitration proceedings took place in the absence of the First Respondent, as it failed to attend the hearing.

**Relief sought by the Second Respondent:**

24. Although the Second Respondent is of the view that the dispute should be limited to the Applicant and the First Respondent, it has requested that the First Respondent be ordered to allow access to its property to investigate the cause of the seepage damage.

### **EVALUATION & FINDING**

25. This matter has played itself out over a period of more than 20 years where the problem has endured unabated and continued to trouble the parties involved. It has stretched over two legal regimes in the form of the Sectional Titles Act and the Sectional Titles Schemes Management Act during that period with no legal solution yet implemented. The common features of the problem have however remained the same:

- 25.1. The Applicant is in the invidious position that seepage damage to his property is none of his making. The location of his property, immediately below the property of the First Respondent, is literally cast in concrete and unalterable. The actions he can take on his own to improve the situation will be rendered undone in short shrift because a sustainable solution depends on the willingness of other parties to meet their obligations. He alluded to this by quoting the remarks of the contractor he engaged to assess the damage with the view that it be repaired so that he can sell his property;

- 25.2. The First Respondent's property seems to be part of the problem of seepage damage caused to the Applicant's property. The First Respondent however believes that the Second Respondent shared the responsibility to resolve the issues because of damp incursion from the common property adjacent to the relevant sections and consequently it has adopted the tactic of deflecting the primary responsibility for resolving the issue until a clear assessment of all the causes can be made by the experts. The First Respondent pursuant to the arbitration award failed to comply with the award as it related to it and also refused access to its property to establish the real cause, at the time;

- 25.3. It is not clear what the basis of the Second Respondent's historic involvement in the issue was. It became a party to the arbitration with the First Respondent but

with the exclusion of the Applicant. There are two bases on which liability for the Second Respondent would arise in the context of this case: first, if the source of the damp seepage is to be found in the common property in proximity to the Applicant's section. Such would be the outer walls housing the balcony attached to the First Respondent's section, and more specifically from the median line inside that wall to the outer surface thereof. This would include the ledge on that outer wall which the First Respondent has pointed out as a possible source of such damp seepage; second, the liability that arises from PMR31(2) as is considered in paragraph 29.

25.4. As can be seen, some doubt has emerged between the parties regarding the true origin of the damp seepage that has caused the damage to the Applicant's section. To establish the true origin of a water leak in a building such as this one that affects one of a number of properties stacked on top of each other is often difficult to pinpoint because it could be a series of cracks in the walls, slabs between sections and balconies that are interlinked from the top of the building to the bottom thereof. This difficulty is touched on by the comment in the SIKa report when it stated that they can't say with 100% certainty that the cause of the water leakage into the property of the Applicant is limited to the property of the First Respondent. The report points to the possibility that contributory leaks may emanate from the void. The result of such a natural phenomenon is that a series of interrelated cracks can act like a natural conduit carrying damp from floor to floor where a number of intermediate properties in that chain would at the same time be the victim of such damp transference and at the same time be the cause thereof as far as the property immediately below it is concerned. It is clear that such a situation can cause an endless blame game between the owners of the properties that have become part of such a linked chain of cracks. That situation may have occurred in the vertical dimension of this problem as far as the transference of damp from the top floor to the floor below in each component of the problem is concerned;

25.5. Initially it was not clear whether there was also in this matter a horizontal dimension in that the First Respondent kept on blaming the Second Respondent as the originating cause of the damp transference from the common property

down to the Applicant's property. An explanation was therefore sought in a situation which could occur if the First Respondent's balcony was deemed to be common property. Such a possibility was however discounted because the adjudicator obtained sheet no. 3 of the amending sectional plan of extension of scheme S G No. 274/1998 of Manhattan Place showing that the balcony forms part of section 186 and is therefore not common property but deemed to be part of its section. Should any leak from the balcony cause any water damage to the property of the Applicant, this would be the responsibility of the First Respondent entirely.

