



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

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **6223/2023**

In the matter between:

TATOLI LITABE
and
COMMUNITY SCHEME OMBUD SERVICE
ORAPELENG SEBECO
ELBERT HEIGHT COMPLEX CO-OPERATIVE

Applicant

1st Respondent

2nd Respondent

3rd Respondent

Coram: NM MBHELE DJP et JP DAFFUE J

Heard: 21 OCTOBER 2024

Delivered: 25 OCTOBER 2024

Summary: The owner of one of the units in the Elbert Height sectional title scheme (Elbert Height) brought an application to review and set aside as invalid a decision by the Community Scheme Ombud Service (the Ombud) dated 13 March 2022 in terms whereof Elbert Height had been ordered to remove the owner's trailer (a mobile kitchen unit) from common property designated as 'guest parking'. The applicant and the second respondent, who had filed the complaint adjudicated by the Ombud, were *ad idem* that the trustees of Elbert Height acted *ultra vires* when they allocated the specific parking, a so-called guest parking in front of the second respondent's unit, to the applicant for his exclusive use. The court held that the relief sought would have no practical effect if granted and dismissed the application with costs.

ORDER

1. The application is dismissed.
2. The applicant shall pay the costs of the application in addition to the costs order already made, including the second respondent's costs of opposition as well as the fees of counsel on scale B.

JUDGMENT

Daffue J

[1] The applicant sought the following relief in the notice of motion:

- '1. The following decision are reviewed and set aside and declared invalid:
 - 1.1 The decision of the 1st Respondent dated 13 March 2022 and with the reference number CSOS6119/FS/22 ordering Albert (sic) Heights Complex Co-operative to remove the trailer parked in a common property in front of the 2nd Respondent's [unit] which has been designated as 'guest parking' area within 14 days of delivery of the said order.
2. Insofar as may be necessary, the period of 180 days referred to in section 7(1) of the PAJA is extended to the date of the launch of this application.
3. The costs of this application are to be paid jointly and severally by any party opposing this application.
4. Further and/or alternative relief.'

[2] It is unnecessary to deal with each and every allegation contained in the application papers and I shall restrict myself to some material aspects. The trustees of the Elbert Height sectional title scheme (Elbert Height) granted the applicant the exclusive use of a guest parking in front of the second respondent's unit in order to park his mobile kitchen indefinitely. Mr Sebeco, the second respondent, filed a complaint with the Community Scheme Ombud Service (the Ombud), cited as first respondent herein. The Ombud's appointed adjudicator considered the complaint without requesting presentations from the applicant who was not cited as a party in those proceedings. The adjudicator directed Elbert Height to remove the mobile kitchen from the common property designated as guest parking. The applicant initially appealed the decision of the Ombud, but eventually instituted a review application seven months after he had become aware of the decision. Answering and replying

affidavits were filed. The second respondent's attorney set the matter down for hearing as the applicant failed to do so. When the matter was heard on 29 July 2024, the applicant's heads of argument had not been filed. The court ordered that the mobile kitchen be removed pending finalisation of the review application which was postponed to 21 October 2024, the applicant to pay the costs occasioned by the postponement on a punitive scale.

[3] When the matter was heard on 21 October 2024, the applicant's counsel conceded that the applicant did not ask for the matter to be referred back to the adjudicator in his notice of motion and that he did not have instructions to ask for such relief.

[4] The applicant stated the following in clause 10 of the founding affidavit:
'As a result of the above decision, the Trustees of the Third respondent allocated a specific parking space to me. This allocated parking space enable me to park my trailer on the allocated parking space. I therefore agree that the trustees acted *ultra virus* (sic) when they amended section 83.1 of the rules in order to grant me additional parking in the communal area of Albert Heights (sic) Co-operative complex.' (emphasis added)

[5] The second respondent stated unequivocally in his answering affidavit that he agreed with the applicant's contention that the trustees' decision to designate the guest parking for the exclusive use of the applicant amounted to an irregularity.¹ In response thereto, the applicant reiterated the illegality of the trustees' decision more than once in his replying affidavit.²

[6] Clause 83.1 of Elbert Height's rules reads as follows:
'The right of exclusive use and enjoyment of the parts of the common property shown as carports and/or garages on the plan titled 'terrain plan A' attached hereto as Annexure A, are awarded to the owners of the units listed in Annexure B hereto, which portions will be utilized for parking purposes by the owners of the units to which it is awarded.' (emphasis added)

Clause 83.3 provides that any amendment of the aforesaid rule 83.1 may only be effected with the written consent of all Elbert Height's owners. It is common cause that no such consent was ever obtained.

