

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO: 2127/2018

Date heard: 22 August 2019

Date delivered: 28 January 2020

In the matter between:

ELIZABETH MARY WARD

APPLICANT

and

**THE BODY CORPORATE OF
SAN PAULO SCHEME**

FIRST RESPONDENT

ADVOCATE DERICK BLOCK N.O.

SECOND RESPONDENT

**THE COMMUNITY SCHEMES
OMBUD SERVICES**

THIRD RESPONDENT

JUDGMENT

JAJI J:

INTRODUCTION

[1] This is an opposed application for an appeal in terms of section 57 of the CSOS Act which was brought by the applicant, a certain Elizabeth Mary ward,

against the ruling and order of the second respondent dated 16 February 2018. The applicant seeks an order in the following terms:

- (i) The late filing of the appeal against the ruling of the second respondent dated 16 February 2018 be condoned;
- (ii) That an order be granted that the ruling made by second respondent at paragraph 8.1 of the ruling, be set aside and replaced with the following:-

“The applicant’s dispute is dismissed.”

- (iii) That the relief granted by the second respondent at paragraph 8.3 of the ruling be found to be ultra-vires and be set aside and replaced with the following ruling:-

“The applicant’s dispute is dismissed.”

- (iv) That the first respondent (and any of the other respondents that may oppose of this application) be ordered to pay the costs of this application.

[2] **BACKGROUND**

- (i) This appeal stems from an application to the third respondent in terms of section 38 of the Community Schemes Ombud Service Act, 9 of 2011 (“CSOS Act”). The above mentioned application was as the result of complaints by the first respondent which necessitated referral to the third respondent who in turn appointed second respondent as an adjudicator.
- (ii) The adjudicator determined and finalised the matter as per the ruling and order dated 16 February 2018 (pg 46, index B, annexure E1).

- (iii) In this present application applicant challenges the validity of the adjudicator's ruling and raised numerous challenges in addition to those in the notice of motion. For instance, at page 16, para 40, she contends that ". . . recordal is clearly incorrect . . ." At page 17, paras 41, 42 and 43 "para 1.1.1 of the ruling is similarly factually incorrect", para 42 ". . . para 1.1.8 of the ruling is also factually incorrect. . ." at para 43 "apart from ruling at para 1.1.7, the remaining facts recorded by second respondent are either not in accordance with the case submitted. . ." Applicant contended at para 49 that the reference to the sub-paragraphs showed that the second respondent failed to come to grips with issues at hand. At para 50, it is alleged that the order is "confusing and nonsensical." It is alleged that the applicant will not be able to perform in terms of para 50.1.
- (iv) Appellant's notice of motion dated 14 June 2018, filed almost four months late. The reasons for the delay are dealt with from paragraphs 67 – 77 of the founding affidavit.
- (v) Applicant further alleged that the non-availability of the record of proceedings and the conduct of third respondent by not availing the record contributed to the delay. In any event, the applicant contended that she is required to deal with grounds of appeal in the founding affidavit. She blames the stance of the third respondent culminating to filing of the application without the record.

- (vi) Applicant averred that on receipt of record, she may file further affidavit and that the relief granted by the adjudicator was *ultra-vires*. The applicant claims that there were only three issues referred to the adjudicator for resolution viz:-
- Whether aluminium frames installed pursuant to consent by first respondent's trustees comply with consent and scheme rules;
 - Whether the applicant removed water meter and re-routed water meter without consent of first respondent's trustees;
 - Whether pillars erected in respect of extension to balcony constitute deviation of approval by first respondent's trustees of the extension.
- (vii) The complaints against the applicant in the adjudicated matter appeared fully in annexure A4 – A5. The relief asked in the complaint appears in annexure A6 (basically requesting compliance with scheme standards, replacing the aluminium frames with the same frames as installed throughout the scheme.) In annexure A9, very importantly applicant is referred to certain Du Preez Builders to assist with the installation as they had previously assisted Unit 13 with installation.
- (viii) On the e-mail dated 04 January 2017, permission to replace wooden sliding doors with aluminium was given to the applicant subject to certain conditions. On 31 May 2017 (annexure A11) e-mail was dispatched to the applicant informing her that she did not comply with

the permission granted to her. She apparently installed bronze aluminium instead of cherry. She was put on terms (30 days) to replace aluminium with cherry.