26. The Second Respondent's liability for seepage damage can only emanate from two sources:

26.1. The first is seepage from the common property. Such common property is usually marked as such on the relevant sectional plans but is also present in the form of the outside part of the outer walls of both sections 164 and 186. In this regard the First Respondent has reiterated its view that the ledge on the outside wall above the Applicant's section could be the cause of some of the seepage damage. The engineers' reports of 2005 & 2007 does refer to a water pipe that may drip onto this ledge that could seep through the wall or slab and erode the window on his lounge. So, this aspect should not be discounted;

26.2. The second is the statutory obligation placed on the Second Respondent to intervene when an owner of a section does not comply with his obligation to keep his section in a good state of repair and such failure threatens the integrity of the building or prejudices the property of other owners as contemplated in the prescribed management rule 31(2) promulgated under the STSMA. It is clearly a secondary obligation that arises only when the relevant owner fails to maintain his section in a good state of repair.

27. The second aspect to be considered regarding this problem is whether the legal framework offers any solution to limiting the liability of the respective parties involved in the spreading of the damp between floors of the same building. This aspect is best considered from the point of view of the innocent party. He bears

no responsibility for the seepage damage caused to his property. The first person who bears responsibility for such damage is the owner of the section directly above the victim of the damage. Does the fact that other sources outside his section may contribute to damp damage in the section below him diminish his obligation? Will the law allow such an owner to limit his liability to the owner below by blaming another source outside his section? The practical effect of such a position is that he would in such circumstance be entitled, if he assesses his property's contribution to the damp seepage at 70%, to take the necessary measures (if practically possible) to ensure that none of the 70% seepage, whether originating in his section or not, is allowed to flow to the section below. The practical difficulties of such a position are immediately apparent. The 30% seepage that is allowed to flow to the section below still uses his section as a conduit for such seepage. That means this owner is allowing his unit to perpetuate the prejudice suffered by or inflicted on the section below and would possibly amount to nuisance in terms of neighbour law<sup>9</sup>. Moreover, section 13(1)(e) specifically addresses this issue<sup>10</sup> Bear in mind that the statutory liability of any sectional title owner is limited by the median line. So, the top owner would be liable to keep his side of the median line in good repair. So too the owner below. He would have to repair the damage on his side of the median line but if he can prove that such damage originated on the other side of the line, he would be able to recover the repair costs from the owner above.

28. The legislative framework is to be found in the relevant subsections of section 13 of the STSMA, which reads as follows:

28.1. *13(1) An owner must -*

28.1.1. *(a) permit any person authorised in writing by the body corporate, during reasonable hours and on notice (except in case of emergency, when no notice is required), to enter his or her section or exclusive use area for the*

---

<sup>9</sup> Sectional Titles and other fragmented property schemes (second edition) G J Pienaar J G Horn, p. 262 – In the context of a sectional title community, the seepage of fluids from a neighbouring section or exclusive use area is an example of nuisance. See case law cited for this proposition in footnote 122 on p. 263.

<sup>10</sup> See paragraph 32.1.5

*purposes of inspecting it and maintaining, repairing or renewing pipes, wires, cables and ducts existing in the section and capable of being used in connection with the enjoyment of any other section or common property, or for the purpose of ensuring that this Act and the rules are being observed;*

- 28.1.2. *(b) forthwith carry out all work that may be ordered by any competent authority in respect of his or her section, other than such work as may be required for the benefit of the building generally, and pay all charges, expenses and assessments that may be payable in respect of his or her section;*
- 28.1.3. *(c) repair and maintain his or her section in a state of good repair and, in respect of an exclusive use area, keep it in a clean and neat condition;*
- 28.1.4. *(d) use and enjoy the common property in such a manner as not to interfere unreasonably with the use and enjoyment thereof by other owners or other persons lawfully on the premises;*
- 28.1.5. *(e) not use his or her section or exclusive use area, or permit it to be used, in a manner or for a purpose which may cause a nuisance to any occupier of a section.*

29. The implementation of whatever relief was obtained by relevant parties based on the obligations of parties as set out in paragraph 28 is to be found in prescribed management rule 31(2) ("PMR31(2)"), which reads as follows:

- 29.1. *PMR31. (2) If despite written demand by the body corporate, a member refuses or fails to —*
- 29.1.1. *(a) carry out work in respect of that member's section ordered by a competent authority as required by section 13(1)(b) of the Act; or*
- 29.1.2. *(b) repair or maintain a section owned by that member in a state of good repair as required by section 13(1)(c) of the Act; and that failure threatens*



