



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CIRCUIT LOCAL DIVISION, GEORGE]**

Case no. 19662/18

In the matter between:

VERVOER NV DE NYS

Applicant

(Registration no. 2016/481691/10

Incorporated in Belgium)

and

ADV GPC DE KOCK N.O

First Respondent

COMMUNITY SCHEMES OMBUD SERVICE

Second Respondent

THE HILL HOUSE BODY CORPORATE

Third Respondent

DARON QUINTON SMIT

Fourth Respondent

Heard: 28 November 2018

JUDGMENT DELIVERED ON 18 DECEMBER 2018

SHER, J:

1. This is an application for an Order staying the execution of a so-called 'adjudication order' which was made by the first respondent herein on 2 October

2018 in terms of the provisions¹ of the Community Schemes Ombud Service Act,² pending the outcome of an appeal which was lodged in respect of part thereof.

2. The Act³ introduced a dispute resolution service referred to as a 'Community Schemes Ombud Service' for the resolution of disputes between persons who have a material interest in regard to the administration of any 'community scheme'⁴ which for the purposes of this matter includes sectional title development schemes such as the one known as 'Hill House', which is administered by the third respondent.
3. The application is opposed by third and fourth respondents on the limited grounds⁵ that this Court allegedly lacks jurisdiction to grant the Order sought and that it is not one which the Court is competent to make in terms of the provisions of s 57(3) of the Act.

The factual background

4. In September 2016 the applicant acquired ownership of sections 13, 21 and 26 in the Hill House scheme, together with an undivided share in the common property (being Erf 43 Plettenberg Bay and the buildings situated thereon), in accordance with its *pro rata* share thereof, as per its participation quota.
5. The land on which the scheme is located is situated in Main Road, Plettenberg Bay in an area which in terms of the applicable municipal zoning and town planning scheme is zoned for 'business use'. According to the Bitou Municipality this allows for the property to be used 'for all manner of businesses'(sic). Given the zoning the Hill House scheme is one which allows for so-called 'mixed' use ie both residential and commercial use. Consequently, sectional units on the

¹ To wit ss 39(2)(a) and (d).

² Act 9 of 2011.

³ Which came into operation together with, and on the same date as, the Sectional Titles Schemes Management Act 8 of 2011.

⁴ Defined in s 1 as any scheme or arrangement in terms of which there is shared use of, and responsibility for, parts of land and buildings.

⁵ A complaint that the deponent to the founding affidavit lacked authority to depose thereto was abandoned and not proceeded with at the hearing of the matter.

ground floor are being used for a variety of business purposes, whilst units on the floors above the ground floor are used as residences.

6. Shortly after purchasing its units the applicant decided to open a restaurant in section 26. It originally envisaged a Belgian beerhall themed facility but after considering numerous objections which were lodged by the Hill House body corporate and its members it revised its concept to a more conventional eatery.
7. After obtaining all necessary municipal approvals and a liquor licence the restaurant opened its doors on 1 January 2018. Some 4 months later, on 19 April the applicant received a notice in terms of the Act⁶ informing it that fourth respondent, who is the owner of a section in Hill House in which he lives, had made application for the resolution of a dispute which he had lodged in terms of Act 9 of 2011, in relation to the operation of the restaurant, which he alleged was being conducted in a manner which constituted a nuisance to owners of units in the scheme. After an unsuccessful conciliation process the matter proceeded to adjudication before the first respondent, who was appointed by the Ombud (second respondent) to adjudicate the matter. Pursuant to a hearing which was held, on 2 October 2018 first respondent made an order⁷ directing the applicant to remove all water and gas pipes and gas bottles which had been installed on the common property (in order to service the restaurant) within 14 days, and in the event that the restaurant was thereafter still operational, directing the applicant to ensure that its service ended daily at 17h00 and that it closed its doors by 18h00, in order to prevent the 'creation of a nuisance' (sic). The directive to remove the water and gas installations from the common property was based on a finding that the applicant had failed to obtain the necessary prior consent for the installation from the owners of units in the scheme.
8. On 29 October 2018 the applicant lodged an appeal (with the Registrar of this Court in George), against the second part of the order ie the directive in regard to daily termination of service and closure of the restaurant. It did not lodge an

⁶ S 43.

⁷ In terms of s 39(2)(a) and (d) of the Act.

appeal in respect of the directive that it was to remove all water and gas installations from the common property. Simultaneously therewith it sought an undertaking from third and fourth respondent that execution of the entire adjudication order would be stayed in its entirety, pending the appeal, but the respondents were not willing to accede thereto.

