REPUBLIC OF SOUTH AFRICA

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

CASE NO: A3029/2019

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

28 April 2023 _____

In the matter between:

MELUSI EMMANUEL NCALA Appellant

and

PARK AVENUE BODY CORPORATE Respondent

Neutral Citation: *Melusi Emmanuel Ncala v Park Avenue Body Corporate* (Case No: A3029/2019) [2023] ZAGPJHC 390 (28 April 2023)

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

OSSIN AJ (MMP Mdalana-Mayisela J concurring)

BACKGROUND

[1] The Community Scheme and Ombud Service Act 9 of 2011 ('the Act') makes provision for the resolution of disputes between community schemes and owners of property situated within the community scheme by way of an adjudication process. In this matter the respondent, Park Avenue Body Corporate ('the Body Corporate) is the community scheme and the appellant, Melusi Emmanuel Ncala ('Mr Ncala') is the owner. Disputes arose between the Body Corporate and Mr Ncala. These were referred to an adjudicator, who upheld, for the most part, the orders sought by the Body Corporate while dismissing the relief sought by Mr Ncala.

[2] Mr Ncala by way of a notice of appeal in terms of section 57 of the Act,[1] appealed the adjudicator's decision to this court. Section 57(2) requires the appeal to be made within 30 days of the adjudicator's decision. Mr Ncala's appeal was out of time. He did not, however, when notifying his appeal, seek condonation for its lateness, and only did so about a year later by way of a self-standing application. His appeal and condonation application then served before us.

[3] After hearing argument on the condonation application and the appeal on its merits, in terms of our judgment handed down on 10 May 2022 we dismissed the condonation application and Mr Ncala's appeal with costs ('the Judgment').

[4] Mr Ncala now seeks leave to appeal our judgment by way of his notice of application for leave to appeal dated 31 May 2022 ('leave to appeal notice'). This judgment addresses Mr Ncala's application for leave to appeal and should be read in conjunction with the Judgment.

[5] Although the Body Corporate did not participate in the leave to appeal application, an attorney representing the Body Corporate was present in court during oral argument on the basis of a 'watching brief'. In an affidavit filed by the Body Corporate's attorneys with the court subsequent to the hearing we were advised that the Body Corporate had decided not to participate in the hearing in order not to incur further legal costs.

[6] In the event, the only written submissions we have before us are Mr Ncala's and the only oral engagement we had was with Mr Ncala's counsel. This was disappointing

[1] In this judgment any reference to a section is a reference to the identified section in the Act unless otherwise stated.

as we were then not able to engage the Body Corporate on the issues raised by Mr Ncala in the context of an application for leave to appeal.

[7] In his leave to appeal notice, Mr Ncala asserts that there are reasonable prospects of success on appeal, and that, in respect of some aspects of the Judgment there are compelling reasons for leave to appeal to be granted. Mr Ncala further asserts that the Judgment was wrong in the following nine respects, and that by virtue of these errors the appeal would have a reasonable prospect of success:

[i] The Judgment ought to have been confined to rulings on points of law, but we erroneously also made numerous findings of fact;

[ii] We erroneously found that Mr Ncala's notice of appeal did not set out the grounds of appeal sufficiently or at all;

[iii] We erroneously found that Courts do not have a general power to condone non-compliance with statutory time periods. In any event we ought, at the very least, to have found that section 57 of the Act implicitly empowers the court to condone non-compliance; the existence of such an implicit power is reached through a process of interpretation which itself is informed by the right of access to justice as required by section 39(1)(a) of the Constitution;

[iv] Having dismissed Mr Ncala's condonation application, we ought not to have then addressed or determined the merits of Mr Ncala's appeal and that we had no power to do so;

[v] We disregarded Mr Ncala's rights to equality and dignity, and erroneously found that Mr Ncala's reliance on these rights was misplaced;

[vi] We unduly limited the powers of Adjudicators appointed in terms of the Act, by finding that these Adjudicators are not empowered to issue declarations of constitutional infringements or declarations which are vague, nebulous and of academic interest only;

[vii] We erred in failing to order the Body Corporate to replace the plastic roof and security gate, and in finding that the Body Corporate was legally entitled to remove these items;

[viii] We erred in failing to direct and order the Body Corporate to reasonably accommodate Mr Ncala, and erred in finding that such an order was vague and nebulous;

[ix] We erred in ordering Mr Ncala to pay the costs consequent on the dismissal of his appeal because (1) we ought not to have dealt with the merits of the appeal at all and (2) Mr Ncala was seeking to vindicate a constitutional right and ought then not to have been penalised with a costs order.

