IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Coram : Nuku et Nziweni JJ

Case No: A163/2022

In the matter between:

NUWEKLOOF PRIVATE GAME RESERVE FARM OWNERS' ASSOCIATION **Appellant**

and

WILLEM TOBIAS HANEKOM N.O. **First Respondent**

LOURENS HERMANUS TALJAARD N.O. **Second Respondent**

THE COMMUNITY SCHEME OMBUD SERVICE **Third Respondent**

ZAMA MATAYI N.O. **Fourth Respondent**

Date of Hearing: **18 November 2022**
Date of Judgment: **30 January 2023 (Delivered electronically)**

JUDGMENT

NUKU J

Introduction

[1] The applicant, Nuwekloof Private Game Reserve Farm Owners' Association, brings this appeal in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 (the Act) against an order made by the fourth respondent who was an adjudicator appointed by the third respondent in terms of the Act.

[2] The applicant is a voluntary association which, in terms of its constitution, is a corporate body with legal personality. It is responsible for the management of Nuwekloof Private Game Reserve (the Game Reserve) which comprises six properties owned by various owners but which have been leased to the applicant and which make up the Game Reserve. The Game Reserve is a community scheme as defined in the Act.

[3] The first and second respondents are the trustees for the time being of the WTH Trust (the Trust), established as such and registered with the Master of the High Court. The Trust owns one of the properties that makes up the Game Reserve on the basis of the lease referred to above.

[4] The third respondent is the Community Schemes Ombud Service, a juristic person established in terms of section 3 of the Act and provides a dispute resolution service in respect of community schemes.

[5] The fourth respondent, Zama Matayi, is cited in these proceedings in his official capacity as an adjudicator appointed in terms of section 21 (2) (b) of the Act and it is his order that is the subject of this appeal.

[6] Only the Trust opposed the appeal with the third and the fourth respondents not participating in these proceedings.

Factual Background

[7] The facts relevant to the determination of this appeal are largely common cause. The Trust is one of the founding members of the applicant as its trustees were signatories to the constitution adopted during 2016 in terms of which the applicant was established. The constitution deals extensively with the governance issues of the applicant including the acquisition and loss of membership in the applicant as well as rights, responsibilities and privileges of the members.

[8] Of some relevance to this appeal are the provisions of clause 11 of the constitution which deal with its amendment and read as follows

> 'This constitution, or any part thereof, shall not be repealed or amended, and no new rules shall be made, save by a special resolution adopted at an annual general meeting of the members and passed by a majority of not less than 75% (seventy-five percent) of the votes cast. Any amendment of the constitution shall also require the written approval of the relevant Local Authority for the area (if so required).'

[9] During 2017, the members of the applicant passed a resolution for the amendment of the constitution. This amendment brought about the provisions of clause 5.13 which are central to this appeal and which read:

‘5.13 When a member is in default of any payment obligation (general and/or special levies and/or obligatory loans), or any other obligation as set out herein, to the Association the defaulting Member shall (unless otherwise determined by the Trustees) not be entitled to any of the privileges of Membership including (but not limited to):

5.13.1 his right to access and/or use of the Reserve and/or any of the common property and/or any Services;

5.13.2 his right to vote in regards to any aspect;

until he shall have paid the full amount due, together with interest and costs and/or any other amount which may be due and payable by him and/or have rectified any other breach in terms hereof, to the Association.’

[10] It is common cause that the resolution for the amendment of the constitution was passed in compliance with the provisions of clause 11 of the constitution quoted above in that five members of the applicant voted in favour of the amendment with one member, being the Trust, voting against the amendment. Thus the requisite vote of not less than seventy-five percent of votes was attained.

[11] Subsequent to the amendment of the constitution, the Trust defaulted in its payment obligations. This resulted in the applicant instituting proceedings for the recovery of the monies owed by the applicant, and putting into effect the provisions of clause 5.13 by denying the Trust access to Game Reserve.

[12] Unhappy with the decision of the applicant to deny the Trust access to the Game Reserve, the Trust applied in terms of section 38 of the Act for an order declaring that the provisions of clause 5.13 of the constitution are invalid. The Trust also sought an order requiring the applicant to approve and record a new governance provision that would remove the provisions of clause 5.13 of the constitution.

