

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 DIVISION, PRETORIA**

**Case number: A135/2023**

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

.....  
DATE

SIGNATURE

In the matter between:

**MOOIKLOOF GLEN ESTATES HOME  
OWNERS ASSOCIATION**

**APPELLANT**

and

**BHUNU TICHAWANA SOLOMON  
KAMOGELO MAPUTLA N.O.**

**FIRST RESPONDENT  
SECOND RESPONDENT**

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**JUDGMENT**

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## **MOTHA, J (Coetzee, AJ concurring)**

### *Introduction*

[1] On 3 March 2022, the adjudicator (the second respondent) appointed in terms of section 21(2) (b) of the Community Schemes Ombud Service Act 9 of 2011 (CSOS Act) delivered her award in a dispute between the appellant and the first respondent. The adjudicator ruled in favour of the first respondent and made the following orders:

- “(a) The Application succeeds.
- (b) The Respondent is directed to immediately cease charging the Applicant building penalties.
- (c) The Respondent is directed to within 7 days from date of the award being issued, have the penalty research done and make a presentation after the lapse of the 7 days, for the members to vote on the “building penalty” topic, the purpose, arithmetic amount to be specified and reasons thereof, methodology to be applied when the penalties are levied at a Special General Meeting to take place within 23 Days from the date of the 7 days lapsing.
- (d) Should the Respondent fail to act within the stipulated timeframe, then the Respondent is ordered to recalculate all the building penalties charged to the Applicant. The Applicant to launch a fresh application under section 39 (1)(e) of the CSOS Act requesting the repayment of such penalties...”<sup>1</sup>

[2] Not satisfied with the adjudicator’s award, the appellant launched an appeal to this court in terms of section 57 of the CSOS Act. It premised its appeal on three grounds, viz:

“Grounds of Appeal:

- 1.The Adjudicator has erred in finding that:
  - 1.1 The building penalties do not exist;
  - 1.2. The Respondents application succeeds;

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<sup>1</sup> Adjudicator’s ruling at para 81.

1.3. That Appellant is directed to immediately cease charging the Respondent building penalties;

2. That adjudicator ought to have made the following findings:

2.1. A resolution was passed with regard to the building penalties on 24 August 2017;

2.2. The legal effect of the resolution is that the shareholder is bound by the decisions of the prescribed majority of shareholders;

2.3. Once a resolution has been approved, it may not be challenged or impugned by any person in any forum on the grounds that it was not clear or did not provide sufficient information, in terms of Section 65 (6) of the Companies Act, 71 of 2008;

2.4. The Respondent was bound to the Memorandum of Incorporation in terms of Section 15(6) of the Companies Act, 71 of 2008;

2.5. ...

3. There are reasonable prospects of success that this court may come to a conclusion different from that of the adjudicator.<sup>2</sup>

### *The parties*

[3] The appellant is Mooikloof Glen Estate Home-Owners Association (the Association), a community scheme within the definition and the meaning of CSOS Act, bearing registration number 2005/038543/08.

[4] The first respondent is Tichawana Solomon Bhunu who is the owner of stand number [...] at Mooikloof Glen Home-Owners' Association.

[5] The second respondent is Kamogelo Maputla N.O. acting in her capacity as an adjudicator and appointed in terms of section 21(2) (b) of CSOS Act.

### *The facts*

[6] It is common cause that the appellant was established in 2005 and the building penalties were incorporated in the Mooikloof Glen Memorandum of Incorporation (MKG MOI). In 2012, an Annual General Meeting (AGM) was held, and

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<sup>2</sup> Notice of appeal page 1 and 2.

a resolution was passed suspending the building penalties. At that stage of the existence of the estate, there were only six (6) completed houses and a number of vacant stands, some in the process of being developed.

[7] In 2014, the first respondent bought a stand in the estate and took ownership in June of the same year.

[8] On 24 August 2017, an AGM was held, and the issue of building penalties was put to a vote. The resolution was passed. It is noteworthy that at this stage, thirty-five (35) homeowners voted in favor of the enforcement of building penalties, and four (4) homeowners voted against. However, a further grace period of two-years was allowed, taking it to 1 September 2019 when the computation of 12 months would start. Following the advent of Covid19, another AGM was held to discuss relaxation of building penalties, on 26 November 2020. Thirty (30) homeowners, almost 66%, voted for the building penalties to remain and ten (10) voted against.<sup>3</sup>

[9] In 2022, again an AGM was held, which reiterated the retention of building penalties. Dissatisfied with the resolutions, the first respondent brought an application to the Community Schemes Ombud Service (CSOS) for a resolution. According to the application for dispute resolution form, the first respondent sought a determination on the following issues:

“9.1 That determination be made on whether or not the late building penalty is legal; and ...

9.2 That if the penalty is found to be legal, whether the procedure followed in imposing...

9.3 That if the penalty is found to be illegal it be removed from Mooikloof Glen Rules;

9.4 That if the penalty is illegal or if the procedure followed was defective it be removed;

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<sup>3</sup> Appellant's submission page 1 to 2.

