

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 17944/23

In the matter between:

MICHAEL DAVID ZYBUTZ

Applicant

and

BODY CORPORATE OF HELIANTHUS

First Respondent

LONGITUDE SECURITIES (PTY) LTD

Second Respondent

HERSCHEL PHILIP MAYERS

Third Respondent

ROBIN ARTHUR HORNE

Fourth Respondent

ELIO SECONDA RITA ROVETTI

Fifth Respondent

CHARLENE ETHNE MAYERS

Sixth Respondent

THE COMMUNITY SCHEMES OMBUD SERVICE

Seventh Respondent

MNINAWA BANGILIZWE N.O.

Eighth Respondent

Corum : Sidaki, AJ

Heard on : 3 June 2024

Delivered on: 2 September 2024

JUDGMENT

Introduction

1. This is a statutory appeal against the order of the Adjudicator acting in terms of the Community Schemes Ombud Service Act (the CSOS Act)¹.
2. An affected person who is dissatisfied by an adjudicator's order may appeal to the High Court, but only on a question of law.²
3. The appeal is opposed by first, third, fourth, fifth and sixth respondents (the respondents). The seventh and eighth respondents filed a notice to abide.

Background

4. The applicant owns a unit in a sectional title residential building, Helianthus, situated at V[...] Road, C[...], Cape Town. The first respondent is the Body Corporate of Helianthus (the body corporate), a community scheme³ under the CSOS Act. The second to sixth respondents are owners of the other units in the scheme. The applicant and second to sixth respondents are members of the body corporate. The eighth respondent is the adjudicator (the Adjudicator) who performs his duties under the auspices of the seventh respondent.

¹ Community Schemes Ombud Service Act 9 of 2011.

² Section 57(1) of the CSOS Act.

³ Section 1 of the CSOS Act defines 'community scheme':

"means any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing co-operative as contemplated in the South African Co-operatives Act, 2005 (Act No. 14 of 2005) and 'scheme' has the same meaning."

5. In about 2014 the applicant initiated a process to obtain the body corporate's approval for alterations involving extensions and improvements which he intended to effect to his unit. The alterations would entail certain layout changes and room extensions, the execution of which, it is common cause, would have some effect to the common property. The Sectional Title Schemes Management Act (STSMA),⁴ provides that the body corporate is responsible for the enforcement of the rules and for the control, administration and management of the common property for the benefit of all owners.⁵
6. The body corporate gave consent for the applicant to seek municipal approval for any departures required from existing land use restrictions.
7. During 2015, the City of Cape Town (the City) granted the departures sought in order to effect the alterations, subject to the passing of any related building plan application in terms of the National Building Regulations and Building Standards Act⁶.
8. The applicant has over time presented several building plans of the intended alterations to meetings of the body corporate for approval. It is out of this process that sharp disagreements have arisen between the applicant and certain members of the body corporate.
9. In 2018, the applicant filed a complaint with the Community Schemes Ombud Service (the Ombud Service),⁷ alleging that members of the body corporate had unreasonably refused to grant consent to his proposed building plans. That complaint was dismissed. The applicant appealed to the High Court.⁸ The outcome of those court proceedings was a remittance of the matter to the body corporate for a consideration of the alterations sought by the applicant.⁹

⁴ Sectional Title Schemes Management Act 8 of 2011.

⁵ Section 2(5) of the STSMA.

⁶ National Building Regulations and Building Standards Act 103 of 1977.

⁷ 'Service' is defined in section 1 of the CSOS Act as, "means the Community Schemes Ombud Service established by section 3".

⁸ In the Western Cape Division, under Case No: 13079/2018.

⁹ Judgment delivered on 27 November 2019.

10. Further engagements took place between the parties. Various members of the body corporate demanded modifications to the applicant's building plans that would suit their personal preferences. In 2021, the applicant effected several changes to the building plans aimed at accommodating the diverse interests. The applicant obtained the City's approval of the amended building plans, which he then took to the body corporate for its approval.
11. The STSMA provides that in addition to the body corporate's main functions and powers under sections 3 and 4, the body corporate must, on application by an owner and upon special resolution by the owners, approve the extension of boundaries or floor area of a section in terms of the Sectional Titles Act (Sectional Titles Act)^{10, 11}
12. At the meeting held on 7 December 2021, the majority of the members of the body corporate voted against the applicant's proposed special resolution to adopt the building plans already approved by the City. On this occasion, various further concerns about the shape and form of certain other aspects of the proposed extensions were cited. Several further engagements ensued between the parties concerning adjustments that would satisfy each of the other owners. Throughout this process the applicant incurred substantial additional costs for services of the engineer, architect and other related professionals.
13. In 2022, a written settlement agreement to resolve the issues between the applicant and the fifth respondent was reached. In terms thereof, the applicant undertook to pay for further works to be especially undertaken by a waterproofing contractor to be appointed by the fifth respondent and to furnish a structural engineer's report endorsing the structural integrity of proposed extensions. This settlement agreement was conditional upon the body corporate's special resolution approving all the elements of the building plans.

