



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 9823/2022P

In the matter between:

HIRALAL RAMPUL

APPELLANT

and

**TRUSTEES OF MANGROVE BEACH CENTRE:
BODY CORPORATE**

FIRST RESPONDENT

**THE BODY CORPORATE: MANGROVE
BEACH CENTRE**

SECOND RESPONDENT

THULANE KHAMBULE N.O.

THIRD RESPONDENT

COMMUNITY SCHEMES OMBUD SERVICE

FOURTH RESPONDENT

This judgment was handed down electronically by being transmitted to the parties' legal representatives by email. The date and time upon which it was handed down is deemed to be 13h00 on 15 December 2022.

ORDER

It is ordered that:

1. The appeal is dismissed with costs.

JUDGMENT

MOSSOP J:

[1] This is an appeal brought in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 (the Act) against an adjudication order (the order) made by the third respondent. In terms of section 57(1) of the Act, such an appeal lies only in respect of a question of law, and not in respect of a question of fact. As a general proposition, '[a] question of fact usually calls for proof' while '[a] question of law usually calls for argument'.¹ The confining of an 'appeal to questions of law is intended to limit the scope of intervention by a court'.²

[2] The appellant is a businessman who owns a single section in the second respondent,³ which is what is termed a 'mixed-use' body corporate. The mixed-use appellation arises from the fact that the ground floor of the building is comprised of commercial sections from which commercial enterprises operate and the second and further floors of the building are comprised of residential sections. There are, in total, 257 sections in the scheme of which 235 are residential sections.

[3] When the appeal was argued, the appellant was represented by Mr Omar and the first and second respondents were represented by Ms Nicholson. Both are thanked for their considered and helpful submissions. The third and fourth respondents elected to abide the decision of this court and consequently played no part in the appeal.

¹ C Morris 'Law and Fact' (1942) 5 *Harvard Law Review* 1303 at 1304.

² *Turley Manor Body Corporate v Pillay and others* [2020] ZAGPJHC 190 para 17.

³ I shall assume this to be the case notwithstanding the fact that the appellant's name does not appear on annexure 'HR4' to the founding affidavit, being a Deeds Office printout detailing the owners of the sections in the scheme. The first and second respondents have not disputed that he is, indeed, an owner.

[4] In the proceedings before the third respondent, which were conducted entirely on paper, the appellant had sought the following relief in a document referred to as an 'Application for Dispute Resolution Form' (the form):

'An order in terms of Section 39(3)(c) and (d) of the CSOS Act, in the following terms:

An order declaring that Annexure "R", or alternatively, Rules 4.4, 4.5, 18, 63, 31.1.2, 31.1.4.1, Annexure "A", Annexure "B1", Annexure "B2" and Annexure "C" of Annexure "R" are invalid and unreasonable, having regard to the interest of all owners of the Scheme, and requires the Scheme to approve and record new management rules:

- (i) To remove the invalid provisions; and
- (ii) To substitute the invalid provisions with the prescribed management rules (Annexure 1 of the STSM Regulations, dated 7 October 2016).'

The reference therein to 'STSM Regulations' is a reference to the Sectional Titles Schemes Management Regulations,⁴ which were introduced through the Sectional Titles Schemes Management Act 8 of 2011 (the STSM Act).

[5] The relief sought by the appellant was refused by the third respondent. In delivering his order, about which I shall have more to say shortly, the third respondent also purported to dismiss an application by the appellant in terms of section 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution). It is not clear what application that was, as it was not an order that the appellant had, in fact, sought in the form. The refusal of the relief claimed by the appellant by the third respondent led to this appeal.

[6] Before the third respondent, in addition to generally denying the appellant's entitlement to the relief claimed, the first and second respondents raised the defence that the matter was *res judicata*. This was based upon an earlier application (the prior application) that had been argued before Masipa J in the matter of *Central Plaza Investments 85 (Pty) Ltd v Body Corporate Mangrove Beach Centre*.⁵ The first and second respondents submitted to the third respondent that Masipa J had authoritatively and finally determined the very issue that the appellant requested the third respondent to determine.

⁴ Sectional Titles Schemes Management Regulations, 2016, GN R1231, GG 40335, 7 October 2016.

