

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A3025/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

26 April 2023
DATE


SIGNATURE

In the matter between:

MEIR GONEN

Appellant

and

**TRUSTEES FOR THE TIME BEING OF THE MELVILLE
BODY CORPORATE**

First Respondent

**THE BODY CORPORATE OF THE MELVILLE
(SS 979/2005)**

Second Respondent

THE COMMUNITY SCHEMES OMBUD SERVICE (CSOS)

Third Respondent

**THE COMMUNITY SCHEMES OMBUD SERVICE
ADJUDICATOR, DR MOHAMED ALLI CHICKTAY**

Fourth Respondent

JUDGMENT

Neutral Citation: *Meir Gonen v Trustees For The Time Being Of The Melville
Body Corporate and Others (Case no: A3025/2022) [2023]
ZAGPJHC 363 (26 April 2023)*

CRUTCHFIELD J:

[1] The appellant appealed in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 ('the CSOS Act'), against the order of the fourth respondent.

[2] The latter order provided that a security protocol implemented at The Melville sectional title scheme SS979/2005 ('The Melville'), was valid, enforceable and, in effect, not a conduct rule as envisaged in s10 of the Sectional Title Schemes Management Act 8 of 2011 ('the Management Act'), as alleged by the appellant.

[3] The appellant, Meir Gonen, a resident of The Melville, sought the setting aside of the fourth respondent's order dated 27 December 2021, delivered to the appellant on 1 February 2022 (the 'order'), and the replacement thereof with an alternate order referred to herein.

[4] The first respondent, the Trustees for the time being of the Melville Body Corporate, ('the Trustees') opposed the appeal together with the second respondent, the Body Corporate of The Melville (SS979/2005) ('the Body Corporate').

[5] The Community Schemes Ombud Service ('CSOS'), was cited as the third respondent and the Community Schemes Ombud Service Adjudicator, Dr Mohamed Alli Chicktay, as the fourth respondent ('the Adjudicator'). The third and fourth respondents abided the decision of this Court and did not participate in the appeal. Accordingly, the first and second respondents jointly are referred to as 'the respondents.'

[6] The appeal is a narrow appeal,¹ limited to issues of law,² the facts before the Adjudicator being accepted by this Court.

[7] The question before us is whether the Adjudicator's finding that the security protocol was not a conduct rule as envisaged in s10 of the Management Act and alleged by the appellant, was correct or not on the facts as they appeared before the Adjudicator.

[8] In the event that the security protocol was a conduct rule, then the appellant argued that the security protocol was not correctly passed in terms of s10 of the Management Act and was invalid on that basis.

[9] The appellant contended that a related issue, not raised by the appellant before the Adjudicator, should be dealt with by this Court notwithstanding that it was raised for the first time during the course of this appeal. The related issue was whether rule 9(e) of The Melville House Rules 2011 ('rule 9(e)'), was valid or not as alleged by the appellant. Rule 9(e) was the mechanism by means of which the Trustees adopted and implemented the security protocol. The appellant argued that the power that rule 9(e) purported to confer on the Body Corporate and, according to the Trustees, on the Trustees, was itself invalid.

[10] As to whether the point could be raised on appeal for the first time, the appellant referred to *Donelly v Barclays National Bank Ltd*.³

[11] The respondents argued that the appellant did not raise the issue before the Adjudicator and thus was not permitted to deal with it on appeal for the first time. Furthermore, and in any event, that clause 9(e) was valid and reasonable.

¹ *Stenersen & Tulleken Administration CC v Linton Body Corporate* 2020 (1) SA 651 (GJ).

² S 57 of the CSOS Act.

³ *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W).

[12] A further related issue, claimed by the appellant in terms of the alternate relief and in the event of the Adjudicator finding that the security protocol was not a conduct rule, was the appellant's contention that rule 9(e) was invalid because it was unreasonable. The Adjudicator did not deal with this issue nor with the facts underlying it.

[13] Accordingly, the appellant sought that the alternate relief be considered by this Court in the event of a finding against the appellant.

