


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: A96/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED:
	
<u>9/1/23</u>	

In the matter between

BLUE WATER CREEK HOMEOWNERS
ASSOCIATION

(Registration Number: 2005/001197/08)

Applicant

and

SIVALINGUM KANNIAH

First Respondent

NIRMALA KANNIAH

Second Respondent

COMMUNITY SCHEMES OMBUD SERVICE

Third Respondent

ADJUDICATOR - (K. BLEIJS N.O.)

COMMUNITY SCHEMES OMBUD SERVICE

Fourth Respondent

IN RE:

SIVALINGUM KANNIAH

First Appellant

NIRMALA KANNIAH

Second Appellant

and

BLUE WATER CREEK HOMEOWNERS ASSOCIATION First Respondent

(Registration Number: 2005/001197/08)

COMMUNITY SCHEMES OMBUD SERVICE
ADJUDICATOR
(K. BLEIJS N.O.)
COMMUNITY SCHEMES OMBUD SERVICE

Second Respondent

Third Respondent

JUDGMENT

MANAMELA AJ

INTRODUCTION

- [1.] The Applicant issued an application to have the first and second respondents' appeal in terms of section 57(1) of the Community Schemes Ombud Service Act, 9 of 2011 ("the CSOS Act"), set aside and to have the Adjudication Order dated 17 October 2019 made an order of Court.
- [2.] The Applicant is a Homeowners' Association, to whom the First and Second Respondents are members by virtue of being property owners within a community scheme. The Third and Fourth Respondents are cited as interested parties, having been involved in the subject case under appeal.
- [3.] The First and Second Respondents' Notice of Appeal was served on 20 March 2020. The basis of this application is that the Respondents' Notice of Appeal was served out of time and that the First and Second Respondents failed to prosecute the

appeal.

[4.] The application is opposed. The First and Second Respondent appeared in person. The basis of opposition is unclear, at the very least the First and Second Respondents relies on the applicant's failure to enforce the adjudication order in accordance with section 56(2) of the CSOS Act ¹.

[5.] The first and second respondents launched an appeal in terms of section 57(1) of the CSOS Act, against the following order:

"1. The Applicant's application is dismissed.

2. The Applicant is ordered to and compelled to:

2.1. Build a spray on Erf 27 Blue Creek Homeowners Association as required by the Respondent's Directors, which is 3 x 3mm, in accordance with safety requirements according to road reserve widths, within 60 days of date of this order.

2.2. Pay to the Respondent the fines and penalties as charges in accordance with the MOI and the Rules;

2.3. Henceforth comply with the Memorandum of Incorporation the Rules and Aesthetic Guidelines made in terms thereof;

2.4. There is no order Costs".

¹ Section 56(2) of the Community Schemes Ombud Services Act 9 of 2011 - If an adjudicator's order is for the payment of an amount of money or any other relief which is beyond the jurisdiction of the magistrate's court, the order may be enforced as if it were a judgment of the High Court, and a registrar of such a Court must, on lodgement of a copy of the order, register it as an order in such Court."

FACTUAL BACKGROUND

- [6.] The First and Second Respondents submitted an application for dispute resolution in terms of section 38 of the CSOS Act, on 20 June 2018.
- [7.] On 18 February 2019, the Applicant filed its answer to the First Respondent's CSOS complaint.
- [8.] The Adjudicator made an order in terms of section 53(1) of CSOS Act.
- [9.] The issues which were dealt with by the CSOS Adjudicator are:
- 9.1. Firstly, whether a spray must be opened in the Respondents' garden wall in terms of municipal regulations and the architectural guidelines of the Applicant; and
 - 9.2. Secondly, whether the Applicant is lawfully entitled to charge the fines and penalties that have been imposed on the Respondents for contravening the Rules of the Applicant.
- [10.] On 1 November 2019, the CSOS Adjudication Order was served on the Applicant as well as the First and Second Respondents, in terms of which the First and Second Respondents complaint was dismissed.
- [11.] On 12 November 2019, the Applicant served a copy of the Adjudication Order on all its members via e-mail, which e-mail

the First Respondent acknowledged receipt of on 18 November 2019.

[12.] On 21 November 2019, the Applicant addressed a letter to the First Respondent requesting that they abide by the adjudication Order within the prescribed 30-day period. The First and Second Respondent failed and/or refused to comply with the Adjudication Order.

[13.] On 20 March 2020, In response, the First and Second Respondents' erstwhile attorneys confirmed that they filed an appeal against the adjudicator's order with regards to the building penalties imposed. At that stage, the appeal was already late.