⁵ *Central Plaza Investments 85 (Pty) Ltd v Body Corporate Mangrove Beach Centre*, case number 11454/2015, KwaZulu-Natal Local Division, Durban.

[7] This argument found favour with the third respondent. In the reasons for his order, the third respondent stated as follows:

'I am therefore of the view that the Applicant's application in terms of sections 39(3)(c) and(d)(i) [sic] is hereby refused. In fact, the issues concerning section 10(2) of the STSMA, and the validity of the Rules has been dealt [sic] at length in the court judgment. The matter in so far as is concern [sic] is Res judicata [sic].'

[8] In my view, the finding by the third respondent on the issue of res judicata was plainly wrong. In determining the issue as he did, the third respondent erred in the following respects:

(a) Firstly, he did not identify or consider the constituent parts of such a defence.⁶ Had he done so with any thoroughness, he would have realised his error. The third respondent found that the appellant was the 'owner' of Central Plaza Investments 85 (Pty) Ltd (Central), the applicant in the prior application. He was entirely mistaken in this regard. Central's guiding mind was not the appellant. Its guiding mind was, and is, a Mr Christopher Pearson (Mr Pearson), one of the three trustees of the second respondent and the person who deposed to the first and second respondents' answering affidavit in this appeal. The appellant had no link whatsoever to Central. Central was not a party to the proceedings before the third respondent and it follows that it is not a party to this appeal. One of the requirements for a successful defence of res judicata, namely that the litigation be between the same parties, was consequently not met;

(b) Secondly, the question before Masipa J and the question that the third respondent was called upon to determine could not have been the same question for several reasons. The issue between the parties before Masipa J in the prior application was summed up by the applicant (the second respondent in this appeal) as follows:

'None of the amendments which were effected by the original developer have any bearing on the present dispute which is solely the question of how to allocate a particular disbursement which has been incurred. As the rules do not cater for this particular expense, the applicant has brought an application to ask the above Honourable Court to make an order about the allocation.'

⁶ They are a final judgment, involving the same parties, arising out of the same cause of action: *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A); *Le Roux en 'n ander v Le Roux* 1967 (1) SA 446 (A); *National Sorghum Breweries Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA).

The issue described above was not the issue before the third respondent, as is evident from the content of the form. In addition, the STSM Act did not exist at the time that Masipa J heard argument in the prior application. The judgment in the prior application was delivered on 2 May 2019. By that time the STSM Act had, indeed, come into effect, but it had not been in place at the time that the papers in the prior application had been prepared or when the prior application was argued;⁷ and

(c) Thirdly, in the application papers before Masipa J, the following extract appears in the replying affidavit delivered on behalf of the applicant by Mr Pearson:⁸

‘As I have already stated, if the respondent’s complaint is that the management rules as they presently stand are unlawful or unreasonable or for any other reason should be set aside, then it is at liberty to make an application to court for the appropriate relief. No such relief is sought herein and in the circumstances I am advised that the above Honourable Court must hear and determine this application based on the management rules as they stand.’

This is precisely the appellant’s complaint and it has acted upon Mr Pearson’s invitation. It is hardly open to the first and second respondents to now claim that the issue was previously determined in the light of the abovementioned extract. In my view, the issues in the prior application and the application before the third respondent could not be, and were not, the same.

[9] The reasoning and finding of the third respondent on the issue of res judicata was incorrect. The matter had not previously been determined. To the extent that this was the basis upon which the appellant’s application was refused, it must be set aside.

[10] The order handed down by the third respondent is some 21 pages long. It diligently and laboriously refers to all the relevant sections of the Act that may possibly be of application. The case for the appellant is stated at some length as is the first and second respondents’ defence thereto. Whilst his summary of the issues demonstrated his awareness of the issues before him, the third respondent did not

⁷ The judgment appears to have been reserved for some two years and eight months. The judgment does make reference to the STSM Act, which came into effect while judgment was being considered.

⁸ In the first and second respondents’ answering affidavit in this appeal, an offer was made to this court to have the application papers that served before Masipa J placed before this court. I took the first and second respondents up on this offer and a full set of the papers was made available to me about a week after the appeal was argued. This occurred with the consent of the appellant’s legal representative. Indeed, in the comprehensive heads of argument that he delivered, he attached extracts of certain of the pages from the papers that served before Masipa J.

directly address those issues, other than the issue of res judicata, in any great detail in his order. It appears that he took the view that the defence of res judicata was unanswerable and therefore there was no need to consider the other issues raised by the appellant. Rather than refer the matter back, it is perhaps prudent for this court to consider those issues, due regard being had to the fact that full argument was delivered at some length on the merits of the matter when the appeal was argued.

