IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION: DURBAN

CASE NO: D11451/2021

In the matter between:

CLUB KERKIRA (PTY) LIMITED	**APPLICANT**
and	
TRUSTEES OF CLUB KERKIRA BODY CORPORATE	**FIRST RESPONDENT**
COMMUNITY SCHEMES OMBUD SERVICES ADJUDICATOR, THANDEKA QWABE N.O.	**SECOND RESPONDENT**
COMMUNITY SCHEMES OMBUD SERVICES	**THIRD RESPONDENT**

ORDER

The following order is granted: -

1, (a) The application for condonation of the late lodgement of this appeal is granted.

(b) The costs of the application for condonation shall be paid by the appellant.

2. (a) The appeal is upheld.

(b) The adjudication order of 26 January 2021, read with the auditor's

report of 28 August 2021, is set aside.

(a) The adjudication proceedings are remitted to the Community Schemes Ombud Service for further consideration and a decision in terms of the Community Schemes Ombud Service Act, 2011.

(b) Each of the appellant and first respondent shall pay its own costs of the appeal.

JUDGMENT

OLSEN J

[1] This is an appeal in terms of s 57 of the Community Schemes Ombud Service Act, 9 of 2011 (the "Ombud Service Act"). The course of events which led the parties to this court on appeal raised a number of disparate issues all of which are in my view subsidiary to a single one which determines the outcome of this appeal.

[2] The appellant is Club Kerkira (Pty) Limited. It was the developer of a sectional title scheme known as "Club Kerkira". The trustees of the Club Kerkira Body Corporate are cited as the first respondent. The appellant and the first respondent are the protagonists in this appeal.

[3] The second respondent is the Community Schemes Ombud Services Adjudicator, Thandeka Qwabe. The third respondent is the Community Schemes Ombud Services, a juristic person established in terms of s 3(1) of the Ombud Service Act which, in terms of s 4 of that Act, has the function of developing and providing a dispute resolution service as contemplated by the Act. The second and third respondents abide the decision of this court.

[4] It is the duty of the Chief Ombud to appoint full time and part time adjudicators. The second respondent is such an appointee, and one must assume that her appointment was one contemplated by sub-section 21(2)(b) of the Ombud Service Act which requires the appointment of adjudicators with

‘(i) suitable qualifications and experience necessary to adjudicate disputes under the supervision of an ombud or deputy-ombud; and

(ii) suitable qualifications and experience in community scheme governance”.

It is the third respondent’s decision on the dispute between the first and second respondents that is the subject of this appeal.

[5] A Mr CC Elsworth, a practising accountant and auditor who played a prominent role in the adjudication process, has not been cited as a party to this litigation. I will get to how he came to be involved later. For the present it is sufficient to state that he compiled a report in which he quantified the contributions which, on his analysis, were due to have been paid by the holders of rights of extension in the Club Kerkira scheme, and in particular by the appellant, to the costs of running the scheme.

[6] A short history of the affairs of the scheme will aid an understanding of the dispute submitted to the adjudication process. The land on which the scheme is sited is situate in an area known as Palm Beach on the lower south coast of KwaZulu-Natal. As to the origins of the development I cannot do better than quote from the introduction to the report made by Mr Elsworth.

‘Club Kerkira (Pty) Limited acquired a property situated at Palm Beach and registered a sectional title plan in 1992. The scheme is registered as Club Kerkira SS No. 242/1992. The said plan included 101 units to be developed in four phases. Since registration of the plan sixteen units have been built and transferred to owners. Club Kerkira (Pty) Limited has also registered a section which comprises of the original dwelling present on the property but which is now in a state of disrepair. The developer installed the majority of the services and roads throughout the estate during the first phase of the development. The estate is set on 44 hectares of land, and the developer also completed a tennis court, two swimming pools with amenities, an administration office, a guardhouse, a workshop, a manager’s dwelling, and a club house. Thus, the estate was prepared for the inhabitants of 101 units.
Club Kerkira (Pty) Limited reserved the right to develop the balance of one hundred and one units.”

