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

Appeal Case No. **A018904-2022**

Date of Appeal: 9 May 2024

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED.

17 May 2024

In the matter between:

SASHEN REDDY N.O.

(In his capacity as trustee of The Emerald Trust)

First Appellant

IPROTECT TRUSTEES (PTY) LTD N.O.

(In its capacity as trustee of The Emerald Trust)

Second Appellant

and

CEDAR LAKES HOMEOWNERS ASSOCIATION NPC

First Respondent

COMMUNITY SCHEMES OMBUD SERVICE

Second Respondent

MOHAMMED ALLI CHICKTAY

Third Respondent

JUDGMENT

Van Vuuren AJ (Dlamini J concurring)

Introduction

[1] This is an appeal in terms of section 57 of the Community Schemes Ombud Service Act.¹ It allows an appeal to the High Court against the order of an adjudicator appointed in terms the Act, but only on a question of law.²

[2] The appellants, exercising their right to appeal, are the trustees of the Emerald Trust (the Trust).³ The Trust is the owner of immovable property within the Cedar Lakes Estate, a residential estate in Fourways, Johannesburg (the Estate). The first respondent is the Cedar Lakes Homeowners Association NPC,⁴ a non-profit company registered under number 2000/002883/08 (CLHOA or Homeowners Association).

[3] The respondents filed notices to abide the decision of this court.

[4] As owners of immovable property within the Estate, the trustees were, with reference to certain rights relating to its property, constrained to adhere to the Estate's published rules. These rules include the Estate's Memorandum of Incorporation and Architectural rules.

[4.1] The main objectives set out in the Estate's Memorandum of Incorporation include: *"to carry on, to promote, advance, and to protect communal interests, safety and welfare of the Members of the Association, including, but not limited to, by maintaining the open spaces, controlling the aesthetic appearance of land, including landscaping, buildings and improvements."*

[4.2] Its Architectural rules in turn provide, with reference to garage doors that it allows timber doors but requires that *"any other finish must first be approved by the CLHOA."*

¹ Community Schemes Ombud Service Act 9 of 2011

² Community Schemes Ombud Service Act 9 of 2011: s57(1)

³ When referring to the Emerald Trust it should be understood that reference is made to the trustees in their representative capacities.

⁴ Although not fully described in the headings to the notice of appeal, the full description of the first respondent is apparent from the documents filed of record.

The Homeowners Association and Adjudicator's decisions and orders

[5] Improvements were made to the Trust's property which included the installation of a new garage door⁵ with a mirror exterior finish. The Trust had not applied for approval prior to the installation. From the papers comprising the appeal record it is however apparent that an application in respect of the garage door was considered and refused. Following the Trustees' dissatisfaction with the refusal and demand for replacement of the new garage door, the matter was referred to an Adjudicator appointed in terms of the Act. The referral was accompanied by the information relied upon by the Homeowners Association.

[6] In the Trust's response to the referral the trustees explained they "*were requested to ... submit an application for change of the garage door, with which we complied however our application was denied and no reasoning has been provided as to why the application has been denied except that mirror/glass doors are not allowed.*"⁶

[7] The Homeowners Association's 11 November 2021 refusal, in relevant part, stated: "*Please note that the garage door ... is not approved.*"

[8] Further in their response to the Adjudicator, the trustees provided photographic evidence of other garage doors and gates within the Estate. In their response they argued, with reference to the images that: "*other properties with unique garages ... have been allowed by the CLHOA some of which have mirrors or glass in their construction If other properties may utilize unique material on their properties why have we the respondent's property not been given the same approval.*"

[9] Section 50(a) of the Act provides that "[t]he adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator- (a) must observe the principles of due process of law." The

⁵ The matter serving before the Adjudicator also concerned the position of a generator which is not directly relevant to these proceedings.

⁶ The omitted text relates to a penalty that was imposed.

corollary of this obligation on the Adjudicator is a right on the part of the Homeowners Association to reply to the response presented by the trustees.

[10] Mr Fouché, counsel for the Trust correctly pointed out that the Homeowners Association did not reply to the trustees' response which stated that the Homeowners Association *allowed* a materially similar mirrored garage door whilst the Trust did not receive the same *approval*. If indeed there was no merit in the trustees' complaint of inconsistent application of allowing and approving, one would have expected a reply dealing with the particularity of the trustees' assertions. The Adjudicator did not exercise his inquisitorial or investigative powers in this regard.

[11] The inconsistency complaint relating to the Homeowners Association's exercising of its powers was central to the Trust's response to the Adjudicator.