[8] In the heads of argument filed on behalf of Mr Ncala for purpose of this leave to appeal application, grounds [ii] and [iv] were not addressed; counsel for Mr Ncala confirmed to us during argument that Mr Ncala did not persist with those grounds. Although ground [i] was addressed in the heads of argument, I understood Mr Ncala's counsel not to be persisting with that ground as well. I therefore do not deal with these grounds but mention that I do not believe that these grounds would have given rise to a reasonable prospect of success on appeal.

[9] Cutting across the remaining grounds, Mr Ncala's counsel argued that there are four broad issues underpinning Mr Ncala's leave to appeal application. I understand these to be as follows:

[a] Arising from Mr Ncala's application for condonation, whether the Court hearing such an appeal has the power to condone non-compliance with the time period set out in section 57(2), either by way of a general power, or because the sub-section ought to be interpreted in such a manner;

[b] Whether the principle of 'reasonable accommodation' which informs and gives content to the right to equality as set out in section 8 of the Constitution, finds application in the particular circumstances of the present matter, viz (1) its application in private housing schemes in general and (2) as it relates to Mr Ncala's contention that the right to equality resolves itself into his right to

install and use his washing machine on common area in the absence of consent by the Body Corporate and its members;

[c] Whether the relief sought by Mr Ncala, both before the Adjudicator, and before us on appeal, is competent under the Act;

[d] Whether the costs order made by us against Mr Ncala infringes the principle laid down by the Constitutional Court in *Biowatch Trust*,[2] which principle is expressed as follows by Mr Ncala in his heads of argument before us: "*The general rule in constitutional litigation is that an unsuccessful litigant in proceedings intended to protect or advance constitutional rights ought not to be ordered to pay costs, unless the application is frivolous or vexatious or in any other way manifestly inappropriate."*

[10] Mr Ncala's condonation application gives rise to two inquiries: (1) whether the court is empowered to condone his late appeal and, if so, (2) whether he has made out a case for condonation. If the court is not empowered to condone a late appeal, Mr Ncala's case ends there. If, however, the court is so empowered the second leg is whether Mr Ncala has made out a case for condonation. For this leg Mr Ncala would have to demonstrate good cause, which at its most basic level requires (1) a satisfactory and bona fide explanation for the delay including the delay in seeking condonation and (2) demonstrating reasonable prospects of success on the merits. If Mr Ncala is not able to satisfy these requirements, his case likewise ends there.

[11] In regard to his condonation application, Mr Ncala asserts that there are reasonable prospects of success on appeal. His submission is that a failure to comply with the time period in section 57(2) is condonable, and that he has made out a case for condonation.

[12] In regard to the merits of the appeal Mr Ncala asserts that there are reasonable prospects of success on appeal, and that, in respect of some aspects of the Judgment there are compelling reasons for leave to appeal to be granted.

[13] The difficulty faced by Mr Ncala is that even assuming that a court seized with an appeal in terms of section 57 has the power to condone non-compliance,

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[2] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)

condonation can only be given if there are reasonable prospects of success on the merits. Thus, even if we were wrong in finding that a court does not have such a power, it does not appear to me to be appropriate to grant leave to appeal if Mr Ncala does not have reasonable prospects of success on the merits of the appeal.

CONDONATION

Whether the court hearing an appeal in terms of section 57 of the Act is empowered to condone non-compliance

[14] Mr Ncala contends that the Court seized with an appeal in terms of section 57, has the power to condone non-compliance with section 57(2)'s time period. He asserts two sources for this power. The first arises from a courts' general power to condone non-compliance with statutory time limits. The second arises through interpretation of section 57 in a manner which advances the right of access to justice as set out in section 39(1)(a) of the Constitution, i.e., one must interpret section 57(2) as containing an implied power to condone non-compliance.

[15] In our Judgment we held that a Court sitting as an appeal court in terms of section 57 does not have a general power to condone non-compliance, and that in any event section 57(2) was not susceptible to an interpretation which affords such a court the power to condone.

[16] Mr Ncala contends that we erred on both these aspects.

A general power to condone non-compliance?

