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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 11936/23

In the matter between:

**THE TRUSTEES OF THE BODY CORPORATE
OF SWEETWATERS**

APPLICANT

and

LUXMI DEVI CHETTY

FIRST RESPONDENT

COMMUNITY SCHEMES OMBUD SERVICE KZN

SECOND RESPONDENT

SUGANDHINI RAJARUTHNAM N.O.

THIRD RESPONDENT

ORDER

The following order is granted:

1. The applicant's late lodgement of this appeal is condoned.
2. The appeal in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 is upheld.

3. The adjudication order of the third respondent dated 28 June 2023, under the auspice of the second respondent under the case number CSOS10681/KZN/22 is hereby set aside.

4. The first respondent is directed to pay costs of suit on scale B

JUDGMENT

PLOOS VAN AMSTEL AJ

[1] This is an appeal in terms of s 57 of the Community Schemes Ombud Service Act, 9 of 2011 ("the Act").

[2] The trustees of the Body Corporate of Sweetwaters ("the Body Corporate") are cited as the applicant. It is common cause that the Body Corporate falls within the meaning of the Act. The first respondent is Lexmi Devi Chetty, who is neither a member of the applicant nor a resident within the scheme. The second respondent is the Community Schemes Ombud Service a juristic person established in terms of s 3(1) of the Act which, in terms of s 4 thereof has the function of developing and providing a dispute resolution service as contemplated by the Act ("the Community Schemes Ombud"). The third respondent is the Community Schemes Ombud Adjudicator, Sugandhini Rajaruthman ("the adjudicator"). The second and third respondents do not oppose the relief sought and have elected to abide the decision of this court.

[3] Acting on a general power of attorney dated 14 February 2019, in terms of which the first respondent was appointed as Dhesigan Gounden's agent to manage all matters in regard to his investment property being Flat 811 in the scheme, she lodged an application for dispute resolution with the Community Schemes Ombud under case number CSOS10681/KZN/22.

[4] After recording that the dispute lodged as aforesaid was forwarded to the applicant's trustees for their comments and version in terms of the issues raised by the first respondent in the dispute, and that "no replies from the Respondents (being the trustees of the applicant herein) disputing the allegations raised by the" first respondent, the adjudicator considered the dispute and granted an adjudication order by default on 28 June 2023. The salient parts of which reads as follows:

" ...

48.3. The order in terms of section 39(4)(a) is granted in that the respondent are (sic) to call a general meeting of its members to finalize the 2022 AGM at a scheduled time suitable to all members.

48.4. The order in terms of section 39(4)(b) is granted in that the 2022 AGM was not validly convened as there was no quorum.

48.5. The order in terms of section 39(4)(c) is granted in that an order declaring that the resolution purportedly passed by the Respondent at the 2022 AGM is (i) void and (ii) invalid.

48.6. The order in terms of section 39(7)(a) is granted in that the Applicant was wrongfully denied access to copies of the 2020/2021 audited financial statements and the 2021/2022 budgets of the sectional scheme.

48.7. The Respondent have to comply within 30 days of this order to reconvene the 2022 AGM and to provide the Applicant with the requested documentation of the sectional scheme... "

[5] On 18 September 2023, subsequent to the granting of the adjudication order, and without notice to the applicant, the adjudication order was made an order of this court pursuant to s 56(2) of the Act.

[6] The Body Corporate, aggrieved by the decision of the adjudicator, launched this application on 25 October 2023 in terms of which it seeks to appeal, alternatively review, the adjudication award.

[7] There are two issues for determination, the first being whether the applicant's late lodgement of this appeal should be condoned, and the second issue being whether the adjudicator erred on a point of law when determining the first respondent's complaint against the applicant, resulting in the award that was issued.

Condonation

[8] Section 57(2) of the Act provides that an appeal such as the present one must be lodged within 30 days after the date of delivery of the order of the adjudicator. Notably, a review does not have prescribed time limits within which it ought to be instituted, save that it should be done within a reasonable time.

[9] As the issue for determination in respect of the adjudication award is on a point of law, this matter falls within the ambit of both an appeal in terms of s 57 and a review. In *Club Kerkira (Pty) Limited v Trustees of Club Kerkira Body Corporate and Others*,¹ it was held that there are two propositions which have a bearing on an application for condonation of this nature:

"Firstly, it is clear that the Act is designed to provide an at least relatively inexpensive and speedy resolution of disputes arising within community living schemes. The confinement of appeal rights to questions of law, and the fixing of a time limit on the institution of such appeals reflect the same philosophy. Secondly, the lodgement of a review is not confined to the aforesaid 30-day time period and is not subject to the same confinement on questions of law only."

