Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NUMBER: A3140/2018

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
SIGNATURE **DATE**

In the matter between:

WATERFALL HILLS RESIDENTS ASSOCIATION NPC Appellant

And

D J JORDAAN First Respondent

L HALL Second Respondent

JUDGMENT

Windell J

INTRODUCTION

[1] This is an appeal and cross appeal in terms of section 57(1) of the Community Schemes Ombud Service Act 9 of 2011 ("the Act") against an award granted by the adjudicator. Section 57(1) vests an applicant or any affected person who is dissatisfied by an adjudicator's order, with a right to appeal to the High Court, but only on a question of law.

[2] The award was made against the appellant, the Waterfall Hills Residents Association NPC ("the Association"), in favour of the first respondent. It was ordered:[1]

> *[2.1]That the koi pond erected at Unit [...] be removed within 14 days of the order.*
>
> *[2.2] That the flower bed adjacent Unit [...] be restored to the original state with indigenous plants within 14 days of the order.*
>
> *[2.3] No order as to costs.*

[3] It was conceded during the hearing of the appeal that the adjudicator erred in granting relief against the Association, as no relief was sought by the first respondent against it during the adjudication hearing: Relief was sought against the second respondent. The appeal should therefore succeed on that basis alone.

[4] In the cross appeal the first respondent seeks an order against the second respondent on the same terms as the award granted against the Association.

[5] The cross appeal was noted late and the first respondent seeks condonation. The application for condonation is opposed by the second respondent.

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[1] In terms of section 54 of the Act.

CONDONATION

[6] The adjudicator granted the award against the Association on 10 November 2017. In accordance with section 57 of the Act, the parties affected by the ruling had 30 (thirty) days to lodge an appeal. The Association lodged its appeal against the adjudicator's decision on 07 December 2017. The cross appeal by the first respondent was only noted five months later, on 11 May 2018.

[7] The first respondent filed a substantive application for condonation setting out the events that led to the late filing of the cross-appeal. It was submitted that the attorney on record for the first respondent only received the full record of the adjudication hearing on 1 March 2018, which consisted of eight volumes. Legal representatives were excluded from the adjudication hearing, and it was contended that the situation was therefore significantly different from an appeal where legal representatives were indeed in attendance in the forum *a quo*, and thus had a good working knowledge of the pleadings, trial bundle, evidence, and the inter-relationship between them. Moreover, inasmuch the Act only permits an appeal on points of law, this was not a matter where the attorney could adequately discharge his obligations to the first respondent by relying solely on his recollection of the evidence, including the cross-examination, and the hearing generally. No hearing date for the appeal had been allocated when the cross appeal was noted, and it was submitted that there was no prejudice to any of the parties in granting condonation.

[8] The second respondent opposed the application for condonation and asserted that the first respondent failed to say anything about the prospects of success on

appeal and except for a single, bald assertion that no prejudice will be suffered by the second respondent, the entirety of the remainder of the affidavit was devoted to an explanation for the delay in bringing the cross-appeal. There was however no explanation for the delay from 1 March 2018 (when the appeal record was received) to 11 May 2018 when the cross appeal was eventually noted. It is contended that the explanation offered by the first respondent was therefore neither complete nor sufficient, and that, coupled with the fact that nothing was said of the merits of his case and only lip service is paid to potential prejudice, the first respondent ought to bear the responsibility for his non-compliance with the Rules.

[9] Counsel for the second respondent further submitted that the second respondent is prejudiced as he finds himself in a position where the ruling was not granted against him and he was reasonably poised to feel comfortable that the dispute had found a resolution of sorts. But then the first respondent belatedly joined the second respondent to the proceedings, forcing him to incur costs by becoming active in litigation he was up to then, just observing. For these reasons, the second respondent seeks a dismissal of the condonation application with costs.

[10] The first respondent had 10 days after the Association noted its appeal to file its cross appeal. It only noted the cross appeal some five months later. The second respondent failed to explain what transpired between eventually receiving the record in March 2017 and the noting of the cross appeal in May 2017, and he also failed to expressly deal with the prospects of success on appeal.

[11] The explanation for the lateness and the prospects of success are however not the only two factors that needs to be considered in a condonation application.

In *Ferris and Another v Firstrand Bank Ltd*,[2] the Constitutional Court held, with reference to *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others,* [3] that the applicant's explanation for the late filing of the application was less than satisfactory and there were no prospects of success. The court held that the test for condonation is whether it is in the interest of justice to grant it.