[17] In arguing for a general power to condone non-compliance, Mr Ncala relies on a *dictum* of the Supreme Court of Appeal ('SCA') in *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue* Service,[3] which appears at paragraph [10]. He contends that this *dictum* is clearly *ratio.* Mr Ncala also contends that this *dictum* was endorsed and confirmed by the SCA in *Samancor Group Pension Fund v Samancor Chrome and Others.*[4] Mr Ncala submits that these judgments are dispositive of this issue.

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[3] 2002 (4) SA 219 (SCA)
[4] 2010 (4) SA 540 (SCA) at [20]

[18] *Toyota's* paragraph [10] reads as follows (the underlined portion was emphasised by Mr Ncala):

> These considerations based on interpretation are strengthened, of course, by the separate consideration that the High Court has inherent jurisdiction to govern its own procedures and, more particularly, the matter of access to it by litigants who seek no more than to exercise their rights. It has been held that this jurisdiction pertains not only to condonation of non-compliance with the time limit set by a Rule but also a statutory time limit: *Phillips v Direkteur can Sensus* 1959 (3) SA 370 (A) at 374G – *in fine*.

[19] *Samancor's* paragraph [20] reads as follows (Mr Ncala' underlining):

> The High Court, because of its inherent jurisdiction, has powers to govern its own procedures. The said jurisdiction pertains not only to non-compliance with the Rules of Court, but also to statutory time limits – see *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue Service…*

[20] We held that *Toyota's dictum* was *obiter*, and that the crucial aspect of that case in so far as condonation was concerned, was entirely dependant on an interpretation of the statutory provision in question: "*The enquiry is simply: what did the Legislature intend?"*.[5]

[21] There are other judgments which deal with this issue. Among these are *Mohlomi,*[6] *Phillips*,[7] and *Vlok NO,*[8] all of which appear to suggest that there is exists no general power to condone non-compliance of a statutory time limit.

[22] On the other hand, and apart from *Toyota* and *Samancor,* counsel for Mr Ncala now asserts that there are other judgments which advocate for such a power albeit dependant on whether the time period in question is to be viewed as extinguishing a substantive right (along the lines of prescription) or merely imposing a procedural bar to the assertion of a substantive right (along the lines of a type of time-bar). Counsel submits that courts have a general power to condone non-compliance with

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[5] *Toyota* (supra) at [9] 286D
[6] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC)
[7] *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC)
[8] *Vlok NO and Others v Sun International South Africa Ltd and Others* 2014 (1) SA 487 (GSJ)

statutory time limits where compliance is viewed as procedural: *Gaoshubelwe*[9] and *Pickfords Removals.*[10] Counsel contends that section 57(1) contains and creates the substantive right to appeal, whilst section 57(2) is to be viewed merely as procedural in nature in the sense that it merely sets out the procedure for asserting the right of appeal. This approach was not argued before us initially and we accordingly did not have the benefit of opposing submissions on this aspect.

[23] In any event I do not believe that the distinction between a substantive right and procedural right in the context of section 57 is relevant. In my view there is no reasonable prospect that another court would find the existence of a general power to condone non-compliance.

Section 57(2) empowers a court to condone non-compliance?

[24] Counsel for Mr Ncala submitted that interpreting this provision so as to include an implied power to condone would best promote Mr Ncala's rights to equality and access to courts. Counsel submitted that construing the 30-day limit as a non-condonable time bar would deny Mr Ncala such a right. It was not Mr Ncala's case that section 57(2)'s 30-day limit was unconstitutional, and in fact Mr Ncala expressly disavowed any reliance on this basis.

[25] It was argued on Mr Ncala's behalf that the context in which section 57(2) arises must be taken into account in its interpretation. Such context includes (1) individuals having to bring their claims before the CSOS without legal representation (save in exceptional circumstances); (2) individuals not being aware of the statutory limit; (3) the short time period within which an appeal must be lodged after the adjudicator's decision ("*the limit of 30 calendar days is tight*") which could be aggravated by these days falling over a holiday period ("*as was the case here*"); (4) the broader legislative framework as it arises from section 173 of the Constitution.

[26] Militating against the above approach, as set out in our judgment (and argued by the Body Corporate at that time) is that the Act seeks to promote prompt and speedy resolution of disputes.