[11] In this division, appeals in terms of the Act are launched by way of a notice of motion and affidavit(s).⁹ This, however, does not render it an application: it still remains an appeal. What must be addressed in the appeal are the findings made by the adjudicator. Indeed, practice directive 39.2 of this division states that the founding affidavit in such an appeal:

‘... shall not exceed ten (10) pages, will succinctly set out the grounds upon which it is alleged that the Adjudicator erred on a point of law.’

The fact that the form of motion proceedings is the preferred method of presentation of the appeal does not mean, in my view, that an appellant is at liberty to raise issues that did not serve before the adjudicator. In this particular appeal, the appellant has taken a point in limine in his replying affidavit regarding the legal standing of Mr Pearson, who deposed to the answering affidavit delivered by the first and second respondents. This is not an issue that was before the third respondent and I consequently shall not consider it.

[12] In the appellant’s notice of motion in this appeal, the following relief is claimed:

1. The Applicant’s appeal in terms of section 57 of the CSOS Act is upheld.
2. The Order of the Third Respondent dated 28 June 2022 is set aside.
3. It is declared that the Special Rules described as Annexure “R”, (Annexure “R”) being Annexure “HR2” to the founding affidavit of H Rampul, are inconsistent with the Sectional Titles Schemes Management Act, 2011 and are invalid.
4. Alternatively to paragraph 3 above, Rules 4.4, 4.5, 18, 31.1.2, 31.1.4.1, 63, Annexure “A”, Annexure “B1”, Annexure “B2” and Annexure “C” of Annexure “R” are declared to be inconsistent with the Sectional Titles Schemes Management Act, 2011 and are invalid.

⁹ *Ellis v Trustees of Palm Grove Body Corporate and others* [2021] ZAKZPHC 97 paras 9-10.

5. It is declared that as from 7th October 2016, the Prescribed Management Rules set forth in Annexure “1” to the Regulations of the Sectional Title Schemes Management Act, 2011 shall apply to the Second Respondent.’

[13] Central to the proceedings before the third respondent, and in this appeal, is the appellant’s complaint concerning a document referred to variously as ‘Annexure “R”’, or as the ‘special rules’. I prefer to refer to it by the latter name. It is the fulcrum around which this appeal moves. The special rules came into being in 1994. When the building was first constructed in 1965, it was initially operated as a share block scheme. In 1994, the developer, Romwood Share Block Investments Limited (Romwood), converted it to a sectional title scheme. Contemporaneously with the act of conversion, Romwood filed the special rules with the Registrar of Deeds. They have remained in place since then.

[14] Before the third respondent, the appellant’s principal complaint was that the special rules unfairly discriminate against owners of residential sections in the second respondent by granting the owners of commercial sections 75 percent of the vote at general meetings when the commercial sections only comprise 27 percent¹⁰ of the total area of all the sections in the second respondent. Thus, the owners of residential sections, which comprise 68 percent of the scheme,¹¹ only have 25 percent of the vote at such meetings. The appellant contends that:

‘[t]here is simply no commercial rationale or rational basis for conferring upon the commercial component 75% of the vote ...’

According to the appellant:

‘The abovementioned rules are clearly unfair, unequal and prejudicial to the residential unit owners ...’.

[15] The result of this, so the appellant contends, is that the owners of the majority residential sections in the second respondent:

‘... have no effective voice in the management, control and administration of the body corporate.’

¹⁰ I have rounded up the figure. The actual area occupied by the commercial sections in the scheme is 26,78 percent.

¹¹ I have also rounded up this figure. The actual area occupied by the residential sections is 67,67 percent. The missing 5 percent of the scheme is comprised of parking.

On the strength of these arguments, the setting aside of the special rules was sought before the third respondent.