[7] The situation is now, as it has been for many years, that the first respondent can only raise levies (properly so-called) against 17 owners of sectional title units in order to service and maintain the large estate designed to accommodate, and enjoy the benefits of the levies payable by, 101 sectional title unit holders. Thus the importance to the first respondent of whatever contributions to its expenses it may lawfully claim from the holders of real rights of extension of the scheme. The majority of those real rights of extension are held by the appellant. It originally held all of them, but over the years sold some to third parties.

[8] The first respondent raised claims against the appellant for payment of such contributions over the years. The appellant repudiated those consistently, to the extent that they exceeded what the appellant claimed was to be the limit of its liability in terms of a certificate issued in terms of s 25(2)(a) of the Sectional Titles Act, 95 of 1986 (the "Sectional Titles Act"). The section ceased to be the provision governing contributions payable by holders of rights of extension when it was amended in 2010. There is no need for me to furnish an account of the provisions of the certificate in terms of s 25 applicable to this development, as the contention that the appellant's obligations continued to be restricted by that certificate after 2010 was no longer pursued in the adjudication process, and has not been pursued in this appeal. It suffices to observe that in terms of the certificate the claims to contributions which may be made by the body corporate against the holders of rights of extension are very much restricted to the obvious advantage of such holders.

[9] In August 2019 the first respondent submitted an application under the Ombud Service Act for the resolution of the dispute relating to the appellant's liability for contributions to the expenses incurred in maintaining the estate. The first respondent asked for a determination as to the legislation applicable to the calculation of the contributions of a holder of rights of extension, an order that notwithstanding our law relating to the prescription of debts the first respondent was entitled to enforce claims from 2010 onwards, a specific award for payment of R798 307,79 as contributions payable from 17 July 2016 to 30 June 2019 together with interest thereon, and an order that the appellant was liable to pay a monthly contribution to the first respondent of R84 142 from 1 July 2019 until the next annual general meeting of the first respondent, when the amount payable thereafter would

be determined. At some stage (it is not clear on the papers when) the first respondent conceded that part of its claim had prescribed and, judging by their conduct at least, the parties agreed that the first respondent's claims from 2016 onwards were justiciable.

[10] In the circumstances the second respondent was called upon to decide whether the monetary claims made by the first respondent had been calculated in compliance with s 3(1)(d) of the Sectional Titles Schemes Management Act, 8 of 2011 (the "Management Act"). The provision reads as follows.

'... Functions of Body Corporate

(1) A Body Corporate must perform the functions entrusted to it by or under this Act or Rules, and such functions include –

…

(d) to require from a developer who is entitled to extend the scheme in terms of a right reserved in s 25(1) of the Sectional Titles Act, to make such reasonable additional contribution to the funds as may be necessary to defray the costs of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution for the provision of electricity and water and other expenses and costs in respect of and attributable to the relevant part or parts.'

[11] The appellant's response to the claims placed before the adjudicator can in my view only be described as obstructive. In my view the third respondent's decision, evident in her adjudication decision dated 26 January 2021, to ignore the detritus generated by the appellant's approach to the dispute was commendable. The third respondent correctly concluded that the appellant's argument concerning the first respondent's money claims amounted to this.

(a) The first respondent had failed to prove that it had undertaken any of the work alleged to generate the money claims.

(b) The first respondent had failed to establish its case on the quantification of those claims.

(c) Given that s 3(1)(d) of the Management Act empowered the first respondent to require a developer to make contributions "necessary to defray" the costs, the costs had to be incurred before any contributions could be claimed.

