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

CASE NO: D5453/2022

In the matter between:

ZONED EARTH DEV CO (PTY) LTD	**FIRST APPLICANT/ FIRST APPELLANT**
ADMINCORP 23 CC	**SECOND APPLICANT/ SECOND APPELLANT**
UNIT EIGHT UMHLANGA ROCKS (PTY) LTD	**THIRD APPLICANT/ THIRD APPELLANT**

and

THE BODY CORPORATE OF 6[...] L[...] DRIVE	**FIRST RESPONDENT**
MALCOLM MOODIE	**SECOND RESPONDENT**
PATRICK SCOTT-MARTIN	**THIRD RESPONDENT**
BUDWA ABROSI	**FOURTH RESPONDENT**
COMMUNITY SCHEME OMBUD SERVICE	**FIFTH RESPONDENT**
BOYCE MKHIZE N.O.	**SIXTH RESPONDENT**
MERVYN DORASAMY N.O.	**SEVENTH RESPONDENT**
T. P. QWABE N.O.	**EIGHTH RESPONDENT**

ORDER

1. The applicants' appeal in terms of s 57 of the CSOS Act is dismissed with no order as to costs.

JUDGMENT

Nicholson AJ

[1] This appeal is brought under s 57 of the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act). The applicants are challenging the ruling made by the Community Scheme Ombud Service (the Tribunal), which was delivered by the eighth respondent (the adjudicator) on 29 April 2022. The relevant reference number for this case is CSOS 3934/KZN/2021.

[2] The hearing, which took place on 27 September 2021 concerned the installation of a Solar Photovoltaic System, also known as solar power and inverters by the first respondent (the solar panel project). It is relevant that five years have elapsed since the initial hearing of this dispute.

[3] The applicants in this case were the original applicants before the Tribunal. I refer to the applicants collectively as "the applicants" where appropriate, depending on the context.

Order sought before the Tribunal

[4] The orders sought before the tribunal were as follows:

'A. URGENT ORDER: That the respondents are ordered not to carry out the installation of the solar panels or any ancillary infrastructure and equipment, pending the outcome of this application in respect of the further relief sought;

B. URGENT ORDER: That the second, third and fourth respondents are ordered to furnish the applicants with the following confirmation and documentation, within three (3) days of the date of the order-

- Copies of minutes of all trustees' meetings and/or;

- Written trustees' resolution relating to the solar panel project;
- Breakdown of the total cost of the project;
- Copies of all quotations obtained for cost/s of the project;
- Engineer's specifications;
- Did the trustees obtain any report or presentation on the project, including but not limited to the lifespan of the assets and equipment, the parts of the electrical reticulation which would be powered by the system and the cost of the operation, maintenance and the repair of the system?
- Copies of all reports and/or presentations and proposals to furnish;
- Cost benefit analysis;
- The reason/s why the trustees did not revert to the members to consider the approval of the project;
- Are the trustees intended funding the project?

C. URGENT ORDER: An order that the applicants are entitled to supplement their claim detailed in support of this application within seven (7) days of receipt of information and documentation.

D. The respondents are directed to carry out, within fourteen (14) days, the removal of any equipment and any improvement or alteration to the common property carried out consequent to the solar panel project and to restore the common property to its prior condition.

E. That the second, third and fourth respondents, jointly and severally the one paying the other to be absolved, pay to the first respondent, within thirty (30) days of the aggregate of all amounts paid to third parties and all liability incurred by the second respondent as a result of the solar panel project.

F. That the second, third and fourth respondents, jointly and severally the one paying the other to be absolved, pay to the applicants, within thirty (30) days, all legal costs incurred by the applicants in this application.'

[5] It is apposite that in their replying affidavit, the applicants sought to amend prayer C to read as follows:

'11. That the second, third and fourth respondents are ordered to furnish the applicants with each of the following information and documentation; alternatively in the event that a document or record is not in their possession, to furnish an affidavit explaining that and why the document/record in question is not in their possession, within three (3) days of the date of the order.'

Adjudicator's ruling

[6] The adjudicator ruled as follows:

'(a) Prayer A was refused, reasoning that the issue had become moot.

(b) Prayer B was granted, albeit in a limited form. The first respondent was directed to make available the trustees' meeting minutes or trustees' resolution related to the solar panel project, the breakdown of the total cost of the project has not been furnished, any report or presentation on the project addressing the costs or operation, maintenance and repair of the system, information or documentation available within ten (10) days from delivery of this order.