Jurisdiction

9. Jurisdiction is the power or 'competence' which a court has to hear and determine a dispute, and to give effect to any judgment or order it may make pursuant thereto. Where jurisdiction is placed in issue in relation to the *subject matter* of a dispute, whether a court is competent to adjudicate it is determined by the nature of the proceedings and the relief sought⁸ therein. It is thus determined on the basis of the pleadings⁹ from which the court must construe what the essence or basis is of the legal issues which require resolution.¹⁰
10. Insofar as the court's power or competence may be challenged in relation to the *parties* before it, the Superior Courts Act¹¹ provides that a division of the High Court shall have jurisdiction over all persons residing or being within its (statutorily defined) territorial area of jurisdiction.¹² In addition, the Court will also have incidental jurisdiction over any person who is outside of its territorial area of jurisdiction where such person is joined as a party to any cause in relation to which the Court has jurisdiction.¹³
11. The respondents contend that this Court lacks jurisdiction on a number of grounds. These pertain both to the subject matter of the dispute in the appeal, as well as to the parties before the Court.

⁸ *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1063F; *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 (6) SA 329 (SCA) at para [6].

⁹ *Chirwa v Transnet* 2008 (4) SA 367 (CC) at 425E.

¹⁰ *Gcaba v Minister of Safety & Security* 2010 (1) SA 238 (CC) at 263C.

¹¹ Act 10 of 2013.

¹² S 21(1).

¹³ S 21(2).

12. Although it is common cause that both third and fourth respondent as well as the immovable property of which section 26 forms part are physically located in Plettenberg Bay, which falls within the territorial area of jurisdiction of this Court,¹⁴ the respondents claim that because the first respondent is an adjudicator who resides and works in Cape Town, and was engaged by the second respondent from its regional office in Cape Town, which falls 'outside' of this Court's area of territorial jurisdiction as a Circuit Court, and the appeal concerns proceedings which were held before him and in relation to which he made a decision and an order pursuant thereto in Cape Town, this Court, as a Circuit Court sitting in George, cannot entertain the matter. However during argument the respondents conceded that the fact that the second respondent is a national public entity¹⁵ which has a national head office in Sandton, Johannesburg and regional offices in certain provinces, including the Western Cape, and that it makes use of adjudicators from Cape Town which it appoints for the purpose of resolving disputes (and who might make determinations in Cape Town), will not necessarily serve as a bar to it being cited and brought before this Court, provided the Court has jurisdiction over the person of certain of the other parties before it, and the cause which is before it.
13. In seeking to develop the non-jurisdiction argument further respondent's counsel contended that as the appeal against first respondent's adjudication order was lodged with the Registrar of this Court, whilst it was sitting on Circuit in George, it was defective as this Court could not hear the appeal because it did not have the statutory power to hear appeals, and it was only the Western Cape division sitting in Cape Town which could do so. Thus, it was submitted this Court had no power to interdict the operation of the adjudication order pending the appeal.

¹⁴ Ordinarily a Court in whose area of jurisdiction an immovable property is situated (as the *forum rei sitae*) has the jurisdiction to deal with any legal action in connection with that property, including any ancillary claim or proceeding in relation thereto.

¹⁵ In terms of s 3 of Act 9 of 2011 it is an entity listed in terms of the Public Finance Management Act and its executive authority is vested in the Minister of Human Settlements.

14. The Superior Courts Act provides that a division of the High Court has the power to hear and determine appeals¹⁶ and reviews¹⁷ from all magistrates' courts which fall within its area of territorial jurisdiction. The respondents point out that the Superior Courts Act further provides¹⁸ that, except where it is in terms of any law required or permitted to be otherwise, for the hearing of any appeal a court of a division must be constituted before 2 judges, whereas in contrast to this the Act provides that a circuit court of a division must be presided over by a single judge.¹⁹
15. In the light of these provisions Erasmus²⁰ is of the view that inasmuch as the Act does not provide for a circuit court to be constituted before more than one judge, in discharging its duties it therefore cannot hear appeals or any other cases where a *quorum* of 2 or more judges is required. However, in *Nedbank v Norris*²¹ Goosen J held that a Circuit Court (in casu the Port Elizabeth local division of the Eastern Cape division) constituted a court of a Division, within the meaning of s 14 of the Act, and as such it exercised the authority of the Division, irrespective of where it sat, and provided it was constituted in accordance with the numbers required, it could hear appeals or reviews at its local seat.
16. In an attempt to further rebut this part of the respondents' argument the applicant points out that the appeal which it has lodged is not an appeal *strictu sensu* in the traditional sense of the word in terms of the Superior Courts Act and the Rules of Court, but a limited statutory right of 'appeal' on a point of law which is afforded to it in terms of the provisions of s 57 (3) of the Community Scheme Ombud Services Act.
17. It points out that in *The Trustees, Avenues Body Corporate v Shmaryahu & Ano*²² Binns-Ward J recently held²³ that such an appeal was not a civil appeal within the

¹⁶ S 21(1)(a).