[14] It was common cause between the parties that the Trustees unilaterally adopted and implemented the security protocol, albeit only in relation to food deliveries to occupiers of the Melville, in order to heighten security at the Melville. The Body Corporate subsequently approved the security protocol by a simple majority vote of 15 of the 24 units at The Melville represented at the meeting, all 15 of which voted in favour of the security protocol at a special general meeting on 17 June 2021. ('the security protocol').

[15] The CSOS Act provides a statutory mechanism by means of which residents of community schemes including sectional title schemes may resolve disputes without resorting to more formal proceedings including court proceedings. The dispute resolution process before the CSOS Adjudicator is an informal inquisitorial process. An adjudicator is "empowered to investigate, adjudicate and issue an adjudication order."⁴ An adjudicator is empowered with a wide mandate and obliged to consider all relevant evidence.⁵

[16] Notwithstanding the nature of the adjudication process, the nature and ambit of the parties' dispute and the relief claimed must be defined with reasonable clarity.⁶

⁴ Sections 50, 51, 53, 54 and 55 of the CSOS Act.

⁵ Section 50 of the CSOS Act.

⁶ *The Rapallo Body Corporate v Dhlamini N.O. and Others* [2020] ZAWCHC 97 paras 15,17 and 18 ('Rapallo').

[17] The Adjudicator determined the issues in this matter with reference to the parties' application and without hearing evidence or oral submissions from the parties.

[18] The Adjudicator concluded that:

"(By adopting the security protocol) (t)here was thus no amendment to the conduct rules. The (security protocol) measures were adopted by the Trustees and by the owners at a special general meeting. The Respondents were merely adopting security measures in accordance with section 9 of its rules. Since it was not an amendment to the conduct rules there was no need for it to be approved by CSOS.

[19] Accordingly, the Adjudicator dismissed the appellant's application. The Adjudicator did not grant a costs order as the respondents acted "within the law."

[20] The security protocol provides as follows:

"All delivery personnel are to report to the guard on duty via the intercom system. The guard on duty will then endeavour to contact the relevant resident by telephone to meet the delivery personnel at the gate to collect the package. If the package is of such a nature that it may not reasonably be collected at the gate by the resident and requires delivery to the resident's unit by the delivery personnel, the delivery personnel will only be granted access to the complex if accompanied by the relevant resident. This will require that the relevant resident meet the delivery personnel at the gate and escort him/her to the resident's unit. The resident is then responsible to escort the delivery personnel back to the gate once the package has been delivered to his/her unit."

[21] The Trustees and subsequently the Body Corporate adopted and implemented the security protocol in terms of rule 9(e) of "The Melville House Rules 2011"⁷ ('the Melville rules'). Rule 9(e) provides the following:

"All security procedures, which may be instituted from time to time, including any operating procedures agreed to between the Body Corporate and any security company charged with rendering security services at the complex shall be abided by."⁸

[22] The statutory rules governing sectional title schemes fall into either management rules or conduct rules.⁹ The purpose, nature and scope of the conduct rules can be

⁷ Caselines 005-22.

⁸ Caselines 005-23.

⁹ S10 of the Management Act.

gleaned from the statutorily prescribed conduct rules,¹⁰ which serve to regulate the conduct of the occupiers of the relevant scheme.

[23] The Melville rules serve to regulate the conduct of the occupiers of The Melville and are, in effect, conduct rules as envisaged in s10 of the Management Act. The respondents accepted that The Melville rules are conduct rules.

[24] The appellant contended that the security protocol regulated the method and manner of occupiers receiving deliveries at The Melville. The security protocol requires occupiers of The Melville to meet delivery personnel at the main gate. If necessary, the occupier must escort the delivery personnel to the occupier's unit for purposes of offloading the delivery and thereafter escort the delivery personnel back to the gate.

[25] Accordingly, the appellant contended that the security protocol fell within the definition of a conduct rule as envisaged in s10 of the Management Act and that the respondents adopted and implemented it in a manner that conflicted with the Management Act.

[26] The respondents' adoption and implementation of the security protocol utilising rule 9(e), circumvented s10(2)(b) of the Management Act in that the respondents created a conduct rule alternatively amended The Melville rules as they existed, by disguising the security protocol in terms of rule 9(e).