[16] In his founding affidavit in this appeal, the appellant claimed further that:

'The owners of the commercial sections have accordingly unlawfully claimed 75% of the votes, thereby purporting to exercise absolute control at all times for their own benefit, despite their minority interest, which is severely prejudicial to the owners of the residential sections and inconsistent with the provisions of the STSMA which came into force on 7 October 2016.'

[17] Finally, the appellant states in his founding affidavit that:

'The voting requirements must otherwise be governed strictly by way of participation quota in accordance with section 20 of the Prescribed Management Rules (Prescribed Management Rules) made under the regulations, being Annexure 1, in terms of STSMA.'

[18] In this appeal, the appellant made further submissions associated with the special rules, it being submitted that:

(a) the owners of the residential sections did not consent to the terms contained in the special rules;

(b) when the special rules were introduced, there were substantially less than 30%

of owners of units in the scheme;

(c) the special rules are inconsistent with section 10(3) of the STSM Act and are therefore invalid and because of that fact, they lapsed; and

(d) the special rules are unconstitutional, as they do not apply equally to all owners of sections within the meaning of section 10(3) of the STSM Act, are inconsistent with section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) and are inconsistent with the equality provisions of section 9(4) of the Constitution.

[19] At the time that the special rules were introduced, the applicable act in place was the Sectional Titles Act 95 of 1986 (the ST Act). The ST Act created a whole new form of composite ownership: owners owned their respective sections separately from other sectional owners in a scheme but owned undivided shares in

the common property collectively with those other sectional owners.¹² The ST Act was intended to create a relatively flexible framework for regulating this new form of sectional ownership.

[20] Section 32(1) of the ST Act reads as follows:

‘Subject to the provisions of section 48, in the case of a scheme for residential purposes only as defined in any applicable operative town planning scheme, statutory plan or conditions subject to which a development was approved in terms of any law the participation quota of a section shall be a percentage expressed to four decimal places, and arrived at by dividing the floor area, correct to the nearest square metre, of the section by the floor area, correct to the nearest square metre, of all the sections in the building or buildings comprised in the scheme.’

[21] Section 32(2)(a) of the ST Act provides further that:

‘Subject to the provisions of section 48, in the case of a scheme other than a scheme referred to in subsection (1), the participation quota of a section shall be a percentage expressed to four decimal places, as determined by the developer: Provided that—

(a) where a scheme is partly residential as defined in any applicable operative town planning scheme, statutory plan or conditions subject to which a development was approved in terms of any law, the total of the quotas allocated by the developer to the residential sections shall be divided among them in proportion to a calculation of their quotas made in terms of subsection (1);’

[22] Section 32(4) of the ST Act, now repealed, provided that:

‘Subject to the provisions of section 37(1)(b), the developer may, when submitting an application for the opening of a sectional title register, or the members of the body corporate may by special resolution, make rules under section 35 by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 37(1)(a) or 47(1) is modified: Provided that where an owner is adversely affected by such a decision of the body corporate, his written

¹² *Mobile Telephone Networks (Pty) Ltd and another v Spilhaus Property Holdings (Pty) Ltd and others* [2018] ZASCA 16; 2018 (3) SA 396 (SCA) para 1.

consent must be obtained: Provided further that no such change may be made by a special resolution of the body corporate until such time as there are owners, other than the developer, of at least 30 per cent of the units in the scheme: Provided further that, in the case where the developer alienates a unit before submitting an application for the opening of a sectional title register, no exercise of power to make a change conferred on the developer by this subsection shall be valid unless the intended change is disclosed in the deed of alienation in question.’¹³

[23] The ST Act thus conceived of, and allowed for, a distinction to exist between residential only and mixed-use schemes when it comes to the calculation of the participation quota. For residential only schemes, the floor area of a section is the basis for calculating the participation quota, as indicated in section 32(1). With regards to mixed-use schemes, the position was summed up by the Supreme Court of Appeal in *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and another*,¹⁴ where Ponnann JA stated that:

‘Since the formula of relative floor area was considered too rigid for calculating the participation quotas for sections in schemes not used solely for residential purposes, the STA provides that the determination of the participation quotas of non-residential sections should be left to the discretion of the developer.’¹⁵ (Footnote omitted.)

