



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

APPEAL CASE NUMBER: A43/2022

A Quo Case No.: CSOS3004/GP/2021

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

SIGNATURE:

DATE: 13.10.2023

In the matter between:

MONTROSE MEWS BODY CORPORATE

Appellant

and

COMMUNITY SCHEMES OMBUD SERVICES

First Respondent

MNINAWA BANGILIZWE N.O.

Second Respondent

(In his/her capacity as adjudicator)

MMANTHO BEAUTY MOKOKA

Third Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

- [1] The appellant, consisting of the members of the board of trustees of the MONTROSE MEWS BODY CORPORATE, is in charge, *inter alia*, of the day to day running and general maintenance of the community scheme known as Montrose Mews Community Scheme, has brought this appeal against the adjudication order dated 16 December 2021 made by the second respondent, in her capacity as an adjudicator in the first respondent, in favour of the third respondent. The appeal is brought in terms of section 57 of the Community Scheme Ombud Service Act 9 of 2011 ("the CSOS Act") which provides for a member in the community scheme who is not satisfied with a decision and order of the adjudicator to appeal against such decision to the high court having jurisdiction, but **only on a point of law**. (*our emphasis*)

BACKGROUND FACTS

- [2] The third respondent bought unit 25 in the Montrose Mews Community Scheme during 2018. The seller had sold the dwelling with an incomplete extension of the dwelling that had not been approved by the municipality. During 2019 the third respondent had a site plan and a guest toilet extension plan, incorporating the

incomplete extension that was left by the previous owner of the unit. Both the third respondent's site and unit plans were approved by the municipality.

- [3] The third respondent alleged that both the chair of the board of trustees and the managing agent at the time, Proximity, had given her the go-ahead with the construction of the approved extension of her dwelling. The third respondent attached a copy of the letter dated 6 November 2010 approving her request to go ahead with the construction of the extension written by Proximity on behalf of the trustees.
- [4] The problem appears to have commenced when new trustees forming the body corporate had taken office and a new managing agent appointed. Despite the third respondent being in possession of the plans that had been approved by the municipality and having been granted the go-ahead to commence with the building of the guest toilet by the previous board of trustees, the new board of trustees sent her a letter stopping her from commencing with the construction work without obtaining prior approval by the trustees as required in section 24(1) of the Sectional Titles Act 1986 which reads thus:

"24(1) If an owner of a section proposes to extend the limits of his section, he shall with the approval of the body corporate, authorised by a unanimous resolution of its members, make application to the local authority for approval of the proposed extension of his section..."

- [5] The stance by the trustees (appellant) resulted in the third respondent approaching the first respondent (Ombud) by way of an application in terms of section 38 of the Act seeking an order that the body corporate withdraws the

letter stopping her from commencing with the construction of the guest toilet. Section 38 of the CSOS Act provides that any person who is a member of the community scheme may lodge an application in the prescribed manner with the office of the Ombud for the resolution of a dispute such person is a party to, or is affected materially thereby and further that the application must be accompanied by payment of the prescribed fee and a statement(s) setting out:

- (a) The facts constituting the dispute and the relief sought by the applicant, which relief must be within the scope of the relief contemplated in section 39;
- (b) the names and addresses of each person the applicant considers would be affected materially by the application, and
- (c) the grounds on which the relief is sought.

[6] The office of the Ombud, established in terms of section 14 of the Act specifically to regulate the conduct of the members of the scheme and to ensure their good governance, including to resolve disputes between the members *inter se* and/or between a member(s) and the body corporate in a less formal, expeditious, inexpensive and more efficient manner, received all relevant documents and submissions from the third respondent and the appellant. The Ombud is, in terms of 47 of the Act obliged to refer the dispute to conciliation if, on the facts set out in the application, he/ she is of the view that there is a reasonable prospect of a negotiated resolution of the dispute. Section 47 of the CSOS Act reads thus:

“On acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the Ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the application, the Ombud must refer the matter to conciliation.”

- [7] The Ombud, having determined that the dispute was not capable of being resolved in a conciliation in terms of section 47, referred the matter to the second respondent for adjudication in terms of section 48 of the Act. The relevant certificate of Non-Resolution was issued in terms of section 48(1) of the Act on 27 September 2021.

SCOPE OF JURISDICTIONAL AUTHORITY OF THE ADJUDICATOR

- [8] In terms of section 39 of the CSOS Act, applications made in terms of section 38 must seek relief limited to one or more of the following orders contemplated in section 39:

“39 (2) In respect of behavioural issues –

- (a) an order that a particular behaviour or default constitutes a nuisance and requiring the relevant person to act or refrain from acting, in a specified manner;
- (b) if satisfied that an animal kept in a private area or on common area is causing a nuisance or a hazard or is unduly interfering with someone else’s peaceful use and enjoyment of his or her private area or common area, an order requiring the owner or occupier in charge of the animal –
 - (i) to take specified action to remedy the nuisance, hazard or interference; or
 - (ii) to remove the animal;

- (c) an order declaring that an animal is being kept in a community scheme contrary to the scheme governance documentation, and requiring the owner or occupier in charge of the animal to remove it; or
- (d) an order for the removal of all articles placed on or attached illegally to parts of a common area or a private area.

