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

Case NO: CASE NO: 2022/061232

COS CASE NO: 4024/GP/22

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
DATE	SIGNATURE

In the matter between:

NDUMISO PEARL DAVIDSON

Appellant

and

**THE TRUSTEES OF MACEDON BODY
CORPORATE N.O.**

First Respondent

MENZI SIMELANI

Second Respondent

COMMUNITY SCHEMES OMBUD SERVICE

Third Respondent

JUDGMENT

DEN HARTOG AJ

[1] This is an appeal in terms of section 57 of the Community Ombud Service Act 9 of 2011 (CSOS Act). It is directed against an adjudication order delivered by the Second Respondent, Mr Menzi Simelani, sitting as the adjudicator on 19 November 2022. In terms of the order the Appellant was directed to pay an amount of R30 901.98 to the First Respondent.

[2] The Appellant in this matter is Ndumiso Pearl Davidson, an owner of Unit 1[...] M[...], T[...] Avenue, R[...], Johannesburg, Gauteng, (hereinafter referred to as “the Appellant”).

[3] The First Respondent is The Trustees of the Macedon Body Corporate N.O. (hereinafter referred to as “the First Respondent”).

[4] The adjudicator as well as the Community Schemes Ombud Service (CSOS) were cited as Second and Third Respondents insofar as they might have an interest in this matter.

CONDONATION

[5] The Appellant seeks conditional condonation for the late filing of his application for an appeal hearing date, appeal record and heads of argument.

[6] The sequence of events can be summarised as follows:

1. On 19 November 2022 an adjudication order was granted.
2. On 20 November 2022 the adjudication order was received by the Appellant.
3. On 20 December 2022 the Appellant lodged an appeal.
4. On 14 February 2023 the Court online system reclassified

the system and the First Respondent's is appointed.

5. On 18 February 2023 the Community Schemes Ombud Service lodges the record of proceedings.
6. On 28 February 2023 the Appellant undertakes to file heads of argument.
7. On 30 May 2023 the lodgement of the system on Court online is approved.
8. On 21 July 2023 the adjudication order is made an order of Court.
9. On 10 September 2023 the heads of argument are drafted and filed.
10. On 5 October 2023 the First Respondent issues a warrant of execution and serves it on the Appellant.
11. On 20 October 2023, the Appellant applied for a date of hearing of the appeal. The application for condonation was served almost six weeks later on 28 November 2023.

[7] The main issue raised by the First Respondent in opposing the application for condonation is namely that Rule 50 of the Uniform Rules of Court apply, and the appeal was never prosecuted within the 60-day period from the noting of the appeal. Consequently, the appeal has lapsed.

[8] In support of this argument attention was drawn to the difference in practices between the Western Cape Division and the Gauteng Division of the High Courts in dealing with appeals in terms of section 57 of the CSOS Act. In the Western Cape Division motion procedure is followed and in the Gauteng Division appeal procedure is followed. See **Trustees Avenues Body Corporate v Shmaryahu** 2018 (4) SA 566 (WCC).

[9] The Practice Directive on Dispute Resolution adopted on 1 August 2019 prescribes the procedure to be followed in appeals in terms of section 57 of CSOS.

34. WHEN TO LODGE AN APPEAL

34.1 A person who is not satisfied with the adjudicator's order, may lodge an appeal in the High Court on a question of law.

34.2 Following the High Court decision in the Western Cape High Court, on a matter of The Trustees for the time being of the Avenues Body Corporate v Shmatyahu (sic) and Another the following procedure is prescribed for all appeal (sic) in terms of section 57 of the CSOS Act until such time that the Full Bench of the High Court has made a determination or order on the process to be followed for Appeals under section 57 of the CSOS Act:..."

[10] The aforesaid procedure was not adopted in this particular instance.

[11] The Directive then goes on to prescribe that the appeal should be brought by notice of motion supported by affidavit.

[12] Section 57 provides as follows:

"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.