9.5 That if the penalty is found to be illegal or if the procedure followed was defective...”<sup>4</sup>

[10] The application was lodged in terms of section 38 of CSOS Act, which reads:

“38 Applications-

- (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 is maybe required by practice directives;
  - (b) lodge 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 their 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.”

*Appeal and the law.*

[11] As already stated, the appellant lodged an appeal in terms of section 57 of the CSOS Act, which reads as follows:

“57. Right of appeal-

- (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.

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<sup>4</sup> Application for Dispute Resolution Form page 2.

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

[12] The role allocated to this court in terms of section 57 (1) of the CSOS Act is, indeed, a limited one. Focusing on this section, the court in *Trustees, Avenue Body Corporate v Shmaryahu and Another*<sup>5</sup> held

“What may be sought in terms of s 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.”<sup>6</sup>

[13] Dealing with the interpretation of section 57 of the CSOS Act, the full court in the matter of *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another*<sup>7</sup> held:

“[31] A preliminary point to take note of is that no leave to appeal is required to be given by the statutory body. An appeal against an order may not be made after 30 days has lapsed. A specific question of law must be identified. It is that question that must be considered by the High Court, and it will not be open to the court later hearing the appeal to consider additional issues. Speed, economy and finality is the reason the legislature limited the appeal process.

[32] The determination of questions of fact is exclusively afforded to the adjudicator who conducts the proceedings inquisitorially and has powers to investigate, examine documents and persons, and to conduct inspections. For this reason, an appeal court should adopt a deferential attitude to the determination of the adjudicator on questions of fact.

[33] Put differently, the appeal court is limited to considering whether the adjudicator -

33.1 applied the correct law;

33.2 Interpreted the law correctly, and/or

33.3 properly applied the law to the facts as found by the adjudicator.

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<sup>5</sup> 2018(4) SA 566(WCC).

<sup>6</sup> Id para 25.

<sup>7</sup> [2019] ZAGPJHC 387.

[34] The conclusions drawn from the evidence (i.e. the ‘findings of fact’) made by the adjudicator cannot be re-considered on appeal.”<sup>8</sup>

[14] In *casu*, the appellant relied on section 65(6) of the Companies Act 71 of 2008 (Companies Act), which reads:

“Once a resolution has been approved, it may not be challenged or impugned by any person in any forum on the grounds that it did not satisfy subsection (4).”

[15] Sub-section (4) reads:

“(4) A proposed resolution is not subject to the requirements of section 6(4), but must be -

- (a) expressed with sufficient clarity and specificity; and
- (b) accompanied by sufficient information or explanatory material

to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.”

[16] In response to section 65(6) of the Companies Act, counsel for the first respondent relied on sub-sections 39(4)(c) and (e) of the CSOS Act, which reads:

“39. Prayers for relief. -An application made in terms of section 38 must include one or more of the following orders:

(4) in respect of meetings-

(a)...

(b)...

(c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association-

(i) was void; or

(ii) is invalid;

(d)...

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<sup>8</sup> Id para 31 to 34.

(e) an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.”

*Counsel for the appellant's submissions.*

[17] The appellant’s counsel submitted that when someone buys into an estate, he or she does so subject to the conduct rules of that estate. Having confirmed that the appeal can only be on a point of law, he submitted that theirs is section 65(6) of the Companies Act. He argued that no person can dispute the resolution or impugn the resolution in any forum. He submitted that the adjudicator did not rely on section 39(4) (c) of the CSOS Act when she made the award, and that she did not find that the resolution was invalid. The adjudicator relied on section 39(3)(d) of CSOS Act, he maintained.

[18] In amplification of his submission, he cited the SCA matter of *Mount Edgecomber Country Club Estate Management Association Two (RF) NPC v Singh and Others*.<sup>9</sup> He stated that the court said:

“That every prospective homeowner, upon purchasing property within the estate, enters into a contra whereby the owner (or prospective owner) agrees to become a member of the Respondent, and to be bound by the rules made and decisions taken by the Respondent. The Applicants, like other residents and the Respondent itself, are bound by the rules which have contractual force.”

*Counsel for the first respondent's submissions.*

[19] In essence, counsel for the respondent submitted that the appellant has not raised a crisp point of law to be determined by this court. She submitted that the first respondent does not dispute the existence of the resolution, nor does she dispute that the Association can charge penalties if the proper procedure is followed, however, the first respondent approached the CSOS in order to challenge the legality of the rule compelling homeowners to build within 12 months or face losing their

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<sup>9</sup> [2019] ZASCA 30.



properties. She submitted that the first respondent's bone of contention was about the penalty levied against those who could not build. It was her submission that an Ombud is permitted to deal with a resolution in terms of section 39(4) (c) and (e) of CSOS Act. Seeing that the court's role is confined to adjudicating on the question of law, she submitted that, for the applicant to succeed, the court must find that the adjudicator committed an error of law, which, she argued, was not present, because the appellant failed to raise a crisp point of law.