[27] Thus, the appellant contended that the respondents avoided submitting the security protocol, a new or amended conduct rule, to the Chief Ombud of CSOS. The respondents allegedly thereby evaded CSOS's scrutiny and the mechanisms utilised by CSOS to approve and certify a new or amended conduct rule.

¹⁰ Schedule 2 of the Regulations to the Management Act.

[28] The respondents allegedly avoided s10(2)(b) of the Management Act by utilising a simple majority vote at a special general meeting of the Body Corporate convened on 17 June 2021.

[29] The appellant argued that the respondents conduct was unlawful and ought to be set aside.

[30] The respondents contended that the purpose of the security protocol was to tighten security at The Melville, that the protocol was recommended by the resident security company and stood to be implemented in terms of rule 9(e).

[31] The respondents relied on s3 of the Management Act relating to the functions of bodies corporate, including that they control, manage and administer the common property for the benefit of all owners of a scheme.

[32] Security related matters in respect of The Melville fall within the control, management and administration of the common property for the benefit of all owners of a scheme.

[33] The respondents relied upon *Barzani 53 (Pty) Ltd v Body Corporate Whitfield Ridge*¹¹ in which Moorcroft AJ dealt with the importance of access control to a scheme.

[34] Whilst Moorcroft AJ was correct insofar as he emphasised the importance of access control into and out of a scheme and that it fell within a management function for purposes of that case, the matter does not appear to have dealt with the requirements of and regulation of conduct required by occupiers of a scheme in respect of access control.

¹¹ *Barzani 53 (Pty) Ltd v Body Corporate Whitfield Ridge* [2022] ZAGPJHC 146.

Barzani is thus distinguishable from the current issues before me and does not serve to assist the respondents.

[35] The respondents invoked s7 of the Management Act in respect of trustees of bodies corporate. Section 7(1) provides that the functions and powers of the body corporate must, subject to the provisions of the Management Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections or units in a scheme, be performed and exercised by the trustees of the body corporate holding office in terms of the rules.

[36] The respondents argued that the resolution passed at the special general meeting of the Body Corporate on 17 June 2021, constituted a restriction imposed or a direction given at a general meeting of the owners of The Melville and that the Trustees were obliged to implement and enforce the security protocol accordingly.

[37] I turn to consider the issues raised in the appeal.

[38] As stated afore, the respondents accepted that The Melville rules were conduct rules.

[39] Conduct rules, as their name implies, regulate the conduct of residents of a scheme. A perusal of the prescribed conduct rules¹² evidences that they provide what residents of a scheme may or may not do in respect of various aspects of community living, including in respect of rubbish, pets and maintaining the common area. The purpose of conduct rules is to promote harmonious communal living of residents in a scheme.

¹² Schedule 2 of the Regulations to the Management Act.

[40] Accordingly, conduct rules, including The Melville rules, regulate what residents in a scheme may and may not do.

[41] It is instructive to have regard to the existing The Melville rules in respect of access of visitors, contractors and the like into The Melville. Rule 9(b) of The Melville rules provides that all visitors and contractors, being persons attending at The Melville, are entitled to access The Melville subject to the relevant occupier of The Melville permitting the visitor or contractor to do so.

[42] The respondents acknowledged that deliveries and delivery personnel that are the subject of the security protocol, qualified as 'contractors' as envisaged in rule 9(b) of The Melville rules. Hence, as with contractors in terms of rule 9(b), the delivery personnel that are the subject of the security protocol, are otherwise entitled to access The Melville subject to the relevant occupier of The Melville permitting the delivery personnel to do so.

[43] Rule 9(b) continues to stand in The Melville rules notwithstanding the adoption and implementation of the security protocol. It is evident that rule 9(b), insofar as it relates to delivery personnel, contradicts the security protocol. In the event that the security protocol is to prevail over the enforcement of rule 9(b) in respect of delivery personnel, then rule 9(b) must be understood as being amended by the terms of the security protocol insofar as the security protocol regulates access and egress of delivery personnel *qua* contractors, into and out of The Melville.

[44] The reference to contractors in rule 9(b) permits a wider definition of contractors than merely deliveries and delivery personnel. Contractors such as builders, plumbers and the like would be included in the term contractors in rule 9(b).