¹⁷ S 21(1)(b).

¹⁸ In s 14(3).

¹⁹ S 7 (2).

²⁰ *Superior Court Practice* A2-10E.

²¹ 2016 (3) SA 568 (ECP)

²² 2018 (4) SA 566 (WCC).

meaning of the Superior Courts Act but was more in the nature of a review ie a hearing limited to determine, not whether the decision under 'appeal' was correct or not but simply whether the decision-maker had exercised his powers and discretion 'honestly and properly' in relation thereto. Consequently, it submitted that there was no statutory bar to a single judge hearing an appeal in terms of s 57(3) of Act 9 of 2011.

18. Although the Superior Courts Act does not contain a similar 2 judge provision in relation to the composition of a Court which entertains reviews, in practice these are also ordinarily heard by 2 judges,²⁴ save for certain reviews in criminal matters.²⁵ In the circumstances the submission that because a right of appeal in terms of s 57 of Act 9 of 2011 is really a right of review (and can therefore technically be heard by a single judge, and by extension therefore by a judge of the Western Cape Division whilst on circuit), does not avail the applicant.
19. The fact that the appeal was lodged with this Court, in George, whilst it was completing its Circuit, and not with the (Western Cape) Division in Cape Town, could well be said to be of no moment inasmuch as this Court is merely an extension of the Western Cape Division, exercising its powers on Circuit. As such, the appeal could well be considered to have been lodged with the Division before which it is to be heard, even though it was filed in George instead of Cape Town. However, in my view it is not necessary to make a finding on this aspect, or on whether this Court can be constituted to hear a review as a Circuit Court, as I believe that the respondents have misconceived the test which has to be applied in relation to the jurisdictional point.

²³ *Id* para [1], relying on the distinction made in *Tikly v Johannes* 1963 (2) SA 588 (T) at 590-591, between (i) an appeal in the wide sense, which allows for a complete rehearing and a fresh determination on the merits of the matter and (ii) an appeal in the 'ordinary strict' sense ie a re-hearing on the merits and a determination limited to whether the decision was right or wrong and (iii) a review ie a limited rehearing not as to whether the decision was correct or not but whether the decision-maker exercised his powers and discretion 'honestly and properly'.

²⁴ Cf *The Trustees, Avenues Body Corporate* which concerned an appeal in terms of s 57(1) of the Community Schemes Ombud Service Act, which was heard by two judges.

²⁵ Such as so-called 'automatic' reviews in terms of ss 302- 303 of the Criminal Procedure Act 51 of 1977, which are considered to be akin to a statutory right of appeal for unrepresented accused who are convicted and sentenced by magistrates of less than 7 years' experience to imprisonment exceeding 3 months or to fines in excess of R6000.

20. In this regard it is important to remember that as far as the subject matter of the proceedings which are before me is concerned, the pleadings and issues arising therefrom are phrased in interdict terminology. As the papers stand therefore the question which must be posed is whether this Court has the jurisdiction ie the power or competence, to grant the applicant an interdict, pending the appeal which it has lodged, irrespective of whether or not the appeal can and will be heard by this Court, on Circuit, or whether it will need to be heard in Cape Town by the division from which this Court has been despatched to exercise that Court's authority whilst on Circuit.²⁶
21. In terms of the Constitution²⁷ this Court has the inherent power to regulate its processes, and as such it is well-established law that it has the power to grant an Order staying proceedings in another matter, pending the determination of a material issue in such proceedings, before another forum.²⁸ In relation to interdict proceedings it has been held that a Court will have jurisdiction if the requirements for an interdict are satisfied by facts that exist within the territorial area of jurisdiction of the Court.²⁹ In my view, all the material facts necessary for consideration of whether or not an interdict should be granted, fall within the territorial area over which this Court has jurisdiction. In the first place the 'order' which is sought to be stayed is an adjudication order which if not stayed will need to be carried out in respect of immovable property which is situated in Plettenberg Bay, within the territorial area of jurisdiction of this Court, and in respect of which property the applicant, and third and fourth respondents (who are all 'resident' in the same jurisdictional area) have an interest, or rights. In the second place, the interdictory Order which is sought is one restraining the third respondent body corporate, which administers the Hill House scheme in Plettenberg Bay, from being allowed to execute the adjudication order, whereby certain water and gas installations on the common property of the scheme are to

²⁶ According to Erasmus n 20 while a Circuit Court is sitting it can exercise all the powers which the division in which area it was established can exercise.