[24] The developer was accordingly entitled in 1994, when it converted the building to a sectional title scheme, to, inter alia, change the value of a section owner’s vote, subject to the proviso’s contained in section 32. The argument by the appellant that that the value of a vote has to be determined with reference to the participation quota of that section is incorrect. The appellant’s further assertion that the commercial owners had unlawfully claimed the 75% voting rights is, in any event, incorrect. The developer, Romwood, introduced the special rules, not the owners of the commercial sections.

¹³ This sub-section was repealed by section 20 of the STSM Act.

¹⁴ *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and another* [2019] ZASCA 161; 2020 (2) SA 61 (SCA).

¹⁵ *Ibid* para 17.

[25] The ST Act also adopted a similar approach to the charging of levies in mixed-use body corporates. In those body corporates, levies do not necessarily have to be charged in proportion to the floor area ratio. Indeed, as was stated in *Marine Sands*, developers were given an ‘unfettered discretion’ in this regard in terms of section 32(2) of the ST Act.¹⁶

[26] On 7 October 2016, the STSM Act came into effect. A similar provision to the repealed section 32(4) of the ST Act was included in the STSM Act, namely section 11(2)(a), which reads:

‘Subject to section 3(1)(b), the developer may, when submitting an application for the opening of a sectional title register in terms of the Sectional Titles Act, or the members of the body corporate may by special resolution, make rules under section 10 by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 3(1)(a) or 14 (1) is modified.’

The possibility that every section may not necessarily have the same value vote has accordingly been retained in the STSM Act, as has the ability to modify the financial contributions of section owners to the body corporate.

[27] The appellant states that the owners of residential sections have no effective voice in the management, control and administration of the body corporate. I am not able to share that point of view:

(a) The special rules indicate that the body corporate, conceptually, is comprised of two segments: the commercial segment and the residential segment. Special rule 4.5 provides that one of the three trustees that the second respondent must have must represent the residential segment. There is thus representation for residential owners on the board of trustees;

(b) In terms of special rule 4.6, at every annual general meeting, the owners of residential sections elect a committee known as the ‘Residential Management Committee’ whose function is to manage the residential aspects of the second respondent’s property;

(c) At meetings of trustees, special rule 25 and 25.1 provides that any trustee may propose that an issue is solely a residential matter, and if there is agreement on this, then only the vote of the residential trustee shall count;

¹⁶ Ibid para 20.

(d) If there is no agreement that the matter is a residential matter, then in terms of special rule 25.2, the matter is put to the vote and all trustees are permitted to vote on it. After the chairman has recorded the votes, he is required immediately in terms of special rule 25.3 to request the trustees to determine the identity of a referee,¹⁷ and once this is done, the matter will be remitted to the referee for his decision.

[28] To suggest, as the appellant does, that the owners of residential sections have no say in the affairs of the second respondent accordingly appears to me to be unfounded.

[29] The first and second respondents submit that there is a sound reason for the differentiation in voting strengths between owners of commercial sections and owners of residential sections. The introduction of the special rules initially drew the commercial tenants to the scheme. As was stated in the second respondent's replying affidavit in the prior application, the developer, Romwood, acknowledged the investment that the owners of commercial sections made in the property as compared to the investment made by owners of residential sections.¹⁸ That investment would presumably have to be protected in some way. The introduction of the special rules was one way of achieving this. In addition, as stated in the answering affidavit in this appeal, the first and second respondents submit that the commercial sections pay far higher levies per section than residential owners, many of whom are pensioners, pay in respect of their respective sections. The consequence of this, according to the first and second respondents, is that the levies that are required to be paid by the residential owners in the second respondent are less than half that allegedly paid by owners in neighbouring residential only schemes. An example was provided: a scheme known as Grosvenor Court is a residential only scheme and the levy paid in respect of a 1,5-bedroom section is R4100 per month, whereas in the second respondent a similar section would attract a levy of R1600 to R1800 per month. The proposition that the owners of commercial sections pay higher levies was disputed in reply by the appellant. On the issue of whether levies paid by the owners of residential sections in the second respondent were markedly lower than

¹⁷ The procedure for the determination of a referee is set out in the special rules which includes a provision dealing with a situation where the trustees cannot agree who he should be: in such event, the referee is to be appointed by the chairman of the Natal Law Society from time to time. Clearly, that latter provision will have to be revised given that the Natal Law Society no longer exists.

