

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A23/2023

DOH: 22 August 2023

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

.....**20 October 2023**
SIGNATURE DATE

In the matter of:

GIFT SHAKOANE

Appellant

AND

COMMUNITY SCHEMES OMBUD SERVICE

First Respondent

FEZILE SITHOLE

Second Respondent

FORESTDALE HOMEOWNERS' ASSOCIATION

Third Respondent

JUDGEMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY E-MAIL. THE DATE AND TIME OF HAND DOWN IS DEEMED TO BE 20 OCTOBER 2023

Bam J (Pretorius J concurring)

Introduction

1. This is an appeal in terms of section 57 of the Community Schemes Ombud Service Act¹ (the Act) against the decision of the second respondent of 17 March 2022. Alongside the appeal is an application for condonation owing to the late lodging of the appeal.

The Parties

2. The appellant is the owner of unit 49 Forestdale Complex, Douglasdale.
3. The first respondent is the Community Schemes Ombud Service. The Service is established in terms of the Act.
4. The second respondent is the adjudicator.
5. The third respondent is Forestdale Home Owners' Association.

Grounds of Appeal

6. In the main, the appellant contends in his Notice of Appeal that the second respondent, *inter alia*:

6.1 failed to observe the *audi alteram partem* rule in that he failed to give the

¹ Act 9 of 2011

appellant notice of the application by the third respondent;

6.2 failed to afford him the opportunity to make written submissions;

6.2 failed to investigate the complaint prior to making his decision. As a result of the second respondent's failure to investigate, he incorrectly held the appellant liable for an alleged arrear levy amounting to R13 868. 66;

6.3 failed to deliver his order to the appellant as prescribed by section 55 of the Act.

7. The appellant seeks the following orders:

7.1 That the late lodging of the appeal be condoned.

7.2 That the appeal be upheld.

7.3 The second respondent's order of 17 March be set aside.

7.4 Declaring that the judgment of 15 March, issued by the Magistrate's Court for the District of Randburg and mentioned in the Writ of Execution, does not exist.

7.5 That the Writ of Execution of 25 August 2022 be set aside.

7.6 That the Notice of Attachment of the Sheriff of Randburg West be set aside; and

7.7 Costs on attorney and client scale.

8. The appeal and the application for condonation are opposed only by the third respondent. The third respondent is for ease of reference referred to as the respondent throughout this judgment. The respondent raised a point *in limine* regarding the deponent's knowledge of the facts and an incorrect confirmatory affidavit. It further asserted that the appellant had failed to make a case for condonation. The respondent further argues that:

8.1 The appellant was notified of the application *via* e-mail and invited to make

written submissions prior to the adjudication.

8.2 Section 43 of the Act does not preclude service by e-mail.

8.3 All communication was sent to the same e-mail address that the appellant had used and continues to use. He has not explained to the court why he had not received the communication.

8.4 The prescribed management rules do not apply to home owners' associations but only to Bodies Corporate.

9. Finally, on the issue of incorrectly holding the appellant liable, the respondent submits that the appellant is liable for damage caused by his guest. Third respondent submits that the appeal together with the condonation should be dismissed with costs.

Background

10. The dispute between the parties appears to have emanated from a levy statement issued by the respondent through its then managing agent during or about 24 March 2021, depicting that appellant was in arrears with his levy in the amount of R7683.00. The statement suggested that an amount had been debited based on an invoice for an item or services supplied by Paul's Gate. Interest at the rate of 9% per annum was further added to the statement. On the same day, the appellant replied to the agents asking pertinently about the item marked Paul's Gate. The response sent by Mr Jacques Mare of 26 March attached a letter of 21 February 2021 relaying that the appellant's water meter had not been operational between the months of January up to 14 September 2020. The water use had accordingly been estimated in the amount of R 5 036.00 but the total amount due by appellant was R 5 462.00.

11. The appellant replied once again seeking an explanation regarding the item labelled Paul's gate in the statement. The agents wrote back attaching a levy statement, not an invoice, depicting the amounts of R 5 462.00 for water and R 5 036.00 in respect of Paul's gate. The next levy statement was in April 2021 and depicted that the appellant owed an amount of R13 058.33. A flurry of e-mail correspondence was exchanged by the parties thereafter. In short, there was a clear dispute regarding the two amounts, not the levy itself.

