IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)

Case No.: 1328/2021

In the matter between:

MARC SPALDING Applicant

and

MOQUINI HOMEOWNERS' ASSOCIATION Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 20 APRIL 2023

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an opposed application in which the applicant seeks the following relief:

1. Declaring that the current constitution of the Respondent, marked 'Version 3' is void, *ab initio*, and, as such, of no force and/or effect.

2. Declaring the Respondent's constitution approved by the Mossel Bay Municipality ["*the Municipality*"] and the Developer, during the subdivision

application in respect of MOQUINI COASTAL ESTATE [*"the Mouqini Estate"*] [*"Version 0"*], to be the only valid constitution of the Respondent.

3. Terminating the appointments of all non-resident members of the Respondent, currently serving as Executive Committee [*"Excom"*] Members of the Respondent with immediate effect;

4. Directing that the Developer, Moquini Coastal Estate (Pty) Ltd [*"the Developer"*], as duly represented by Henk de Bruyn, within 30 (thirty) days of this order, appoint resident members of the Respondent to serve as Executive Committee Members of the Respondent as provided for in the respondent's constitution Version 0.

[2] These proceedings were launched on 22 October 2021, some months after the applicant launched proceedings at the Community Schemes Ombud Service (*"CSOS"*) on 8 November 2020, the details of which are discussed later. The CSOS proceedings were still pending when these proceedings were launched.

[3] On 22 February 2022, a few months after launching these proceedings, the applicant launched urgent proceedings seeking to interdict the Executive Committee (*"Excom"*) of the respondent from convening its Annual General Meeting (*"AGM"*), which was scheduled for 4 March 2022, and to interdict the Excom from exercising any of its constitutional powers, pending the finalization of these proceedings. The urgent proceedings were referred to mediation after the applicant's counsel indicated in open court that the applicant no longer wished to pursue the interdictory relief relating to the AGM. The issue remaining with regards to the interdict proceedings relates to costs.

B. THE RELEVANT BACKGROUND

[4] The applicant has been a member of the respondent since October 2002, when he bought property at the Mouqini Estate. He has also served as part of the Excom for numerous periods, the last of which ended on 6 March 2020.

[5] The respondent is described in both versions of its constitution that are the subject of these proceedings as "the Moquini Homeowners Association, established for the Development[1] at the instance of the Mossel Bay Municipality in terms of section 29(1) of the Land Use Planning Ordinance 15/1985 when approving of the subdivision of the Remainder of Farm 284 Mossel Bay (*"Farm 284"*), in terms of Section 25(1) read with Section 42(1) of the said Ordinance".

[6] Indeed, on 12 December 1997 the Provincial Department of Housing, Local Government and Planning (*"the Department"*) approved an application for the rezoning and subdivision of Farm 284 in terms of section 16, read with section 42(1), of the (now repealed) Land Use Planning Ordinance, 15 of 1985 (*"LUPO"*). One of the conditions imposed for the approval was that *"a Home Owner's Association be formed which is compulsory, the constitution of which will ensure and must include the environmental/architectural standards to be maintained"*.

[7] On 26 August 1999 the inaugural AGM of the respondent was held. There, some constitutional amendments were adopted by the respondent. The parties differ as to the status of the document that was amended at the inaugural AGM.

C. THE PARTIES' ARGUMENTS

[8] According to the applicant, the document amended at the inaugural AGM was a constitution - Version 0 - whilst according to the respondent it was a draft which had not yet been adopted, and which needed amending, and was so amended.

[9] The significance of this difference between the parties is firstly that clause 7a of Version 0 provided that *"Excom shall consist of five (5) persons who shall be resident members or the spouses of resident members. Any Excom member shall be eligible for re-election"*. The applicant states that, except for when he was part of the

[1] The 'Development' is defined as *"the subdivision established or to be established on the Remainder of Farm 284 Mossel Bay, by virtue of a General Plan in one or more phases"*.

Excom between 2019 and 2020, the respondent has been acting in contravention of this provision since 1999 in that the Excom has consistently consisted of mostly non-resident members.

[10] Another provision on which the applicant places great reliance is paragraph 14 of Version 0 which provides that any amendment or addition to the constitution must be confirmed by the Municipality and the Developer in writing. The applicant states that, contrary to paragraph 14 of Version 0 the respondent has adopted numerous constitutional amendments from 1999 to 2021 without the approval of the Municipality or the Developer. In this regard it is common cause that since the inaugural meeting there have been approximately 3 adoptions of the constitution by AGM's of the respondent on 17 May 2002, 5 March 2010 and 5 March 2021. Some constitutional amendments were again made recently, in March 2023.