(c) Prayer C, as amended in the replying affidavit, was refused.

(d) Prayer D was refused.

(e) Prayer E was refused.

(f) Prayer F was refused.'

Adjudicator's reasons

[7] The reasons for the ruling were as follows:

(a) With respect to prayer A, the adjudicator found that the installation of the solar panels, inverters, and ancillary equipment had already been completed by the time of the hearing, rendering the application for interdictory relief moot. Furthermore, the adjudicator noted that despite the application been made as an urgent, the Tribunal did not deal with the matter as urgent in terms of the Tribunal's practice directive; and despite requests for clarification, the Tribunal did not provide any explanation.

(b) Regarding prayer C, the adjudicator determined that the relief sought by the applicants did not fall within the scope of s 39 of the CSOS Act and, as such, did not comply with s 38(3)*(a)* of the Act. Consequently, he concluded that he lacked the authority to grant such relief. To support this position, the adjudicator cited *Trustees, Avenues Body Corporate v Shmaryahu and Another*,[1] where the court stated:

'…The character of the various types of substantive relief that an adjudicator is empowered to grant in terms of the Act appears from, the provisions of s 39.'

(c) Regarding prayer D, the adjudicator determined that the request to restore the common property to its previous condition could not be granted; because the removal of any equipment, improvement, or alteration made as part of the solar panel project because "events had overtaken each other".

(d) Prayer E was refused because, the adjudicator reasoned, on the face of it, prayer E could not be considered, unless prayer D had been granted.

(e) Prayer F was refused because both sets of parties had attorneys with the applicants making the election to utilise the services of an attorney.

Applicants case

[8] The applicants argue that the adjudicator made an error by failing to acknowledge the adjudication request and not treating it with the urgency required by the practice directive prior to the installation of the solar panel project. Furthermore, they contend that the adjudicator wrongly dismissed prayer A.

[9] I pause to mention here that, although the applicants argue the adjudicator was mistaken in not granting prayer A, as will become clear later, they are not actually requesting any remedy on this issue. Furthermore, the issue does not present an active or current dispute.[2] Accordingly, there is no reason to consider this issue any further.

[10] In relation to prayers B and C, the applicants assert that the adjudicator erred by misinterpreting or misapplying the provisions of the CSOS Act and the relevant practice directives for dispute resolution, specifically those issued in 2019 and amended on 23 June 2020. They claim

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[1] *Trustees. Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC) (*Shmaryahu*) para 17. See also *Kingshaven Homeowners' Association v Botha and Others* 2023 (4) SA 187 (WCC) (*Kingshaven*) para 34.

[2] *SA Metal Group (Pty) Ltd v The International Trade Administration Commission* [2017] ZASCA 14 para 20.

these directives should have been read in conjunction with ss 50[3] and 51[4] of the CSOS Act. Alternatively, the applicants argue that the adjudicator failed to appreciate the obligation to investigate the application and revert to them for adjudication, and therefore, should have exercised his powers under s 51 to call for documentation. Had documentation been called for, parties could have submitted supplementary written submissions, and full relief under prayers B and C should have been granted.

[11] The applicants maintain that order 50.2[5] issued by the adjudicator has not been fully complied with, as they have not received all the requested documents. With respect to the costs of the solar panel project, only four invoices submitted and paid by the first respondent have been received.

[12] Regarding prayer D, the applicants claim that the adjudicator erred by failing to determine that the solar panel project and improvements to the

[3] Section 50 of the CSOS Act provides: 'Investigation by adjudicator
'The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator-
(a) must observe the principles of due process of law; and
(b) must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and
(c) must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.'

[4] Section 51 of the CSOS Act provides: 'Investigative powers of adjudicator
'(1) When considering the application, the adjudicator may-
(a) require the applicant, managing agent or relevant person-
(i) to give to the adjudicator further information or documentation;
(ii) to give information in the form of an affidavit or statement; or
(iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview;
(b) invite persons, whom the adjudicator considers able to assist in the resolution of issues raised in the application, to make written submissions to the adjudicator within a specified time; and
(c) enter and inspect-
(i) an association asset, record or other document;
(ii) any private area; and
(iii) any common area, including a common area subject to an exclusive use arrangement.
(2) The adjudicator must give reasonable notice to the executive committee or occupier of any private area or common area to be entered in terms of subsection (1) *(c)*.
(3) The association or any other person who is in possession of an association's records must, if required by an adjudicator and without payment of a fee-
(a) allow the adjudicator access to the records within 24 hours after being notified of the adjudicator's requirement; and
(b) provide the adjudicator with copies of the records.'

