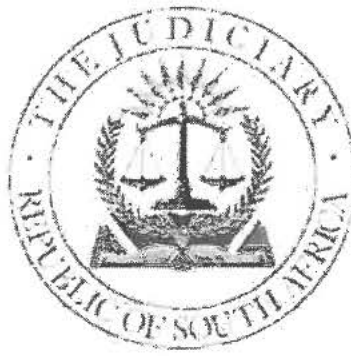




**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:
YES/NO
Of Interest to other Judges:
YES/NO
Circulate to Magistrates:
YES/NO

Case number: A68/2022

In the matter between:

DIKELEDI PALESA KOBİ

Appellant

And

**TRUSTEES for the time being of the
DE LA REY BODY CORPORATE**

First Respondent

R REDDY N.O.

Second Respondent

COMMUNITY SCHEMES OMBUD SERVICES

Third Respondent

CORAM: VAN ZYL, J *et* REINDERS, J

JUDGMENT BY: C REINDERS, J

HEARD ON: 24 OCTOBER 2022

DELIVERED ON: 14 APRIL 2023

- [1] Ms Dikeledi Palesa Kobi (the appellant) is the owner of Unit 2 in the De La Rey Community Scheme ("the property") which falls under the auspices of the De La Rey Body Corporate (as represented by the trustees, hereafter the first respondent/ "the Body Corporate"). It is common cause that the Scheme falls within the meaning of the Community Services Schemes Ombud Services Act 9 of 2011 ("the Act"). On 19 September 2021 the appellant, through her attorney of record, lodged a dispute in terms of the Act with the third respondent, the Community Schemes Ombud Services (the "CSOS"). The second respondent was the adjudicator who considered the application (hereafter "the adjudicator").
- [2] This appeal is brought in terms of s57¹ of the Act against an adjudication order made by the adjudicator on 17 March 2022 ("the order"), dismissing a claim instituted by the appellant in terms of s 8 of the Act for relief concerning alleged incorrectly calculated levy account statements. The adjudicator dismissed the complaint on the basis that the third respondent lacked jurisdiction to preside over the dispute.
- [3] The appellant instituted the appeal by way of motion proceedings on 4 May 2022 under case number 2030 /2020 claiming, amongst others, relief in the following terms:
- "1. Setting aside the Adjudication order of the second respondent dated 17 March 2022, under the auspices of the third Respondent, under case number **CSOS 3792/FS/21**, in that the second respondent erred in law by finding that the third respondent lacks jurisdiction to entertain the complaint lodged by the appellant.
 2. Remitting the dispute to the third Respondent, to convene and conduct an adjudication afresh (*de novo*), before an adjudicator other than the second respondent, **alternatively**, that the above Honourable Court replaces and/or

¹ s57 (1) of the Act reads:

'Right of Appeal

57 (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."

corrects the Adjudication order of the second respondent as it deems appropriate.”

[4] The application was properly served on all respondents. The first respondent did not oppose the relief claimed and a notice to abide was filed by the second and third respondents on 4 July 2022.

[5] On 24 August 2022 the appellant issued and served on the respondents a notice of appeal (termed “Amended Notice of Appeal”). A summary of the grounds of appeal relied upon by the appellant in her amended notice of appeal entails that second respondent erred in law in finding that:

“5.1 ...the third Respondent lacked jurisdiction to entertain the complaint lodged by the Appellant.

5.2 ...the relief sought does not fall within the ambit of the relief that can be handed down in terms of Section 39 of the Community Schemes Ombud Service Act No 9 of 2011.

5.3 ...the relief sought by Appellant would have the effect that Community Schemes Ombud Service(CSOS) ‘steps into the shoes of the Trustees and have the ability to read the minds of the parties in order to reach consensus on what is reasonable’; and

5.4 ...it was unnecessary to deal with the merits of the Application.”

The appeal, and the consequent notice of set down, were likewise properly served on all respondents. There was no appearance for the respondents when the matter was heard.