39(3) In respect of governance issues –

- (a) an order requiring the association to record a new scheme governance provision consistent with a provision approved by the association;
- (b) an order requiring the association to approve and record a new scheme governance provision;
- (c) An order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision; or
- (d) An order declaring that a scheme governance provision, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable, and requiring the association to approve and record a new scheme governance provision –
 - (i) to remove the provision;
 - (ii) if appropriate, to restore an earlier provision;
 - (iii) to amend the provision; or
 - (iv) to substitute a new provision.

39(4) In respect of meetings –

- (a) an order requiring the association to call a general meeting of its members to deal with specific business;

- (b) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or a purported general meeting of the association, was not validly convened;
- (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or a purported general meeting of the association –
 - (i) was void; or
 - (ii) is invalid.
- (d) an order declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed, or
- (e) an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.”

ADJUDICATION PROCESS

- [9] In the adjudication record, the adjudicator has summarised the submissions by the applicant and the body corporate - third respondent and appellant, respectively, as follows:

The Applicant's Submissions

[10] The applicant's submissions before the Adjudicator were that:

10.1 The applicant bought unit 25 in the scheme in 2018;

10.2 The unit had an extension that was incomplete and had been built without approval of the plans by the municipality;

10.3 In 2019 the applicant commenced planning to extend of the unit by building a guest toilet. The relevant plans were to incorporate the incomplete unapproved extension by the previous owner of the unit. The process was handled by the previous board of trustees of the scheme and the managing agent at the time, Proximity. The latter subsequently issued a letter of approval for the applicant to commence with the extension;

10.4 The previous trustees had allowed the erstwhile owner of the unit to build the toilet notwithstanding the absence of building plans approved by the municipality. That constituted a neglect of duty by the trustees.

10.5 The present trustees were insistent that the applicant comply with the legal requirements for a purported building an extension and seek prior approval of the trustees for commencement with the building of the guest toilet;

10.6 The applicant further made the submission that the previous board of trustee had a culture of leniency that saw units being extended despite the

absence of municipality approved extension and building plans. The applicant also submitted that there were units belonging to some members of the current board of trustee which were extended following that leniency.

10.7 The applicant alleged that one of the trustees who benefitted had suggested that one architect of his/her preference be engaged to attend to the issue of all non-compliant extensions jointly to reduce costs. The applicant surmised that her refusal to participate in this combined venture resulted in the trustee concerned developing a vendetta against her which manifests itself in the 'trustees' stoppage of her continuation with her extension.

Relief Sought by Applicant

- [11] The applicant sought an order that the body corporate withdraws the letter stopping her from commencing with the extension of her unit by the construction of the guest toilet and for to proceed on the basis of the approval by the previous body corporate.

THE RESPONDENT'S SUBMISSIONS

- [12] The Respondent submitted that:

12.1 On the 27 September 2019, the managing agent, PROXIMITY sent out an email to all Montrose Mews owners, stipulating that in order for the applicant to be able to construct a guest toilet, it would be required to obtain approval from all owners.

12.2 On the 21 September 2019, consent was given to the Applicant for the request to construct a guest toilet, provided all provisions and requirements of the Sectional Title Schemes Legislation were complied with for the floor area increase of 3,5 square metre and that national building regulations were adhered to;

12.3 The Applicant was invited to a meeting on the 27 October 2020 to discuss the requirements of the Sectional Title Scheme legislation, in regards to floor increase pertaining to extensions.

12.4 The Applicant is solely responsible for previous owners building extensions as the Body Corporate has no involvement in the sale of a section.

12.5 After the meeting on the 27 October 2020, a building extension reference manual was sent out to all owners with examples to explain the process.

12.6 In November 2020, a meeting with the Applicant's architect was held and amongst other issues discussed was the requirements for an extension and this was facilitated by the use of a referral architect.

12.7 On the 6 January 2021, the Applicant was sent a letter as she had recused herself from a group meeting, to remind her of the outstanding issues that still needed compliance before the building extensions could commence.

12.8 Building extensions done in units which are not compliant to the necessary processes presents disadvantages to those owners who have not made any extensions to their units.

12.9 Despite all endeavours and information served to the Applicant, the applicant has totally rejected and ignored all requests for compliance.

12.10 Contrary to the Applicant's allegations, the rules being applied by the trustees were never approved of as she alleges.