[11] It is also common cause that on 3 March 2021 the Municipality approved an amended version of the respondent’s constitution, referred to in these proceedings as Version 3. According to the applicant, this version was not approved by the members of the respondent at an AGM before submission to the Municipality. Neither was it approved by the Developer in terms of paragraph 14 of Version 0, which is common cause.

[12] The result, according to the applicant, is that there remains only one valid constitution of the respondent, namely Version 0. And since the appointment of non-resident members on the Excom has been contrary to section 7a thereof from 1999, all such current appointments must be terminated with immediate effect, and the Developer must be directed to appoint resident members to serve on the Excom within 30 days.

[13] The respondent’s case is that Version 0 was a draft of the respondent’s constitution which had no status other than for use as an attachment to the brochure

used for marketing the Moquini Estate. At the inaugural AGM, the draft was adopted by means of a list of amendments which were adopted there. One notable amendment which appears from the minutes of the inaugural AGM was the deletion of the reference to ‘resident’ members in section 7a of Version 0. The result is that, since the inaugural AGM, it was no longer a requirement for membership of the Excom that individuals be resident members of the respondent. The applicant disputes the respondent’s version that version 0 was a draft, and argues that if that is the case, everything done by the respondent since its inception has been unlawful and invalid and *ultra vires*.

[14] The respondent further relies on the subsequent constitutional amendments which were adopted at different AGM’s, the last of which was on 3 March 2023. The current version of the constitution relied upon by the respondent is Version 3, which was approved by the Municipality on 3 March 2021, and was adopted by the respondent’s members at an AGM held on 5 March 2010, and again on 5 March 2021, with few amendments. The respondent further argues that, to the extent that there may have been non-compliances with the requirements complained about by the applicant, the respondent has continued to rely on those amendments in good faith. In any event, the respondent states that the applicant has not pointed to any prejudice suffered by him as a result of the non-compliances he relies upon.

[15] As for the requirement that the Developer should approve any constitutional amendments, the respondent refers to the definition of “the Developer” contained in all the versions of the respondent’s constitution since 1999, most notably Versions 0 and Version 3. They define *“the Developer”* as *“Moquini Coastal Estate (Pty)Ltd <u>or its successors in title</u> to the Remainder of Farm 284 Mossel Bay”*. In this regard, the respondent emphasizes that it is the successor in title of the Developer since 9 July 2004 when the latter transferred the Moquini Estate to it. Since then, the Moquini Estate has been held in common in the name of the respondent. In any event, the respondent states that the requirement of the Developer's approval for constitutional

amendments was deleted at the AGM of 5 March 2010, of which the applicant was a part and member of Excom.

[16] Although the applicant admits that, notionally, the respondent is the successor in title of the Developer, he disputes the lawfulness of any constitutional amendments subsequent to Version 0. He also points to correspondence sent by the respondent in July 2020 to the Developer, in which the respondent's deponent was of the view that the Developer's approval was still required at that point for purposes of amending the respondent's constitution.

[17] The respondent has, in addition to the above defences, raised a number of preliminary points. First, that the Municipality was exercising administrative action as contemplated in the Promotion of Administrative Justice Act 3 of 2000 when it approved Version 3 in terms of s29(3)(g) of LUPO, and that accordingly a review application ought to have been brought for the setting aside of the Municipality's approval of Version 3, and the Municipality ought to have been joined as a party. Second, that all Exco members impacted by the relief sought in paragraph 3 of the notice of motion have a direct and substantial interest in the outcome of the proceedings and should have been joined and cited by name. Third, the Developer, which is the subject of the mandatory interdict sought in prayer 4, should have been joined as a party to the proceedings. Fourth, that the applicant has failed to exhaust the proceedings already instituted before the CSOS. Because of the approach I adopt in this judgment, I deal with the last of these issues.

D. THE CSOS PROCEEDINGS

[18] As I have already indicated, it is common cause that the applicant has initiated proceedings before the CSOS in August 2020 in which he seeks the following relief:

a. That the constitutional amendment removing "resident" as a requirement for an Excom member in 1999 be declared unconstitutional, due to the lack of evidence

that quorum was present and/or that the amended constitution was approved by the Developer and the Mossel Bay Municipality.

b. That all non-resident members of the Excom resign from Excom and be replaced by elected resident members.

c. That the inaugural amendments to the Constitution made on 26 August 1999 be declared null and void for lack of a quorum at the meeting and the absence of confirmation of the amendments by the Developer and the Municipality as is required by section 14 of the Constitution.

d. That all subsequent amendments to the Constitution be declared null and void for the absence of confirmation by the Developer and the Municipality as is required by section 14 of the Constitution; and

e. That the non-resident Excom members resign and new Excom be elected from resident members which is in line with the original Constitution clause 7(a).

