IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A 60/2022
Date of hearing: 21 February 2023
Date delivered: 1 March 2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

1/3/23
DATE SIGNATURE

In the matter between:

VILLAGE WALK RETIREMENT HOA	**Appellant**
and	
MARK HUGHES	**First Respondent**
COMMUNITY SCHEMES OMBUD SERVICE	**Second Respondent**
COMMUNITY SCHEMES OMBUD SERVICE ADJUDICATOR L. BULO	**Third Respondent**

JUDGMENT

SWANEPOEL J:

INTRODUCTION

[1] The most serious disputes often arise between close neighbours, as this case proves once again. This is an automatic appeal in terms of section 57 (1) of the Community Schemes Ombud Service Act, Act 9 of 2011 ("the Act"). It concerns the disputed election of directors of a Home Owners' Association ("HOA") in a retirement village, which further proves that advanced age does not necessarily bring wisdom, nor does it engender peace between neighbours.

[2] The facts are largely common cause, and although the grounds for appeal are voluminous, the dispute is simple: Was the first respondent, together with Pat Anthony, Paul Scot, Chris Jonker and Robert Patterson (referred to herein as "the alleged directors") elected as directors of the HOA at an annual general meeting held on 29 August 2019, or was the meeting adjourned without new directors being elected? A further meeting was held on 31 October 2019, at which other directors were elected. The position is simply the following: If the alleged directors had been properly elected on 29 August 2019, the subsequent election of other directors on 31 October 2019 is void. There were other issues raised in the papers, but I believe that this one issue is dispositive of the matter.

[3] First respondent opposed the appeal. However, shortly before the appeal was heard, first respondent's attorneys withdrew from the matter. First respondent has not filed heads of argument, and did not appear at the hearing of the appeal.

BACKGROUND

[4] First respondent referred the dispute to the Community Schemes Ombud Service in terms of section 38 of the Act on 20 March 2020, seeking relief in terms of section 39 (4) (c) (although the adjudicator seems erroneously to have referred to section 39 (4) (d) relief), by declaring the election of directors of the HOA on 31 October void. The referral included a statement which made the bald allegation that the alleged directors had been duly elected at the 29 August meeting. It was supported by a petition, which was apparently signed by certain members of the HOA, in which they expressed their unwillingness to accept the directors elected on 31 October 2019.

[5] The appellant's response to the referral was delivered on 8 February 2021. The appellant took certain points *in limine,* which are not relevant to these proceedings, and which I shall not mention further. On the merits, respondent denied that any directors had been elected on 29 August. The annual financial statements could not be approved and so, respondent said, in order to correct the statements, the meeting was adjourned without any directors being elected. Respondent formed the opinion, correctly in my view, that as the meeting had been adjourned,

and not completed, the existing directors remained in office until the meeting had been concluded, and new directors had been appointed.

[6] The appellant enclosed a copy of the minutes of the meeting of 29 August. The minutes record that a number of resolutions had not been adopted, including the approval of the annual financial statements, and that the meeting could, consequently, not be completed. The minutes record that the meeting of 29 August was deemed to be incomplete and was adjourned.

[7] In reply first respondent took the point that the managing agent representing the appellant was not authorized to do so. I do not believe it necessary to dwell on this aspect. On the merits, first respondent denied that the minutes were accurate, and said:

"*14. The minutes purportedly annexed to the response:*

14.1 Are draft minutes;

14.2 Do not accurately reflect what transpired at the meeting as will be demonstrated at a hearing in due course, the meeting having been recorded."

[8] First respondent also undertook to present evidence at a hearing of the veracity of his statement. He stated that he intended to call the signatories to the petition in support of his version. It seems that first respondent realized that there was a material dispute of fact on the papers, and that the dispute should be resolved at a hearing. However,

that is not what transpired. The adjudicator decided to resolve the dispute on the papers, apparently because of the restrictions imposed by the Covid-19 pandemic, and she called for further submissions to be made in writing.