*the stability of the common property, the safety of the building or otherwise materially prejudices the interests of the body corporate, its members or the occupiers of sections generally, the body corporate must remedy the member's failure and recover the reasonable cost of doing so from that member; provided that in the case of an emergency, no demand or notice need be given to the member concerned.*

30. It is clear from the statutory framework set out above that the –

30.1. Applicant, in the circumstances of this case has no obligations to the other parties in this dispute. His property has been damaged by the damp seepage that have been outlined above. However, even if he has no obligations to the other parties, he has to keep his own section in a state of good repair and repair the seepage damage in his own section to enable him to claim the cost of the repair work from the First Applicant<sup>11</sup>;

30.2. First Respondent has incurred the following statutory obligations:

30.2.1. It must allow any person authorised in writing by the body corporate, during reasonable hours and on notice (except in case of emergency, when no notice is required), to enter its section for the purposes of inspecting it and maintaining, repairing, or renewing pipes, wires, cables, and ducts existing in the section and capable of being used in connection with the enjoyment of any other section or common property, or for the purpose of ensuring that this Act and the rules are being observed;

30.2.2. It must repair and maintain its section in a state of good repair;

30.2.3. It must not use its section, or permit it to be used, in a manner or for a purpose which may cause a nuisance to any occupier of a section;

---

<sup>11</sup> Section 39(6)(b) – an order requiring the relevant person – (ii) to pay the Applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the Applicant.

- 30.2.4. Should the First Respondent fail to comply with such statutory obligations, it can be ordered by a competent authority to forthwith carry out all work in respect of its section, other than such work as may be required for the benefit of the building generally, and pay all charges, expenses and assessments that may be payable in respect of its section;
- 30.3. Second Respondent has incurred the following statutory obligations:
- 30.4. It must authorise a person to enter the First Respondent's property for the purposes of inspecting it and maintaining, repairing, or renewing pipes, wires, cables, and ducts existing in the section and capable of being used in connection with the enjoyment of any other section or common property, or for the purpose of ensuring that this Act and the rules are being observed;
- 30.5. It must, if a member fails to repair or maintain a section owned by that member in a state of good repair as required by section 13(1)(c) of the Act (STSMA); and that failure threatens the stability of the common property, the safety of the building or otherwise materially prejudices the interests of the body corporate, its members or the occupiers of sections generally, the body corporate must remedy the member's failure and recover the reasonable cost of doing so from that member; provided that in the case of an emergency, no demand or notice need be given to the member concerned.
31. Despite the arbitration and other litigation proceedings that have ensued in this matter there have been no positive outcome as far as the Applicant is concerned. The following aspects of the matter are still without solution:
- 31.1. The property of the Applicant is still largely in the same state as it was for the last 20 years and nothing improved as a result of the litigation undertaken by the First and Second Respondent at the end of that litigious period, nor as a result of the repairs that have been attempted by the Second Respondent;
- 31.2. There is no current report by a waterproofing expert that can determine the actual source of the damp seepage currently which is causing the seepage

damage to the ceiling of the Applicant's property, nor the lounge windows thereof. The reports available from waterproofing experts are not up to date and would therefore not be reliable in guiding the assessment of contractors to determine the nature and extent of the work required to remedy the problems, nor in addressing some of the concerns of the parties;

- 31.3. As a result of the lack of current expert advice regarding the cause and the nature of the damp seepage there is no current assessment of the work required and the cost of such work in order to remedy such causes;
- 31.4. There is very little goodwill between the parties that would assist in solving the problem. In fact, the main feature of the history of any efforts to cobble together a solution has foundered on the reluctance of the First Respondent in cooperating with such efforts, ostensibly because the ledge adhering above the Applicant's section to the outer wall may not have been properly considered in determining the cause of the seepage damage in the Applicant's section. In any event, the First Respondent has tendered, in his response to the Application, to obtain the necessary assessments of the damp seepage but did not furnish any such assessments by the completion of this adjudication. It could hardly now refuse whatever steps may be required to achieve that very purpose.
- 31.5. It would serve no purpose to examine the history of this dispute to assess how the various efforts to deal with this matter may have ameliorated the effect of the damp seepage on the property of the Applicant's property or may have exacerbated the situation. This adjudicator does not have enough expert evidence to make such an assessment. From the point of view of the Applicant it does not matter whether the alleged attempts of the Second Respondent to repair the waterproofing in the top property contributed to or retarded the seepage damage to his section that he has suffered. Should such evidence emerge, it would be a matter to be settled between the First and Second Respondent which should not affect the position of the Applicant in this adjudication.