¹⁰ Sectional Titles Act 95 of 1986.

¹¹ Section 5(1)(h) of the STSMA.

14. The matter returned to a special general meeting held on 17 February 2023, where there was mixed reaction to certain elements of the modified building plans. Not all the alterations sought were approved.
15. An owner who is unable to obtain a special or unanimous resolution may approach the chief ombud for relief.¹² Chief ombud is as defined in section 1 of the CSOS Act.
16. Aggrieved by the body corporate's failure to reach consensus on the full set of the proposed extensions, the applicant, once again, on 31 May 2023, lodged an application with the Ombud Service, alleging that members of the body corporate had, for various reasons, acted unreasonably in refusing to pass the remaining special resolutions. *Inter alia*, the applicant asserted that:
 - 16.1. There had been an unreasonable refusal by a meeting of the body corporate to pass all the necessary resolutions for the proposed building plans;
 - 16.2. The body corporate had in the past approved a similar type of extensions sought by other of its members and that the refusal in this instance was indicative of the body corporate's inconsistency in dealing with such matters.
 - 16.3. Some of the concerns put forward for refusing the outstanding special resolutions were unjustifiable.
 - 16.4. Concerns raised by one particular member of the body corporate were not *bona fide*.
 - 16.5. Certain members of the body corporate sought deliberately to frustrate the applicant's plans for alterations to his unit.
 - 16.6. Members of the body corporate had violated section 5(1)(h) of STSMA by declining to approve building plans which had already

¹² Section 6(9) of STSMA.

been approved by the City. According to the applicant, this provision did not give members of the body corporate any discretion in approving the special resolutions sought.

17. The relief sought from the Adjudicator was in terms of section 39(4)(d) of the CSOS Act, which provides:

“39. An application made in terms of section 38 must include one or more of the following...

(4) In respect of meetings-

(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.”

18. Having considered the matter, the Adjudicator issued an order dated 11 September 2023, dismissing the application and stating the following:

“6.33 It is the Adjudicator’s considered opinion that this application should rather be directed to the Chief Ombud and dealt with in terms of a section 6(9) application. In this regard the applicant ought to lodge an application with the Ombud in terms of section 6(9) of the STSMA.”

19. Thus, the Adjudicator dismissed the application on the basis of a lack of jurisdiction.

20. On 18 October 2023, the applicant instituted this appeal against the Adjudicator’s order, citing jurisdiction as one of the grounds of appeal involving an error of law.

Issues for determination

21. The underlying cause or main basis upon which the Adjudicator's decision is premised is one of a lack of jurisdiction. That is indeed the main point taken by the respondents in defending the Adjudicator's finding.
22. Mr Morrissey, for the applicant, contended in argument that the Adjudicator made errors of law, firstly, by failing to apply the reasonableness requirement in the assessment of the application lodged under section 38 read with section 39(4)(d) of the CSOS Act and, secondly, by interpreting section 6(9) of the STSMA in a manner which ousted the Adjudicator's jurisdiction to determine the application before him. He stressed that the matter involved the required standards for proper exercise of governance, conduct of meetings and application of reasonableness in the decision-making process of body corporates.
23. The respondents set out in the heads of argument that the Adjudicator "*...did in fact find that he lacked jurisdiction to entertain the application, on the ground that the relief sought by the applicant fell within the ambit of section 6(9) of the STSMA*". Further, "*It is submitted... the applicant's application did not fall within the ambit of sections 38 and 39 of the CSOS Act and accordingly that the eighth respondent lacked the jurisdiction necessary to determine the application. It is submitted further and in any event that the eighth respondent was correct in finding that the course for the applicant to follow would have been under section 6(9) of the STSMA Act*".
24. Mr Sievers SC, for the respondents, contended in argument that the Adjudicator lacks jurisdiction to entertain an application under section 38 of the CSOS Act. I understood the argument to be that there is a distinction between the types of applications to be resolved by the Chief Ombud and those that can be resolved by an Adjudicator. In this case, as further contended, the applicant ought instead to have approached the Chief Ombud for relief, described as a different person who would apply a different procedure and a different test to the complaint.