[9] In first respondent's final submission he made the point that:

"As a final note, the complainant submits that it is in the very nature of this dispute that it should require the hearing of oral evidence,….."

[10] Appellant did not have any further submissions to make, and on the above information the adjudicator decided to make a finding without conducting further interviews, and without holding a hearing. The adjudicator held that **at the commencement** of the annual general meeting the existing directors were deemed to have resigned. She did so on the strength of clause 6.2 of the HOA Memorandum of Incorporation which provides:

"Save as set out in Article 6.3 below, and save for the 3 (three) Directors appointed by the developer in terms of Article 6.1.3 above, each Director shall continue to hold office from the date of his appointment to office until the next Annual General Meeting following his said appointment at which meeting each Director shall be deemed to have retired from office as such but will be eligible for re-election to the Board of Directors at such meeting."

[11] The adjudicator's interpretation of clause 6.2 of the memorandum means that once the meeting commences, the directors have already been deemed to have resigned. That begs the question, what happens if

the meeting is adjourned, as in this case, and no other directors have been elected? Is the HOA then to be left without a proper board of directors? That cannot be, in my view, a proper interpretation of clause 6.2. I believe that on a proper interpretation, clause 6.2 means that upon the election of new directors, the old directors are deemed to have automatically resigned.

[12] The adjudicator then made the finding that the first respondent and the other alleged directors had been duly elected, without any explanation as to why she made such a finding, and on what basis she rejected the appellant's version. It is eminently clear from the first respondent's responses to the adjudicator, that even the first respondent realized that the dispute of fact could not be resolved on paper, and that something further had to be done to resolve the factual impasse.

[13] Section 51 of the Act prescribes the adjudicator's investigative powers as follows:

"(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 as to time and place, to come to the office of the adjudicator for an interview;

(b) invite persons, whom the adjudicator considers able to assit in the resolution of issues raised in the application, to make written submissions to the adjudicator within a specified time; and

(c) to 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."

[14] The adjudicator's powers do not seem to include the right to hold a hearing in the formal sense of the word, although I do not make a definitive finding in this regard, but they do allow for an adjudicator to interview persons, and to obtain affidavits. What an adjudicator may not do is simply to pick one of two opposing versions on paper, without first investigating the background to the matter, interviewing relevant witnesses, and obtaining statements where necessary. Although the Covid-19 pandemic had a profound effect on the manner in which business was conducted, nothing precluded the adjudicator from interviewing persons by electronic means, and from having regard to the alleged recording of the meeting.

[15] In my view, therefore, the adjudicator erred in law when she found that she could resolve the dispute solely on the written submission. There was no rational reason to accept one version and to reject the other. In the circumstances the appeal should succeed. First respondent was evidently well aware of this fact, which is why he tendered to present evidence at a hearing to substantiate his averments.

[16] I find it strange that first respondent, whilst realizing that the dispute could not be resolved on paper, nevertheless opposed this appeal

virtually to the end. He also opposed an application to suspend the order (which is still pending), and he took issue with the managing agent's authority to act. He brought application to have appellant's replying affidavit in the stay application struck out. In other words, first respondent prosecuted the matter aggressively, despite knowing that the adjudicator's finding was very likely not defensible. For those reasons first respondent should pay the costs of the appeal.

[17] It is then necessary to consider what should be done with the matter. The Court is entitled to refer the matter back to the adjudicator to hear further evidence. However, nearly four years have elapsed since the disputed elactions occurred. Subsequently, other directors have been appointed. It would serve no purpose at this stage to refer the matter back.

[18] I make the following order:

[18.1] The appeal is upheld.

[18.2] The finding of the adjudicator is replaced with the following:

"The application is dismissed."

[18.3] First respondent shall pay the costs of the appeal.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree:

GREYVENSTEIN AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

COUNSEL FOR APPELLANT	**Adv. Van Wyk**
ATTORNEY FOR APPELLANT:	**JDB Inc**
DATE HEARD:	**21 February 2023**
DATE OF JUDGMENT:	**1 Maart 2023**