[45] Rule 9(b) permits access by delivery personnel in express and unequivocal terms subject to the relevant occupier permitting the delivery personnel access to The Melville.

The security protocol, however, prohibits access to The Melville by delivery personnel unless certain restrictive and onerous conditions are complied with by the relevant occupier, without exception or mediation.

[46] The security protocol imposes a procedure that departs significantly from rule 9(b). In addition, the security protocol varies markedly not only from rule 9(b) but also from rule 9(i), rule 9(l), rule 11(b)(i) and rule 28, which provide for the access of visitors and contractors including workers and workmen more generally, to The Melville subject to access being granted by the relevant occupier.

[47] Furthermore, rule 23(a) permits the vehicles of visitors and contractors to be parked in demarcated visitor parking bays in The Melville. Rule 23(h) provides that motorbikes, trailers and motor vehicles, all vehicles commonly used by delivery personnel, are permitted entry into the scheme, without any exclusion in respect of contractors or delivery personnel.

[48] It is evident that the security protocol provides for a procedure in respect of deliveries and delivery personnel that departs significantly from multiple of the existing The Melville rules. This variance applies not only to the access of deliveries and delivery personnel to The Melville but also to the conduct required of occupiers, in order to accept deliveries made to them at The Melville.

[49] The security protocol requires the relevant occupier to exit their unit to meet the delivery personnel at the main gate, and if necessary, to escort the delivery personnel to the unit in order to offload the delivery at the unit. Thereafter, the occupier must escort the delivery personnel back to the main gate.

[50] The existing The Melville rules in respect of the manner in which delivery personnel, being contractors, gain access to The Melville is amended by way of the

security protocol. That amendment entails regulating the manner of access by delivery personnel such that the relevant occupier is obliged to adhere to onerous and restrictions conditions in order to accept their delivery.

[51] The respondents, in adopting and implementing the security protocol, created in substance, a new conduct rule alternatively amended the existing The Melville rules impacted by the security protocol referred to afore, in terms of the security protocol.

[52] The appellant's counsel conceded that the purpose of the security protocol was an attempt to improve the security regulating access into and within The Melville's premises. Notwithstanding, whilst that may be a commendable intention, it ought not to be used to disguise the fundamental character of the security protocol as a conduct rule and the manner in which such a rule should be legislated correctly and enforced by the respondents.

[53] Having found that the security protocol is substantively a conduct rule and that it is irrelevant that it was implemented in terms of rule 9(e) in order to improve security at The Melville, it follows that the finding of the Adjudicator was incorrect and stands to be set aside.

[54] The next issue is whether the security protocol, a conduct rule, was adopted and implemented in a valid manner.

[55] The Trustees initially adopted and implemented the security protocol in terms of rule 9(e). The latter provides that security procedures agreed to by and between the body corporate and any security company are to be abided by. It was common cause that the security protocol was proposed by the security company in an attempt to improve the

security of the scheme. I have found already that the purpose of the security protocol does not alter its true nature as a conduct rule.

[56] Section 7 of the Management Act provides for the functions and powers of trustees. They act on the decisions and directions of the body corporate subject to the provisions of the Management Act and the rules, and any restrictions given at a general meeting of the owners of sections or units in a scheme.¹³

[57] Accordingly, the Trustees had no power to unilaterally, absent a decision or direction of the Body Corporate in general meeting, to agree to the security protocol and to adopt, implement and enforce it in terms of s 10(2)(b) of the Management Act.

[58] The Trustees were not empowered to unilaterally adopt and implement the security protocol as they did.

[59] As to the respondents' argument that the unanimous adoption of the security protocol by all 15 units represented at the special general meeting on 17 June 2021, constituted a resolution of the Body Corporate in terms of s7(1) of the Management Act, that resolution did not suffice in the face of s10(2)(b) of the Management Act, to validly adopt and implement the security protocol. Nor did it permit the Trustees to depart from the requirements of validly introducing a new conduct rule or amending an existing conduct rule.

[60] The respondents' argument that the trustees were obliged to act on the resolution approving the security protocol was without merit as the respondents did not comply with s 10(2)(b) of the Management Act.