(2)An appeal against an order must be lodged within 30 days after the date of delivery of the order by 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."

[13] The Act does thus not prescribe any time periods other than that for the lodgement of the appeal and/or any other procedures to be followed in lodging such appeal.

[14] In the first instance, this Court is not bound by any provisions or Directives of any other Tribunal to how it should conduct its proceedings. I am of the view that the procedure adopted by the Appellant in violation of the CSOS Directives in this matter is not fatal. In any event it is to be noted that the Practice Directive of the CSOS is prescriptive and not peremptory when it prescribes a procedure for an appeal until a Full Bench of the High Court has made a determination or order or process to be followed.

[15] That brings me to the second point of whether Rule 50 applies or not. For purposes of adjudication, it is not necessary to make a final determination on this issue. I will thus deal with the issue of condonation as if the Appellant has not complied with the provisions of Rule 50 of the Uniform Rules of Court and whether the Appellant is entitled to condonation or not.

[16] It is well-known that parties have in the modern era suffered various difficulties and delays as a result of the non-functionality of the Court online procedures. The fact that this played a role in the delay is not to be disregarded.

[17] The Appellant does attempt to offer an explanation for the delay, but an explanation for lateness and prospects of success are not the only two factors to be considered by the Court in a condonation application. The main consideration is whether it is in the interest of justice or not to grant condonation and in the adjudication of same, a Court has a wide discretion in deciding whether to condone non-compliance with the Rules or not. See **Ferris and Another v Firststrand Bank Limited** 2014 (3) SA 39 (CC) and **Bertie van**

Zyl (Pty) Limited and Another v Minister for Safety and Security and Others 2010 (2) SA 181 (CC).

[18] Having regard to all the circumstances in this matter, I am of the view that any non-compliance with the Rules or Directives are to be condoned and the Appellant is entitled to proceed with the appeal.

THE EFFECT OF THE ADJUDICATION ORDER HAVING BEEN MADE AN ORDER OF COURT

[19] During the hearing of the proceedings, it became apparent that there was a real possibility that the adjudication order had been made a Court Order. Supplementary heads were then required from the parties with the following issues to be addressed:

“If the Court Order was granted, the parties are to address the following:

- 1. Can the appeal against the adjudicator’s order proceed in the face of a Court Order confirming same?*
- 2. Can this Court of Appeal set aside that Court Order?*
- 3. If there is such a Court Order, must this appeal be dismissed? or alternatively*
- 4. Should this appeal be postponed pending the outcome of an application for the setting aside or rescission of that order?”*

[20] The Court is grateful to the parties for the submission of the supplementary heads of argument. It is clear from such heads of argument that the adjudicator’s order was in fact registered by the Clerk of the Court as an order of Court.

[21] In terms of Section 56 of the CSOS Act, an adjudicator’s order may be enforced as if it were a judgment of the High Court and the Registrar of such

Court must, on lodgement of a copy of the order register it as an order in such Court.

[22] In **Trustees Avenues Body Corporate v Shmaryahu** *supra* at 579 D-E Binns-Ward J found as follows:

“It is also desirable that when, as happened in the current matter, the adjudicator’s order has been registered as an order of Court in terms of s 56 of the Act, notice of the proceedings also be given to the Registrar or Clerk of the Court concerned; for the setting-aside of the order should as a matter of good order result in the Registrar or Clerk concerned, expunging the registration of it from the Court Record.”

[23] The registration of the Court Order in the Registrar’s Records is thus an administrative act and not a judicial act. The appeal against an adjudicator’s order can proceed in the face of a Court Order having been registered. Consequently, should the Court set aside the adjudication order, the Registrar simply expunges same from his register and consequently there is no *de facto* setting aside of the Court Order.