25. The Adjudicator's finding on jurisdiction raises the question as to whether a correct legal interpretation was applied when determining the pathway through which an application to the Ombud Service may be instituted.
26. It is accordingly necessary to first address this antecedent question of jurisdiction as its resolution may be determinative of the outcome of this appeal.

Legislative framework

27. The STSMA provides, *inter alia*, for the establishment of bodies corporate to manage and regulate sections and common property in sectional titles schemes and to apply rules applicable to such schemes.
28. The CSOS Act, on the other hand, provides, *inter alia*, for the establishment of the Community Schemes Ombud Service; the mandate and functions of the Ombud Service; for a dispute resolution mechanism in community schemes.
29. As I see it, sectional titles schemes which are regulated by the STSMA fall within the definition of community schemes in the CSOS Act. For purposes of dispute resolutions, the two pieces of legislation must be read together.
30. The Chief Ombud as the head of the administration of the Ombud Service, *inter alia*, manages the affairs of the Service.¹³ Any of the powers and responsibilities of the Chief Ombud may be delegated to an employee. The Ombud Service employees include the Chief Ombud, who designates an Ombud and Deputy Ombud for each regional office, as well as full-time and part-time Adjudicators.¹⁴
31. Any person may submit an application to the Ombud Service if such person is a party to, or materially affected by a dispute.¹⁵ A dispute means a dispute in regard to the administration of a community scheme between persons

¹³ Section 18 of the CSOS Act.

¹⁴ Section 21 of the CSOS Act.

¹⁵ Section 38(1) of the CSOS Act.

who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly.¹⁶

32. An application referred to in section 38(1) of the CSOS Act must be made by submission of an application by physical delivery or electronically, in accordance with the practice directive issued by the Chief Ombud.¹⁷
33. In terms of the Practice Directive on Dispute Resolution issued by the Chief Ombud (Practice Directive)¹⁸, its objective is to provide information on the procedures and content requirements for dispute resolution applications lodged with the Ombud Service.
34. The Practice Directive's scope of application is in regard to all applications for dispute resolution in CSOS. In order to determine whether a dispute should be referred directly for adjudication, the Ombud will consider the following factors, *inter alia*, if it relates to governance issues, meetings, a declaration invalidating a scheme rule and termination of a managing agent's contract.¹⁹
35. The word 'Ombud' is defined in the Practice Directive: "*means the Chief Ombud and/or regional Ombud appointed in terms of the CSOS Act.*"
36. The CSOS Act, the STSMA and the Sectional Titles Act are listed as some of the 'pieces of legislation' which 'govern' the Practice Directive on dispute resolution.

Discussion

37. The Constitutional Court²⁰ has approved the definition of the term 'jurisdiction' given by Watermeyer CJ in *Graaf-Reinet Municipality*²¹ as follows:

¹⁶ Section 1 of the CSOS Act.

¹⁷ See Regulation 19(1) of the Regulations on the Community Schemes Ombud Service.

¹⁸ Practice Directive on Dispute Resolution No:1 of 2019, signed by the Acting Chief Ombud, dated 1 August 2019.

¹⁹ Section 21.5.6 of the Practice Directive.

²⁰ *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at para 74.

“Jurisdiction means the power or competence of a Court to hear and determine an issue between parties.”

38. *Pollak The South African Law of Jurisdiction*²² refers to the following more comprehensive definition in *Wright*:²³

“[A] lawful power to decide something in a case, or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction.”

39. In the present matter, jurisdiction would entail the power or competence of the Ombud Service under the CSOS Act to hear and determine the issues between parties as set out in the application for dispute resolution to the Ombud Service.
40. The finding by the Adjudicator has two dimensions to it.
41. The Adjudicator initially expressed an opinion that the applicant had failed to prove on a balance of probability that the decision of the owners sitting as the body corporate to reject the special resolution was unreasonable. The Adjudicator is criticised for having only considered procedural fairness aspects without looking at the substance of the issues that were brought before him. I agree.
42. It is unclear in the Adjudicator’s finding how the ‘reasonableness’ factor of the decision of the body corporate was evaluated. It seems to me that this exercise still needs to be carried out. The Adjudicator merely expressed a general sense of satisfaction that the owners had applied their minds without pertinently engaging with the nub of the applicant’s complaint. At the core of the complaint is the inconsistency of the body corporate’s decision-making

²¹ *Graaff-Reinet Municipality v Van Ryneveld’s Pass Irrigation Board* 1950 (2)SA 420 (A) at 424.

²² DE Van Loggerenberg *Pollak The South African Law of Jurisdiction* (Juta 3rd Ed) p 2 [service 7, 2022].