32. The Second Respondent is the only party of the parties involved in this dispute on which a coercive power has been conferred by the legislature in that it –
- 32.1. can demand entry to any section *for the purpose of ensuring that this Act and the rules are being observed;*<sup>12</sup>
- 32.2. can take over the liability of a member who has failed to carry out the work in respect of its section ordered by a competent authority;<sup>13</sup> and
- 32.3. bears the overall responsibility to *repair or maintain a section owned by that member in a state of good repair as required by section 13(1)(c) of the Act; and that failure threatens the stability of the common property, the safety of the building or otherwise materially prejudices the interests of the body corporate, its members or the occupiers of sections generally, the body corporate must remedy the member's failure and recover the reasonable cost of doing so from that member; provided that in the case of an emergency, no demand or notice need be given to the member concerned*<sup>14</sup>.
- 32.4. In the context of the history of this matter and because the legislature has seen fit to empower the Second Respondent to ensure that the stability of the common property, the safety of the building and the interests of the members of the Body Corporate are not threatened by the failure of a member to comply with its obligations to keep its section in a good state of repair in order to safeguard the interests of the other members, the Second Respondent is the obvious entity in the scheme of things to be tasked with the controlling role of coordinating the various tasks to be performed to resolve this issue as set out in paragraph 33. Moreover, such powers, having already been vested in the Second Respondent, would obviate, in the absence of compliance, that any of the parties have to approach CSOS again.

---

<sup>12</sup> Section 13(1)(a) of the STSMA.

<sup>13</sup> PMR31(2)(a) of the prescribed Management Rules promulgated in terms of the Regulation of the STSMA.

<sup>14</sup> PMR31(b) of the prescribed Management Rules promulgated in terms of the Regulation of the STSMA.

33. The better approach would be for the following actions to be taken which is underscored by the relevant legislative framework set out above:
- 33.1. The Second Respondent should obtain the services of at least three experienced waterproofing experts and submit that list to the Applicant and the First Respondent to agree to select one expert that would inspect the First Respondent's section and such of the common property above and adjacent to the Applicant's property, including the ledge, that may have contributed to the damp seepage concerned and to deliver a report of the most probable cause of the damp seepage causing the damage to the Applicant's section and the remedial work recommended to repair such damage. Should the parties failed to agree on one expert, the Second Respondent shall select an expert of its own choice. The Second Respondent shall then authorise such an expert in writing to inspect the First Respondent's property and the relevant common property to assess the cause of the damp seepage that has resulted in the damage to the Applicant's section and on its findings and the recommended repairs required to remedy such cause and seepage damage wherever it may have occurred;
- 33.2. Both the Applicant and the First Respondent shall cooperate with the Second Respondent and the nominated waterproofing expert to enable the latter to produce a report as contemplated. Both parties must also commit to accepting the recommendations by such contractor. Such commitment will be signified upon agreeing to the same contractor, or failing that, their agreement that the Second Respondent selecting and nominating the waterproofing expert will automatically signify their commitment to be bound to the recommendations of the nominated waterproofing expert;
- 33.3. Once the report is available, the Second Respondent shall produce a list of three reputable contractors to submit their respective quotations to the Second Respondent to have the recommendations by the nominated waterproofing expert implemented. Should the Second Respondent be satisfied that the nominated waterproofing expert possesses the capacity to do the repair work itself required by its own recommendations, the Second Respondent may, in its own discretion, include such nominated expert on its list of three contractors.

The Second Respondent shall submit its list of contractors and their respective quotations to the Applicant and the First Respondent to select one contractor, failing which the Second Respondent shall select a contractor to do the repair work recommended by the nominated waterproofing expert.