### *Discussion*

[20] Upon the examination of grounds of appeal, the only ground that is akin to a point of law is the issue of section 65(6) of the Companies Act raised by the appellant. The other grounds of appeal do not qualify as points of law and, therefore, must be rejected. We accept that the appellant has raised a narrow question of law in section 65(6) of the Companies Act. To recap, the *raison d'être* for this appeal is that the second respondent cannot question the resolution taken in 2017, as that would be in violation of section 65(6) of the Companies Act. Bearing in mind that the first respondent sought the CSOS to deal with the resolution in question, this court is alive to section 39(4) (c) and (e) of the CSOS Act.

[21] Under the rubric Evaluation and Finding, the adjudicator failed to deal with the law and the dispute placed before her for adjudication. She totally missed the mark and applied the incorrect law when she wrote: "It The relief sought by the Applicant, is one that is accommodated under section 39(3)(d)(i) and (ii) of the CSOS Act."<sup>10</sup>

[22] Section 39(3)(d)(i) and (ii) of the CSOS Act deals with scheme governance and reads:

"(3) In respect of scheme governance issues-

(d) an order declaring that a scheme governance provision, having regard to interest of all owners and occupiers in the community scheme, is unreasonable, and requiring the association to approve and record a new scheme governance provision

(i) to remove the provisions;

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<sup>10</sup> Adjudicator's ruling para 53

(ii) if appropriate, to restore an earlier provision”

[23] Without developing this point, she shifted her focus to a discussion on penalties and fines. The discussion that ensued left much to be desired. She wrote that:

“Fundamentally, an unanswered question remains lingering i.e. whether the “building penalty” is punitive or corrective in nature. The Association does not explain. If punitive, then one would have expected it to be once off, not a recurring punishment it currently is. If corrective in nature, then it must benefit the majority through an interest -bearing trust account set-up to assist the corrective course.”<sup>11</sup>

[24] She went further and said:

“It is unarguable that the cumulative arithmetic figure for building penalty in the Respondent’s parlance, is one that overtime will shoo away any potential buyer as the barrier to entry as it were will be unreasonably high owing to the current financial status of the Republic, complimented by the pandemic.

This point is especially important to emphasise in light of a pronouncement in a leading Australian case that, “*if the case is plainly unarguable is improper to argue it*”, and most recently endorsed by O Rogers JA of the Competition Appeal Court.”<sup>12</sup>

[25] After referring to foreign authorities such as New South Wales Supreme Court of Appeal in *Cooper v The Owners -Strata Plan NO 58068*,<sup>13</sup> she, like the appellant, relied on *Mount Edgecomber Country Club Estate Management Association Two (RF) NPC v Singh and Others*<sup>14</sup> in which the court said:

“When the respondents chose to purchase property within the estate and become members of the Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature. The conduct rules, and the restrictions imposed by them, are private ones, entered into voluntarily when an owner elects to buy property within the estate.”<sup>15</sup>

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<sup>11</sup> Adjudicator’s ruling para 58.

<sup>12</sup> Adjudicator’s ruling para 73 and 74.

<sup>13</sup> (2020) NSCCA 50 (12 October 2020) para 57.

<sup>14</sup> [2019] ZASCA 30.

<sup>15</sup> Id at para 19.

[26] The adjudicator failed to properly apply the law to the facts presented to her. She was called to determine the legality of the resolution, instead she embarked on a process of interpretation and the analysis of the differences between a penalty and a fine, hence the reference to foreign authorities. This amounted to a wild goose chase, since the issues at hand and the law applicable to the issues were left unexplored.

[27] The court pointed out to the respondent's counsel that the adjudicator failed to deal with the resolution or rely on section 39(4)(c) and (e). She confirmed that it was not in the adjudicator's judgment and expressed her inability to understand some of the paragraphs in the adjudicator's judgment. That sentiment captured the frustrations of both counsel with the adjudicator's judgment. Accordingly, this court finds that the adjudicator misapplied the law, and the appeal stands to succeed.

#### Costs

[28] It is trite that the issue of costs proceeds from two basic principles, namely:

“...the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first.”<sup>16</sup>

[29] Therefore, this court does not see a reason to depart from these principles.

#### ORDER

1. The appeal is upheld with costs.
2. The adjudicator's order dated 03 March 2022 is set aside.

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<sup>16</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) at para 3.

**M. P. MOTHA**

**JUDGE OF THE HIGH COURT, PRETORIA**

Date of hearing: 2 November 2023

Date of judgement: 15 February 2024

**APPEARANCES**

For the appellant Adv Mahomed Z E, instructed by  
Mothle Jooma Sabdia Inc.

For the respondent Adv R. Baloyi Nyiko, instructed by Ngobeni Inc

*Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be the 15<sup>th</sup> of February 2024.*