²⁷ S 173.

²⁸ *Mokone v Tassos Properties CC* 2017(5) SA 456 (CC) at 475B-477F.

²⁹ *Zokufa v Compuscan (Credit Bureau)* 2011 (1) SA 272 (ECM) 282G-I.

be removed, and preventing it from compelling the restaurant which is operating from section 26 of the scheme, to terminate its service and to close by no later than 18h00 each day. To this end the relief which is sought is based on the essential averments that the applicant has a *prima facie* right (this is based on the statutory right of appeal it has and the developmental rights allegedly afforded to it in terms of the zoning scheme, in respect of which it alleges the first respondent erred in law), that it will suffer irreparable harm in the event the Order is not granted to it (because without such an Order its restaurant will effectively become commercially unviable and will have to close its doors permanently, as its principal source of income is derived from trading in the evenings), that the balance of convenience is in its favour (in this regard it points to the fact that the respondents will suffer minimal harm in the event that they are compelled to tolerate the restaurant being open at night until the appeal is heard, whereas in the event that the adjudication order is put into operation the applicant will suffer immeasurable financial prejudice), and finally, that it has no reasonable, alternative remedy available to it. Although the respondents dispute that the applicant has made out a proper case for an interdict, they do not have any real answer to the assertions which are made by the applicant in support of these elements, and in respect of these assertions the respondents' answer is largely a simple denial.

Conclusion

22. In the circumstances, based on the papers before me I am of the view that this Court has the necessary jurisdiction both in regard to the parties as well as in relation to the subject matter of the proceedings.
23. There is one final aspect that needs to be attended to. The respondents contend that, inasmuch as the applicant is only seeking to appeal against the second part of the adjudication order ie the directive pertaining to the restaurant's operating hours, it cannot obtain an order staying execution of the entire order. In this regard they point out that s 57(3) of Act 9 of 2011 provides that a person who appeals against an (adjudication) order which is made in terms of the Act may

also apply to the High Court to stay the operation of such order, to 'secure the effectiveness of the appeal'. The respondents contend that given this provision, the applicant cannot apply for an Order to stay something which it is not appealing.

24. The applicants have lost sight of the fact that the application for a stay has been made not only on the basis of the statutory power which the Court has in terms of s 57(3), but also on the basis of the power which the Court has at common law to interdict. In its founding affidavit the applicant made it very clear that it was seeking to rely on both, and as pointed out above, it dealt at some length with the requirements for an interdict in its papers. It avers that in the event that it succeeds on appeal and the directive that it is to close its restaurant daily by 18h00 is set aside, it will then be able to make application to the body corporate for permission to retain its gas and water installations on the common property, and were the Court not to come to its aid by making an interim Order staying the operation of the entire adjudication order, it could then be compelled to remove these installations, which would in effect result in it not being able to operate its restaurant at all. This would effectively emasculate its statutory right of appeal.
25. As far as costs are concerned, I am of the view that the appropriate Order to make is that these should stand over for determination at the appeal. It will be the appeal court which will be in the best position to determine whether these proceedings were warranted or not, after it has duly considered all the relevant circumstances.
26. I make the following Order:
 - 26.1 Execution of the adjudication order which was made by the first respondent on 2 October 2018 in terms of ss 39(2)(a) and (d) of the Community Schemes Ombud Service Act 9 of 2011, shall be stayed, pending the outcome of the appeal which the applicant has launched in respect thereof in terms of s 57(1) of the Act.

26.2 The costs of this application shall stand over for determination at the hearing of the appeal.

SHER J

Appearances:

Applicant's counsel: AF Schmidt

Applicant's attorneys: Jordaan & Smith Attorneys
(Plettenberg Bay)

Third and Fourth Respondents' counsel: DL Van Der Merwe

Third and Fourth Respondents' attorneys: HDRS Attorneys Inc
(Plettenberg Bay)