²³ *Wright v Stuttaford & Co* 1929 EDL 10 at 42, referring to the definition adopted in *Vromans De Foro Competenti* and approved in *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 551 C-D.

process, a lack of *bona fides* in respect to at least one of the owners sitting on the body corporate, etc.

43. An Adjudicator's evaluation of reasonableness of the impugned decision of the body corporate should entail assessing factors such as the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.²⁴ In this case, whilst, on the one hand, the Adjudicator acknowledged, at para 6.22 of the ruling, the minimal effect of the applicant's proposed changes to the other owners, on the other hand, this important factor does not appear to have been appropriately weighed or explored further in the analysis of the evidence before the Adjudicator.
44. The Adjudicator made a definitive finding that he lacked jurisdiction to entertain this particular application because it had been brought in terms of section 38 of the CSOS Act and, on that basis, found that the "*application should rather be directed to the Chief Ombud and dealt with in terms of a section 6(9) application. In this regard the applicant ought to lodge an application with the Ombud in terms of section 6(9) of the STSMA.*"
45. There does not appear to be any mechanism for lodgement of applications with the Chief Ombud or Ombud Service other than the procedure that is prescribed in Chapter 3 of the CSOS Act. The STSMA points to the CSOS Act for the definitions of the Chief Ombud and Ombud. And, as I have pointed out above, the Practice Directive defines Ombud and meaning the Chief Ombud and/or regional Ombud appointed in terms of the CSOS Act.
46. In this case, the Adjudicator ought first to have established whether the applicant and the body corporate were parties to a dispute involving the

²⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 45.

administration of a community scheme, as envisaged in the CSOS Act.²⁵
This is clearly the case.

47. The next step would involve determining the process through which a party aggrieved by the conduct of the meetings of the body corporate may approach the Chief Ombud for relief. Section 6(9) of the STSMA is a non-prescriptive provision which merely alerts a dissatisfied party to a recourse available to them in the event they are unable to obtain a special or unanimous resolution.
48. The CSOS Act created Ombud Service appears to be the only alternative dispute resolution body designed to resolve disputes involving all types of community schemes including sectional title schemes and home-owners associations.
49. Thus, the pathway through which to approach the Chief Ombud for the relief foreshadowed in section 6(9) of the STSMA, would require following the mechanism prescribed in Chapter 3 of the CSOAS Act.
50. Such would be following an unduly strained interpretation of the language used by the legislature when one considers the architecture of the applicable legislation.
51. There is one dispute resolution office, headed by the Chief Ombud who is assisted by the regional Ombuds and Adjudicators, which administers all the disputes arising from community schemes.
52. The Adjudicator's ruling makes mention in its introduction that the application under consideration was made in the prescribed form to the Ombud Service in terms of section 38 read with section 39 of the CSOS Act. The application underwent the prescribed screening process, came before the Ombud who,

²⁵ A Community Scheme is any scheme or arrangement where there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, a housing scheme for retired persons, and a housing co-operative.

in the exercise of his discretion, accepted the application and referred the dispute directly for adjudication before an adjudicator in accordance with section 48 of the CSOS Act, read with the Practice Directive.

53. Had the Ombud Service lacked jurisdiction to hear such an application, the Ombud would likely have rejected the application at screening stage,²⁶ and not referred it for adjudication.

Conclusion

54. Accordingly, I am satisfied that the Adjudicator misdirected himself materially on a question of law in dismissing the application before him for a lack of jurisdiction.
55. The proper course now is to remit the matter to the Ombud Service to decide the merits of the application. Given the views expressed by the Adjudicator who heard this matter, as I have discussed, prudence dictates that the merits should be heard by a different staff member of the Ombud Service to be assigned by the Ombud.
56. The parties were agreed that costs should follow the result in this Court and that the nature of the matter was such that such costs be pegged on the “C” scale.

Order

57. The appeal is upheld.
58. The order of the Adjudicator refusing the application is set aside.
59. The applicant’s application in terms of section 39(4)(d) of the CSOS Act is remitted to the Community Schemes Ombud Service for hearing before a different staff member of the Ombud Service in order to determine the merits of the application.

²⁶ See section 42 of the CSOS Act.

60. The first, third, fourth, fifth and sixth respondents shall be jointly and severally liable for the applicant's costs of suit, on the "C" scale.

T.S. SIDAKI
Acting Judge of the High Court

Appearances:

For Applicant : Adv. Andrew Morrissey

Instructed by : BBP Law attorneys

For First, Third, Fourth, Fifth, Sixth Respondents : Adv. Fred Sievers SC

Instructed by : Smith Tabata Buchanan Boyes

For Second, Seven, Eight Respondents : No appearances