¹⁸ Indexed papers, at 313, para 28.

those paid in solely residential schemes, this was met with a blanket denial and a terse, and unsubstantiated, response that maintenance in other schemes is superior.

[30] The appellant appears to me to have approached the issue before the third respondent without acknowledging that he did not buy into a purely residential scheme but bought into a mixed-use scheme. There is no recognition by him that there may be competing interests between the different classes of owners. Those competing interests cannot be disregarded and need to be addressed in some form or another. The developer chose the form by granting the owners of commercial sections a greater weighted vote. It was permitted to do so in terms of the ST Act.

[31] I do not find the method adopted by the developer as being unreasonable or iniquitous. The appellant plainly knew that he was buying into a mixed-use scheme. In my view, the applicant as a prudent purchaser,¹⁹ knew, or ought to have known, of the provisions of the special rules when he considered acquiring a section in the second respondent. He has not stated that he acquired ownership at the time of the conversion of the building from a share block to a sectional title scheme. The sectional title scheme would thus have been up and running when he acquired his section and he could, and should, have acquired knowledge of the special rules before investing. He was not compelled to buy into the scheme but chose to do so. It appears that he is now dissatisfied with the rules that he undoubtedly knew existed when he acquired his section. In my view, he has no reason to be dissatisfied.

[32] I do not find it unreasonable that a distinction in voting rights has been established between commercial and residential section owners in the second respondent. In a mixed-use scheme it appears to me to be an inevitability that such must occur. That it has occurred in this matter does not render its occurrence unfair: both the ST Act and the STSM Act provide for it. In the circumstances, I can find no basis for the setting aside of the special rules.

[33] The appellant alleges that the owners of residential sections did not consent to the terms contained in the special rules. It appears to me, strictly speaking, that

¹⁹ In the founding affidavit the appellant describes himself as 'an adult male insurance broker, estate agent, professional accountant and tax practitioner'.

this is a ground of appeal based upon a question of fact and is not an issue that I am thus required to consider. For the point to be upheld, it would require proof and not merely argument. In the event that I may be wrong in the characterisation of the issue, I shall deal with it. It is not clear to me what the basis for this assertion by the appellant is. The special rules were introduced in 1994, some 28 years ago. The appellant does not claim to have been an owner at that stage and no affidavits have been put up of anyone who was an owner of a section at the time that the special rules were introduced. The point has accordingly not been established and must fail.

[34] The applicant further asserts that when the special rules were introduced, there

were allegedly substantially less than 30 percent of owners of units in the scheme. Again, this is an issue of fact that must be determined by evidence. Again, if I am incorrect in this regard, I consider the appellant's argument. He submits that section 11(2)(c) of the STSM Act is offended, which reads:

'The members of the body corporate may not make rules by which a different value is attached to the vote or liability of the owner of any section as contemplated in paragraph (a) until such time as there are owners, other than the developer, of at least 30 per cent of the units in the scheme.'

The fragility of the appellant's argument is immediately obvious. The special rules were

not introduced when the STSM Act was in place, but rather when the ST Act was the applicable legislation. Further, the restriction of 30% applies only where a change is contemplated by a special resolution of the body corporate. The restriction does not apply where the developer introduces the change in the rules. In this case, the special rules were not introduced by the body corporate but their introduction was the work of the developer. Whether the owners of residential sections agreed or did not agree to the special rules is accordingly irrelevant. This point holds no merit.

[35] The appellant claims further that the special rules are inconsistent with section 10(3) of the STSM Act and are therefore invalid and because of that fact, they lapsed. Section 10(3) reads as follows:

'The management or conduct rules contemplated in subsection (2) must be reasonable and apply equally to all owners of units.'

Implicit in this point raised by the appellant is that the special rules are unreasonable and that they do not apply equally to all owners. I have already dealt with the alleged unreasonableness of the special rules. In my view, when considering whether a rule is reasonable, regard must be had to the particular circumstances of the scheme and members of the body corporate. This appears to be what the appellant has failed to take into account: the second respondent is a mixed-use scheme and not a residential only scheme.