33.4. The Second Respondent should then employ the nominated contractor on suitable terms to complete the remedial work recommended by the nominated waterproofing expert in its report to the Second Respondent setting a reasonable time commensurate with best practice in the service industry for completion of the remedial work. When the work has been completed to the satisfaction of the Second Respondent, the Second Respondent shall pay the cost of all the repairs to the nominated contractor and allocate such cost of repairs in proportion to the premises to which the source of the seepage damage was attributed by the nominated waterproofing experts.

33.5. The Third Respondent<sup>15</sup> should then raise special levies<sup>16</sup> for the recovery of such repair costs as follows:

33.5.1. A general special levy to cover the costs attributable to such repairs to the common property as may have constituted the cause of such seepage damage of the Applicant's section as assessed by the nominated waterproofing expert. The amount in respect of such general special levy shall be adjusted to exclude the proportion thereof that would under normal circumstances be payable by the Applicant; and

33.5.2. A special levy on the First Respondent to –

---

<sup>15</sup> Section 3(3) of the STSMA.

<sup>16</sup> The passing of a resolution by trustees to raise a special levy to recover the costs of repairs converts such charges from ordinary expenses to contributions enabling a body corporate to levy such amounts on its members. It also enables a body corporate to comply with the provisions of PMR25(5), which reads as follows: *The body corporate must not debit a member's account with any amount that is not a contribution, or a charge levied in terms of the Act or these rules without the member's consent or the authority of a judgment or order by a judge, adjudicator, or arbitrator.* This route is best advised in the circumstances as this adjudicator cannot order such payments as the amounts thereof have not yet been determined.

- 33.5.2.1. cover the costs as may be attributable to the repairs to its section required to terminate the damp seepage causing the seepage damage to the Applicant's section; and
- 33.5.2.2. cover the costs attributable to the repairs to the Applicant's section regarding the seepage damage caused by the damp seepage emanating from the First Respondent's section.<sup>17</sup>

## **COSTS**

33. No order as to costs is made.

## **ADJUDICATION ORDER**

34. The following orders are made in terms of section 39(6)(a), section 39(6)(b), section 54(2) and section 54(3) of the CSOS Act respectively to the extent applicable to the orders below:
  - 34.1. The Second Respondent is ordered to –
    - 34.1.1. forthwith obtain the services of at least three experienced waterproofing experts and submit that list to the Applicant and the First Respondent to agree to select one expert that would inspect the First Respondent's section and such of the common property above and adjacent to the Applicant's property, including the ledge, that may have contributed to the damp seepage concerned and to deliver a report as to the most probable cause of the damp seepage causing the damage to the Applicant's section and the remedial work recommended to repair such damage. Should the parties failed to agree on one expert, the Second Respondent shall select an expert of its own choice. The Second Respondent shall then authorise such an

---

<sup>17</sup> See footnote 16, but also section 39(6)(b)(ii) of the CSOS Act, which reads as follows: *an order requiring the relevant person – (ii) to pay the Applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the Applicant.* In the circumstances of this case a more circuitous route is required.

expert in writing to inspect the First Respondent's property and the relevant common property as well as the Applicant's section to assess the cause of the damp seepage that has resulted in the damage to the Applicant's section and the recommended repairs required;

34.1.2. ,once the report is available, the Second Respondent is ordered to produce a list of three reputable contractors to submit their respective quotations to the Second Respondent to have the recommendations by the nominated waterproofing expert implemented. Should the Second Respondent be satisfied that the nominated waterproofing expert possesses the capacity to do the repair work itself required by its own recommendations, the Second Respondent may, in its own discretion, include such nominated expert on its list of three contractors. The Second Respondent shall submit its list of contractors and their respective quotations to the Applicant and the First Respondent to select one contractor, failing which the Second Respondent shall select a contractor to do the repair work recommended by the nominated expert.

34.2. Pursuant to the order made in paragraph 34.1.1 and 34.1.2 respectively the Applicant and the First Respondent is ordered to cooperate -

34.2.1. with the Second Respondent and the nominated waterproofing expert by allowing access to their respective properties to enable the latter to produce a report as contemplated. Both parties shall commit to accepting the recommendations by such waterproofing expert. Such commitment shall be deemed to have been signified upon agreeing to the same waterproofing expert, or failing that, their agreement that the Second Respondent select the waterproofing expert shall automatically signify their commitment to be bound to the recommendations of the nominated expert;

34.2.2. with the Second Respondent and the nominated contractor to enable the latter to do the repairs recommended by the waterproofing expert. Both parties shall commit to accepting the completed repair work as approved by the Second Respondent. Such commitment shall be deemed to have been



signified upon agreeing to the same contractor, or failing that, their agreement that the Second Respondent select the contractor shall automatically signify their commitment to be bound thereto.

