

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)**

JUDGMENT

Not Reportable
Case no: 104/2025

In the matter between:

THANAPAL PILLAY

APPLICANT

and

**THE WHALE ROCK HEIGHTS HOMEOWNERS
ASSOCIATION**

FIRST RESPONDENT

DEON STEENKAMP

SECOND RESPONDENT

Neutral citation: *Pillay v The Whale Rock Heights Homeowners' Association and Another* (Case no 104/2025) [2025] ZAWCHC 224 (28 MAY 2025)

Coram: **NUKU J**

Heard: 14 April 2025

Delivered: 28 MAY 2025

Summary: **Review** – decision of the trustees of a homeowners association to approve building plans that did not comply with the provisions of the Architectural Guidelines of the homeowners association that the trustees

were responsible for enforcing – decision of the trustees of a homeowners association to condone the building plans’ non-compliance comply with the provisions of the Architectural Guidelines where no application had been made for such condonation – in both instances the trustees acting beyond the powers conferred on them by the Constitution of the homeowners association – decision reviewed and set aside

ORDER

- 1. The First Respondent’s 23 July 2023 approval of the Second Respondent’s building plans in respect of the building presently being erected on Erf 8[...], as well as the decision, which it claims to have taken on 18 February 2025, to condone a departure from Item 1.2.1.2 of its Architectural Guidelines in respect of Erf 8[...] are hereby reviewed and set aside.**
- 2. The respondents, jointly and severally, the one paying the other to be absolved, are directed to pay:**
 - 2.2.1 the costs occasioned by the interdict application, including the qualifying costs of the experts, David Friedman and Steven Neufeld, including the cost of Senior Counsel and appointing correspondent attorneys to assist with file pagination in George and Cape Town, and**
 - 2.2.2 the costs of the review application, including the qualifying costs of the experts, David Friedman and Steven Neufeld, and including the cost of Senior Counsel and appointing correspondent attorneys to assist with file pagination in George and Cape Town.**

- 3. The costs referred to above, which shall be in accordance with scale C, shall include the costs occasioned by the postponement of the application on 20 March 2025 and 28 March 2025**
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JUDGMENT

Nuku J

[1] The final relief that the applicant seeks in these proceedings is the review and setting aside of decisions taken by the first respondent (a) on 23 July 2023 to approve building plans submitted by the second respondent (Building Plans) which did not comply with the first respondent's Architectural Guidelines and Rules (Architectural Guidelines), and (b) on 18 February to condone the Building Plans' non-compliance with the Architectural Guidelines in circumstances when there was no application for such condonation.

[2] The complaint is that the Building Plans do not comply with the provisions of clause 1.2.1.2 of the Architectural Guidelines which prescribes a minimum requirement of not less than seventeen and a half degrees in respect of roof pitches.

It is common cause that the roof pitch depicted in the Building Plans is less than seventeen and half degrees.

[3] The applicant raises various grounds of review but based on the view I take of the matter, there is one review ground that is dispositive of the matter, and it is the one that relates to the *vires* which can be paraphrased as follows: as to the decision of 23 July 2023, the first respondent did not have the authority to approve building plans that deviated from the requirements laid down by the Architectural Guidelines, and as to the decision of 18 February 2025, the first respondent had no authority to condone the Building Plans' non-compliance with the requirements laid down by the Architectural Guidelines in the absence of an application for such condonation.

[4] The first respondent is a body corporate established in terms of section 29(1) of the Cape Land Use Planning Ordinance No. 15 of 1985. In terms of its Constitution, the management and control of its affairs vest in a Board of Trustees which is referred to as the Committee. Further, the Committee is, in terms of clause 11.1.2 of the Constitution, entitled and obliged to give effect to the Constitution. In turn, clause 9.1 of the Constitution provides that 'The Committee shall enforce the Architectural Guidelines of the Whale Rock Heights Private Estate on behalf of the Association.'

[5] In approving the Building Plans on 23 July 2023, albeit through an oversight, the Committee clearly acted beyond the powers conferred on it by the Constitution. In fact, in so approving the Building Plans, it acted contrary to the Constitution, and it cannot and does not claim to have any power so to act.

[6] As regards the decision to condone the Building Plans' non-compliance with the requirements laid down by the Architectural Guidelines, it is common cause that the second respondent made no application for condonation. The Committee discovered its erroneous approval of the Building Plans when it was in the process of investigating complaints it had received in relation to the house that the second respondent was in the process of building. A minute of the meeting where the Committee is said to have made the decision reads, in the relevant part, as follows:

'A discussion regarding the build on stand 8[...] was held. Specific reference was made to the deviations from architectural guidelines with regard to the pitch of the roof. It was acknowledged that the plans had been approved by the Trustees in 2023 and submitted as approved to the Council – where the plans were also approved. All indications from the two surveyors' reports are that the construction was in compliance with the approved plans, and that it would not exceed the maximum height limit. It was further stated that the architectural guidelines are guidelines, rather than strict rule, and that there can be some discretion with regard to these. It was further agreed that any concerns raised by impacted members, addressed through PPM, would be responded to.'

[7] It is clear from the above extract, that the Committee was not presented with an application for condonation for the non-compliance, but it was deliberating over concerns that had been raised by impacted members. Significantly, the concern related to the Building Plans' non-compliance with the roof pitch requirements.

What the above extract demonstrates is that the Committee granted the condonation as a way of getting rid of the complaints that had been raised by the applicant as well as other members of the first respondent. In the absence of an application for condonation for the Building Plans' non-compliance with the provisions of clause 1.2.1.2 of the Architectural Guidelines, any discretionary powers to grant condonation

that the Committee may have had were not engaged. As such, the Committee acted beyond the powers conferred upon it by the Constitution when it granted the condonation which had not been applied for.

