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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case no: 2927/2025

REPORTABLE

In the matter between:

LE ROUX PETROLEUM (PTY) LTD

Appellant

and

COMMUNITY SCHEMS OMBUD SERVICES (CSOS)

1st

Respondent

S GORDEEN (CSOS ADJUDICATOR)

2nd Respondent

OTTERS LANDING HOMEOWNERS ASSOCIATION

3rd Respondent

JUDGMENT

GQAMANA J

[1] This appeal brings into sharp focus an adjudication order in terms of section 39 of the Community Schemes Ombud Service Act 9 of 2011 (“the CSOS Act”). It is a unique statutory appeal provided for in section 57 of the CSOS Act to an applicant, the association or any affected party who is dissatisfied by an adjudicator’s order. However, the appeal may only be on a question of law.

[2] The appellant, Le Roux Petroleum (Pty) Ltd is the registered owner of Unit no. 6 Otters Landing, St Francis Bay, a secured residential Estate commonly known as Otters Landing Estate, which falls under Kouga Municipality.

[3] The first respondent is a juristic person established in terms of section 3 of the CSOS Act with its purpose to, *inter alia*, develop and provide a dispute resolution service as envisaged in this Act.

[4] The second respondent is S Goordeen, an adjudicator who issued an adjudication order which is the subject matter of this appeal.

[5] The third respondent is Otters Landing Homeowners Association, a body corporate established in terms of section 29 (2) of the Land Use Planning Ordinance 15/1985 and is regulated by its constitution. The affairs of the third respondent are managed and controlled by its committee which consists of five registered owners of units within the Estate. All registered owners of units within the Estate are members of the third respondent. The applicant, by virtue of ownership of the unit within the Estate, is a member of the third respondent.

[6] Only the third respondent participated and opposed this appeal. Any reference to the respondent shall mean the third respondent unless specified otherwise.

[7] There are two issues for consideration in this appeal. First, whether the appeal raises a question of law. Secondly, whether there are any substantive merits to the grounds of appeal individually or collectively. Before I can engage in those issues, I intend to set out briefly the factual background which caused the gripe between the parties.

Factual background

[8] The third respondent was formed by the owners of the development called Otters Landing. The relationship between the members of the third respondent is regulated and governed by its constitution.

[9] On or about 17 January 2019, the applicant purchased erf 2519 within the Estate. And by virtue of clause 4 of the third respondent's constitution, the applicant automatically became its member. For interests' sake, clause 4 reads:

‘Upon registration of ownership of the Unit in the name of a purchaser, membership of the Association by such purchaser shall be automatic and obligatory and members shall be obliged to comply with the provisions of this Constitution.’

[10] On or about 25 September 2024, the applicant lodged a dispute with the first respondent against the third respondent. The dispute was lodged in the prescribed form accompanied by voluminous documents. The acrimonious relationship between the appellant and the third respondent's members is evident from the exchange of emails attached to the application in terms of section 38 of the CSOS

Act. The appellant's main contention was that the third respondent has impermissibly allowed, condoned, and/ or acquiesced to members encroaching to private open space of the Estate in contravention of clauses 4.6 and 8.3 of its constitution.

[11] For comprehensiveness, clauses 4.6 and 8.3 reads:

‘4.6 Every member shall be entitled to enjoy the private open space.....

8.3 No member shall be entitled to dump material or goods on the open private space or on any ref not registered in the name of the member and shall be liable for payment of the cost of rectifying the damage or removal of the material or goods.’

[12] The details of the appellant's dispute were that some members have encroached onto the private open space areas by building retaining walls, braai areas, swimming pools, lawned areas and decks. In addition, it was its contention that some members, i.e., owners of eleven 2527 and 2526, have encroached onto the state-owned land within the marine reserve area, alternatively onto land zoned as a nature reserve. Accompanying the application were photographs depicting the alleged encroachment.

[13] As a remedy, the appellants sought relief as envisaged in section 39(6), alternatively section 39(7), further alternatively section 39(2) of the CSOS Act. These sections provide for wide remedies, and I deal with the remedies in paragraphs 51 and 52 below.