Point in limine

12. The respondent submits that the deponent to the affidavit supporting the condonation application is an attorney. He does not explain how he had gained personal knowledge of the material facts on which the appellant bases his case. The respondent further submits that the appellant filed a supporting affidavit which bears no relation to the case. The appellant is represented by an attorney in these proceedings, one Mr Ngomame, whom, judging from the record, has been communicating for some with the respondent, *via* its agents. Given the written trail and the accessibility of the details to this case, the criticism that Mr Ngomane does not state where he gained his personal knowledge amounts to unnecessary formalism.

13. As was said by Corbett JA in the Appellate Division case of **Maharaj v Barclays Bank Ltd**², unnecessary formalism on procedural matters must be eschewed. As to

² Maharaj v National Bank Ltd 1976 (1) SA 418 (A) at 426

the incorrect affidavit attached by appellant, the court accepts his explanation that this was in error. The error has since been corrected by uploading the correct affidavit.

Condonation

14. It is trite that this court has the power to regulate its own procedures and that such power includes not only non-compliance with the Uniform Rules, it includes statutory time limits. See in this regard **Samancor Group Pension Fund v Samancor Chrome**:

*'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...'*³

15. In **Toyota South Africa Motors (Pty) Ltd v Commissioner for the South African Revenue Service**, the court reasoned:

'[9] The first question for decision is whether it was, as contended in the respondent's heads of argument, not open to the Court below to grant condonation.... We are dealing here with non-compliance with a statutory provision laying down the time within which an appeal from the decision of the Special Court must be noted. It is of no practical assistance to seek to classify the provision as peremptory or directory. The enquiry is simply: what did the legislature intend? Weenen Transitional Local Council v SJ Van Dyk, Supreme Court of Appeal Case 399/2000 in which judgment was delivered on 14 March 2002, at pp 10-11). That the legislature did not intend non-compliance within the 21 business days referred to in s 86A(12) inevitably to have fatal consequences for an intended appeal is, in my view, clearly apparent....'

³ (452/09) [2010] ZASCA 77; 2010 (4) SA 540 (SCA); [2010] 4 All SA 297 (SCA) (27 May 2010), paragraph 20

*[10] These conclusions 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 Directeur van Statistiek 1959 (3) SA 370 (A) at 374 G ...'*⁴

16. The decision whether to grant or refuse condonation is determined by the interests of justice. This much is plain from **Aurecon South Africa (Pty) Ltd v City of Cape Town**:

'[16] Contrary to the court a quo's finding in this regard, the City far exceeded the time frames stipulated in s 7(1) [of PAJA] and did not launch the review proceedings within a reasonable time. In that case, it clearly needed an extension as envisaged in s 9(1)(b) without which the court a quo was otherwise precluded from entertaining the review application...

*[17] The question then is whether the City made out a case for such an extension. Whether it is in the interests of justice to condone a delay depends entirely on the facts and circumstances of each case...'*⁵

17. We do not wish to belabour the test for condonation. However, it is important

4 (495/2000) [2002] ZASCA 27 (28 March 2002), paragraph 9-10

5 (20384/2014) [2015] ZASCA (9 December 2015), paragraph 16-17

to refer to the *ratio* on the issue of condonation as set out in **Steenkamp v Edcon Limited**, where the Constitutional Court, held:

[26] The principle is firmly established in our law that where time limits are set, whether statutory or in terms of the rules of court, a court has an inherent discretion to grant condonation where the interests of justice demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court. In Grootboom this Court held that—

“[i]t is axiomatic that condoning a party’s non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.”

[27] And that—

“It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case.”

[36] Granting condonation must be in the interests of justice. This Court in Grootboom set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

“[T]he standard for considering an application for condonation is the interests of justice. However, the concept ‘interests of justice’ is so elastic that it is not capable of precise definition...”⁶

18. The respondent’s submissions centred on **Ncala v Park Avenue Body Corporate**, a decision of the Full Bench of this court. According to the respondent,

⁶ [2019] ZACC 17, paragraphs 26-27, 36

Ncala is authority for the fact that this court, sitting as a court of appeal, has no jurisdiction to condone non-compliance with Section 57 (2) of the Act. Section 57 deals with the right of appeal and it states:

'Right of appeal

57. (1) 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.