¹ Record: p101-105, answering affidavit paras 5.6-5.22.

² Record: p117-120, replying affidavit paras 5.8-5.20.

[7] There can be no doubt that the meaning of 'guest parking' in sectional title complexes is clear and unambiguous. These guest parkings form part of the common property and are to be used by guests who from time to time visit owners. Generally speaking, no owner is entitled to the exclusive use thereof.

[8] It should have been clear from the very moment when the applicant launched his application that the trustees had no right to allocate this specific guest parking to him for his exclusive use. The fact that he was not called upon by the adjudicator to make a presentation is neither here, nor there.

[9] As mentioned, on 29 July 2024 the court already ordered the mobile kitchen to be removed from the particular guest parking allocated to the applicant for his exclusive use pending finalisation of the review application. The applicant did not insist in using the particular guest parking for his exclusive use and also did not ask the court to refer the matter back to the adjudicator for reconsideration to allow the applicant to make submissions. Consequently, the issue is of such a nature that the relief sought from this court will have no practical effect or result and therefore the application should be dismissed.³ In *Premier, Provinsie Mpumalanga en 'n Ander v Groblersdalse Stadsraad*⁴ the Supreme Court of Appeal held that appeals should be submitted for adjudication only if there will be a real practical effect or result of a judgment on appeal. Clearly, the test is not whether the order sought might be of importance in a hypothetical future case. In *Absa Bank v Van Rensburg*⁵ the Supreme Court of Appeal confirmed the approach that the court will not determine issues that are moot merely because the parties (or one of them) believe that a practical result could be achieved in other respects. I am of the view that the same principle is applicable to litigation in any court of first instance. The applicant did not insist that he was entitled to the exclusive use of the guest parking allocated to him and consequently, there is no existing or live controversy between the parties. They are in agreement in this regard.

[10] Adv HP van Staden appeared before us for the first time on 21 October 2024 on behalf of the applicant. He was constrained to accept that insofar as the applicant was also of the view that the trustees of Elbert Height acted unlawfully in granting

³ See in general pertaining to appeals: s 16(2)(a) of the Superior Courts Act 10 of 2013.

⁴ 1998 (2) SA 1136 (SCA) at 1141D-F; and *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC) paras 14-16.

⁵ 2014 (4) SA 626 (SCA) para 7.

applicant the exclusive use of the relevant guest parking, it would serve no practical effect to either refer the matter back to the adjudicator, or to grant an order as requested. The matter has indeed become moot.

[11] The only remaining issue to be considered was the costs of the application. Adv Van Staden submitted initially that insofar as the applicant's predicament was caused by the trustees of Elbert Height, the applicant should be entitled to the costs of the application. However, on being questioned in this regard, he submitted as an alternative argument that each party should be ordered to pay their own costs.

[12] It should be emphasised that the Ombud abided the decision of the court and that Elbert Height did not oppose the application. Costs were not sought from these two parties. In my view there is no reason why second respondent shall be ordered to pay his own costs in opposing the application. He is not at fault and as the successful party he is entitled to be awarded his costs for opposing the application. Adv MP Modise submitted on behalf of the second respondent that a punitive costs order on the scale as between attorney and client should be awarded in favour of his client. I do not agree that a punitive order is warranted. The usual party and party costs order should be granted.

[13] Having considered the application, it should be dismissed and the applicant should be ordered to pay the second respondent's costs of opposition.

Order

[14] The following order is made:

1. The application is dismissed.
2. The applicant shall pay the costs of the application in addition to the costs order already made, including the second respondent's costs of opposition as well as the fees of counsel on scale B.

I concur

JP DAFFUE J

NM-MBHELE DJP

Appearances

For applicant: HP Van Staden
Instructed by: Byron Says Attorneys Inc
Bloemfontein

For respondent: Adv MP Modise
Instructed by: Moruri Attorneys Inc
Bloemfontein