[14] The dispute was opposed by the third respondent. In its opposition the third respondent refuted the appellant's allegations and contended that the application was vexatious. In addition, it cast aspersions about the conduct and motive of Mr

Le Roux, the managing director of the appellant. It also mentioned in detail the encroachment of the private open space areas and the transgressions of the internal rules by the appellant, some of which were referred to the law enforcement authorities like SAPS and the Department of Environmental Affairs. Stripping off verbosity, the case made out by the third respondent was that all its members (bar the appellant) were satisfied with the manner in which its committee was managing the private open space areas. Also, the third respondent mentioned in its opposition to the dispute that the appellant failed to adduce evidence to demonstrate that its governance provision was unreasonable, having regard to the interests of all its members.

[15] The second respondent was appointed to adjudicate such dispute. Directives were issued by him on the management of the matter. After compliance with such Directives, he issued the adjudication order which is the subject matter of this appeal.

[16] The second respondent made the following findings:

16.1 firstly, in respect of the earthworks on unit 5, the second respondent found that such work was approved by the third respondent's committee based on the professional advice from an Environmentalist which stated that the work was compliant with the relevant legislation. Therefore, the complaint was moot.

16.2 secondly, that the appellant itself had contravened the very same provisions of the third respondent's constitution that it was complaining about, because the swimming pool rim flow on its own property was also encroaching onto the private open space and that the appellant has expanded

the access path through the natural vegetation across the private open space for its exclusive use.

16.3 thirdly, that the appellant's complaint was time-bared in that, the construction on unit 5 commenced in November 2023, but the dispute was lodged in September 2024. Accordingly, the dispute was lodged outside 60 days from the date of the decision contrary to section 41 of the CSOS Act and there was no condonation application.

16.4 fourthly, that the reference to "articles" in section 39 (2) of the CSOS Act, means only movable items and fixed structures. Therefore, the relief sought by the appellant was incompetent of the alleged encroachments onto the private open space areas.

16.5 fifthly, that because there was an existing complaint lodged by the appellant, which was underway in private prosecution, the due process of law must be observed. Accordingly, he dismissed the application on the basis that it was misconceived.

[17] The appellant was dissatisfied with all the above findings and the adjudication order. This appeal hinges on those grounds. The legislature has limited and restricted matters of this kind to appeal to question of law only.

Discussion

Section 57 of the CSOS Act

[18] At the commencement of the argument of this appeal, both parties were at loggerheads with each other on whether this appeal raises a question of law. The third respondent strongly argues that this appeal does not raise the question of law, because the adjudicator dismissed the application on the basis that it was misconceived. The argument advanced was that the adjudicator lacked jurisdiction because the real dispute was about the unlawfulness of the land use, which is not catered for in the CSOS Act.

[19] The third respondent's submission was that in terms of section 1 of the CSOS Act, the dispute is defined as a dispute in respect of the administration of scheme and it does not cater for disputes in respect of encroachments. Therefore, his findings that the third respondent and/or its committee were entitled to make decisions in terms of the encroachments of the private open space areas were a factual finding and are not an error of law. Accordingly, this is not an appeal as envisaged in section 57 of the CSOS Act. That argument is flawed for the reasons set out herein.

[20] Section 57 of the CSOS Act makes provision for any party dissatisfied by the adjudication order to lodge an appeal with the high court within 30 days of the date of the adjudication order. There is no issue about the 30-day time period because this appeal was lodged timeously.

[21] The interpretation of section 57 was extensively considered in *Stenersen & Tullenken v Linton Park*¹. The court in that matter held that:

‘[33]... the appeal is limited to considering whether the adjudicator -
33.1 applied the correct law;

¹ 2020 (1) SA 651 (GJ) (24 October 2019) at para 33.

33.2 interpreted the law correctly, and /or

33.3 properly applied the law to the facts as found by the adjudicator.

[34] The conclusions drawn from the evidence by the adjudicator cannot be reconsidered on appeal.

[35] In essence by limiting the scope of an appeal to questions of law only, the court of appeal is only tasked with deciding whether the conclusions of law reached by the adjudicator were right or wrong. This determination can only be made based on the facts in existence at the time the order was given, and as they appear from the record.’

[22] Further the court in the above matter concluded that the appeal contemplated in section 57 is an appeal in the ordinary strict sense.² That was also affirmed by the Constitutional Court.³

[23] At the heart of this appeal is whether the third respondent and or its committee are empowered by its constitution to approve, condone, acquiesce to, or otherwise authorize the private exclusive use or encroachment onto private open space areas within the Estate.