[12] The Adjudicator issued his findings and order on 27 July 2022. Although he provided reasoning to underpin his finding that the Homeowners Association failed to apply their discretion fairly when it came to removal of a generator, he held and ordered that:

"When it comes to the removal of the garage doors, there is no evidence before me to show that the [Homeowners Association] acted unreasonably when applying their discretion."

and

"The Respondent must remove the garage door before 1st October 2022."

Analysis of the Adjudication

[13] Analysis of the adjudication order reveals a single reason for the conclusion reached by the Adjudicator regarding the garage door, which is: *"there is no evidence ... to show that the [Homeowners Association] acted unreasonably when applying their (sic) discretion."*

[14] Disagreeing with the asserted reason, Mr Fouché correctly pointed to the following facts and considerations that militate against the absence of evidence premise:

[14.1] First, the evidence included photographs of garage doors finished with materials other than timber, and in particular of a like-mirrored garage door within the Estate;

[14.2] Second, the trustees' assertion that the Homeowners Association for example *allowed* the like-mirrored garage door whilst it refused approval of the Trust's mirrored door; and

[14.3] Third, the absence of any reply from the Homeowners Association to gainsay the asserted inconsistency of approval.
(evidence of inconsistent approval.)

[15] The Trust's ground of appeal succinctly stated that: "*The [Adjudicator] erred in the following respects - He failed to exercise his discretion reasonably, properly and fairly in light of the evidence produced by the appellant.*"

[16] Counsel for the Trust relied on *Stenersen*⁷ wherein the Full Court considered the nature of an appeal pursuant to section 57 of the Act and *inter alia* held:

[32] The determination of the questions of fact is exclusively afforded to the adjudicator who conducts the proceedings inquisitorially and has powers to investigate, examine documents and persons, and to conduct inspections. For this reason, an appeal court should adopt a deferential attitude to the determination of the adjudicator on questions of fact.

[33] Put differently, the appeal court is limited to considering whether the adjudicator

—

[33.1] applied the correct law;

[33.2] interpreted the law correctly, and/or

[33.3] properly applied the law to the facts as found by the adjudicator.

⁷ *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and another* 2020 (1) SA 651 (GJ)

[34] The conclusions drawn from the evidence (ie the 'findings of fact') by the adjudicator cannot be reconsidered on appeal.

[35] In essence, by limiting the scope of an appeal to questions of law only, the court of appeal is only tasked with deciding whether the conclusions of law reached by the adjudicator were right or wrong. This determination can only be made based on the facts in existence at the time the order was given, and as they appear from the record."

and

"an appeal in terms of s 57 of the Act is a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination to be made by the court of appeal is whether that decision was right or wrong in respect of a question of law."

[17] Section 50(c) of the Act compels an adjudicator *"to consider the relevance of all evidence"*. Use of the word *"must"* in the sub-section underscores the obligation. The sub-section adds that the adjudicator is *"not obliged to apply the exclusionary rules of evidence as they are applied in civil courts,"* which may broaden the spectrum of evidence which encompasses that which is to be considered by an adjudicator.

[18] The apparent omission on the part of the Adjudicator to consider the evidence of inconsistency in approval of a like-mirrored garage door by the Homeowners Association, which criticism and evidence were squarely placed before him in the Trust's response, leads to the conclusion that such relevant evidence was not considered. A failure by the Adjudicator to consider the inconsistent application of the rules by the Homeowners Association, demonstrated by the facts put up by the Trust, is an error of law.

[19] The Adjudicator ought thus to have taken the evidence of inconsistent approval that was placed before him into account when considering whether the Homeowners Association acted unreasonably in taking its decision, which, if he had done so, should have led him to the conclusion that the Homeowners Association acted inconsistently, and thus unreasonably, by ordering removal of the garage door.

The failure to consider relevant evidence led to the wrong conclusion culminating in his order for removal of the garage door.

[20] The Adjudicator accordingly erred by upholding and ordering removal of the garage door.

Costs

[21] Although the appellant is successful on appeal, the respondents filed notices to abide the outcome on appeal. The second and third respondents exercised powers and performed their functions within the statutory framework of the Act for which they are not to be held liable unless warranted by circumstances such as those referenced in section 33 of the Act. Timeous decisions to abide the decision of the court on appeal would be incongruent with an award for costs against the respondents.

Order

1. The appeal is upheld.
2. The Adjudicator's order at paragraph 42 a. dated 21 July 2022 is set aside and replaced with the following: "*The Cedar Lakes Homeowners Association NPC's decision and order that the garage door at Erf 5[...], [...] M[...] C[...], S[...] G[...]s, C[...] L[...]ms Estate be removed are hereby set aside.*"

Van Vuuren AJ
Acting Judge of the High Court
17 May 2024