- 34.3. The Third Respondent, on behalf of the Second Respondent, is authorised to approve the repairs performed by the nominated contractor and such approval shall constitute final acceptance thereof to be in good order and more specifically authority to pay such reasonable charges as may have been agreed with the nominated charges. Such approval shall also bound the Applicant and the First Respondent to such acceptance.
- 34.4. The First Respondent is ordered to allow the waterproofing expert and contractor respectively after being nominated, appointed, and authorised in writing by the Second Respondent entry into its property, section 186 Manhattan Place, during reasonable business hours for the duration of the time required by the nominated waterproofing expert to determine the source of the damp seepage in section 186 Manhattan Place that caused the seepage damage to the Applicant's property, section 164 Manhattan Place, and for the duration of the time required by the nominated contractor to do the remedial work recommended therefor.
- 34.5. The Second Respondent is authorised to rely on the description of the process of selecting the waterproofing expert and contractor set out in paragraph 33 and ensuing relevant subparagraphs thereof for further clarification.
- 34.6. The Third Respondent<sup>18</sup> is ordered then to raise a special levy<sup>19</sup> for the recovery of such expenses as follows:

---

<sup>18</sup> Section 3(3) of the STSMA.

<sup>19</sup> The passing of a resolution by the trustees to raise the special levy to recover the costs of repair converts such charges from ordinary expenses to contributions enabling the body corporate to levy such amounts on its members. It also enables to the body corporate to comply with the provisions of PMR25(5), which reads as follows: *The body corporate must not debit a member's account with any amount that is not a contribution, or a charge levied in terms of the Act or these rules without the member's consent or the authority of a judgment or order by a judge, adjudicator, or arbitrator.* This route is best advised in the circumstances as this adjudicator cannot order such payments as the amounts thereof have not yet been determined.

- 34.6.1. A general special levy to cover the costs associated with the repairs to the common property which constituted the cause of such seepage damage of the Applicant's section as assessed by the nominated waterproofing expert and such costs as are associated with repairs to the Applicant's property regarding the damp seepage emanating from the common property as assessed by the nominated waterproofing expert as has caused the seepage damage to the Applicant's property. The general special levy shall be adjusted to exclude the proportion thereof that would under normal circumstances be payable by the Applicant; and
- 34.6.2. A special levy on the First Respondent to –
- 34.6.2.1. cover the cost associated with repairs to his section required to terminate the damp seepage that have caused the seepage damage to the Applicant's section; and
- 34.6.2.2. cover the cost associated with the repairs to the Applicant's section regarding the seepage damage caused by the damp seepage emanating from the First Respondent's section.
- 34.7. The First Respondent is ordered to pay the special levy raised by the Third Respondent in terms of paragraph 34.6 to the First Respondent within the time period allowed for such payment.
- 34.8. The relief sought by the Applicant set out in paragraph 7.5 is refused for want of jurisdiction.

## **RIGHT OF APPEAL**

35. Section 57 of the CSOS Act, provides for the right of appeal-

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

- (2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.
- (3) A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.

**DATED AT CAPE TOWN ON      OCTOBER 2021.**

**ADJUDICATOR**

**W T DU TOIT**

## **CSOS ADMINISTRATIVE CHECKLIST**

- Relief applied for in terms of the CSOS Act: Section 39(6)(a) & section 39(6)(b)  
– in respect of works pertaining to private areas and common areas
  - Dates Adjudication conducted: 16 September to 7 October 2021.
  - Name of the Adjudicator: W T du Toit
13. Order: See order above in par. 34
- Circulate:
  - Authority: Section 13 and PMR31(2) of STSMA.
  - Legislative Provisions: n/a
  - Quality Assured by & date:
  - Date issued (signed)
  - Issue or topic - damp seepage between sections.

- Date sent to parties:
- Enforcement Notice issued