[8] The review is, in my view, good. But the respondents say that the applicant should be non-suited for failure to join the local authority with jurisdiction over the area where the subject property is situated. The short answer to this is that the local authority has no interest in the enforcement of the Architectural Guidelines by the first respondent. The respondents have also not suggested any interest of the local authority that may be adversely affected by a judgment relating to enforcement of the first respondent's Constitution and Architectural Guidelines. The non-joinder point is, thus, bad in law.

[9] A further point *in limine* that the respondent raised relates to the applicant's failure to utilise the internal dispute resolution mechanisms either in terms of clause 21 of the Constitution or in terms of the provisions of the Community Schemes Ombud Services Act, 9 of 2011 (CSOS Act).

[10] The first respondent puts this point no higher than suggesting that it ‘would have greatly preferred that the dispute raised by the applicant should have been dealt with in terms

of the dispute resolution procedures provided for in clause 21 of the Constitution of the Association’. This is understandable because clause 21.2.1 provides, in the relevant part, that if a matter is not resolved ‘it may be dealt with in accordance with the procedure as set out in this clause.’ Thus, the applicant was not obliged to deal with his concern in terms of the procedure laid down by the Constitution but could elect to do so. His election not to utilise that procedure can, thus, be no basis to non-suit him.

[11] The second respondent pleaded this preliminary point vaguely as follows ‘My understanding is that the correct forum for the applicant declare a dispute with me would be in terms of the Community Schemes Ombud Service Act, 2011 (“CSOS”). This Act was specifically adopted to deal with, among others, disputes between members of a homeowners’ association in the manner as described therein.’

[12] In argument, reference was made to two decisions of this Court in **Heathrow**¹ and **Sorronto**² in support of the proposition that this Court should only entertain disputes emanating from community schemes in exceptional circumstances. Context, however, matters. I say this because in **Heathrow** this Court was dealing with a dispute in respect of which the CSOS Act makes provision for whilst here the dispute goes to the legality of the decision. As this Court stated in **Heathrow** the High Court ‘is confined to reviewing the legality or rationality of the conduct of a decision-making body’³.

[13] Reference that was made to section 39(6) of the CSOS Act by the respondents was unhelpful because on the plain reading of that provision it confers no review powers

¹Heathrow Property Holdings No 33 CC and Others v Manhattan Place Body Corporate and Others (7235/2017) [2021] ZAWCHC 109; [2021] 3 All SA 527 (WCC); 2022 (1) SA 211 (WCC) (1 June 2021) at para [61]

² Body Corporate of the Sorronto Sectional Title Scheme, Parow v Koordom and Another (5439/2021) [2022] ZAWCHC 99; 2022 (6) SA 499 (WCC) (26 May 2022) at para [17]

³ At para [53]

as part of the dispute resolution mechanism. In the end I am of the view that this point *in limine* is also bad in law.

[14] At the commencement of the hearing there were divergent views between counsel on whether the part A relief still requires determination. Counsel for the applicant indicated that the relief sought in part A still required determination whereas the respondents' counsel was of the view that it had become moot and had been overtaken by events because the Court was now dealing with the review.

[15] Applicant's counsel attempted to explain why the applicant persisted with part A relief and from the explanation it was clear that it was for selfish reasons which would result in the part A relief operating like an order given in terms of section 18 (3) of the Superior Courts Act, 10 of 2013 in that it would, if granted, not be suspended by an appeal against an order made in respect of the review.

[16] The relief sought in part A had clearly become moot because the applicant sought it on the basis that it would operate until the outcome of the review application. I asked a rhetorical question – if the court grants the interim interdict – until when such interdict would operate and there was no ready answer to that. The only issue that remains are the costs relating to part A which stood over when the matter was postponed on 20 and 28 March 2025 with costs standing over for later determination.

[17] In my view, the costs, including the costs in relation to the postponements on 20 and 28 March 2025 should follow the result. What triggered the application was

the first respondent's decision that was taken on 18 February 2025 which made it clear that the dispute would remain unresolved. Prior thereto, the applicant had been told that the matter is receiving attention, and he would be kept informed.

Order

[18] In the result I make the following order:

18.1 The First Respondent's 23 July 2023 approval of the Second Respondent's building plans in respect of the building presently being erected on Erf 8[...], as well as the decision, which it claims to have taken on 18 February 2025, to condone a departure from Item 1.2.1.2 of its Architectural Guidelines in respect of Erf 8[...] are hereby reviewed and set aside.

18.2 The respondents, jointly and severally, the one paying the other to be absolved, are directed to pay:

18.2.1 the costs occasioned by the interdict application, including the qualifying costs of the experts, David Friedman and Steven Neufeld, including the cost of Senior Counsel and appointing correspondent attorneys to assist with file pagination in George and Cape Town, and

18.2.2 the costs of the review application, including the qualifying costs of the experts, David Friedman and Steven Neufeld, and including the cost of Senior Counsel and appointing correspondent attorneys to assist with file pagination in George and Cape Town.

18.3 The costs referred to above, which shall be in accordance with scale C, shall include the costs occasioned by the postponement of the application on 20 March 2025 and 28 March 2025.

L G NUKU
JUDGE OF THE HIGH COURT

Appearances

For applicants: J Heunis SC

Instructed by: Mosdell Pama & Cox Attorneys, Plettenberg Bay

For respondents:

A De Vos SC and

Instructed by:

HDRS Attorneys Inc, Plettenberg Bay