[6] The right to appeal to the Superior Court against an adjudicator's order as envisaged in s57 of the Act, does not provide any procedural directions concerning the lodging and prosecution of appeals permitted in terms of s57. We considered both the initial application on motion proceedings as well as the notice of appeal in adjudicating the appeal brought in terms of s57.

[7] S57 (2) of the Act provides that an appeal must be lodged within 30 days after the date of delivery of the order of the adjudicator. The appeal was instituted on 4 May 2022, thus just over two weeks outside the prescribed time period. Accordingly, we had to decide whether it is within the court's powers to grant condonation for the late institution of the appeal.

7.1 In *Baxter v Ocean View Body Corporate and Others*² Bins-Ward J (with whom De Wet AJ concurred) had occasion to consider this question where the appeal was instituted outside the time period.

7.2 With reference to *Mohlomi v Minister of Defence*³ where Didcott J noted that the courts have no inherent power to condone non-compliance with statutorily prescribed time limits, Bins-Ward J stated that it does not follow that the court does not have such powers in every case in which a time limit for the institution of court proceedings is statutorily prescribed and has not been complied with. He then opined that "there does not, however, need to be to be an express provision in the statute conferring a power of condonation. Depending on the context, the existence or conferral of such a power might in a given case be implied upon a proper construction of the relevant provisions of a statute. Such an exercise was undertaken by the late Appellate Division in analogous circumstances in *Phillips v Directeur vir Sensus* 1959 (3) SA 370 (A).⁴ The learned judge stated that "(t)he court reviewed various common law authority that supported the incidence of the power of courts to condone the bringing of appeals outside the prescribed time limits and had regard to what the adverse practical effects would be were the statute in question construed to exclude such a power. It concluded, on the basis of a broad contextual analysis, that the statute fell to be construed to imply a power in the court to condone non-compliance with the prescribed time limit for the lodging of an appeal."⁵

7.3 Having applied the reasoning in *Phillips supra*, it was concluded that "...the exclusion of a power of condonation could readily conduce to incorrect decisions that could, and should be, rectified being irremediably visited upon members of community

² 2023 (2) SA 205 (WCC)

³ 1996 (12) BCLR 1559; 1997 (1) SA 124 (CC) at para 17

⁴ At para 5

⁵ At para 6

schemes. It is unlikely that the legislature could have intended such an effect. It would be irreconcilable with the objects of the Act. The whole object of the CSOS Act is to facilitate the cost-effective and relatively informal resolution of community scheme related disputes; cf. *Coral Island Body Corporate v Hoge* [2019] ZAWCHC 58 (23 May 2019); 2019 (5) SA 158 (WCC) at para 8-11. Its provisions should not be read in a way that would unreasonably limit the proper ventilation of such disputes, including in appeals from the decisions of the Ombud Service.”⁶

[8] We align ourselves with the reasoning and view held by Binns-Ward J and concluded that upon a proper contextual consideration of the provisions of s 57(2), the court does have the power, on good cause shown, to condone non-compliance with the 30-day prescribed time limit. In view thereof that the delay was not inordinately long and could not cause any material prejudice to the respondents (taking into account that the relief claimed was not disputed by the respondents), and our prima facie view that appeal appeared to have merit we condoned the late institution of the appeal in the interest of justice.

[9] I now turn to the question whether the adjudicator erred in dismissing the appellant’s claim. It is not disputed that the trustees of the first respondent are responsible for administering the functions and powers of the Body Corporate, including calculation and furnishing of levy accounts or statements (“the statements”). In her founding affidavit the appellant states that she received such statements from National Real Estates (NRE) who was the managing agent of the Body Corporate (ostensibly since she became owner of the property). During 2015 the Body Corporate and a company called Propell Specialised Finance (Pty) Ltd (“Propell”) entered into an agreement in terms whereof Propell would make loans available to the Body Corporate against security in the form of the latter’s claims against owners in the Scheme. The agreement made Propell a collecting agent. Consequently, she received statements from Propell, which amounts she queried with NRE as the amounts reflected therein were incorrect. Statements were send to her simultaneously by NRE and Propell. The amounts due differed vastly, with that of NRE for instance reflecting an amount of R 75 755.04 for the billing period

⁶ At para 7

of May 2021, whilst an amount of R 313 826.81 was indicated in the statement of Propell for the same period.