MERITS

[24] The appeal is based on the following grounds:

1. The amount awarded is in excess of that claimed.
2. That there was a violation of the *in duplum* Rule when it came to the calculation of interest.
3. The order granted was beyond the scope of the Act.
4. There was an error in the books of account.
5. There was non-compliance with Section 39(1)(c) of the CSOS Act.
6. The evidence did not support the balance of probabilities.

[25] In my view, the first ground goes hand in hand with the reasoning of the fourth, fifth and sixth grounds.

[26] An application for dispute resolution was launched by the First Respondent for payment of arrear levies and in the application form the relief sought is described as follows:

*“As mentioned above, legal remedies were pursued through the Court system prior to the CSOS dispute resolution remedy becoming available. The body corporate now seeks to make use of the CSOS mechanism to resolve the present impasse in an effort to “wipe the slate clean”. In this regard, the body corporate seeks the following remedy:
- payment of arrear levies and interest raised in terms of the trustee resolutions amounting to R15 269-13.”*

[27] The adjudicator was presented with a summary of relevant evidence and found, after considering such evidence, that in light of the limited nature of the claim, section 51 of the CSOS Act should be invoked. He therefore requested the First Respondent to provide him with the latest levy statements indicating the amount owed. This request was also copied to the Appellant and the information was provided.

[28] After considering the evidence, the adjudicator found as follows:

“34. The Applicant also submitted a levy statement dated 9 November 2022. It relates to Unit 1[...] (see statement). It is worth noting that the Respondent made payments towards this unit and reduced the arrears. The balance owing is reflected as R30 901.68. In his contribution, the Respondent did not address the levy statement and did not indicate why he argues that he does not owe the balance as indicated. His argument effectively remained that he made a lot of payments previously and that the Applicant had not reconciled the statement properly.”

[29] The adjudicator then goes on to find that although the Appellant disputed the claim, he did not provide any information as to why he disputed the balance owed.

[30] In coming to this finding, the adjudicator applied the following principles:
“20. I have perused the parties’ written submissions. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.

21. The general rule is that only evidence, which is relevant, should be considered. Relevance is determined with reference to the issues in dispute. The degree or extent of proof required is a balance of probabilities. This means that once all the evidence has been tendered, it must be weighed up and determined whether the Applicant’s version is probable. It involves findings of facts based on an assessment of credibility and probabilities.”

[31] Having regard to the aforesaid, the adjudicator ordered the Appellant to pay the First Respondent an amount of R30 901.68 in respect of arrear levies and makes no order as to costs.

[32] In my view, this finding is erroneous for the following reasons: At the commencement of the finding and at paragraph 7, the adjudicator finds that the adjudication proceeds in terms of the CSOS Act and Practice Directive on Dispute Resolution, 2019 as amended and more specifically the amended Practice Directive dated 23 June 2020. The latter provides under paragraph 8.2 that adjudications will be conducted on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed adjudicator.

[33] The Practice Directive on Dispute Resolution 2019 adopted on 1 August 2019 has the following provision for the adjudication process and the Rules thereof in paragraph 26:

“26.5 The adjudicator shall:

26.5.4 adopt the most cost- and time- effective procedure consistent with fairness to determine the dispute;

26.5.5 conduct a hearing and shall observe procedural fairness;

26.6.4 require a party to submit within a said period of any further information, document or evidence which he/she may reasonably require in making a determination.”

[34] In response to the further information provided by the First Respondent, the Appellant wrote to the adjudicator on 16 November 2022 at 14:09, stating as follows:

“Good afternoon Adv Simelane,

I have watched the e-mail correspondence in the last week or so but not fully engaged as I presumed it was merely intended to provide yourself with some clarity with respect to the claim by the Applicant rather than to establish what is actually due and payable by myself as the Respondent.

I would therefore respectfully like to understand where exactly we are in the process of arbitration so can respond accordingly. My response below may pre-empt an opportunity that is yet to be afforded to me by the arbitration process to make my own submission and I apologise and advance, if this is the case.”