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[9] *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* 2018 (5) BCLR 527 (CC) at [184]

[10] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* 2021 (3) SA 1 (CC) at [56]

[27] In asserting a power to condone non-compliance based on an interpretation exercise, Mr Ncala appears to argue that since he is seeking to overturn what he perceives to be infringements of his constitutional rights to dignity and equality, the section must be interpreted in that context. In my view the nature of the alleged right which an appellant is seeking to uphold is irrelevant to this interpretation process. If we were to find that a court's power to condone non-compliance with the 30-day time limit is to be informed by the nature of the alleged right being asserted, this, in my view, would not be a principled approach to the question, and could well lead to different outcomes depending on how the alleged right is framed.

[28] In the circumstances I am of the view that there is no reasonable prospect of success on appeal on this aspect.

Mr Ncala's case for condonation

[29] Mr Ncala lodged his appeal 67 days late. He did not however at that stage make application for condonation, and only did so about a year later. This is not in keeping with basic principles as to when condonation ought to be sought. Furthermore, Mr Ncala did not in his condonation application give any explanation as to why he had sought condonation at such a late stage (i.e., more than a year after lodging his out of time appeal). The fact that Mr Ncala had framed his case on the basis of an infringement of constitutional rights does not appear to me to justify his failure to address this aspect.

[30] Before us Mr Ncala again argues that condonation was warranted. In the Judgment we set out our reasons why we would not have granted Mr Ncala's condonation application in so far as his explanation is concerned.[11] In my view Mr Ncala does not have reasonable prospects of success on this aspect.

[31] I deal with the substantive merits below.

[11] Judgment: paragraphs 148 to 154

MERITS

[32] In the context of the condonation application, Mr Ncala's prospects of success on appeal on the merits obviously plays a role. But this is provided that the court seized with a section 57 appeal has the power to condone non-compliance. We have found that it does not. In my view Mr Ncala does not have reasonable prospects of success on appeal on this aspect. However, even if we may be found to be wrong on this, I do not believe that granting condonation would in any event have been appropriate. This is because, in my view, Mr Ncala does not have reasonable prospects of success on appeal in respect of the merits.

The orders declaring that the Body Corporate infringed Mr Ncala's constitutional rights to equality and dignity, and directing the Body Corporate to take reasonable steps to accommodate Mr Ncala's needs

[33] The fundamental issue in this appeal is whether Mr Ncala's reliance on the constitutional rights to equality and dignity was appropriately raised, and whether the Body Corporate had infringed such rights. The question as to whether Mr Ncala's rights to equality and dignity were infringed arises because Mr Ncala sought orders declaring this to be the case as set out in paragraph 1 of his notice of appeal *" The conduct of [the Body Corporate] is declared to be an infringement of [Mr Ncala's] right to dignity"* - and in paragraph 4 of his notice of appeal directing the Body Corporate "*to take all reasonable steps to accommodate [Mr Ncala's] needs as a person living with a disability*."

[34] Sight must not be lost that whatever orders Mr Ncala sought, such orders would have to be competent under the Act. In the Judgment we found that the Act does not permit the adjudicator to make orders of a general nature which are not explicitly referenced in section 39 of the Act.[12] Mr Ncala submits that this finding is wrong.

[35] Thus, even assuming that Mr Ncala had made out a case for such infringements of his constitutional rights, it does not necessarily follow that a declaration on these terms can be made in the context of the Act.

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[12] Judgment: paragraphs 198 to 203

[36] Counsel for Mr Ncala submit that section 39(7) gives an adjudicator the power to make orders in respect of general issues that do not fall within the orders contemplated in sections 39(1) to (6). In doing so reliance is placed on the heading of section 39(7) "*general and other issues"* as well as section 39(7)(2) which empowers an adjudicator to make "*any other order proposed by the chief ombud.*" The Judgment addresses the submissions made by Mr Ncala on this aspect (see paragraphs 204 to 208, as well as paragraphs 198 to 203). For the reasons stated in the Judgment we, once again, reject Mr Ncala's submissions.

[37] Even if we are wrong in regard to the powers of the adjudicator to make a declaratory order on the terms sought by Mr Ncala, the Judgment addressed the substance of such an order.[13] Counsel for Mr Ncala submitted that we erred in finding that Mr Ncala's rights had not been infringed and that the Body Corporate's interests outweighed Mr Ncala's interests.