- [10] The appellant avers that she continued in pursuing the issue of the incorrectly determined amounts internally, without any success, leading to the lodging of the said dispute which entailed a dispute resolution in respect of financial issues. I do not find it necessary for purposes of adjudicating this appeal to deal with the rest of the history of this matter, save to say that the dispute was eventually referred to adjudication in terms of Section 48 of the Act read with the provisions of clause 21.5.7 of the CSOS Practice Directive on Dispute Resolution dated 1 August 2019. Written submissions as requested by the adjudication department of the CSOS were duly furnished by appellant's attorneys of record on 25 November 2021. The adjudication order (which contains the reasons thereto) was received via electronic communication on 17 March 2022.
- [11] I find it apposite to quote the more important sections of the Act for determination of this appeal (also referred to by the adjudicator in reaching the conclusion that the relief claimed did not fall within its jurisdiction).

11.1 Section 38

- 38(1) Any person may make an application if such person is a party to or affected materially by a dispute.
- (2) An application must be—
- (a) made in the prescribed manner and as may be required by practice directives;
 - (b) lodged with an ombud; and
 - (c) accompanied by the prescribed application fee.
- (3) **The application must include statements setting out—**
- (a) **the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39;**
 - (b) the name and address of each person the applicant considers to be affected materially by the application; and

- (c) the grounds on which the relief is sought.
- (4) ...” (own emphasis added)

11.2 Section 39

- (39) An application made in terms of section 38 must include one or more of the following orders:

- (1) In respect of financial issues—**

- (a)....

- (b) ...

- (c) an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way; ... (own emphasis added)**

[12] In a document titled “ADJUDICATION ORDER”, the adjudicator states under the heading “EXECUTIVE SUMMARY” that the relief applied for is in terms of “Section 39(1)(c) In respect of financial issues...”, and later “(t)he relief sought the Applicant is for an order directing the respondent arrives at a realistic amount taking into account all the issues raised”.

12.1 The adjudicator indicated that the matter is “adjudicated in terms of the CSOS Act and the Practice Directive on Dispute Resolution, 2019 as amended and more specifically the amended Practice Directive date 23 June 2020 which provides under paragraph 8.2 ‘Adjudications will be conducted on papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator’. The parties were requested to make written submissions. The adjudication was conducted on the 4th of January 2022 and an order is now determined.”⁷

12.2 In his evaluation the adjudicator stated that he had perused the parties' written submissions. It is common cause that only the appellant had made such submissions, and the first respondent failed to do so. In fact, in paragraph 19

⁷ At para 5

of his evaluation it was recorded "(t)he Respondent has not submitted any responses".⁸

- 12.3 In the appellant's written submissions⁹ the history of the dispute and all facts relied upon were set out comprehensively. It stated that the appellant lodged an application for dispute resolution on 19 September 2021 "in respect of financial issues in terms of Section 39" of the Act. The relief sought was indicated as "...that the statements of account sent by Propell to Miss Kobe be declared incorrectly determined and unreasonable." The background facts relayed in the statement was as set out as in paragraph [8] herein above. Statements from both NRE and Propell were annexed. The appellant submitted that a perusal of the statements from Propell displayed unreasonable legal fees, interest being charged excessively and in contravention of the applicable acts, collection fees and administrative costs which placed an adverse financial burden on owners of the units. It was finally recorded in the statement that the statements of account were incorrectly determined and unreasonable.
- 12.4 The adjudicator stated that "the issue to be decided firstly is whether the provisions of S38 of the CSOS act No.9 of 2011 have been complied with."¹⁰ It is common cause that the appellant fully complied with the mandatory requirements as set out in section 38 (2) and (3) including the subsections thereto. The reference to whether there was compliance with s38 was ostensibly a reference to s38 (3)(a) that the application must include statements setting out the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in s39. The adjudicator then proceeded: "In order to found Jurisdiction, the relief sought must fall strictly within the ambit of the reliefs provided for in Section 39. If it does not, then CSOS will lack Jurisdiction. In this case the relief sought does not fall within the ambit of the relief that can be handed down in terms of S39, and CSOS being a creature of Statute is bound by the four corners of the