[12] It is trite that a court has a wide discretion in deciding whether to condone non-compliance with the Rules. The main factor in consideration of the application for condonation in this matter is the fact that the adjudicator had already made a factual finding, but because the adjudicator erroneously made an order against the Association and excluded the second respondent, the order was unenforceable. The purpose of the cross –appeal is to get an order, on the same terms as the adjudicator's original order, against the party against whom relief was originally sought, namely the second respondent. Were the first respondent not allowed to proceed with the cross appeal, the first respondent will be without a remedy. His prejudice is substantial and irreparable were the cross appeal not to be entertained.

[13] The second respondent's disappointed expectation is not a cognisable ground of prejudice. I agree with counsel for the first respondent that the second respondent would in any event have to incur costs in defending the cross appeal if he so chooses, but such costs would be attendant upon the cross appeal even if it were noted timeously. The finalization of the appeal was not delayed by the late noting of the cross

[2] 2014 (3) SA 39 (CC)

[3] 2010 (2) SA 181 (CC)

appeal as notice of the set down was served on 7 June 2018; well after the cross appeal had been noted. The late filing of the cross appeal is condoned.

BACK GROUND FACTS

[14] For ease of reference the parties in the cross appeal will be referred to as "Jordaan" and "Hall".

[15] Jordaan and Hall both reside at the Waterfall Hills Mature Lifestyle centre and are neighbours. They are members of the Association and bound to its rules. On 13 February 2017 Jordaan lodged an application for dispute resolution in terms of section 38 (3) of the Act. In his application Jordaan complained about the installation of a koi pond in a flower bed in front of Hall's house that was attracting frogs that made such a noise that Jordaan and his wife were unable to sleep at night which was causing them health problems. Peace and quiet is a key factor regarding life on the estate and the frogs were creating a disturbance. Jordaan further contended that Hall was in any event not allowed to install the koi pond as it was against the landscaping rules. Jordaan therefore sought an order instructing Hall to, at his own cost, remove the koi pond and restore the flower bed. No relief was sought against the Association.

[16] Pursuant to the processes contemplated in Chapter 3 of the Act, and following the failure of a conciliation process as contemplated by section 47 of the Act, the dispute between the parties was referred to an adjudicator, Mr. P Samuels. The adjudicator duly convened a hearing on 10 October 2017 in order to hear evidence on the disputes between the parties. At the adjudication hearing the Association was represented by authorized representatives, and Jordaan and Hall represented

themselves. None of the parties were legally represented at the hearing. Following the conclusion of the adjudication hearing, the award was handed down on 10 November 2017.

EVALUATION

[17] The adjudicator heard evidence from Hall, Jordaan and Mr Kilbourn, a board member of the Association, and made two findings. He found that: (1) The koi pond was not a small water feature as contemplated in clause 5.4 of the Landscaping Rules and; (2) The koi pond created a nuisance as envisaged in rule 8.1 of the Conduct Rules. Counsel for Jordaan submitted that both these findings were factual findings and were therefore not appealable in terms of the Act. The second respondent argued that both findings involved points of law and were appealable. I agree with the second respondent. Although factual findings were made, which this court is not entitled to interfere with, the conclusion the adjudicator arrived at involved the interpretation of documents (the Landscaping Rules and the Conduct Rules) which involved points of law.

The water feature

[18] Clause 5.4 of the Landscaping Rules states as follows:

> *"Small water features are permitted and can be positioned in any recess of a unit or on patios. The water features must be an earth colour, the same or similar to the recommended colours for pots. The electrical cord for the water feature pump must be concealed. The installation of water features will be permitted only after approval by Estate Management."*

[19] The adjudicator interpreted clause 5.4 of the Landscaping Rules and found that it did not provide for the installation of a koi pond. In addition, he found that the pond was, in any event, not approved by the Association as permission was not granted in writing at the time it was sought, but was confirmed *ex post facto*.

[20] In *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[4] Wallis JA set out the proper approach to be adopted when interpreting documents. He remarked as follows:[5]

> *"[W]hatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-businesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (Footnotes omitted.)*

[4] 2012 (4) SA 593 (SCA)

[5] At 604 -605

[21] The adjudicator found that a small water feature as contemplated in clause 5.4 of the Landscaping Rules did not include a pond which he found is defined as *"a body of standing water either natural or artificial that is usually smaller than a lake*" and that it could not have been within the contemplation of the drafters of the rules that a koi pond should be considered as part of "small water features". He did not find, as was contended by the second respondent during argument, that a koi pond was not a water feature but only that it was not a **small** water feature (my emphasis).