- (ix) Annexure A-12, dated 03 May 2017, is a response from the applicant to the effect that “colours will all match once the build is finished.” Once again in annexure A-15, email dated 15 May 2017, applicant was advised that she did not comply with permission granted to her and was requested to replace the aluminium with cherry within 30 days. Applicant was referred to scheme rules, procedure to be followed if owner was unable to obtain requirements. The contractor was available to supply correct aluminium frames. Applicant was further requested to stop replacing the windows until situation was resolved. She was advised by Jane Britz, from the trustees, that the proposal to aluminium conversion, closest match was a cherry wood grain powder coated finish which was voted unanimously by all 21 owners.
- (x) On 24 May 2017, the applicant was informed that the trustees resolved not to authorise installation of frames and deviate from appearance of others already installed as per the requirements. Applicant replied on 26 May 2017, annexure A-16, that once finished, windows and doors will comply in terms of Rule 33 of Management Rules. Applicant was further informed regarding deviation and alterations permitted. It was made clear to her that no deviation would be allowed without written consent from trustees. This was put to her attention by the managing agents of the trustees.

- (xi) The matter was unresolved and ultimately referred to adjudication. Section 38 requirements were met and application as per s 48 (CSOS Act). The matter was set down on 28 January 2018. The applicant was represented by Mr Ian Ward. The summary of the dispute and the relief sought appears at pgs 48, annexure E3, E4, E5 and relief sought annexure E6.

[3] **RESPONDENTS' CASE (MS WARD) BEFORE THE ADJUDICATOR**
(SUMMARY)

- (i) In summary, she referred to Clause 33 of the Management Rules of the Body Corporate (See E6 – E8). The aforementioned rules relate to written approval for minor improvements and that the approval must be subject to written conditions and that the rules are applied fairly.
- [4] (i) The outcome and the findings appear on the last paragraph of E11 (at page 56). "It is therefore my view that the applicant (1st respondent herein) proved on a balance of probability that it acted in a manner consistent with being prudent and reasonable, and using sound business judgment and avoiding arbitrary or capricious actions by ensuring that the rules of the Body Corporate were applied fairly and that, in terms of PMR 68(1)(iv), the harmonious appearance of the San Paulo sectional title scheme was not affected in any way."
- (ii) At page 57 (E 12) in consideration of submissions and evidence adduced, the adjudicator (2nd respondent herein) concluded as follows:

“After careful consideration of the facts and the evidence adduced and the probability of the said evidence, I had come to the conclusion that the minor improvements effected by the respondent (applicant herein) was deviating from the rules and therefore in contravention of Clause 33 of the Management Rules of San Paulo Body Corporate. It is also undisputed that the respondent failed to adhere to Clause 2(2) of the prescribed Management Rules of the San Paulo Body Corporate by not taking all reasonable steps to ensure compliance with the conduct of Rules of San Paulo Body Corporate.”

- (iii) At page 6 (E 15), the adjudicator dealt with the responsibility of the body corporate in respect of water services.

“If the by-laws of the municipality determine that the payment of water services is the Body Corporate’s responsibility, which appears to be the case in the current dispute, the body corporate is liable and accountable to the municipality for the payment of such services. The insistence by the San Paulo Body Corporate that the respondent appoint an independent plumber to assess that the water supply to the respondent’s unit is metered, is therefore consistent with the duty of the Body Corporate to act in the best interest of all owners of the Body Corporate. It could therefore not be asserted (as the respondent contended) that the applicant misconstrued or overstepped its authority to impose a rule emanating from its conduct rules.”

- (iv) The adjudicators referred to the matter of ***Wilds Home Owners Association and others v Van Eeden and others*** case no. 53643/09 [2011] ZAGPPHC 101 (25 May 2011) Murphy J ruled that the amending of Rules should be guarded against, i.e. “... A court accordingly should be loath to re-write the bargain struck by the members with each other, especially where the impetus to do so is at the instance of a minority who think the terms of the agreement are unfair or no longer serve their interests.” ***Schalk Leon Baard and another v Koro Creek Home Owners’ Association and another*** case no: 28281/2012 North Gauteng Division, Pretoria delivered on 14/02/2012 at para 36.
- (v) It is so that the adjudicator referred to case law in all fours with the present dispute. ***(Vanilla Street Home Owners Association v Ismail and another*** (A345/2013) [2014] ZAWCHC 25 (5 March 2014) at para 22 and 24).
- (vi) At page 63 (E 18) the order by the adjudicators took into account that in consideration of the evidence adduced, “respondent could not prove on a probability that the respondent: (a) took all reasonable steps to ensure compliance with the conduct of Rules of San Paulo Body Corporate; (b) acted in a manner furthering the objectives and interests of the Body Corporate as a member of the said Body Corporate and to observe all rules so made by the Body Corporate, (c) was not aware of the provisions of Clause 33 of the prescribed management rules of San Paulo Sectional Title Scheme. . .” At the end, adjudication dealt with enforcement of the order and the right to appeal. It was in the right to

appeal that a party may appeal “only on a question of law” (my emphasis). Appeal also to be lodged within 30 days after date of delivery of the adjudicator.