[12] In my view the third respondent correctly concluded that the contributions payable by the holders of rights of extension had to be the subject of the ordinary budgeting process followed in respect of levies payable by sectional title owners, and claimable and therefore payable on a monthly basis. The appellant's contention that the first respondent had to establish that it had incurred the expenditures making up especially its money claim for the period 2016 to 2019 carries with it the implication that the body corporate must incur liabilities not covered by its purse; or, on the other hand, an implication that the levies raised against sectional title owners under s 3(1)(a) of the Management Act must include anticipated expenditures falling within s 3(1)(d) of the Management Act in the hope or expectation that such would be recovered from the holders of rights of extension. This latter proposition can be rejected on the language of the Act. What s 3(1)(d) obliges a body corporate to do is to secure from such holders an "additional" contribution. Clearly what was contemplated is a contribution in addition to the ordinary levies payable under s 3(1)(a) by the owners of sectional title units. As to the former implication, it is inconsistent with the scheme of s 3 of the Management Act, and especially ss 3(1)(a) to (c), that a scheme should run on credit.

[13] The appellant's argument built around the use of the word "defray" rests on a very narrow and incorrect meaning of the word. However, even accepting the meaning adopted by the appellant, the argument overlooks the fact that on its proper construction, s 3(1)(d) involves the contribution of monies by holders of rights of extension being available to defray expenditure when it is incurred. The narrow meaning the appellant attributed to the word "defray" does not imply that the expenditures had to have been incurred before a monetary contribution to them could be claimed.

[14] Unfortunately, having reached the conclusions just discussed, the third respondent fell into error in one respect certainly, and perhaps in a second respect. As to the second respect, the position was that the task which remained to be done

was adjudication on the question as to whether the claims to contributions from the appellant made by the first respondent were reasonable when it was resolved to make them. If they were they had to be paid, irrespective of whether the expenses were actually incurred after the claims were made. As far as I can see the order and direction given by the third respondent can be interpreted to convey a different thing, that is to say that what was required was an assessment of the costs actually incurred during the period in question, and likely to be incurred during the year after June, 2019.

[15] The adjudication order read as follows.

'34.1 An auditor from the Independent Regulatory Board for Auditors (IRBA) must be appointed within 30 days of delivery of this order to peruse the financial statements for the period 2016 to 2019 and ascertain the costs incurred by the body corporate for the costs listed under s 3(1)(d) of the STSMA in relation to the common property.

34.2 The amount determined by the auditor must be apportioned accordingly to what the respondent owes for the period claimed and what the monthly contribution will be until the next annual general meeting.

34.3 The auditor's findings in respect of amounts owed including interest must be paid by the respondent.'

[16] In making this order the third respondent purported to delegate her authority as an adjudicator to a third party who was not a duly appointed adjudicator. The most important issues in the dispute between the parties were left to the proposed auditor. The Ombud Service Act afforded no power to the third respondent to delegate her function. She fell into an error of law in this regard. The only argument advanced by the first respondent before me against this conclusion rests on s 54(3) of the Ombud Service Act which reads as follows.

'The order may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate.'

There is no merit in that argument. Firstly, it is contrary to the scheme of the Ombud Service Act that any such "ancillary and ensuing" provision includes the delegation of the adjudicator's decision-making powers to a third party. In any event, the construction favoured by the first respondent is contradicted by s 54(1)(a) of the Ombud Service Act which provides that if an application is not dismissed the adjudicator must make an order granting or refusing each part of the relief sought by the applicant. The crucial parts of the orders sought by the first respondent (as applicant before the adjudicator) were the monetary awards. Section 54(3) of the Ombud Service Act supposes the addition of "ancillary and ensuing" provisions once there has been compliance with s 54(1).

[17] Neither the appellant nor the first respondent raised any objection to the third respondent's decision that what must be paid must be an amount determined by an auditor. In the result Mr Elsworth was appointed the task.

[18] I do not propose to go into Mr Elsworth's work in any detail. There is no doubt at all that he applied himself fully to the task, considering the provisions of the applicable legislation as well as the data available in the financial documents of the body corporate. As already noted, he was not joined in these proceedings and would therefore not have been able to defend his decisions and reasoning if in this case the issue was alleged errors in his work. The matter came to him late, after the adjudication process had been delayed, I understand, because of the pandemic. Mr Elsworth thought that in the circumstances he should bring his work up to date given that his decision was only made on 20 August 2021. He concluded that as at August 2021 the appellant owed the first respondent contributions and interest thereon in an amount of R4 604 466. More importantly, the component of this assessment (excluding interest) which coincides with the period in respect of which the first respondent had made a claim before the adjudicator for payment of the sum of R798 000, amounted to some R2,2 million. On Mr Elsworth's report one concludes that the first respondent had been very conservative when quantifying its claims for contributions from the appellant for the period 2016 to 2019.