[14.] On 3 April 2020, the First and Second Respondents' erstwhile attorneys, namely Barnard Inc, served a copy of the Respondents' Notice of appeal on the Applicant's erstwhile attorneys, namely AM Theron Inc.

[15.] On 6 April 2020, the Applicant's attorneys addressed a letter to the Respondents' attorneys, noting that the Respondents' Notice of Appeal was served out of time. This is by virtue of Section 57(2) of the CSOS Act, which states that an appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.

[16.] On 22 April 2020, the Respondents' attorneys noted in their letter that an application for condonation would follow in due course. No application for condonation was ever filed by the First and Second Respondents and no

further steps was taken to prosecute the appeal.

- [17.] The Applicant elected to enforce its rights against the order and instituted this application, which was served on the Respondents on the 20th of January 2022.

ISSUES OF DETERMINATION

The issues to be considered are:

- [18.] Whether the Respondents' Notice of Appeal dated 19 March 2020 should be set aside due to their failure and/or refusal to file their Appeal timeously and due to their failure and/or refusal to prosecute their appeal within a reasonable time period.
- [19.] Whether the CSOS Award dated 17 October 2019 (Marked Annexure "X" to the Notice of Motion) should be made an Order of Court.

LEGAL FRAMEWORK

- [20.] The objective of the Community Schemes Ombuds Service Act 9 of 2011 ("CSOS Act"), is to provide for the establishment of the Community Schemes Ombud Service; to provide for its mandate and functions; and to provide for a dispute resolution mechanism in community schemes; and to provide for matters connected therewith. One of the purposes set out in the CSOS Act, is to provide for a dispute resolution mechanism in community

schemes².

[21.] Community schemes are defined in the CSOS Act as any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing cooperative...

[22.] In terms of section 56 of the CSOS Act, an order handed down by an adjudicator must be enforced as if it were a judgment of the High Court or Magistrate Court, depending on the jurisdiction. The relevant court official must, upon lodgement of the order, register it as an order of such court.

[23.] Chapter 3 of the CSOC Act, provides for the procedure to be followed in the case of dispute.

[24.] Section 57 (1) of CSOS Act provides that 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 of the order of the adjudicator. (3) A person who appeals against an order, may

² Section 2(c) of CSOS Act

also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.

[25.] An appeal in terms of s 57 is not a —civil appeal within the meaning of the Superior Courts Act 10 of 2013.

ANALYSIS

[26.] It is common cause that the first and second respondent files a complaint with the Fourth Respondent in terms of section 38 of the CSOS Act³.

[27.] The adjudicator granted an order on 1 November 2020. The appeal had to be served on or before 1 December 2020. It is common cause that the case launched by the First and Second Respondents was unsuccessful. The First and Second Respondent were informed of the right to appeal within 30 days in terms section 57(1) of the CSOS Act.

[28.] The proper manner in which such an appeal should be brought in the circumstances is upon notice of motion supported by affidavit(s), which should be served on the respondent parties by the sheriff.⁴ Neither the CSOS Act nor the Uniform Rules of Court prescribe a procedure for bringing an appeal as contemplated in section 57 of SCOS Act.

³ 38. (1) Any person may make an application if such person is a party to or affected materially by a dispute. (2) An application must be— (a) made in the prescribed manner and as may be required by practice directives; (b) lodged with an ombud; and (c) accompanied by the prescribed application fee. (3) The application must include statements setting out— (a) the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39; (b) the name and address of each person the applicant considers to be affected materially by the application; and (c) the grounds on which the relief is sought. (4) If the applicant considers that the application qualifies for a discount or a waiver of adjudication fees, the application must include a request for such discount or waiver.

⁴ *Ibid* paras 25-26

[29.] In Stenorson and Talikan Administration CC v Linton Park Body Corporate and Another 2021 SA 651 the court dealt with the process to be followed when launching an appeal, where the court stated that “*an appeal against the order may not be made after 30 days have lapsed*”⁵.

[30.] The First and Second respondents conceded in their heads of argument that “*it came to their knowledge that the CSOS adjudication order is not appealable as there are no questions of law to appeal*”. The Respondents made a clear concession that the appeal has lapsed and that the adjudication order has to take effect.

[31.] The Applicant made a clear indication that it would not condone a late appeal, in its letter dated 6 April 2020. No application for condonation for was sought.