[5] **OPPOSITION TO THE APPLICATION**

The first respondent raised three points in *limine*:- i.e.

- (i) Non-compliance with Rule 53 of the Uniform Rules. In terms of Rule 53(4), a party wishing to oppose the relief sought must do so within fifteen (15) court days. Further to the above in terms of Rule 53(1) (b), the adjudicator (chair of dispute) is required to file a record of proceedings related to decisions that are sought to be appealed and set aside. No such record of proceedings is filed herein. It is thus impossible to respond to the relief sought. The record thus forms the basis of the second respondent's decision and order.

- (ii) The second point in *limine* relates to non-compliance with s 57(1) of CSOS requiring an appeal against the order sought to be appealed within 30 days after delivery of the order. The order was delivered on 20 February 2018 to the applicant. It is the case of the 1st respondent that section 57 is peremptory and CSOS makes no provision for condonation for the late filing of an appeal.

- (iii) The third point in *limine* is that after receipt of the adjudication order, Ms Ward (applicant) complied with part of the order, and (namely) the appointment of the independent plumber, to verify the water supply. She therefore waived any right that she may have had to appeal the

adjudication order. She was fully aware of her rights in terms of CSOS, as this was mentioned in the adjudication order. In terms of the principle of pre-emption, no litigant can appeal an adjudication order if he/she has partly complied with the order. The litigant must make up its mind. He/she cannot equivocate by acquiescence and later decide to appeal such order.

(iv) Main affidavit (applicant)

- She appreciated the necessity of the record, before she could proceed with any possible appeal (ad para 7 – 13 thereof);
- The lack of record in terms of Rule 53 makes it impossible to deal with allegations contained herein. The test is what was placed before the second respondent at the hearing. The above is relevant herein. The allegations by the applicant go beyond what was placed before second respondent (ad para 14 – 64);
- (Ad para 67 – 77) thereof, applicant sought (“the record”) clearly appreciating the need for record before proceeding with her application. Subject to the points in *limine*, the respondent denied that the applicant was entitled to the relief which she sought and that the main application should be dismissed with costs.

(v) A question of law

The first respondent submitted that the appeal should be on a question of law not on merits. The applicant’s complaint is not contemplated by

section 57(1) of CSOS. On this point alone, Ms Ward's application stands to be dismissed.

- (vi) The adjudication order, which was e-mailed to the applicant on 20 February 2018, has not been complied with.

[6] **ANSWERING AFFIDAVIT (APPLICANT)**

- (i) (Ad para 4 – 9) The applicant contend that the nature of the application is a review of adjudicator's decision but not a review of proceedings within the meaning of Uniform Rules. Therefore applicant was not required to comply with Rule 53.
- (ii) The Rule is operational in favour of the applicant and the applicant has waived that benefit voluntarily.
- (iii) (Ad para 10 – 12) The applicant admitted receiving the adjudication order on 20 February 2018 and that section 57(1) of the CSOS Act requires an appeal against ruling to be lodged within thirty (30) days after delivery of the ruling. The applicant further accepts that CSOS makes no provision for condonation but the High Court enjoys inherent jurisdiction to condone late filing when taking into account the interests of justice. The applicant prayed that the court exercise its discretion in her favour and grant condonation for the late filing.
- (iv) The applicant admitted compliance with part of the order but denied that it constituted waiver of rights to appeal. She contended that the

proper reading of annexure “EMW5”, intended that an appeal would proceed. The date of “EMW5” is 01 March 2018.

- (v) (Ad Para 24.5) The applicant contended that she was not required to obtain record of proceedings before appeal. She confirmed that she did not comply with the adjudication order and submitted that she is justified to do so as the order stands to be overturned on appeal.
- (vi) The applicant claimed that the adjudicator was incompetent to make the order as it fell beyond his jurisdiction. The relief that he/she makes must be in the scope of s 38(3). The relief granted is therefore *ultra-vires* and does not fall within s 39 of CSOS Act.