[24] The second respondent in his order found, *inter alia*, that the earthworks on unit 5 was approved by the third respondent’s Committee based on the advice from a professional environmentalist. And because of that, his conclusion was that the complaint in relation to unit 5 was moot.

² *Ibid* para 40. Placing reliance in *Tikly and Others v Johannesburg NO and Others* 1963 (2) SA 588 (T) at 590-591.

³ *National Union of Metalworkers of South Africa obo M Fohlisa and Others v Hendcor Mining Supplies (a division of Marschalk Beleggings) (Pty) Ltd* 2017 (7) BCLR 851 (CC) at para 135.

[25] The interpretation of the third respondent's constitution features eminently and is of critical importance to this appeal. I say so, because the main criticism against the adjudicator's order is about the powers of the third respondent or its committee in terms of its constitution to approve, or to condone and /or to acquiesce or otherwise to authorize the private exclusive use or encroachment of the private open space areas.

[26] That being said, my reading of the *dicta* in *KPMG Chartered Accountants (SA) v Securefin Ltd*,⁴ is that the interpretation of a document is a matter of law and not of fact. Clearly then the issues raised in this appeal individually and collectively revolves around the proper interpretation of the third respondent's constitution. That said, it is my view that the first ground of appeal is dispositive of this appeal.

[27] Consequently, I am satisfied that this appeal raises a question of law. The second requirement about the 30-day time period is not an issue. Because the appeal was lodged timeously. I now turn to consider the grounds of appeal.

Grounds of appeal

[28] The gist of the dispute by the applicant in the CSOS application was about the encroachment of the private open space areas by certain members of the third respondent. Specific reference was made to unit 5 which apparently encroached the private open space area in the manner detailed somewhere above.

⁴ 2009 (4) SA 399 (SCA) at para 39.

[29] In answer to that, the version put up on behalf of the third respondent was *inter alia* that the renovations and building plans on unit 5 were approved by its committee based on the advice of a professional environmentalist who advised them that the work on that unit was compliant with the relevant legislation.

[30] Based on the above findings, the second respondent concluded that the complaint was moot. Perhaps it's appropriate to mention that he also found that the appellant's hands were not clean, in that, it had also contravened the very same provisions of the constitution which it was complaining about.

[31] The crucial issue then is whether such approval as mentioned in paragraph 25 above is consistent with the third respondent's constitution. Put differently, whether the third respondent and/or its committee has authority to approve encroachment onto private open space areas. The answer to this lies squarely in the interpretation of the third respondent's constitution.

[32] It is trite that when one deals with an interpretation of any legal document or a statute, the correct approach is that which is set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵:

‘...that interpretation is a process of attributing meaning to the words used in a document, be it legislation, or some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax, the context in which the provision appear; the apparent purpose to which it is directed material to those responsible for its production..... A sensible meaning has to be preferred to

⁵ 2012 (4) SA 593 (SCA) (16 March 2012) at para 18.

that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.’

[33] As a point of departure, it is common cause that in terms of section 2.7 of the third respondent’s constitution, erven 2[...], 2[...]², 2[...]³, 2[...]⁴, 2[...]⁵ and 2[...]⁶ Sea Vista are defined as the private open space.

[34] Furthermore the objects of the third respondent are:

‘3.1 to promote and enforce standards for high quality living in the development in such a way that members⁶ may derive the maximum collective benefits there from;

3.2 to provide for the control over the design, the construction and maintenance of the buildings and private open space forming part of the development,⁷ more particularly to enforce certain building regulations imposed by the Council⁸ when approving the development.

3.3 to have the powers to do such acts as are necessary to accomplish these objects.’

[35] Members of the third respondent are entitled to enjoy the private open space areas within the Estate.⁹

[36] It was submitted by the appellant that private open space areas are not a negotiable convenience. The argument was that private open space areas are reserved for the benefit of all the members and is governed by the Kouga Municipality zoning instruments. In advancing that submission, it was submitted that the third respondent cannot through convenience authorize exclusive use or

⁶ A member is defined in clause 2.10 read with clause 4 of the third respondent’s constitution.

⁷ The development means Erf 2[...]⁷ Sea Vista in the Municipality of St Francis Bay.

⁸ The Council means the St Francis Bay Municipality or its successor. Clause 2.2.

⁹ See clause 4.6 of the constitution.

any form of encroachment upon private open space areas that are specifically zoned and reserved in terms of the Kouga Land Use Scheme.