[10] It is common cause that the applicant did not lodge this appeal within the prescribed 30-day period. The first respondent objected to the late lodgement of the appeal, and notwithstanding the applicant's initial persistence that condonation was not necessary, Mr *Blomkamp* correctly conceded that condonation would be necessary in circumstances where an appeal in terms of s 57 of the Act is not lodged within the prescribed 30-day period. Whilst the applicant's founding affidavit details all steps taken in pursuance of the setting aside of the adjudication order, its notice

¹ *Club Kerkira (Pty) Limited v Trustees of Club Kerkira Body Corporate and Others* [2024] ZAKZDHC 40.

of motion failed to seek relief pertaining to condonation. Mr *Blomkamp* at the commencement of his argument, on behalf of the applicant, sought an amendment to this effect from the bar, and fortunately for the applicant the first respondent did not object to the proposed amendment. That amendment was accordingly granted to include a further prayer in the notice of motion that the applicant's failure to launch its appeal within the time limit set by s 57(2) of the Act be condoned.

[11] The applicant contends that the adjudication order of 28 June 2023 did not come to its attention until 18 July 2023. It is not in dispute that the applicant did not receive notice of the dispute or any further communication in that regard, specifically a notice of set down for the hearing thereof. Upon becoming aware of the adjudication order, and by way of notice dated 27 July 2023, the applicant instituted a rescission application purportedly in terms of item 25.3 of the second respondent's "practice directive on dispute resolution for the setting aside of an adjudication order".

[12] Notwithstanding receipt of the applicant's rescission application, no decision was made and/or communicated to the applicant by the second respondent following the institution of its rescission application. After waiting for a response from the Community Schemes Ombud regarding its rescission application, to no avail, the applicant launched this application on 25 October 2023, albeit approximately three months after the adjudicator order was received by the applicant.

[13] The first respondent's opposition to the application for condonation was predicated on her contention that the delay in the lodging of this application was inexcusable as it was caused solely by the applicant incorrectly applying for the rescission of the default adjudication award instead of instituting this appeal within the 30 days provided for in the Act, as advised and recorded on the last page of the adjudication award.

[14] The court, in *Baxter v Ocean View Body Corporate and Others*,² cited with approval in this division in *Club Kerkira (Pty) Limited v Trustees of Club Kerkira Body*

² *Baxter v Ocean View Body Corporate and Others* 2023 (2) SA 205 (WCC) para 22.

Corporate and Others,³ was tasked to consider whether it is within a court's powers to condone non-compliance with statutorily prescribed time limits. With reference to *Mohlomi v Minister of Defence*⁴, where it was noted that courts do not have an inherent power to condone non-compliance with statutorily prescribed time limits, Binns-Ward J (with whom De Wet AJ concurred) concluded that upon a proper contextual consideration of the provisions of s 57(2), the court does have the power, on good cause shown, to condone non-compliance with the 30-day time limit.⁵

[15] Accordingly, it is necessary to decide whether the applicant has shown sufficient good cause for the granting of condonation. The facts usually relevant to the issue of condonation were enunciated in the judgment of the then Appellate Division in *Melane v Santam Insurance Co Ltd*.⁶ Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case.

[16] The explanation proffered by the applicant for its failure to lodge this appeal timeously was its election to institute a rescission application, which it instituted on 27 July 2023, shortly after the adjudication order came to its attention. In that rescission application, as is repeated in its founding affidavit herein, the applicant explained that it was not in wilful default, having received neither the notice of dispute lodged by the first respondent nor the notice of the set down thereof. The aforesaid explanation was not disputed by the first respondent, with the only issue taken by her being that the applicant was the author of its own misfortune by electing to institute rescission proceedings prior to instituting this appeal, thus causing a delay.

[17] I am of the view that for the interests of justice to prevail condonation must be granted, as the level of prejudice suffered by the applicant, confronted as it is with the adjudication order, far exceeds that of the first respondent who was at all times

³ *Club Kerkira (Pty) Limited v Trustees of Club Kerkira Body Corporate and Others* [2024] ZAKZDHC 40.

⁴ 1977 (1) SA 124 (CC) para 17.

⁵ *Kobi v Trustees, De La Rey Body Corporate and Others* 2024 (1) SA 174 (FB).

⁶ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B-F.

kept abreast of the steps taken by the applicant since the adjudication order came to its attention.

Grounds upon which the applicant seeks the setting aside of the adjudication order

[18] The main ground of appeal and/or review, as alleged by the applicant is that the adjudicator erred in entertaining the first respondent's dispute as lodged with the Community Schemes Ombud, as the first respondent lacked the necessary standing to lodge such a dispute. As this is a point of law, it falls within the ambit of an appeal.

[19] The basis upon which the first respondent contended that she enjoyed the requisite standing to apply for dispute resolution Community Schemes Ombud Service was predicated upon the power of attorney dated 14 February 2019 provided by her husband, Dhesigan Gounden, who is a member of the applicant, and notably not by any independent rights personal to her.