[19] It is immediately apparent that, save for the consequential relief sought in prayer 4 of the notice of motion in these proceedings - that the Developer should select new Exco members from the ranks of resident members - the remedy sought in the CSOS proceedings is similar, if not the same as the relief claimed in these proceedings. It is also common cause that the relief sought in the CSOS is based on the same facts and issues as those which form the basis of these proceedings.

[20] In response to this observation the applicant's counsel argued before me that the dispute that is pending before the CSOS relates to internal administration issues of the respondent, which is the jurisdiction of the CSOS, whereas these proceedings turn on the status of respondent. I note that this argument is in contrast to averments made in the applicant's papers (including in the urgent interdict) and heads of argument where it is stated that *"the outstanding CSOS matters and in [this] application turn on the status of the respondent's Excom and the legality and validity of the respondent's constitution"*. Whatever these statements mean, the provisions which govern CSOS proceedings require examination.

[21] The CSOS proceedings are instituted in terms of section 38 of the Community Schemes Ombud Service Act 9 of 2011 (*"the CSOS Act"*). The dispute referred by the applicant was accepted by the ombud, an indication that the dispute falls within the jurisdiction of the CSOS. In terms section 42(a), an ombud must reject an application by written notice to the applicant if the relief sought is not within the jurisdiction of the CSOS.

[22] On 27 October 2020 conciliation proceedings were held in terms of section 47, and were unsuccessful, and a certificate of non-conciliation was issued on 11 November 2020. Thereafter, the dispute was referred to adjudication in terms of section 48. It is common cause that the CSOS proceedings have not been withdrawn and are still under consideration by the office of the CSOS.

[23] Section 39 of the CSOS Act sets out the headings of relief that may be sought in that forum. They include 'scheme governance issues' and relief relating to meetings of associations. As regards scheme governance issues, a referral may seek the following orders in terms of section 39(3):

> *"(a) an order requiring the association to record a new scheme governance provision consistent with a provision approved by the association;*
>
> *(b) an order requiring the association to approve and record a new scheme governance provision;*
>
> *(c) an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision; or*
>
> *(d) an order declaring that a scheme governance provision, having regard to the interests 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 provision;*
> *(ii) if appropriate, to restore an earlier provision;*

(iii) to amend the provision; or
(iv) to substitute a new provision." (my emphasis)

[24] In terms of section 1, 'scheme governance documentation' includes a constitution, and 'scheme governance provision' has a corresponding meaning. By parity of reasoning, 'scheme governance issues', which are referred to in section 39(3) above must include issues relating to the constitution of an association. It is my considered view that the relief sought in paragraphs 1 and 2 of the notice of motion in the current proceedings amounts to what is described in paragraphs 39(3)(a) and (c) above, in terms of which the applicant seeks orders declaring provisions of a constitution invalid, and replacement thereof with other constitutional provisions, respectively.

[25] As regards relief available in respect of meetings, section 39(4) provides that a referral may seek one or more of the following orders:

"(a) an order requiring the association to call a general meeting of its members to deal with specified business;

(b) an order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened;

(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;…" (my emphasis)

[26] The applicant's complaints regarding the appointment of non-resident members into the Excom and decisions taken by them fall within the purview of these provisions. In terms of the case of the applicant here, the relief sought in paragraphs 3 and 4 of the notice of motion constitutes consequential relief of the declaratory orders sought in paragraphs 1 and 2. Whether a case is made out for any of the relief sought in any of the paragraphs of the notice of motion is a matter for another occasion.

[27] What is important for present purposes is that, upon consideration of the relief sought in these proceedings, including the substance and nature of the complaints raised by the applicant, it is clear that these proceedings concern the same issues raised before the CSOS. Here, as in the CSOS, the applicant seeks to declare provisions of a constitution (Version 3) void for failure to follow certain constitutional requirements (contained in Version 0) concerning the make-up of the Excom as well as the manner in which the impugned constitution came about.

[28] The question is whether this Court should, or can, refuse to grant the relief sought by the applicant on that basis. That question has been answered in the affirmative in this Division in the matter of *Heathrow Property Holdings No 3 CC and Others v Manhattan Place Body Corporate and Others* [2]. I am in agreement with the considerations mentioned in *Coral Island Body Corporate v Hoge*[3] and *Heathrow Property*[4] that the policy considerations which informed the introduction of the CSOS Act lead to the conclusion that the CSOS is intended to be the primary dispute resolution forum in matters which resort under its jurisdiction. It was established by statute for the expeditious, informal and cost-effective resolution of particular disputes which involve the application of specialized or technical knowledge or experience. And this Court should be reluctant to permit parties to bypass the mechanisms created by that statute.