[5] Prayer B at the Tribunal

first respondent's common property were not properly authorised and thus constituted unlawful improvements. They note the following:

(a) It was undisputed that the solar panel project constituted an improvement to the common property.

(b) The first to fourth respondents argued that the improvement was "reasonably necessary" under management rule 29(2).

(c) The adjudicator correctly found no evidence of compliance with rule 29(2) by these respondents.

(d) The adjudicator also correctly held that the necessary process under rule 29(2) had not been followed.

[13] The applicants further contend that the adjudicator erred in determining that the removal of the equipment would not be in the interests of the members. They argue that the adjudicator failed to recognise his lack of jurisdiction under the CSOS Act to condone non-compliance with management rule 29(2). Moreover, they assert that the adjudicator is not authorised or empowered to resolve disputes based on the "interest of members".

[14] With respect to prayer E, the applicants argue that the adjudicator erred by not finding that the implementation of the solar panel project resulted in costs incurred by the first to fourth respondents, who either acted without authority or exceeded their powers. This is significant in light of the adjudicator's correct determination that management rule 29(2) was not complied with and the failure to properly apply ss 8(1), 8(2), and 8(3) of the Sectional Titles Schemes Management Act 8 of 2011 (STSMA). Additionally, the applicants point out:

(a) The adjudicator did not assess whether the actions of the second, third, and fourth respondents constituted a breach of their fiduciary duties to the first respondent.

(b) There was no determination as to whether breaches of fiduciary duty resulted in financial loss to the first respondent.

(c) The findings imply that further conduct by the second, third, and fourth respondents would be necessary before they could be held liable for such losses.

(d) The adjudicator considered whether the improvement benefited members of the first respondent and relied on this factor when evaluating possible breaches of fiduciary duty.

[15] For prayer F, the applicants submit that the adjudicator erred in several respects:

(a) By misinterpreting and/or misapplying ss 39[6] and/or 42[7] of the CSOS Act, specifically by failing to state explicitly that legal representation was unwarranted under the circumstances.

(b) By declining to award costs in favour of the applicants, whether against the second, third, and fourth respondents or the first respondent, despite having a discretion under the Act to do so.

[16] They further argue that neither the ombud nor the adjudicator have jurisdiction to direct that the costs of any remedial work to restore common property should be paid from a special resolution/levy or from reserves.

Relief sought by the applicants in this court

[17] In the notice of motion, the applicants seek the setting aside of the adjudicator's order and to be replaced as follows:

'50. …

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[6] Section 39 of the CSOS Act provides: 'Prayers for relief
An application made in terms of section 38 must include one or more of the following orders:
(1) …'

[7] Section 42 of the CSOS Act provides: 'Rejection of applications
An ombud must reject an application by written notice to the applicant if-
(a) the relief sought is not within the jurisdiction of the Service;
(b) the applicant fails to comply with a requirement of the ombud in terms of section 40;
(c) within 14 days after delivery of a notice contemplated in section 44, the ombud does not receive written confirmation from the applicant that the applicant wishes to proceed with the application;
(d) the ombud is satisfied that the dispute should be dealt with in a court of law or other tribunal of competent jurisdiction; or
(e) the application does not, in the opinion of the ombud, qualify for the discount or waiver of adjudication fees applied for.'

50.1 The relief under prayer B is granted and second, third and fourth respondents are ordered to furnish the applicants with the following information and documentation, within 3 days of the date of this order:

50.1.1 Copies of minutes of all trustees' meetings and written trustees' resolutions relating to the solar panel project;

50.1.2 Breakdown of total cost of the project;

50.1.3 Copies of all quotations obtained for cost/s of the project;

50.1.4 engineer's specifications;

50.1.5 Copies of all reports, all presentations, all proposals to the trustees on the solar panel project including, but not limited to the lifespan of the assets and equipment, the part of the electrical reticulation which would be powered by the system and the costs of operation, maintenance and repairs of the system;

50.1.6 Cost/benefit analysis;

50.1.7 The reason why the trustees did not revert to the members to consider the approval of the project; and

50.1.8 How the trustees intended to fund the project.

50.2 The relief under paragraph C is granted and the applicants are entitled to supplement their claim details in support of the application within seven (7) days of receipt of the information and documentation.