[36] In *Wilds Home Owners Association and others v Van Eeden and others*,²⁰ Murphy J cautioned, when dealing with demands made of a court to amend the articles

of association of a company, that this should only be acceded to:

'... as a last resort. The articles are the contract bringing about the association and the basis for the members doing future business together. By becoming a shareholder in a company a person agrees to be bound by the decisions taken in accordance with the provisions and prescriptions of the articles. A court accordingly should hesitate to re-write the bargain struck by the members with each other, especially where the impetus to do so is at the instance of a minority of the members (albeit a substantial minority, in this case about 30%) who think the terms of the agreement are unfair or no longer serve their interests. The Act requires that the articles be changed by a special resolution, which means 75 percent of the votes at a general meeting with a quorum of 25 percent of total membership. A court ordinarily should pause before overriding those prescriptions, unless there are illegitimate or unfair impediments rendering the achievement of a special resolution impracticable; and even then it should intervene only to the extent necessary to remove the impediment.'²¹

I can see no reason why these words should not apply to the amendment of rules within a body corporate.

[37] Ms Nicholson submitted that the special rules are not required to treat all members of the body corporate equally. What was intended, so she argued, was that the rules apply to every member of the body corporate equally as opposed to them

²⁰ *Wilds Home Owners Association and others v Van Eeden and Others* [2011] ZAGPPHC 101.

²¹ *Ibid* para 205.

applying only to some members and not to others. I agree with that but it appears to me that, on a practical level, not every rule can apply to all members. For example, there may be a rule in place that deals with the management of gardens by those owners who have ground floor sections. Those rules cannot apply to owners who may reside on the second and higher floors. The rules may thus treat ground floor owners differently.

[38] In the circumstances, I do not find the provisions of the special rules to offend against the provisions of section 10(3) of the STSM Act.

[39] The final point taken by the appellant is that the special rules are unconstitutional, as they are inconsistent with section 6 of the Equality Act and are inconsistent with the equality provisions of section 9(4) of the Constitution.

[40] The Equality Act was, *inter alia*, brought into existence in an attempt to construct a society that cared for the wellbeing and dignity of its members. Our country's past had been characterised by a lack of care and compassion for our fellow citizens. In an attempt to right this wrong, the Equality Act prohibits unfair discrimination, hate speech and harassment on a number of prohibited grounds, including religion, conscience, belief and culture. Its objectives are thus to introduce measures to address the injustices that result from social inequalities by combating unfair discrimination.

[41] The Bill of Rights in the Constitution also prohibits unfair discrimination on the abovementioned and other grounds. In addition, the Bill of Rights also contains additional important rights, such as the right to freedom of association and the right to freedom of expression.

[42] All laws, including the Equality Act, must be interpreted in accordance with the spirit, purport and objectives of the Bill of Rights. To an extent, the bringing to life of the Equality Act was aimed at infusing life itself into

section 9 of the Constitution as required by section 9(4) of the Constitution.

[43] Section 6 of the Equality Act has been identified by the appellant as the relevant section relied upon by him. It reads as follows:

‘Neither the State nor any person may unfairly discriminate against any person.’

[44] The Equality Act defines discrimination as being:

‘Any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.’

[45] The prohibited grounds are:

- ‘(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
- (b) any other ground where discrimination based on that other ground-
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).’

[46] I cannot discern any act of discrimination in the special rules that would bring them within the purview of the Equality Act. Nothing commends itself to me within the prohibited grounds identified in sub-section (a) quoted above as being of application. And while sub-section (b) appears to be a catch-all sub-section that would permit grounds not identified in sub-section (a) to nonetheless still afford relief to a complainant if established, I cannot conceive of the appellant’s complaint falling within that sub-section either. Mixed-use schemes are permissible in law and it is not unlawful to adjust the voting strengths of owners within

such a mixed-use scheme. There is no unlawful conduct and there can therefore be no discrimination.

[47] Section 9 of the Constitution reads as follows:

- ‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

[48] Given the fact that the second respondent is a mixed-use scheme, any differentiation in the rights of different classes of owners within the scheme is both to be expected and is not unfair in terms of the Equality Act or the Constitution. I can likewise find no basis for concluding that any infringement of the appellant’s personal rights has occurred nor that any of his property rights have been infringed.²²

[49] In the circumstances, I grant the following order:

1. The appeal is refused with costs.

²² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC) para 46.

MOSSOP J

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Date of Hearing : 31 October 2022

Date of Judgment : 15 December 2022