[35] Further on he goes on to state on 16 November 2022 at 4:40 pm:

“Good afternoon

This back and forth is evidence of a need for a hearing given the complexity of the matter. Arbitration or adjudication by e-mail is challenging.”

[36] The amendment to the Practice Directive dated 23 June 2020 at para 8, provides as follows:

“8. PROCEDURE FOR THE CONDUCT OF ADJUDICATIONS:

8.1 *No face-to-face adjudications will be conducted.*

8.2 *Adjudications will be conducted based on papers filed by the parties and further written submissions, documents and information (including evidence in the form of affidavits and photos) as requested by the appointed adjudicator;*

8.3 *The adjudicator may at his or her discretion conduct the adjudication telephonically or virtually. Parties in a dispute are requested to have sufficient data, bandwidth, battery-life or connectivity for the duration of the conciliation;”*

[37] At the bottom of this paragraph, it is stated:

“The CSOS reiterates the requirement for fairness and a transparent process.”

[38] In my view, paragraph 8.3 provides the adjudicator with a discretion, in the interest of fairness and justice in terms of paragraph 8.3 read with the provisions of paragraph 26 of the 2019 Practice Directive, to call for oral hearing, and/or either telephonic or virtual oral evidence, which the Second Respondent has not done.

CAN AN ADJUDICATOR MAKE A FINDING ON THE PROBABILITIES WHEN THERE IS A DISPUTE OF FACT ON THE EVIDENCE OF AFFIDAVITS ALONE

[39] The obvious answer to this question is “no”. There is a dispute of fact, the Appellant has raised certain issues in correspondence requesting a

hearing and the adjudicator finds on the papers on a balance of probabilities in favour of the First Respondent.

[40] The adjudicator erroneously found that the Appellant did not dispute the version of the First Respondent and states that the Appellant did not indicate why he argues that he does not owe the balance as indicated in the levy statements dated 9 November 2022. This in the face of the specific request on the part of the Appellant to respond accordingly as set out in paragraphs 33.3 and 33.4 hereinbefore.

CAN AN ADJUDICATOR PROVIDE RELIEF DIFFERENT TO THAT WHICH WAS ASKED I.E. THE INCREASING OF THE CLAIM AMOUNT WITHOUT AN AMENDMENT

[41] At no stage was there an application to amend to increase the claimed amount in any way whatsoever and accordingly the adjudicator could not of his own accord without affording the Appellant an opportunity to deal with it, find in favour of the First Respondent.

DO THE ABOVE DIRECTIONS CONSTITUTE AN ERROR IN LAW AND DO THEY FALL WITHIN THE GROUNDS OF APPEAL

[42] In my view the adoption of the incorrect procedure in the adjudication of the matter under circumstances where the practice directives provide the adjudicator with a discretion to hear evidence, and he fails to do so under circumstances where there is a clear dispute of fact, constitutes an error of law and that alone provides the Appellant with a right to appeal.

[43] In respect of the grounds of appeal, they are set out hereinbefore and the findings by increasing the amount claimed unilaterally of his own accord

and furthermore making a finding on a balance of probabilities on paper following an incorrect procedure falls within the ambit of the grounds of appeal.

[44] The appeal accordingly succeeds and the following order is made:

1. The order made by the Second Respondent is set aside;
2. The matter is referred back to the Community Services Ombud for adjudication;
3. The order is to be served on the Registrar of the High Court Local Division (Johannesburg) and the Registrar is to expunge the registration of the order granted by the adjudicator;
4. The First Respondent is to pay the costs of the appeal on Scale B.

A P DEN HARTOG
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

I agree

L. WINDELL
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: this judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed

to be 30 August 2024

APPEARANCES

Counsel for the Appellant:	B Manning
Instructed by:	M Neale Inc Attorneys
Counsel for the First Respondent:	D E Goosen
Instructed by:	Scalco Attorneys
Date of hearing:	2 May 2024
Date of judgment:	30 August 2024