[29] A case in point applies to the circumstances of this case, where the applicant has approached this Court for far-reaching relief, the effect of which is to vitiate decisions (constitutional amendments) and institutions (Excom committees) which have been in operation since approximately 1999. In terms of the CSOS Act, such relief must be instituted within 60 days after the impugned decision was made. Yet the applicant approached this Court in October 2021, with no explanation for why he did not bring it sooner, or why he decided to bring it when he did. This creates a strong

[2] *Heathrow Property Holdings No 3 CC and Others v Manhattan Place Body Corporate and Others* 2022 (1) SA 211 (WCC)
[3] *Coral Island Body Corporate v Hoge* 2019 (5) SA 158 (WCC) para 8 and 9.
[4] At paras 56 – 60.

impression that the applicant seeks to bypass the provisions of the CSOS Act. The prejudice to the respondents and its members by this delay is evident.

[30] The applicant has furthermore not furnished any explanation for why he cannot await the outcome of the CSOS. As I have already indicated, the relief sought there is the same, in form and in substance, as the relief sought here. And to the extent that the applicant persists with his view that the relief sought here relates to status whereas the relief sought in the CSOS relates to internal workings of the respondent, that argument is not supported by the content of CSOS Act provisions I have already discussed above, which make no such distinction. I find no merit in this argument. Both *fora* have the power to declare provisions of an association's constitution invalid, remove them and replace them with the new contended provisions. And both *fora* have the power to declare resolutions taken at a meeting contrary to the provisions of a constitution to be void or invalid. And that, in essence, is what the applicant seeks in both *fora*.

[31] In the circumstances of this case, in which the primary relief sought is in the form of declaratory orders, the fact of the pending proceedings at the CSOS is a matter that I consider relevant in the exercise of this Court's discretion regarding whether or not to grant the relief.[5]

[32] There is also to consider, the administration of justice. In terms of section 56 of the CSOS Act a decision of the CSOS is enforceable as if it were a judgment of a court, and, in terms of section 57, is subject to statutory appeal. It is undesirable to have two judgments from different *fora* dealing with the same issue. There is always the possibility that those judgments may have contradictory pronouncements.

[33] For all the reasons discussed in this judgment, I am of the view that the applicant's application should be struck off the roll, on the basis of the pending CSOS

[5] Section 21(1)(c) of the Superior Courts Act 10 of 2013; *Proxi Smart Services (Pty) Ltd v Law Society of South Africa and Others* 2018 (5) SA 644 (GP) para 69.

proceedings. Should either party wish to appeal the outcome of those proceedings, they have a statutory right to approach a court at that stage.

E. COSTS

[34] As regards costs, there is already precedent[6] for this Court to use its discretion in respect of costs to discourage inappropriate resort to it in relation to a case that should more appropriately have been taken to the CSOS. In the case of *Heathrow Property* the Court granted punitive costs. Importantly in this case, after the applicant approached this Court for relief in this application and in the urgent application, the respondent addressed several letters imploring the applicant to await the outcome of the CSOS proceedings, to no avail. There remains no explanation for why the applicant has chosen to litigate in two *fora* simultaneously. The applicant has done so recklessly. I am of the view that he should bear the costs of these proceedings on an attorney and client scale.

[35] As I have already indicated, the costs of the urgent proceedings need to be determined. This was in terms of a court order taken by the parties on 2 May 2022 in terms of which costs could be determined by the Court if mediation between the parties failed. I have already indicated that the applicant's counsel indicated in open court at the hearing of the urgent interdict that the applicant no longer wished to pursue the primary urgent relief it sought. This was after the respondent was forced to oppose the proceedings with very little notice[7]. And even though the mediation attempt failed, the applicant abandoned the urgent relief it sought and did not persist with it. The urgent applicant was clearly an abortive exercise. It would not be fair for the respondent to be placed out of pocket for those abortive proceedings.

F. ORDER

[36] In the circumstances, the following relief is granted:

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[6] See *Coral Island* and *Heathrow Property.*

[7] The papers were delivered on or about 22 February 2022, and the respondent was required to deliver an answering affidavit by 25 February 2022.

a. The applicant's application is struck off the roll, with costs to be paid on an attorney and client scale.

b. The applicant is to pay the costs of the urgent proceedings launched on 22 February 2022, on an attorney and client scale.

N MANGCU-LOCKWOOD
Judge of the High Court