[37] The above submissions are premised on the complaint by the appellant in the CSOS application that the owner of unit 5 (i.e. erf 2520) was encroaching onto the private open space areas (i.e. erven 2[...]2 and 2[...]4). The Nub of his complaint/ dispute was that: ‘...the entire area beyond his pool towards the sea [which part of erf 2[...]4] has been infilled with spill from his house building project, grassed and fenced for exclusive use with land slip protection through retaining walls.’ There was also a complaint that other members have also encroached onto the private open space areas, but the details thereof were not specified. An additional complaint was that the owners of erven 2527 and 2526 had also encroached on land owned by the State within the marine reserve area. Photographs evincing such complaints were also attached to his dispute resolution form in the CSOS application.

[38] In response, it was argued by Counsel for the third respondent that the constitution requires that the members enjoy the private open space areas and not the entire private open space areas. To illustrate the point, it was submitted that part of the private open space areas consists of pathways, roadways, natural vegetation and the like which then limits access to the entirety of such areas.

[39] In advancing such submissions, it was argued that an encroachment of half a meter or more onto the private open space area(s) would not deprive the members of the enjoyment of such areas.

[40] In addition, it was submitted that, having regard to the objectives of the third respondent as captured in clauses 3.2 of its constitution, is to provide control, *inter*

alia over the private open space areas and fundamentally to enforce certain building regulations imposed by the Council when it approved the development. Therefore, the constitution makes no reference to planning regulations and accordingly it does not impose an obligation upon the third respondent to enforce the planning regulations.

[41] It was argued that the third respondent's committee is the repository of the powers to, *inter alia*, determine what constitutes appropriate standards and the maintenance of the private open space areas and subdivision area in general¹⁰. It was submitted that the third respondent's committee acted within its powers that is to enforce its objectives and that its decision did not prevent any its members from enjoying the private open space areas.

[42] Regarding the complaints about unit 5, (erf 2520) it was submitted that the buildings plans were approved by both the third respondent and the Kouga Municipality. And therefore, because the gist of the dispute in the CSOS application was about an alleged unlawful use of the land, the adjudicator lacked jurisdiction. Because in terms of section 1 of the CSOS Act, a dispute means 'a dispute in regard to the administration of a community scheme'. The dispute about encroachments or about boundary lanes are not disputes about the administration of the scheme. Hence the adjudicator issued an order dismissing the CSOS application on the basis that it was misconceived. It was argued that if the appellant felt aggrieved by the decisions of the third respondent's committee to approve the the contraventions by the members including the appellant with regard to use of private open space areas within the Estate, the appellant should have approached

¹⁰ See clauses 7.1 and 7.2 of the constitution.

the appropriate forum instead of bringing a CSOS application to the Community Schemes Ombud Service.

[43] I have great difficulty comprehending with the third respondent's submissions. First of all, the complaint by the appellant viewed objectively is about the conduct of the member(s), which deprived other members of the right to enjoy the private open space areas. The third respondent and /or its committee are constitutionally empowered to manage and control the association. The third respondent is vested with the powers to, *inter alia*, the maintenance of the private open space areas.

[44] Coupled to that; each member of the third respondent is entitled to enjoy the private open space areas.¹¹ Clause 4. 6 of the third respondent's constitution reads: '4.6 Every member shall be entitled to enjoy the private open space but shall be obliged to pay such levy as is determined from time to time by the association.'

[45] An encroachment onto the private open space areas in the manner described in the complaint by the appellant would deprive other members of their entitlement to enjoy the private open space area(s). The submission on behalf of the third respondent that the members are not entitled to the enjoyment of the entirety of the open space areas is flawed. Clearly from reading and on proper construction of clause 4.6 referred to above, each member of the third respondent is entitled to enjoy the private open space areas. The encroachment onto the private open space area, in respect of unit 5, is for the exclusive use of the owner of that property contrary to clause 4.6. Equally this applies to encroachment by the appellant, if

¹¹ See clause 4.

any. It is no answer therefore that the appellant itself has contravened the same provisions it has lodged the dispute about.

[46] To add to that, members of the third respondent are not allowed to dump material or goods on the private open space areas. Clause 8.3 is unambiguous about that. It reads:

‘8.3 No member shall be entitled to dump material or goods on the private open space or any erf not registered in the name of the member and shall be liable for the payment of the costs of rectifying the damage or removal of the material or goods.’