(2) An appeal against an order must be lodged within 30 days after the date of delivery 25 of the order of the adjudicator. (3)...'

19. In **Ncala**, the appellant lodged his appeal 65 days late, in 2019, without an application for condonation. One year later in 2020, he filed his application for condonation. In considering the application for condonation, the learned judge Ossin AJ, after surveying the relevant case law, turned to the circumstances of the case stating that even if his analysis of the applicable legal principles may have been with too strict⁷, the application in any event fell to be rejected based on **Ncala's** failure to state the reasons he waited for one year prior to launching his appeal. **Ncala** must accordingly be distinguished from the present case.

20. I propose to first dispose of what may be regarded as a dispute of fact when in fact it is not. Section 55 of the Act enjoins the Ombud to cause a copy of his order to be delivered on every affected person. The respondent submitted, with reference to an e-mail that was sent by the second respondent, that the appellant had been notified or served with the Ombud's order. This statement must be viewed against the

⁷ Paragraph 148

undisputed fact that there had been no prior arrangement between the parties nor between the Ombud's office and the appellant to exchange notices *via* email. The respondent does not even know whether the e-mail bounced back after it had been sent. Accordingly, the statement does not amount to a dispute of fact and does not invoke the application of the **Plascon Evans** Rule⁸.

21. The respondent further submitted that Section 43 does not preclude delivery by e-mail. Delivery by email is not proof that the intended recipient has received the email, more so where there had been no prior arrangement to exchange notices or correspondence by email. There was no evidence that the appellant had either read or received the email. During argument Counsel conceded that for a variety of reasons intended recipients may at times not receive their e-mail/s. Accordingly it is idle to call upon the intended recipient to defend why he had not receive a particular e-mail or e-mails. [See in this regard **Commissioner for the South African Revenue Service v Morgan Beef (Pty) Ltd** (66096/2020) [2022] ZAGPPHC 367 (2 May 2022), paragraph 17.] Where a sender chooses to rely on e-mail for service, as the second respondent does, they must track the email for display and or delivery to the intended recipient, or they must use the traditional methods of service.

22. Having conceded that there was no credible evidence pointing to the service of the order upon the appellant, Counsel submitted that the appellant did not provide

⁸ In *Van Heerden v Bronkhorst*, it was said:

"In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . the Court . . . may proceed on the basis of the correctness thereof . . ."

[See also *Signature Real Estate (Pty) Ltd v Charles Edwards Properties and Others* and the attendant footnote.]

reasons for his delay in launching the urgent application after service of the writ on 12 October 2022. The appellant explained in his affidavit that they had to first investigate the matter. In this regard, his attorney had written to the respondent's attorneys requesting assistance with various pieces of information. It is also not in dispute that his attorney had sought an undertaking from the respondents that they not continue with execution whilst he was investigating the matter and requested them to revert by no later than 21 October. Such an undertaking was not provided. The appellant had to launch an urgent application to prevent the respondents from continuing with the execution. The order was obtained on 18 November 2022.

23. Counsel for the respondent criticised the appellant's attorney for his reference in his affidavit to the lack of availability of typing services at that time of the year. The fundamental problem with the submission is that it overlooks that the appellant, having not received notification of the respondent's application, was served with a writ. He had to investigate the matter and instructed his attorneys to do so. After the urgent order was granted, the earliest the application could be filed, taking into account the time of the year that this incident occurred, was in January 2023. The explanation is reasonable to the court, taking into account the circumstances of this case. We find that the circumstances surrounding the delay in filing the appeal have been adequately explained and condonation should be granted.

Prospects of success

24. Section 43 of the Act provides that the Ombud must serve notice on:

- (a) the association; and
- (b) each person the Ombud considers to be affected materially by the application.

25. Such notice must include, *inter alia*, details of the parties to the dispute and the relief sought in terms of the application. It must also invite written submissions, and draw attention to the right to legal representation. The record suggests that on 16 January and on 24 February 2022, the second respondent had issued an e-mail inviting the appellant to submit his final written submissions. The submissions were required within 5 days from the date of invitation. There is no evidence of either a delivery or display receipt. For the same reasons as cited when dealing with the requirement on the Ombud to deliver the order, this court accepts that there is no proof that the appellant was notified of the complaint.