[38] In argument before us, reliance was placed by Mr Ncala on *Governing Body of the Juma Musjid Primary School and Others v Essay N.O and Others*[14], for purposes of distinguishing between a positive obligation on the part of a private body – an obligation to provide the right – as opposed to a negative obligation – an obligation on the part of the private body not to impair the right. It was argued that Mr Ncala was not seeking to impose a positive obligation on the Body Corporate (i.e., to do something) but rather that the Body Corporate do nothing and allow Mr Ncala to take such steps as were in his view appropriate to protect his constitutional rights – in this case making alterations to the washing line area which was common property. It appears to me that this submission (as set out in Mr Ncala's heads of argument before us now) went beyond Mr Ncala's previous argument that the Body Corporate was obliged to take steps to reasonably accommodate his disability.

[39] It does not appear to me, however, that the distinction which Mr Ncala now seeks to draw between a negative obligation and a positive obligation are of much assistance in the present circumstances. The Body Corporate's Conduct Rules do not permit a unit owner to unilaterally make alterations to common property, and accordingly the Body Corporate is not entitled to allow a unit owner to infringe the rules by merely doing nothing.

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[13] Judgment: paragraphs 155 to 197
[14] 2011 (8) BCLR 761 (CC) at [45]

[40] I remain of the view that in the circumstances of the particular facts in this matter Mr Ncala's reliance on the rights to equality and dignity are misplaced and that the concept of 'reasonable accommodation' does not find application.

[41] For the above reasons, I do not believe that it would have been appropriate to grant Mr Ncala leave to appeal in respect of the orders sought by him in paragraph 1 and paragraph 4 of his notice of appeal.

The order to replace the gate and corrugated plastic sheeting

[42] In his notice of appeal, Mr Ncala sought an order directing the Body Corporate to "*replace the gate and corrugated plastic sheeting removed from [Mr Ncala's] washing area at its own cost.*"

[43] Mr Ncala submitted before us now that this order flows from an application of the reasonable accommodation principle, and that any of sections 39(4)(d), 39(4)(e), 39(6)(c) and 39(6)(f) empowered the adjudicator to make such an order.

[44] I have already rejected the application of the reasonable accommodation principle to the present matter. In any event the sections relied upon by Mr Ncala in support of the order sought do not in my view assist Mr Ncala because these sections deal with a particular resolution or decision of an association being declared void on the basis of unreasonableness. No order on these terms was sought by Mr Ncala. I also point out that the washing area was not Mr Ncala's washing area.

[45] For these reasons I would have declined to grant leave to appeal in respect of the order sought in paragraph 2 of the notice of appeal.

The order to replace Mr Ncala's washing machine with a new one

[46] In his notice of appeal Mr Ncala sought an order directing the Body Corporate to replace his washing machine "*with a new one of similar make and model to that which was removed by [Body Corporate].*"

[47] The Judgment dealt with this order and dismissed it.[15]

[15] Judgment: paragraphs 212 to 217

[48] Mr Ncala does not seek leave to appeal in respect of our findings relating to this order in particular. In any event it does not appear to me that Mr Ncala would have had reasonable prospects of succeeding in respect of this order.

COSTS

[49] Having dismissed Mr Ncala's appeal, we ordered Mr Ncala to pay the costs thereof.

[50] Mr Ncala seeks leave to appeal against the costs order on the basis that because he was seeking to vindicate a constitutional right he should not have been penalized with a costs order (the *Biowatch* principle).

[51] We addressed the costs aspect in the Judgment.[16]

[52] Whilst it may well be that Mr Ncala perceived that he was seeking to vindicate his constitutional rights, we have found that his reliance on the right to equality and dignity was misplaced. Even assuming that there are reasonable prospects of this finding being overturned on appeal, Mr Ncala was at a basic level first required to demonstrate that the orders sought by him were competent in terms of the Act, more particularly section 39. He was not able to do so, and therefore in my view reliance on the *Biowatch* principle is inappropriate.

CONCLUSION

[53] For the above reasons Mr Ncala's application for leave to appeal is dismissed. In the absence of opposition from the Body Corporate, there will be no order as to costs.

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T Ossin AJ
Acting Judge of the High Court
Gauteng Division

I agree:

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MMP Mdalana-Mayisela J

[16] Judgment: paragraphs 233 to 237

Judge of the High Court
Gauteng Division

Counsel for the appellant:	E Webber (with her N Nyembe)
Attorneys for the appellant:	Norton Rose Fulbright South Africa Inc
Counsel for the respondent:	No appearance
Attorneys for the respondent:	Andraos and Hatchet Inc
Date of Hearing:	17 November 2022
Date of Judgment:	28 April 2023

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be 28 April 2023