[20] Whilst the first respondent in argument submitted that she did not lodge the dispute with the Community Schemes Ombud Service in her own name, this was not averred in her answering affidavit, nor was a copy of the referral form placed before court to evince that the dispute was not referred to Community Schemes Ombud in the first respondent's personal capacity. The adjudication order further provides otherwise when one has regard to the repeated reference to the "applicant" as the first respondent therein. For example, in paragraph 1 thereof it is recorded that the applicant in the dispute is "Luxmi Devi Chetty who is acting in terms of a power of attorney on behalf of her spouse Mr D. Gounden, the registered owner of unit 8[...] S[...] , 1[...] B[...] Road, Amanzimtoti, Durban, KwaZulu-Natal". Paragraph 5 further details the relief sought by the applicant, with reference to the first respondent herein. Finally, under the heading of "summary of relevant evidence", the adjudicator repeatedly referred to the applicant in the dispute as being the first respondent.

[21] Accordingly, *ex facie* the adjudication order, there can be no doubt that the dispute was lodged by the first respondent. I should state that the first respondent, in

argument, averred that the application lodged with the second respondent identified her husband as the applicant in that dispute.

[22] Insofar as the first respondent's *locus standi* to apply for dispute resolution, Mr *Blomkamp* correctly referred to and relied upon *Durdoc Centre Body Corporate v Singh*⁷ where the question regarding locus standi was considered by a Full Bench of this Division. The court held that "the right to lodge a dispute has been prescribed by legislation as a right that accrues to owners of units who are materially affected by a community scheme related matter".⁸

[23] Section 38(1) of the Act provides that "any person may make an application [for adjudication of a dispute] if such person is a party to or affected materially by a dispute".

[24] In *Durdoc Centre* the court was tasked with determining whether a party, acting on an authority given by the property owner, had the requisite standing to refer a dispute to the Community Schemes Ombud with reference to s 38(1) of the Act. With reference to *Watt v Sea Plant Products Bpk and Others*⁹ the distinction between *locus standi* and authority was explained as *locus standi* being an access mechanism controlled by the court itself with the standing of a person not being dependant on authority to act. A party's standing depends on whether the litigant is regarded by the court as having a sufficiently close interest in the litigation.

[25] The Full Bench in *Durdoc Centre* concluded that the applicant therein, who was authorised to apply to the Ombud on behalf of a property owner, being the company with whom he was employed, lacked the necessary standing to institute the dispute that was adjudicated before the Ombud as he was not a person who could make such application as envisaged by s 38(1) in that he was neither the owner of a unit in that body corporate nor did he have a material interest in the scheme.

⁷ *Durdoc Centre Body Corporate v Singh* 2019 (6) SA 45 (KZP).

⁸ *Ibid* para 16.

⁹ [1998] 4 All SA 109 (C) at 113h.

[26] This court's aforesaid reasoning applies equally to the present matter. The first respondent is neither the owner of a unit, nor does she enjoy a material interest in the scheme, as she does not reside within the scheme. The dispute was lodged by the first respondent with the Community Schemes Ombud on the strength of the power of attorney provided by her husband to whom she is married by customary rites. There is nothing further before me to suggest that the marriage was duly registered, or as to the marital regime governing their union.

[27] It follows then that she does not have the necessary standing to lodge a dispute with the second respondent.

[28] The adjudicator, aware of the fact that the first respondent lodged the dispute on the basis of the general power of attorney, in her capacity as an agent of the unit owner, ought to have questioned and considered the first respondent's standing to refer such dispute.

[29] Errors of law made by adjudicators result in decisions which are not in accordance with law. The legislation recognises that such decisions should not be allowed to prevail and therefore provides for appeals. It is self-evident that some decisions which might be made by adjudicators will have long-term effects which may indefinitely dictate the course of the relationship between members of community schemes in a manner which is not consistent with the law. That would be an undesirable outcome inconsistent with the purpose of the Act.

[30] In the circumstances, the first respondent did not have the necessary authority to lodge a dispute such as is the subject matter of this appeal. The adjudicator's failure to satisfy herself that the applicant to the dispute before her had the requisite locus standi to institute the dispute, erred in law by entertaining such dispute.

[31] Accordingly, the appeal must succeed.

Order

[32] In the result the following order is made:

1. The application for condonation of the late lodgement of this appeal is granted.
2. The appeal in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 is upheld.
3. The adjudication order of the third respondent dated 28 June 2023, under the auspice of the second respondent under the case number CSOS10681/KZN/22 is hereby set aside.
4. The first respondent is directed to pay the costs of suit on scale B.

PLOOS VAN AMSTEL AJ

Case information

Date of Hearing: 05 November 2024

Date of Judgment: 05 December 2024

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