[13] The application by the Trust succeeded and the fourth respondent made an order as sought by the Trust. In granting the relief sought by the Trust, the fourth respondent appreciated that there is a difference between the challenge to the governing provisions, that is, clause 5.13 and the decision taken by the applicant to give effect to the provisions of clause 5.13. This appreciation by the fourth respondent was critical because he was only competent, in terms of the Act, to deal with the challenge to the validity of the governance provision, in this case clause 5.13, and not the decision giving effect to the governance provision, a matter that resorts under the ordinary jurisdiction of the courts.

[14] The other issue of importance in respect of the difference between the challenge to the governance provision and the challenge to the decision giving effect to the governing provision, is that the legal principles applicable in the case of the former do not apply in the case of the latter and vice-versa.

[15] The reasons by the fourth respondent for granting the relief sought by the Trust appear from paragraph 61 of his order where he starts off by stating that:

> 'the Respondent (the appellant in these proceedings) cannot use denial of access to property as a means of collection. There are lawful means which the Respondent can use to collect arrear levies….'

[16] From thereon, the fourth respondent referred to cases dealing with spoliatory relief and then concludes that:

> '… Much as the parties' freedom of contract must be respected and honoured, the terms of the contract should be in line with the laws of the Republic and should be in harmony with public policy. To agree to be locked out of your own property as a collection means cannot be in harmony with public policy and laws of the Republic when in fact there are lawful means of collecting arrear levies or loans….'

[17] Dissatisfied with the order made by the fourth respondent, the appellant appeals to this court in terms of section 57 of the Act on the basis that the fourth respondent made an error of law when he granted the relief sought by the applicant.

[18] The Trust opposes the appeal on the basis that:

18.1 the order made by the fourth respondent was within his competence and is the remedy contemplated in section 39 (3) (c) read with section 54 (1) (a) of the Act;

18.2 the order was not based on a wrong appreciation of the facts;

18.3 the order was not based on wrong principles of law;

18.4 the fourth respondent reached a decision which could reasonably have been reached by another adjudicator properly directing himself to all the relevant facts and legal principles; and

18.5 the fourth respondent exercised his powers and discretion honestly and properly in making the order.

Issues

[19] The narrow issue in this appeal is whether the fourth respondent committed an error of law as contemplated in section 57 of the Act when he made an order declaring the provisions of clause 5.13 of the constitution to be invalid as well as the ancillary relief.

The applicable legal framework

[20] The starting point in considering this appeal is section 57 (1) of the Act which reads:

> 'An applicant, the association or any affected person who is dissatisfied with an adjudicator's order, may appeal to the High Court, but only on a question of law.'

[21] From the reading of section 57 of the Act it is clear that the appeal under the Act concerns only errors of law and an error of law occurs where an issue is decided using an incorrect legal standard. As the Constitutional Court stated in ***Villa Crop***[1]*:*

[1] Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH [2022] ZACC 42 at para [65]

> 'the adoption of an incorrect legal standard to decide an application is to make an error of law. It is not the misapplication of the law because the decision does not proceed from a correct legal premise to an incorrect conclusion as a result of a failure to properly apply the law to the relevant facts.'

[22] It is thus necessary to set out the correct legal standard or principles applicable to the determination of the validity of the provisions of 5.13 of the constitution. As already stated, the applicant is a voluntary association which was established in terms of its constitution. There is ample authority for the proposition that constitutions of voluntary associations constitute contracts between members of the voluntary associations.[2]

[23] A contractual provision will not be invalid for the mere fact that it interferes, restricts or limits the right of an owner of immovable property to the full enjoyment of his or her property.[3] Courts will only conclude that contractual provisions are contrary to public policy only when that is their clear effect.[4]

Did the fourth respondent commit an error of law

[24] Whether the fourth respondent committed an error of law is a matter that falls to be determined with reference to the reasons he gave in support of the order he made. As already stated, the reading of his reasons suggest that he appreciated the

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[2] Mount Edgecombe Country Club Estate Management Association II NPC v Singh and Others (323/2018) [2019] ZASCA 30 at para [19] and Natal Rugby Union v Goud 1999 (1) SA 432 (SCA) at 440F-G

[3] Willow Waters Homeowners Association (Pty) Ltd v Koka NO 2015 (5) SA 304 (SCA); Van Rooyen V Hallandale Homeowners Association [2014] ZAFSHC 226 and Vanilla Street Homeowners Association v Ismail and Another [2014] ZAWHC 25

[4] Juglal NO v Shoprite Checkers t/a OK Franchise Division 2004 (5) SA 248 at para [12]

difference between a challenge to the governance provision and the challenge to the conduct giving effect to the governance provision.