50.3 The relief in prayer D is granted and the respondents are directed to carry out, within fourteen (14) days, the removal of any equipment and improvements or alteration to the common property carried out consequent to the solar panel project and restore the common property to its prior condition (before the installation of the solar panel project).

50.4 That the first respondent body corporate is ordered to pay the applicants' costs.'

[18] In addition, the applicants seek an order that the first respondent bear the costs of the application and a declaration that the applicants are fully absolved from any liability, whether direct or indirect, with respect to payment or contribution towards legal expenses before the Tribunal, charges arising from the removal of the solar panel system, and any legal costs associated with this appeal. Additionally, they seek an interdict preventing the first respondent from settling such costs or charges from the reserve fund.

Respondents case

[19] The respondents argue that the applicants could have called a SGM to request the necessary documentation from the first respondent, regarding the solar panel and inverter installation. Such a meeting would have allowed the first respondent to ratify the installation or vote on its removal.

[20] They note that a special general meeting was not held because 21 out of 24 owners in the scheme supported the installation. Instead, the applicants seek broad and intrusive relief under s 39 of the CSOS Act, but the respondents propose that a vote on whether to remove or ratify the installation would be the most cost-effective and practical solution to address non-compliance with Management rule 29(2).

[21] The respondents contend that the orders requested, particularly prayers C and D, exceed the court's authority. They are of the view the applicants are seeking to replace the adjudicator's' order with that of this court, and therefore, the matter should be stayed pending the outcome of an SGM.

[22] Additionally, they argue that prayer B is not a point of law and should be submitted to the magistrate's court clerk for compliance and maintain that all required information under prayers 50.1 has been disclosed that are in its possession.

[23] The respondents also assert that the applicants have not identified which provision of s 39 of the CSOS Act applies to prayer C, failing to substantiate a point of law.

[24] Regarding prayer D, the respondents state that the adjudicator correctly determined that the requested relief was moot due to subsequent events. Even if compliance with management rule 29(2) had been found, there was no authority to grant the relief sought. Had an order under prayer D

been made in terms of s 39(4)[8] of the CSOS Act, invalidating the installation, the matter would be academic as the installation was already complete. Section 39(6)[9] does not apply, as it is only relevant where improvements to

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[8] Section 39(4) of the CSOS Act reads: 'In respect of meetings-
(a) an order requiring the association to call a general meeting of its members to deal with specified business;
(b) an order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened;
(*c*) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association-
 (i) was void; or
 (ii) is invalid;
(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; or
(e) an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.
(5) In respect of management services-
(a) an order requiring a managing agent to comply with the terms of a person's contract of appointment and any applicable code of conduct or authorisation; or
(b) an order declaring that the association does or does not have the right to terminate the appointment of a managing agent, and that the appointment is or is not terminated.'

[9] Section 39(6) of the CSOS Act reads: 'In respect of works pertaining to private areas and common areas-
(a) an order requiring the association to have repairs and maintenance carried out;
(b) an order requiring the relevant person-
 (i) to carry out specified repairs, or have specified repairs made; or
 (ii) to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the applicant;
(c) an order requiring the association-
 (i) to carry out, within a specified time, specified works to or on the common areas for the use, convenience or safety of owners or occupiers; or
 (ii) not to carry out specified works;
(d) an order declaring that the association's decision to reject a proposal to make improvements on or alterations to common areas is unreasonable, and requiring the association-
 (i) to agree to the proposal; or
 (ii) to ratify the proposal on specified terms;
(e) an order requiring the association-
 (i) to acquire, within a specified time, specified property for the use, convenience or safety of owners or occupiers;
 (ii) not to acquire specified property; or
 (iii) to dispose of specified property, within a specified time;
(f) an order declaring that an owner or occupier reasonably requires exclusive use rights over a certain part of a common area, that the association has unreasonably refused to grant such rights and requiring the association to give exclusive use rights to the owner or occupier, on terms that may require a payment or periodic payments to the association, over a specified part of a common area; or
(g) an order obliging an owner or occupier to accept obligations in respect of a defined part of a common area..'

common property are found to be inconvenient or unsafe, which was not the case here.