26. Section 43 (1) is couched in peremptory terms and it reads:

'43. (1) Unless an application is rejected, the ombud must serve notice on—

(a) the association; and (b) each person the ombud considers to be affected materially by the application...'

27. The court in **Toyota South Africa Motors** said that it is of no use classifying a provision as directory or peremptory, the question is what did the lawgiver intend. In **CSARS v Marshall NO and Others**, the legal principles of interpretation were once again articulated thus:

'...The principles applicable in the process of ascertaining the meaning of legislative provisions have been repeatedly stated by this court. It is settled law that the process

entails attributing meaning to the relevant statutory provision, in the light of the language used, the context in which the provision is set, including the material known to the drafters, and the purpose which the provision is intended to serve. These factors are not mutually exclusive. See Natal Joint Municipal Pension Fund v Endumeni Municipality...

28. From the plain language used in the Act, the Ombud is enjoined to serve a notice to each person the Ombud considers to be affected materially by the application. The context in which the statute must be understood is not obscure. The Ombud Service is not only as a service that offers speedy, economic and effective dispute resolution, but a service for everyone, including those who do not have the power to engage the services of a lawyer to take charge of the procedural aspects that impact fairness. It is for that reason that the duty is placed on the Ombud to serve a notice to each person the Ombud considers to be affected materially by the application, otherwise a miscarriage of justice may arise. In **Van Heerden**⁹, it was said:

'... This court has repeatedly held that the failure to give notice of proceedings where such notice was required constitutes an irregularity which justifies rescission of the order granted.'

29. It is understandable that the Ombud uses e-mail to maintain a cost effective service. At the very least, emails must be tracked either for a delivery or a read receipt. There is no evidence that the emails advising the appellant of the application and inviting him to file written submissions were received by the appellant, which renders the second respondent's decision liable to be set aside.

⁹ Note 8 *supra*, paragraph, 13

30. The appellant further submits that the second respondent failed to investigate the case. Had he investigated the matter he would have seen that the so called arrear levy was not a levy but a disputed debt arising from amounts such as the damage to the gate and the disputed water bill. It does not help the respondent to suggest that appellant is liable for the conduct of his visitor. The case put before the second respondent had to do with arrear levies arising from non payment. The adjudicator's order in this regard refers to levies being the lifeblood of a Home Owners' Association and to rule 25 of the Conduct Rules of the respondent dealing with the owner's obligation to pay levies.

31. If the third respondent was confident of appellant's liability in respect of the two disputed issues, it should have placed that case before the second respondent for adjudication. That would have enabled the second respondent to adjudicate the real dispute. A survey of the correspondence exchanged between the parties prior to the respondent lodging its application with the first respondent shows that these were hotly contested issues that were never brought to the attention of the second respondent.

32. The respondent had a duty, given the absence of the appellant, to inform the second respondent of the facts of the dispute so that the latter adjudicates the real dispute. The third respondent did not do so. This is a further reason for the second respondent's decision to be set aside. Based on all the reasons set out in this judgment as well as applying the legal principles as set out in the authorities, condonation is granted and the second respondent's order must be set aside.

Order

33. The following order is issued:

1. Condonation is granted.
2. The appeal is upheld.
3. The second respondent's order of 17 March is set aside.
4. The judgment of 15 March issued by the Magistrate's Court for the District of Randburg, mentioned in the Writ of Execution does not exist.
5. The Writ of Execution of 25 August 2022 is hereby set aside.
6. The Notice of Attachment of the Sheriff of Randburg, West is hereby set aside;
7. Respondent must pay appellant's costs.

NN BAM

JUDGE OF THE HIGH COURT, PRETORIA

I agree:

PRETORIUS J

JUDGE OF THE HIGH COURT, PRETORIA

Date of Hearing: 22 August 2023

Date of Judgement: 20 October 2023

Appearances:

For Appellant:

Adv MC Ntshangase

Instructed by

S Ngomane Attorneys, Pretoria

For Respondents:

Adv K Lavine

Instructed by:

Alan Levy Attorneys, Parktown.