[19] The adjudication order which had been made by the third respondent obliged the appellant to pay the amounts determined by Mr Elsworth. When asked how

such an order could be permitted to stand counsel for the first respondent argued that as the appellant had acquiesced in the process which transferred the decision making power to Mr Elsworth, the first respondent should not be prejudiced by the fact that the body corporate was deprived of an opportunity to amend its claim upwards to the true and very much higher quantum which would have been revealed during the quantification of the claim in the ordinary course of proceedings before the adjudicator herself. In my view that argument cannot prevail for a number of reasons, the principle one being that the first respondent's claim was for contributions which it had raised, no more and no less. An application for an increase in its claim would properly have been refused upon the basis that the first respondent had no right to increase the claimed contribution *ex post facto*, beyond the amounts fixed and determined by the budgetary process followed in each of the three years to which the claim of some R798 000 relates.

[20] Section 57(2) of the Ombud Service Act provides that an appeal such as the present one (ie on a question of law contemplated by s 57(1)) "must be lodged within 30 days after the date of delivery of the order of the adjudicator". The appellant delivered a notice of appeal on 5 or 6 October 2021, some eight months after the adjudicator's order was made, and a little over 40 days after Mr Elsworth's decision was received by the appellant. About eight months later, on 15 June 2023 the appellant delivered a notice of motion and founding affidavit, thereby relaunching its appeal. The explanation tendered for this peculiar method of launching proceedings turned on the contention that there was confusion generated by conflicting decisions on how properly to launch such an appeal. I am not satisfied with the explanation. On any basis the appeal was launched out of time. The appellant asks that its failure to launch its appeal within the time limit set by s 57(2) of the Ombud Service Act be condoned and the appeal considered. The first respondent opposed the application for condonation upon the basis that this court has no power in effect to extend the statutory period for the launching of the appeal, and on the further basis that if the court does have such power this is not an occasion for the exercise of it.

[21] There are two propositions which have a bearing on the application for condonation about which there is no dispute between the parties.

(a) Firstly, it is clear that the Ombud Service Act is designed to provide an at least relatively inexpensive and speedy resolution of disputes arrising within community living schemes. The confinement of appeal rights to questions of law, and the fixing of a time limit on the institution of such appeals reflect the same philosophy.

(b) The High Court has no inherent jurisdiction to condone non-compliance with statutory provisions. The power to do so must be conferred upon the High Court. (See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 17.)

[22] The question as to whether the Ombud Service Act impliedly confers a power on the High Court to condone the late lodgement of an appeal was considered by a Full Bench in *Baxer v Oceanview Body Corporate and Others* 2023 (2) SA 205 (WCC). The court (at paragraph 5) drew attention to the fact that an express provision in the statute is not required to confer a power of condonation on the court. The question as to whether the conferral of such a power is implied turns upon a proper construction of the statutory provision. With reference to *Phillips v Direkteur vir Sensus* 1959 (3) SA 370 (A) the court in *Baxter* decided that the 30 day time limit for the lodgement of an appeal was not intended to be an expiry period with the implication that if the relevant right was not exercised within the prescribed time it would *ipso facto* be extinguished. It held that the provisions of the Act should not be read in a way which limits the proper ventilation of disputes of the type requiring adjudication under the Act. The conclusion was that the court does have the power to condone non-compliance on good cause shown. The parties were given the right to submit brief written argument after the hearing of this appeal on the question as to whether I am bound by the Full Bench decision of the Western Cape Court in *Baxter* to accept that this court does have the power to condone the late delivery of the appeal in this case. The answer to the question as to whether I am bound does not seem perfectly clear and I have decided that there is no need for me to go any further into the subject. In my view *Baxter* was correctly decided. Appeals against decisions of adjudicators are confined to questions of law. Under our Constitution the determination of disputes over questions of law are the preserve of the courts. Errors of law made by adjudicators result in decisions which are not in accordance