[25] With respect to s 8(2) of the STSMA, the respondents assert that the trustees acted honestly and in good faith towards the first respondent, and the adjudicator correctly asserts that malice or dishonesty is required to establish a breach of fiduciary duty, which he could not find.

Section 57 appeal

[26] Section 57(1) of the CSOS Act reads as follows:

'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.'

A plain reading of the section indicates that an appeal under s 57 is limited to questions of law rather than questions of fact.

[27] In *Shmaryahu*, the court held: [10]

'[25] … An appeal in terms of s 57 is not a "civil appeal" within the meaning of the Superior Courts Act 10 of 2013. What may be sought in terms of s 57 is an order from this court setting aside a decision by a statutory functionary on the narrow ground that it was founded on an error of law. The relief available in terms of s 57 is closely analogous to that which might be sought on judicial review. The appeal is accordingly one that is most comfortably niched within the third category of appeals identified in *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590-591.

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[10] Also see *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F-591A where the court stated: 'The word "appeal" can have different connotations. In so far as is relevant to these proceedings it may mean:
(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information (*Golden Arrow Bus Services v Central Road Transportation Board*, 1948 (3) SA 918 (AD) at p. 924; S.*A. Broadcasting Corporation v Transvaal Townships Board and Others*, 1953 (4) SA 169 (T) at pp. 175 - H 6; *Goldfields Investment Ltd v Johannesburg City Council,* 1938 T.P.D. 551 at p. 554);
(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong (e.g. *Commercial Staffs (Cape) v Minister of Labour and Another*, 1946 CPD 632 at pp. 638-641);
(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly (e.g. *R v Keeves*, 1926 AD 410 at pp. 416-7; *Shenker v The Master*, 1936 AD 136 at pp. 146-7).

…

[27] As mentioned, the applicants stated four grounds for their appeal. In view of the restricted basis for appeal permitted in terms of s 57 of the Act *it would have been preferable if they had stated the points of law in respect of which they contended that the adjudicator had erred*...' (Footnotes omitted.) (My emphasis.)

[28] In *Kingshaven*, the court held:

'[8] Section 57(1) of the CSOS Act provides that an aggrieved party may appeal against an adjudicator's decision, but only on "a question of law"….

[9] In *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC), in the course of giving guidance as to the procedure by which such appeals should be brought, I acknowledged that it is well recognised that the word "appeal" is often used indiscriminately to refer to any one of a number of what are in fact quite distinguishable procedures, and that therefore, when treating of a statutory appeal, one has to look at the context of the provision in question to ascertain the juridical character of the remedy afforded thereby. I opined that the remedy available in terms of s 57 of the CSOS Act is closely analogous to that which might be sought on judicial review, and concluded that such an appeal was accordingly one that was "most comfortably" niched within the third category of appeals identified in *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T), which was not the same as suggesting an exact fit.

[10] A subsequent judgment of the KwaZulu-Natal Division concurred in that categorisation; see *Durdoc Centre Body Corporate v Singh* 2019 (6) SA 45 (KZP) para 15 (per Steyn J, Madondo DJP concurring)…

[11] The third category of appeal in *Tikly* was defined by Trollip J in these terms: "a review, that is a limited rehearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly". In my view, the "proper" exercise of administrative powers includes whether they have been exercised within the ambit of the arbiters' authority or in accordance with the applicable law….

…

[13] …. In my respectful opinion, the proviso attached to the characterisation actually serves to highlight why such appeals are *not*, in essential respects, of the second type. This is because, being limited to questions of law, they do *not* involve a

rehearing of and fresh determination of the merits (as distinct from just the result), and they would *not* allow for the introduction of additional evidence or factual information.

…

[15] On reflection, I think there is little profit in the categorisation debate, and it was perhaps unfortunate that I sparked it, with reference to *Tikly*, when I wrote the judgment in *Shmaryahu*. I do not read Trollip J's judgment in *Tikly* as having been intended by the learned judge to provide an exhaustive taxonomy, and it does not deal at all with the appropriate procedures by which the different types of appeal should be brought. Where not expressly provided for by the enabling statute, the appropriate form for the bringing to court of a statutory appeal is a matter to be regulated by the courts with an eye to practicality.