[22] The interpretation of a document is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses.[6] Clause 5.4 stipulates that "*small"* water features are permitted and can be positioned in any *"recess of a unit or on patios".* The water features must be an earth colour*, "the same or similar to the recommended colours for pots"* and that the *"electrical cord"* for the *"water feature pump"* must be concealed*.* From a proper reading of clause 5.4 the adjudicator was correct in finding that a koi pond was not a small water feature. The language used in clause 5.4; the context in which, and the apparent purpose to which it was directed at, is, in my view, clear. If a pond does not constitute a "small water feature" as contemplated in the Landscaping Rules, then it is against the Landscaping Rules for it to be installed on Hall's property.

[23] However, the main issue, as far as I am concerned, is not the installation of the koi pond *per se*, but the allegation that the koi pond creates a nuisance as it attracts frogs that make such a loud noise during the night that it impacts on the health of

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[6] *KPMG v Securefin Ltd* 2009 (4) SA 399 SCA, at [39] and [40]

Jordaan and his wife. Based on the evidence presented before him, the adjudicator made a factual finding in favour of Jordaan.

[24] Jordaan testified that his wife is suffering from Hashimoto's auto immune disease and the frog noise is having a detrimental effect on her health as she is unable to sleep at night. In support of his evidence Jordaan relied on the report of a well-known environmentalist and frog expert Vincent Carruthers. Mr. Carruthers found that the species of the frog causing the disturbance was the Guttural Toad *Sclerophyrs gutturalus.* In his report he described the call of the toad as follows:

> *"The call of the Guttural Toad is a loud, pulsed bray, which is amplified by the large vocal sac. Only the males call – the purpose of the call is to attract females to the site to breed. They call from semi-concealed positions under overhanging rocks or embankments. Each call has a duration of about 0.8 seconds and is emitted once every four or five seconds. Males congregate at the breeding sites and establish large choruses, which, to the human ear, produce a very loud and incessant sound. Calling usually starts around sunset and continues until about midnight. There are occasional short periods of silence if the chorus is disturbed".*

[25] During the adjudication hearing a recording of the frog noise was listened to. The adjudicator found that the noise constituted a disturbance not in keeping with the peace and quiet offered by the estate. He found that the koi pond created a nuisance on the basis that frogs were inhabiting the pond and creating a noise disturbance which was adversely affecting Jordaan and his wife.

[26] It was submitted by the second respondent that, on the objective facts, the conduct of Hall (installing the koi pond) did not constitute a nuisance as

contemplated in Rule 8.1 of the Conduct Rules as such conduct was undertaken in due and reasonable exercise of the owner's property rights and any disturbance to Jordaan constituted a mere discomfort, inconvenience or annoyance emanating from the use of neighbouring property which must be endured.

[27] An occupier of land commits a nuisance by creating (or allowing) a state of affairs on land whereby the owner or occupier of other land is unreasonably or unfairly and materially disturbed or annoyed or interfered with.[7] The test is an objective one. The standard applied is not that of a perverse, particular or over scrupulous person but of a normal person of sound and liberal tastes and habits.[8]

[28] Clause 8.1 of the Conduct Rules prohibits any member from creating any nuisance or disturbance (whether through noise, odours, or any manner whatsoever) on or about the Estate. The reality in this matter is that the water feature is attracting a large number of very noisy frogs to the flower bed. Objectively, these frogs make an unacceptable noise for the most of the evening and Jordaan and his wife are finding it difficult to get a good night's sleep. In my view the adjudicator was correct in finding that the koi pond causes a disturbance and the only effective way of removing the nuisance was to order the removal of the koi pond.

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

[29.1] The appeal and cross appeal are upheld.

[29.2] The adjudicator's ruling is set aside and replaced with the following:

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[7] *East London Wester Districts Farmers Association v Minister of Education & Development Aid* 1989 (2) SA 63 (A)

[8] *Prinsloo v Shaw* 1938 AD 570

[29.2.1] Mr L. Hall, the owner of Unit [...], Waterfall Hills Mature Lifestyle estate, is ordered to remove the koi pond erected at Unit [...] within 14 days of this order.

[29.2.2] Mr L. Hall, the owner of Unit [...], Waterfall Hills Mature Lifestyle estate, is ordered to restore the flower bed adjacent to Unit [...] to the original state with indigenous plants within 14 days of this order.

[29.3] Costs in the appeal to be paid by first and second respondents jointly and severally.

[29.4] Costs of the cross appeal to be paid by the second respondent.

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L. WINDELL
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

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C.REYNEKE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the applicant:	Advocate D. Mahon
Instructed by:	Faber Goertz Ellis Austen Inc.
Counsel for the first respondent:	Adv HM Viljoen
Instructed by:	Johan Victor Attorneys
Counsel for the second respondent:	Advocate HV Vorster
Instructed by:	Lloyd Attoreys
Date of hearing:	14 August 2018
Date of judgment:	12 November 2018