with law. The legislation recognises that such decisions should not be allowed to prevail and therefore provides for appeals. It is self-evident that some decisions which might be made by adjudicators will have long-term effects which may indefinitely dictate the course of the relationship between members of community schemes in a manner which is not consistent with the law. That would be an undesirable outcome inconsistent with the purpose of the Act. In the circumstances, whilst the requirement that such appeals must be lodged within 30 days is understandable, it is equally understandable that if there should be default in that regard, and the circumstances of the case warrant it, the court should have the power to condone the delay so that the relationships sought to be protected by the Ombud Service Act are conducted in accordance with law.

[23] Counsel for the appellant has argued that the test for condonation revolves around the interests of justice, and that the following are the main factors to be considered.

(a) The nature of the relief sought.
(b) The extent of the delay.
(c) The effect of the delay on the administration of justice and other litigants.
(d) The reasonableness of the explanation for the delay.
(e) The importance of the issues to be raised in the intended appeal.
(f) The prospects of success.

[24] I should state immediately that I am quite unimpressed by the appellant's explanation for the delay, especially given the duration of it, and by its failure to raise its objection to the course followed by the second respondent in delegating powers to an auditor. At least since 2010 the appellant has adopted an obstructive course designed to avoid its financial responsibilities as the holder of rights of extension. On the papers before the adjudicator and before this court in the appeal this has placed the 17 sectional title holders in a precarious position. The manner in which the appellant has run this appeal is consistent with that prior conduct. The founding affidavit runs to 30 pages and 100 paragraphs. The unpaginated heads of argument run to 196 paragraphs. Most of the material has the hallmarks of an exercise in obfuscation. The only point made in the appellant's documents which

legitimately addresses the issues in this appeal is the one, repeated more than once in the papers, that the adjudicator erred in law by purporting to delegate to Mr Elsworth the power to determine the amount of money owed by the appellant to the first respondent.

[25] All this notwithstanding, the interests of justice must prevail. Condonation must be granted because of the level of prejudice suffered by the appellant, confronted as it is with an adjudication order for payment of money far in excess of the claim which the appellant was called upon to answer. If indeed Mr Elsworth's assessment of the claim is wrong (a subject on which I express no view for obvious reasons), it holds the potential detrimentally to affect future financial relations between the body corporate and the appellant.

[26] In my view although the appeal must succeed, this is not a case in which costs should follow the result. My reasons for that conclusion will be evident from what I have already said concerning the appellant's conduct prior to and in the course of the adjudication process and, indeed, in this appeal.

I make the following order.

1, (a) The application for condonation of the late lodgement of this appeal

is granted.

(c) The costs of the application for condonation shall be paid by the appellant.

2. (a) The appeal is upheld.

(b) The adjudication order of 26 January 2021, read with the auditor's report of 28 August 2021, is set aside.

(c) The adjudication proceedings are remitted to the Community Schemes Ombud Service for further consideration and a decision in terms of the Community Schemes Ombud Service Act, 2011.

(d) Each of the appellant and first respondent shall pay its own costs

of the appeal.

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OLSEN J

Date of Hearing:	Friday, 09 February 2024
Date of Judgment:	Tuesday, 4th June 2024
For the Appellant:	Adv DC Johnson
Instructed by:	Maryke Prinsloo Attorney Applicant's Attorney Suite 801, 8th Floor, Esplanade Garage 127 Margaret Mncadi Avenue Durban (Ref: Club Kerkira) (Tel: 031 – 903 4780) Email: maryke@marykelaw.co.za
For the 1st Respondent:	Mr M Bingham
Instructed by:	CGS Attorneys First Respondent's Attorneys 1st Floor, Pharos House 70 Buckingham Terrace Westville Durban (Ref: CHG Salmon/MAT5881)

(Tel: 031 – 003 5148
Email: chris@cgsattorneys.co.za