…

[19] In *Farmer v Cotton's Trustee* the legislation provided for the form in which the relevant appeals only on grounds of law were to be brought; viz on a stated case. It is evident from the speeches given by the members of the Appellate Committee that the framing of the stated case in that matter, which no doubt would have been in comparable form to a notice of appeal succinctly stating the grounds for it, yet also still directed at highlighting the relevant factual underpinnings, could give rise to problems. Thus, Earl Loreburn remarked, at p 600 of the Tax Case Reports, "I desire to say that when cases are stated for the opinion of a Court of Law it is very much to be desired that the point of law should be clearly stated together with the decision upon it arrived at by the inferior Court. Otherwise, it may prove difficult for a Court of Law to distinguish between conclusions of law and conclusions of fact." The procedure laid down in *Stenersen* does not, in terms, provide for the distillation of the "question of law"; as I understand it, it contemplates rather that the appellant set out the grounds upon which it contends that the adjudicator's decision erred in law.

[20] Lord Parker's remarks in *Farmer v Cotton's Trustee* were uttered in the context of an assumption that the initial arbiter had made all the pertinent findings of fact necessary for a consideration of the question of law. It is very conceivable, however, that a situation might arise where the initial arbiter has not made a finding on relevant facts that had been established on the evidence and subsequently became pertinent to the question of law put in issue on appeal. It is by no means uncommon for a tribunal to arrive at a decision without finding it necessary to make

findings on all the factual evidence that has been adduced before it. It might be necessary in such matters, if the evidence on which findings have not been made is alleged to be germane to the question of law relied on in the appeal, for the appellate tribunal itself to consider and make a finding on such facts for the purpose of its task. The alternative would be to remit the issue of fact to the initial arbiter for it to make the finding of fact considered necessary to inform the determination of the question of law. The identification of such matters of fact for the purposes of an appeal of the sort provided in terms of s 57, and the motivation of their relevance for the determination of the question of law contended for, would, in my view, be better done through an exchange of affidavits than in a notice of appeal stating shortly the grounds upon which it is brought.'

(Footnotes omitted.)

[29] After reviewing the relevant authorities, including those drafted by the full court of this division, I conclude that an appeal under s 57 of the CSOS Act should be limited to questions of law, with two notable exceptions: first, when factual findings are necessary to contextualise the legal issue; and second, when a factual determination results from an incorrect interpretation of the law. Furthermore, an appeal under s 57 is not intended as a rehearing or a thorough re-examination of the case. Accordingly, the inclusion of new evidence or information underlying the decision being appealed may be considered only in limited circumstances, considering that the Act does not regulate the procedure of the s 57 appeals and given this court's inherent jurisdiction.[11]

Interlocutory applications

[30] In addition to the appeal under consideration, there are two interlocutory applications: one made by the applicants concerning non-compliance with this division's established practice regarding affidavit length, and another filed by the respondents seeking permission to submit an additional affidavit.

[11] *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC) para 33.

[31] The interlocutory application by the applicants is unopposed while the interlocutory affidavit by the respondents is opposed.

[32] In *Ellis v Trustees, Palm Grove Body Corporate and Others*,[12] the full court of this division held:

'[10] In this division, although not concerned with the procedure to be followed in lodging the s 57 appeal, the court did not raise any difficulties in adopting the procedure followed and prescribed in *Shmaryahu.* We do not see any reason to depart from this procedure. Binns-Ward J has demonstrated in his two judgments why it is beneficial to adopt the motion procedure. I do not intend to repeat his reasons but just to add that that procedure would enhance the CSOS Act's objective, namely, to have such matters adjudicated and dealt with expeditiously and cost-effectively. The facts contained in those affidavits will assist in bringing the point of law to the fore as it has been acknowledged that at times it is difficult to decide a point of law in isolation from the facts.

[11] In order to curtail costs, there has to be a limit on the length of the affidavits to be filed. In my view, the applicant to such an appeal will have to file a notice of motion to be served on the respondents so that they may respond if they wish to within the time limits provided for in Uniform Rule 6(5). The affidavit accompanying such a notice should not be longer than ten (10) pages, so as to curb the costs, and it must succinctly state the grounds upon which it is averred that the adjudicator erred on a point of law, together with a brief background about the facts leading to such a dispute. Should the respondent wish to respond, their affidavit(s) also should not be longer than (ten) 10 pages, with the applicant's replying affidavit limited to six (6) pages. Once the affidavits have been filed, the appeal will follow the practice directives provided for opposed motions, including the filing of the heads of argument, should same be opposed. In this way, the appeal will serve before a single judge as an unopposed or opposed motion. A practice directive to this effect will ensure that the matter does not drag out unnecessarily.' (Footnotes omitted.)