¹³ Section 7(1) of the Management Act.

[61] That section¹⁴ provides that subject to the approval of the Chief Ombud, the conduct rules of a scheme may be amended by a special resolution of a Body Corporate as prescribed.

[62] Special resolution is defined in terms of s1 of the Management Act as a resolution that is passed by 75% calculated both in value and in number, of the votes of the members of a body corporate who are represented at a general meeting, or, agreed to in writing by members of a body corporate holding at least 75% calculated both in value and in number of all the votes.

[63] The resolution was approved unanimously by the 15 units represented at the general meeting. However, the minutes of the meeting reflect that the meeting was not considering an amendment to a conduct rule (and by implication was not considering the adoption of a new conduct rule), and accordingly a special resolution was not up for consideration.

[64] Section 10(5) of the Management Act provides for the process of substituting, adding to, amending or repealing the management or conduct rules. It imposes certain obligations upon a body corporate to lodge a notification with the chief Ombud and that the latter examine the proposed substitution, addition, amendment or repeal referred to and must not approve it for filing unless satisfied that such variation is reasonable and appropriate to the scheme.¹⁵

[65] The respondents did not comply with the provisions of s10(2) and s10(5) of the Management Act and thus did not validly adopt and implement the security protocol.

¹⁴ Section 10(2)(b) of the Management Act.

¹⁵ Section 10(5)(b) of the Management Act.

[66] Accordingly, the security protocol is to be declared invalid and the Body Corporate required to approve and record a new scheme governance provision to remove the invalid security protocol, in terms of s 39(3)(c) of the CSOS Act.

[67] Turning to the appellant's argument in respect of rule 9(e), the appellant conceded that it did not raise the issue of rule 9(e) being unreasonable before the Adjudicator. As a result, the Adjudicator did not grant an order in respect of the unreasonableness or otherwise of rule 9(e) and there is no order, in terms of s 57(1) of the CSOS Act, in respect of the issue.

[68] In the circumstances, the jurisdictional facts necessary for this Court to determine whether rule 9(e) is unreasonable or not in terms of s57(1) of the CSOS Act, have not been met and this Court is not empowered to determine the issue.

[69] As to the costs of this appeal, there is no reason why the costs should not follow the outcome on the merits. In so far as the appellant sought an order in respect of the costs of the Adjudication, the matter was dealt with absent legal representation. Such legal costs as were incurred by the appellant, if any, will not have been wasted. Accordingly, I am not inclined to order costs of the Adjudication.

[70] In the circumstances, the following order will issue:

1. The appeal is upheld.
2. The adjudication order of the fourth respondent dated 27 December 2021 is set aside and replaced with the following order:

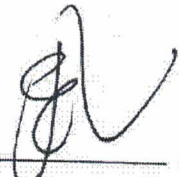
- 2.1. The security protocol approved by ordinary resolution of the second respondent at its special general meeting on 17 June 2021 is declared to be –
 - 2.1.1. A conduct rule as contemplated in the Sectional Titles Schemes Management Act 8 of 2011;
 - 2.1.2. Invalid in terms of section 39(3)(c) of the Community Schemes Ombud Services Act, 9 of 2011 (“CSOS Act”);
- 2.2. The second respondent is directed –
 - 2.2.1. to approve and record a new scheme governance provision to remove the security protocol;
 - 2.2.2. immediately to allow all deliveries and delivery personnel access to The Melville sectional title scheme, in accordance with the existing conduct rules of The Melville;
 - 2.2.3. to submit The Melville conduct rules to the Community Schemes Ombud in accordance with section 10(5)(a) of the Sectional Titles Scheme Management Act, 8 of 2011.
3. The first and second respondents are to pay, jointly and severally, the appellant’s party-and-party costs of this appeal.

4. The first and second respondents shall not recover a *pro rata* share of the contribution towards costs from the appellant.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG

I agree.



DLAMINI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **26 April 2023**.

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INSTRUCTED BY:

MJD Law Incorporated.

DATE OF THE HEARING:

16 August 2022.

DATE OF JUDGMENT:

26 April 2023.