[32.] What may be sought in terms of section 57 is an order from this court setting aside a decision by a statutory functionary on the narrow ground that it was founded on an error of law. The relief available in terms of section 57 is closely analogous to that which might be sought on judicial review. The appeal is accordingly one that is most comfortably niched within the third category of appeals defined in Tikly and Others v Johannes NO

⁵ Stenorson and Talikan Administration CC v Linton Park Body Corporate and Another 2021 SA 651

and Others 1963 (2) SA 588 (T) at 590 – 591⁶.

[33.] Once a concession is made by the Respondents that the appeal was not file timeously and that there is no point of law to warrant an appeal, the first and second respondents should have complied with the adjudicator's order.

[34.] The First and Second Respondents relies on the fact that the Applicant did not lodge a copy of the order, with the Registrar of the High Court, as contemplated in section 56(2) of CSOS Act. The said provision does not prescribe a period within which the order should be lodged. The first and second Respondents were still bound to comply with the order and had to comply with it within the timeframe stated in the order. Section 56(2) only kicks in upon failure to comply.

[35.] The First and Second Respondents misdirected themselves that by virtue of the fact that the Applicant launched this application, they had an opportunity to resume with the appeal, which was not prosecuted after notice of appeal.

[36.] The First and Second Respondents argues that the delays relating to the impact of COVID-19 and lock-down around March 2023 should be taken into account to allow the appeal to be heard out of time. This argument bears no legal basis.

Review as an alternative relief

⁶ Trustees, Avenues Body Corporate v Shmaryahu and Another 2015 (4) SA 566 (WCC)

[37.] Having notices that the order is not appealable, the first and second respondents in their answering affidavit opted to change to a review application without making specific reliance to the relevant provisions under the Promotion of the Administrative Justice Act⁷.

[38.] The application for review was launched 885 days after they became aware of the adjudication. The requirement is that it must be launched within 180 days, they launched it 885 days late.

[39.] The first and second respondent did not seek any condonation for lateness in accordance with section 9 of PAJA. When the delay is longer than 180 days, a court is required to consider whether it is in the interests of justice for the time period to be extended⁸. The SCA in Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited (90/2013) [2013] ZASCA 148 (SCA), held that -

"45. Absent any extension under section 9, the 180-day time bar precludes us from entertaining the direct challenge by way of a review application"

[40.] The standard to be applied in assessing delay under both PAJA

⁷ Section 7(1) of PAJA - Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which the proceedings are completed or on the date on which the person concerned was informed of the administration, administrative action.

⁸ Section 9(2) of PAJA -

and legality is thus whether the delay was unreasonable⁹.

Moreover, in both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken. Unfortunately, I am also precluded from entertaining the review application out of time without any reasons for condonation.

[41.] It is trite law that, where there is no explanation for the delay, the delay will be undue¹⁰

CONCLUSION

[42.] I find that the Applicant has made out a case for the relief sought, the First and Second Respondents failed and/or refusal to file and to prosecute their appeal within a reasonable time period, and in the light of that, the CSOS Award dated 17 October 2019 (Marked Annexure "X" to the Notice of Motion) should stand.

COSTS

[43.] Unlike in the adjudication proceedings, I find it appropriate to grant an order of cost on a punitive scale, the First and Second Respondents had no legal basis to persist with the opposition of this declaratory order, knowing that the adjudication order was not appealable. It may also be

⁹ *City of Cape Town v Aurecon South Africa (Pty) Limited* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC)


¹⁰ *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC)

possible that they were advised against this opposition and decided to proceed regardless.

ORDER –

The following order is order-

1. The First and Second Respondents' appeal in terms of section 57(1) of the Community Schemes Ombud Service Act, 9 of 2011 ("the CSOS Act") is set aside;
2. The Adjudication Order dated 17 October 2019 is made an order of Court, that -
The First and Second Respondents ordered to -
 - 2.1. Build a spray on Erf 27 Blue Creek Homeowners Association as required by the Respondent's Directors, which is 3 x 3mm, in accordance with safety requirements according to road reserve widths, within 60 days of date of this order.
 - 2.2. Pay to the Respondent the fines and penalties as charges in accordance with the MOI and the Rules.
 - 2.3. Henceforth comply with the Memorandum of Incorporation the Rules and Aesthetic Guidelines made in terms thereof.
3. The First and Second Respondents are liable for costs on attorney and client scale.



P. N. MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 24 August 2022

Judgment delivered: 9 January 2023

APPEARANCES:

Counsels for the Applicant: Adv. NG Louw

Attorneys for the Applicant: JV Rensburg Kinsella Inc Attorneys

The first and second Respondents: Appeared In Person