[33] The applicants' founding affidavit spans 13 pages, exceeding the prescribed ten-page limit stipulated in practice directive 36 of this division. However, as this is insubstantial and the non-compliance does not prejudice

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[12] *Ellis v Trustees, Palm Grove Body Corporate and Others* 2023 (4) SA 608 (KZP).

the respondents, it is appropriate, in the interests of justice, to condone the non-compliance.

[34] With respect to the respondents' application, on 8 September 2023, the first respondent convened a SGM to deliberate, among other matters, the issue of continued support for the solar project. The supplementary affidavit serves to formally present, under oath, the minutes from this meeting as evidence before the court, asserting that the applicants acquiesced by voting in favour of maintaining the solar installation. As a result, the respondents contend that the appeal is now moot.

[35] The applicants contest the application on several grounds, including procedural objections. Notably, they dispute the claim that they voted in favour of the solar installation and reject the contention that the appeal is now academic.

[36] This matter has extended over five years. The respondents provided the applicants with adequate time to review the interlocutory application, and most of the issues raised are not disputed and/or have been addressed in the heads of argument submitted by both parties. Accordingly, I will permit the respondent's supplementary affidavit.

The appeal

[37] It has already been determined hereinabove that the applicant does not seek relief regarding prayer A, and which in any case is now moot.

[38] The tribunal partially granted prayer B and dismissed prayer C. The applicants assert that s 51 of the CSOS Act requires the adjudicator to investigate and request further documents as specified in prayer B. However, s 51 states that "When considering the application, the adjudicator may", indicating that such action is discretionary rather than mandatory. Additionally, the adjudicator did not order that all documents under prayer B be provided, determining that the documents not produced were outside the scope of Management rules 26 and 27. My reading of these rules is that the

adjudicator's interpretation aligns correctly with the rules. There is no obligation for the adjudicator to undertake an investigation, and the refused documents are not required to be maintained according to rules 26 and 27. Accordingly, this is not a question of law. In any event, prayer B did not request the adjudicator to do an investigation.

[39] The adjudicator dismissed prayer C,[13] clarifying that under s 38 of the CSOS Act, only matters arising under s 39 of the Act can be ordered by an adjudicator. To support this interpretation, the adjudicator referenced *Shmaryahu*. After reviewing both the *Shmaryahu* judgment and s 38, I find myself in agreement with this view. Therefore, prayer C is dismissed.

[40] The adjudicator dismissed prayer D, explaining that even though the application was marked as urgent, CSOS did not handle it with urgency. As a result, by the time the hearing took place, the solar panels and inverters had already been installed, making this relief moot. Furthermore, the adjudicator noted that, despite some lack of clarity in the resolution, there appears to be authorization for installing the solar units. In the circumstances, he asserts he could not order their removal, even though Management Rule 29 was not followed.

[41] The relevant Management rule 29 reads:

'Improvements to common property

29(1) The body corporate may on the authority of a unanimous resolution make alterations or improvements to the common property that is not reasonably necessary.

(2) The body corporate may propose to make alterations or improvements to the common property that are reasonably necessary; provided that no such proposal may be implemented until all members are given at least 30 days written notice with details of —

(a) the estimated costs associated with the proposed alterations or improvements;

[13] See paragraph 35 of the adjudicator's ruling: Relief C: 'An order that the Applicants are entitled to supplement their claim details in support of this application within 7 days of receipt of the information and documentation.'

(b) details of how the body corporate intends to meet the costs, including details of any special contributions or loans by the body corporate that will be required for this purpose; and

(c) a motivation for the proposal including drawings of the proposed alterations or improvements showing their effect and a motivation of the need for them; and if during this notice period any member in writing to the body corporate requests a general meeting to discuss the proposal, the proposal must not be implemented unless it is approved, with or without amendment, by a special resolution adopted at a general meeting.