⁸ At para 19

⁹ Annexure "DPK 17"

¹⁰ At para 28

Statute, and cannot go outside of the powers conferred upon it, even with consent of all parties.”¹¹

- 12.5 In reaching the conclusion that the appellant’s complaint be dismissed on the basis that “CSOS lacks Jurisdiction”¹², the adjudicator stated that “(t)he relief sought will have the effect that CSOS steps into the shoes of the Trustees and have the ability to read the minds of the parties in order to reach consensus on what is reasonable. This is a discretionary power that CSOS is devoid of, what we can do, is establish whether the amounts claimed are justified or not, the reasonableness of which is not given any thought.”¹³ The amount must be founded on cold hard facts, as the discretion to be reasonable or not falls within the ambit of the Body Corporate represented by the Trustees.¹⁴”

- [13] In terms of s38 (1) any person may make an application if such a person is a party to or affected materially by a dispute. The appellant’s dispute resolution actions as mandated by the Act, can leave no doubt that she is a person affected materially by the dispute consequent upon the statements in respect of levies (and ancillary costs). The adjudicator’s reasoning and finding that the dispute did not fall within the ambit of Section 39 of the Act, cannot be correct. In my view the documents before him does not leave any room for a conclusion other that the dispute concerned financial issues of “an order declaring that a contribution levied on owners is incorrectly determined or unreasonable” as contemplated in Section 39(1)(c) of the Act. The dispute fell squarely within this provision. In addition hereto, the adjudicator could/should have made use of the powers of investigation conferred upon him in terms of section 51 of the Act.¹⁵

¹¹ At para 28

¹² At para 31

¹³ At para 29

¹⁴ At para 30

¹⁵ Section 51 reads:

Investigative powers of adjudicator

51. (1) When considering the application, the adjudicator may—

(a) require the applicant, managing agent or relevant person—

- (i) to give to the adjudicator further information or documentation;
- (ii) to give information in the form of an affidavit or statement; or
- (iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview;

[14] I am of the view that the adjudicator erred in finding that the application did not fall within the ambit of s39 as a result whereof the order must be set aside. This court does not have the power to substitute the order of the adjudicator with that of our own and accordingly the matter falls to be referred back to the third respondent. The appellant did not seek any cost orders against the respondent in the event that the appeal is not opposed.

[15] Accordingly the following order is granted:

1. The appeal in terms of Section 57 of the Community Services Schemes Ombud Services Act 9 of 2011 is upheld with no order as to costs.
2. The adjudication order granted by the second respondent (under the auspices of the third respondent) under case number **CSOS 3792/FS/21** (dated 17 March 2022), is hereby set aside.
3. The matter (dispute) is remitted back to the third respondent in order to refer the application, together with any submissions thereto, to an adjudicator other than the second respondent to convene and conduct an adjudication *de novo*.

(b) invite persons, whom the adjudicator considers able to assist in the resolution of issues raised in the application, to make written submissions to the adjudicator within a specified time; and

(c) enter and inspect—

- (i) an association asset, record or other document;
- (ii) any private area; and
- (iii) any common area, including a common area subject to an exclusive use arrangement.

(2) The adjudicator must give reasonable notice to the executive committee or occupier of any private area or common area to be entered in terms of subsection (1)(c).

(3) The association or any other person who is in possession of an association's records must, if required by an adjudicator and without payment of a fee—

- (a) allow the adjudicator access to the records within 24 hours after being notified of the adjudicator's requirement; and
- (b) provide the adjudicator with copies of the records.



GREINDERS, J

I concur.



VAN ZYL, J

On behalf of appellant:

Adv RJ Nkhahle
Maduba Attorneys
BLOEMFONTEIN

On behalf of respondents:

No appearance