THE LAW

[13] Section 54 of the CSOS Act provides that:

- "(1) If the application is not dismissed, the adjudicator must make an order
 - (a) granting or refusing each part of the relief sought by the applicant;
 - (b) In the case of an application which does not qualify for a waiver of adjudication fees, apportioning liability for costs;
 - (c) including a statement of the adjudicator's reasons for the order; and
 - (d) drawing attention in the prescribed form to the right of appeal.
- (2) An order may require a person to act, or refrain from acting, in a specified way.
- (3) The order may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate.
- (4) The order must set the time –

- (a) when the order takes effect; or
- (b) within which the order must be complied with,

(5) The adjudicator's order may provide that the order has the effect of any type of resolution or decision provided for in the scheme governance documentation."

ADJUDICATOR'S DETERMINATION

[14] On the 16 December 2021 the adjudicator granted an order that:

"The Applicant (Mokoka) is hereby permitted to proceed with the construction of the guest toilet as per the approved building plans."

[15] Section 57 of the CSOS Act provides that;

- "(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."

[16] The procedure applicable in appeals to the High Court on the question of law as envisioned in section 57 of the CSOS Act was considered in **Stenersen &**

Tulleken Administration CC v Linton Park Body Corporate and Another¹

where the court stated the procedure to be adopted as follows;

- (a) The appeal should be brought by way of notice to appeal where the grounds of appeal are set out succinctly.
- (b) The notice should be served on the respondent parties by the Sheriff.
- (c) Both the adjudicator and the CSOS should be cited as respondents.
- (d) While the adjudicator and the CSOS might be expected to abide the judgment of the court, nothing precludes them from filing a report for the court in respect of any aspect of the law which they might consider to be helpful to the court.

THE APPEAL

[17] In bringing this appeal the appellant has complied with the time frames stipulated in section 57 of the Act and has followed the procedure prescribed in the matter of ***Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another***, *supra*.

ANALYSIS AND FINDINGS

[18] It is apposite at this stage, and prior to considering the grounds of appeal, to state that the adjudicator appears to have had no regard to the provisions of the CSOS Act in handling the matter. In fact, the matter ought not to have dealt with by the adjudicator as;

¹ 2020 (1) SA 651 (GJ)

18.1 The relief that was sought by the third respondent was in effect a final interdict which would serve only the interests of the third respondent and not the whole community scheme as envisioned in the categories of prayers stated in section 39. This relief accordingly fell outside the scope of prayers mentioned in section 39 to which the jurisdiction of the adjudicator is confined. See ***Prag NO and Another v Trustees, Mitchell's Plain Industrial Enterprises Sectional Titles Scheme Body Corporate and Others***² where the court, citing with approval the findings relating to the scope of operation of the prayers referred to in section 39 of the Act said the following:

"[16] As was pointed out in Shmaryahu, the orders which can be made by the adjudicator in respect of the different categories which are provided for in s 39 of the Act are primarily directed at, and pertain to, matters which bear on the sectional title community concerned as a whole, i.e. on members of the sectional title scheme itself, and not on individual members. Such orders will generally only be incidental to personal interests or rights of individual members.

[17] Not only was the order granted erroneous and outside the parameters of the orders the adjudicator may make in terms of section 39 of the Act, but the order made was not the relief sought in the third respondent's application. The third respondent sought, albeit incorrectly, the retraction by the appellant of the letter stopping the construction and not the granting of the approval by the second respondent."

18.2 Despite listing the submissions by the applicant and the body corporate, the adjudicator failed to recognise that the third respondent's non-compliance

² 2021 (5) SA 623 (WCC)

with the applicable statutory provisions pertaining to the third respondent's sought extension of boundaries of the particular section and the floor area of the unit precluded the granting of the relevant approval by the appellant (see the provisions of section 24 of the Sectional Title Act quoted in para [9], above. It would have been impermissibly for the appellant to grant permission to the third respondent to commence with her project in the circumstances. Thus the order granted by the second respondent was unlawful and *ultra vires*. Similarly, the adjudicator had no authority to set aside the decision of the appellant to stop the third respondent from commencing with the extension despite the failure to comply with applicable laws.

CONCLUSION

[19] The above analysis and findings effectively confirm the merit in each of the six grounds underpinning the appellant's appeal against the adjudication order made by the second respondent. The appeal ought to succeed in the circumstances.

COSTS

[20] In considering an award of costs, it is the general principle that costs follow the outcome of the case. I am of the view that a deviation from this principle is warranted in the present matter, but only in respect of the appeal.

ORDER

[21] Resulting from the findings in this judgment the following order is made:

1. The appeal is upheld.

2. The order of the adjudicator dated 16 December 2021 is set aside and is replaced with the order that;

"The applicant's application is dismissed with costs."

3. There is no order as to costs in the appeal.


MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered,


JS NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCE

For the Appellant:

JHF Le Roux

Instructed by:

van der Walt Attorneys