[47] The main defense by the third respondent was that the encroachments onto the private open space areas on unit 5 and other encroachments within the Estate were approved by the third respondent’s committee on the advice of the professional environmentalists and the approval by the Municipality.

[48] The record is bereft of such approval, despite my diligent search of the entire appeal record at my disposal. Even my gratuitous invitation to the third respondent’s counsel for such assistance was without success. The only evidence which was placed before me and the adjudicator was that of third respondent’s previous chairman. That evidence was that he informed the members about the encroachments onto the private open space areas by some members and that there was no approval for such encroachments. The adjudicator’s finding that there was approval is not borne out of the evidence which was before him. Consequently, the adjudicator in that regard was wrong. He failed to properly apply the law to the facts.

[49] Not only that, but there was also no evidence that such encroachment was approved by the Municipality. Counsel for the third respondent correctly mentioned that the approval of renovations, construction etc. is two tier, first by the committee and secondly by the municipality. Once again, the evidence was bereft of any approval by the relevant Municipality. That also evinces flaws in the adjudicator's findings.

[50] The adjudicator's order that the compliant was moot because there was an approval by the committee and the municipality is indefensible. Most fundamentally the constitution of the third respondent does not empower its committee to authorize use of the private open space areas for exclusive use. On the contrary, in terms of clause 4.6, each member is entitled to enjoy the private open space areas within the Estate.

[51] With that conclusion, the appeal must succeed on the first ground alone. That being said it would be unnecessary to deal with the other grounds of appeal. However, in so far as the relief is concerned, section 39 of the CSOS Act sets out the various substantive remedies which an adjudicator is empowered to grant. Some of the orders sought by the appellant as set out in the draft order are too wide and are outside the remedies catered for in section 39 of the CSOS Act.

[52] The relief which was sought by the appellant in the CSOS application were those envisaged in sections 39(2)(d), alternatively section 39 (6), or alternatively section 39(7)(b). The appellant has made out a case as against the third respondent only for the orders as set out in section 39(2)(d) and 39(6)(c) and not for the prayers as set out in paragraphs 4.1 to 4.4 of its proposed draft order. In my reading

of the CSOS Act and the authorities¹², the power to make ‘*any other order proposed*’ as catered for in section 39(7) resides in the ‘chief ombud’ and not the adjudicator. It would be stretching the provisions of section 39 beyond its intended purpose to grant the order sought in paragraphs 4.1 to 4.4 of the proposed draft order by the appellant.

¹² Ncala v Park Avenue Body Corporate and Others (813/2023) [2026] ZASCA 16 (12 February 2026) at para 93.

Order

[53] In the results, the following order shall be issued:

- 1. The appeal is upheld.**
- 2. The third respondent is ordered to pay the costs of this appeal.**
- 3. The adjudicator's order, dated 19 April 2025 is set aside and replaced with the following:**

“1.1 The Otters Landing Homeowners Association is ordered to, within 7 days of receipt of this order, retain, at its cost the services of a registered Land Surveyor to determine and report in writing within 30 calendar days of his/her appointment to what extent each individual property in the Otters Landing Estate encroaches and/or has been allowed to encroach onto any private open space erven depicted on the SG diagram attached as Annexure “NOM1”.

1.2 The Otters Landing Homeowners Association is ordered to, within 7 days of this order, retain, at its cost, the services of a registered Environmental Assessment Practitioner to establish and report in writing within 30 days on whether any activity / activities that require prior authorisation in terms of a specific environmental management Act or Acts have been undertaken in the private open space areas of Otters Landing.

1.3 The reports of both the Land Surveyor and the Environmental Assessment Practitioner must be shared with Le Roux Petroleum (Pty) Ltd and all owners of properties in the Otters Landing Estate on receipt but no later than the day after expiry of the 30-day period afforded to them.

1.4 The Otters Landing Homeowners Association is ordered to require that all encroachments of any kind onto the private open space areas, including material used for landfill, be removed and the affected area rehabilitated to its

natural state within 90 days of expiry of the 30-day period afforded to the Land Surveyor and Environmental Assessment Practitioner.”

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant : *Adv D J van Heerden*

Instructed by : Rushmere Noach Attorneys
Gqeberha

Counsel for the 3rd Respondent : *Adv N J Mullins*

Instructed by : Van Zyl Rudd Inc. Attorneys
Gqeberha

Date heard on : 04 December 2025

Delivered on : 03 March 2026