[25] Despite his appreciation of the difference, on close scrutiny his reasoning reveals that he did not apply the legal principles applicable to the determination of the validity of a contractual provision. That this is so also appears from the submissions made on behalf of the Trust when it was submitted that the fourth respondent based his order on the well-established principle stated by the Constitutional Court in ***Ngqukumba***[5] that a person cannot deprive another person of possession of his property against his consent.

[26] The Constitutional Court in ***Ngqukumba*** dealt not with the determination of the validity of contractual provisions but with spoliation. In applying the legal principles applicable to spoliation to determine the validity of a contractual provision, the fourth respondent committed an error of law. The fourth respondent having committed an error of law, it now falls on this court to assess the validity of the provisions of clause 5.13 on the application of correct legal principles.

Are the provisions of clause 5.13 contrary to public policy?

[27] The appellant made two submissions in this regard. Firstly, it was submitted that to the extent that the provisions of clause 5.13 may result in a degree of self-help, its implementation would not be contrary to public policy. In the alternative, it was submitted that the implementation of the provisions of clause 5.13 in a manner that is contrary to public policy, would not render the clause itself contrary to public policy.

[5] Ngqukumba v Minister of Safety and Security and Others 2014 (5) SA 112 (CC)

[28] It is not necessary to consider the argument regarding the conduct of the applicant in implementing the provisions of clause 5.13 lest this court repeat the error committed by the fourth respondent. The real issue that has to be determined is whether the provisions of clause 5.13 which are quite capable can result to a degree of self-help are contrary to public policy.

[29] In support of the appellant's alternative argument, this court was referred to ***Juglal***[6] where the court stated the following:

> '[12] Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect … it follows that the tendency of a proposed transaction towards such a conflict … can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor… If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract will stand. Much of the appellant's reliance before us on considerations of public policy suffered from a failure to make the distinction between the contract and its implementation and the unjustified assumption that, because its terms were open to oppressive abuse by the creditor, they must, as a necessary consequence, be against public policy.' (reference to authorities omitted)

[30] Applying the legal principles referred to above requires this court to examine whether there is a manner in which the provisions of clause 5.13 can be implemented in a manner that is not unconscionable, illegal or immoral.

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[6] At para [12]

[31] Whilst the provisions of clause 5.13 are capable of implementation in a manner that is unconscionable, illegal or immoral, the tenor of the provisions themselves are neutral in that they do not exclude, as an example, the appellant from approaching the courts in order to give effect thereto. There is thus merit in the submissions made on behalf of the appellant that the provisions of clause 5.13 are not contrary to public policy.

[32] The arguments presented on behalf of the Trust proceeded on the wrong premises referred to in ***Juglal***, that is a failure to make the distinction between the contract and its implementation and the unjustified assumption that, because its terms were open to oppressive abuse by the creditor, they must, as a necessary consequence, be against public policy.

[33] It follows from the above that the order made by the fourth respondent cannot stand.

[34] The issue of costs does not arise in respect of the proceedings before the fourth respondent. In respect of the appeal, however, both the appellant and the Trust have sought costs in the event of success. The appellant has been successful in the appeal and no cogent reasons have been advanced to justify why it should not be awarded the costs.

[35] In the result, the following order is made:

35.1 The appeal is upheld.

35.2 The order made by the fourth respondent dated 11 August 2022 is hereby set aside in its entirety and is replaced with the following order:

> 'The application by the trustees for the time being of the WTH Trust is dismissed.'

35.3 The first and second respondents (the Trust) are ordered to pay the costs of the appeal.

LG NUKU
JUDGE OF THE HIGH COURT

I AGREE:

CN NZIWENI
JUDGE OF THE HIGH COURT

30 January 2023 : NUKU, J [NZIWENI, J – Agrees] **Case No. A163/2022**

In the result, the following order is made:

1. The appeal is upheld.
2. The order made by the fourth respondent dated 11 August 2022 is hereby set aside in its entirety and is replaced with the following order:

   'the application by the trustees for the time being of the WTH Trust is dismissed.'

3. The first and second respondents (the Trust) are ordered to pay the costs of the appeal.

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