(3) …'

[42] It is common cause that Management rule 29(2) was not complied with, because no notice regarding the solar panel project was issued. This omission deprived the relevant parties of their right to object and to have the matter addressed at an AGM by special resolution, and despite their objections, the project was implemented.

[43] I have perused the STSMA and Regulations but unable to find any authority therein that states that in the event of these rules not having been observed or complied with, the structures or improvements *must* be removed. Accordingly, whether or not to grant the order, would be at the discretion of the adjudicator and not a question of law. [Underlining for emphasis]

[44] Regarding prayer E, the adjudicator dismissed the prayer because he reasoned that s 8(4) of the STSMA indemnified the trustees from all costs, losses and expenses arising out of their official acts provided that it was not a breach of their fiduciary duties.

[45] Section 8 of the STSMA reads:

Fiduciary position of trustees

'8(1) Each trustee of a body corporate must stand in a fiduciary relationship to the body corporate.

(2) Without derogating from the generality of the expression "fiduciary relationship", the provision of subsection (1) implies that a trustee-

(a) must in relation to the body corporate act honestly and in good faith, and in Particular-

(i) exercise his or her powers in terms of this Act in the interest and for the benefit of the body corporate; and

(ii) not act without or exceed those powers; and

(b) must avoid any material conflict between his or her own interests and those of the body corporate, and in particular-

(i) not receive any personal economic benefit, direct or indirect, from the body corporate or from any other person; and

(ii) notify every other trustee of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the body corporate, as soon as such trustee becomes aware of such interest.

(3) A trustee of a body corporate who acts in breach of his or her fiduciary relationship, is liable to the body corporate for—

(a) any loss suffered as a result thereof by the body corporate; or

(b) any economic benefit received by the trustee by reason thereof.

(4) Except as regards the duty referred to in subsection (2)(a)(i), any particular conduct of a trustee does not constitute a breach of a duty arising from his or her fiduciary relationship to the body corporate if such conduct was preceded or followed by the written approval of all the members of the body corporate where such members were or are cognisant of all the material facts.'

[46] The fiduciary relationship of the trustees with a body corporate require that they act honestly and in good faith, in the interests and for the benefit of the body corporate, refrain from exceeding their powers, avoid conflicts of interest, and disclose any such conflicts to co-trustees. On my interpretation of s 8(2) of the STSMA, a breach of the fiduciary relationship necessitates a breach of all these factors mentioned in the section, and intent is required rather than negligence. In the circumstances, the applicants must demonstrate that the trustees intentionally contravened their fiduciary obligations; if this is established, the trustees would be liable for any resulting losses.

[47] In this case, it appears that the trustees believed that the resolution that had previously been passed satisfied all requirements of the STSMA and

thus acted in good faith. Furthermore, the solar panel project was undertaken for the benefit of the first respondent, with no evidence indicating that any trustee derived improper personal gain or that a conflict of interest existed. Consequently, the adjudicator did not err in law and correctly dismissed prayer F.

[48] In reference to the applicants requesting reimbursement for the tribunal hearing costs, neither the CSOS Act nor the STSMA stipulates that the unsuccessful party must pay the costs of the prevailing party. It is well established that cost awards are discretionary; therefore, this matter does not constitute a question of law.

Costs

[49] While it is customary for costs to follow the result, it is well established that the court has discretion in such matters. In this case, the applicants brought the application due to being deprived of certain rights, specifically, their right to bring an urgent matter before the tribunal and their right to object to the solar panel project in accordance with the STSMA and its Regulations. Notwithstanding their lack of success, for the reasons stated, I do not believe it would serve the interests of justice to burden them with the costs of the first respondent, to which they have already contributed indirectly.

Order

[50] In the result, I make the following order:

1. The applicants' appeal in terms of s 57 of the CSOS Act is dismissed with no order as to costs.

NICHOLSON AJ

Case information

Date of hearing:	11 December 2025
Handed down:	13 February 2025

Counsel for the applicant/ appellant:	Mr M. E. Stewart
Instructed by:	Northmore Montague Attorneys Suite 4, The Colony 50 Old Main Road Hillcrest KwaZulu-Natal Ref: K NORTHMORE/ZMD-001

Counsel for the first to fourth respondents:	Mr D J. M. Randles
Instructed by:	Lott Attorneys Office 8, Dias Block, Fairway 3 Abrey Road Kloof Ref: EA/tk/LBC-01