[7] **APPLICABLE LEGAL PRINCIPLE**

- (i) The applicant raised issues which the first respondent contend that they go beyond what was placed before the second respondent (adjudicator).
- (ii) How does the court resolve this dispute of fact? For instance, the applicant’s founding affidavit raised numerous dispute of facts which cannot be resolved on the papers (see paras 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 60). Without the record, it is virtually impossible to assess the merits of the applicant’s argument. The averment of the applicant at paragraph 10 of the founding affidavit does not assist either. (“ . . . Aforesaid proceedings are nonsensical as I am required to deal with the full grounds for my appeal in this founding affidavit”) argued the applicant.

(iii) The applicant fails to properly address the point taken by first respondent that the appeal is not on a question of law as required by s 57 of CSOS Act. A fact is the event that has led to litigation while law refers to actual rules that decide how the facts will be viewed by court. If facts of a case fall within the law or regulation, it is a question of fact. Interpretation and scope of law on the other hand is a question of law. Clearly, the matter which is raised on appeal by applicant is not on a point of law but based on factual findings.

(iv) Regarding condonation, the applicant averred that the court will exercise its discretion in applicant's favour because of interests of justice. The law regarding condonations is well settled. Before the court exercises its discretion, the full explanation of the delay is relevant in condonation application. The other important factor on condonation is the prospects of success.

(v) EXPLANATION OF DELAY

There is no explanation proffered herein. In annexure "EMW5" dated 01 March 2018, applicant clearly stated that she was consulting with legal consultants in March already. Why the application is only brought on 14 June 2018 is not explained. It is trite that the whole period of delay should be explained.

(vi) Strangely, the applicant tried to suggest that the delay in getting the record contributed to the delay in proceeding with the appeal. That cannot be so because in its own papers, the applicant did not need the

record because it claimed that it was not proceeding with Rule 53 review which is in any event, operated in favour of the applicant. The applicant decided to waive that benefit as provided by Rule 53. It cannot therefore argue that the delay in not obtaining what it did not need resulted in its delay to proceed with the appeal.

(vii) **PROSPECTS OF SUCCESS**

The applicant's appeal is not on a question of law. Even if condonation is granted, the matter ends there and there. Even if this hurdle is overcome, there is a dispute of fact that cannot be resolved in the papers. There is no record to assess the merits of the appeal.

(viii) It is worthy to note that the averments and allegations raised on appeal were not made during the adjudication. The notice of set down by the adjudicator was sent to Ian Ward dated 25 January 2018 and the certificate of non-resolution dated 17 January 2018 was also sent. The question of premature nature of the adjudication was there already. No objection was raised before commencement.

(ix) The relief sought was there long before the adjudication commenced and there was no objection that it was "*ultra-vires*" in nature. It seems to me that these averments were an afterthought.

"Generally, applications are not designed to resolve factual disputes between the parties and are decided on common cause facts." (See

Plascon-Evans Paints (Tvl) Ltd. v Van Riebeeck Paints (Pty) Ltd.

1984 (3) SA 623A at 634-635.

- (x) Regarding condonation, the court in the matter of ***Standard Bank of South Africa v Carien Erasmus***, case no 56672/213 [2016] ZAGPPHC 126 (23 March 2016) :

Msimeki J stated as follows at para 4:-

“ . . .

- (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.”

Clearly, no such application has been launched in the present matter.

- (xi) It is so that a court has a discretion to grant or not grant condonation as stated above, one of the considerations in the enquiry is the explanation of success (***United Plant Hire (Pty) Ltd v Hills and Others*** 1976 1 SA 717 (A) at 720E-F.

[8] **CONCLUSION**

- (i) The objective of the Act (CSOS) is to provide a service and the mechanism for the expeditious, informal and cost-effective resolution of disputes in “community schemes”. (See ***Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another***

(A31/2018) [2018] ZAWCHC 54 2018 (4) SA 566 (WCC) (10 May 20185) before Binns-Ward J (Langa AJ concurring).

- (ii) It is therefore proper to heed the Supreme Court of Appeal *albeit* on a different context. “To accede to the proposition in such general terms would, I consider, open the door to the possibility of large numbers of appeals being brought . . . , contrary to the limited scope of that section which I conceive the legislature contemplated.” It is the same with s 57 of CSOS Act, contemplating limited scope on a question of law. To allow the proposition by applicant would definitely open the door to a possibility of large number of appeals. See ***Nzimande v S*** [2010] ZASCA 80; 2010 (2) SACR 517 (SCA) at paragraphs 11 – 13.
- (iii) The applicant on account of all the above failed to make out a proper case for the relief sought.

[9] I, therefore make the following order:

The application is dismissed with costs.

N P JAJI

JUDGE OF THE HIGH COURT

APPEARANCES:

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