REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: 45733/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

SIGNATURE :

DATE : 25/10/2021

In the matter between:

Kibo Property Services (Pty) Ltd	First Applicant
Stefanus Andrias Louw	Second Applicant
Paulus Jacobus Burger	Third Applicant
Shashikant Gangaram Bhaga	Fourth Applicant
Solomon Pienaar Zietsman	Fifth Applicant

and

The Purported Board of Directors Amberfield Manor Hoa NPC	First Respondent
The Community Schemes Ombud Service	Second Respondent
Advocate MA Mavodze	Third Respondent
J.W. Swart	Fourth Respondent
SC Du Preez	Fifth Respondent
JV Wiesner	Sixth Respondent

Hemendra Bhugwandass Seventh Respondent

Amberfield Manor HOA NPC Eight Respondent

Summary: Interim interdict pending the final adjudication of the pending appeal. Section 57 of Community Schemes Ombud Service (CSOS) (Act No 9 of 2011) applies - Term of the Respondents expired as per The Memorandum of Incorporation (MOI) thus they are not directors - Injury is patent.

JUDGMENT

Maumela J.

1. This case came before this court in the Urgent Roll. The Applicant seeks an order in the following terms:
   1.1. A relief to be granted pending the final adjudication of the First Applicant's appeal in terms of section 57 of the Community Schemes Ombud Service Act: (Act No: 9 of 2011, (the Act):
      1.1.1. A stay of operation in terms of section 57(3) of the Act of the order of Advocate M.A. Mavodze, (acting as adjudicator for the Second Respondent), handed down 6 July 2021 and varied on 23 August 2021;
      1.1.2. The Fourth to Seventh Respondents are interdicted and restrained from acting or representing directors of Amberfield Manor Homeowners Association NPC and
      1.1.3. Costs on a scale as between attorney and client, to be paid by the Fourth to Seventh Respondents jointly and severally, the one paying the others to be absolved.

2. As indicated, the Applicants seek interim statutory relief in terms of a suspension of an order issued by the Community Schemes Ombud Service as well as an Interim Interdict, pending a statutory appeal. The Homeowners Association stands plagued by the Respondents who obtained an CSOS Order in default however, thereafter not notifying the Applicants of the dispute referral. The CSOS order serves as impetus to Respondents to misrepresent themselves as directors of the Homeowners Association.

BACKGROUND.

3. This matter came before court on the 28th of September 2021 as an urgent application. The First Applicant, *Kibo Property Services (Pty) Ltd,* (*Kibo*), is the managing agent of the Eighth Respondent; *Amberfield Homeowners Association NPC,* (*Amberfield*). Kibo was the Respondent in a dispute referral by the Fourth to Seventh Respondents, purportedly acting on behalf of the Eight Respondent, which is its Board of Directors; (the Applicant in the dispute referral).

4. The dispute was referred to the Second Respondent, the Community Schemes Ombud Service (CSOS), in terms of the Community Schemes Ombud Services Act: (Act No 9 of 2011) – (Community Schemes Ombud Services Act: - CSOS. The Third Respondent acted as adjudicator on behalf of CSOS in adjudicating the dispute, which was not properly served on Kibo. The Fourth to Seventh Respondents do not dispute the fact that an incorrect Email address was used in communicating with Kibo and that Kibo did not receive notice of the dispute referral.

5. The Third Respondent adjudicated the dispute on the papers and in essence, on an *ex parte* basis. Only the Fourth to Seventh Respondents delivered notices of intention to oppose. Hereinafter, they shall be referred to as the Respondents in the process of appealing the *ex parte* adjudication order issued by the Third Respondent in terms of Section 57 of the CSOS Act. The CSOS Act, does not provide for the rescission of an adjudication order.

6. Central to the issues before court is the effectiveness of the pending appeal and the restoration of the *status quo* to a semblance of proper corporate governance pending the appeal. Kibo therefore applies for a suspension of the adjudication order, pending the appeal. It, together with the remainder of the Applicants as members and/or directors of the Eight Respondent applies for an order to prohibit them from misrepresenting themselves as Directors of Amberfield.

RELIEF.

7. Briefly put, the First set of relief is a statutory relief in terms of section 57(3) of the CSOS Act. The Second set of relief is an interdictory relief of an interim nature, pending the final adjudication of the pending appeal.
8. Section 57 of the CSOS Act provides as follows:

Section 57:

(1). An Applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.

(2). An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.

(3). A person who appeals against an order may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.

9. The Applicant submits therefore that firstly, it ought to make out a case that there is an appeal pending; of which there is one and secondly that the suspension sought in terms of the statutory relief is aimed at securing the effectiveness of the appeal.[1] Hereunder are the requirements for an interim interdict:
   (i). a *prima facie* right;
   (ii). an injury or injury reasonably apprehended;
   (iii). balance of convenience; and lastly;
   (iv) that no suitable alternative legal remedy is available at the disposal of the Applicant.[2]

10. The Applicant submits that because it requests an interim relief and given the subject matter of the pending appeal, it is not necessary for this court to entertain the subject matter which will be fully ventilated during the appeal. It was pointed out at an early juncture that the Respondents had indicated that they would not oppose the relief sought, save where it regards the question of cost only.

11. The Applicant makes the point however that Counsel for the Respondents did not provide answers concerning the following:
    11.1. The Applicants' Counsel referred to annexure "FA24" of the founding affidavit; a letter of demand written by him to the Respondents on the 26th of August 2021;
    11.2. The letter of demand records *inter alia* that:
        11.2.1. The Respondents are not Directors of Amberfield because their term expired and they have not been elected pursuant to the CSOS order or at all;

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[1]. See Section 57(3) of the CSOS Act.
[2]. The laws concerning interim interdictory requirements are trite. See Innes JA in *Setlogelo v Setlogelo* 1914 AD 221 and the long line of cases which followed the aforesaid *locus classicus.*

11.2.2. An appeal in terms of section 55 of the CSOS Act will be lodged and an application will be made for a suspension of the CSOS order;
11.2.3. An undertaking is required that the Respondents will not act as Directors or execute the functions of Directors of the estate, failing which an application will be made to approach court on an urgent basis for an interdict.

11.3. The Applicant charges that the Respondents acted with haste in response to the letter of demand. It contends however that their actions were of cold comfort in that:
11.3.1. Annexure "FA25" to the founding affidavit reflects a letter dated the 27th of August 2021, written by the Respondents, (as purported directors), on the letterhead of Amberfield;
11.3.2. The Respondents refer to the CSOS order and intimate that they are directors;
11.3.3. The Respondents intimate that they will oppose any legal action;
11.3.4. The undertaking requested is labelled as presumptions;
11.3.5. The Respondents indicated that they would act in terms of the "legal judgment" of the Third Respondent.

11.4. The Applicant points out that the letter goes further, on the same day; 27th of August 2021**,** and after receiving the letter of demand, the Respondents wrote to Kibo in a document labelled "FA26", but forming part of Annexure "FA25" to the founding affidavit:
11.4.1. "FA26" is also on the letterhead of Amberfield, with the Respondents intimating that they are directors;
11.4.2. Kibo is placed on terms to comply with the adjudication order.

12. The Applicant states that the upshot is that the Respondents had ample opportunity to comply with the letter of demand and requests made therein, pending the appeal, but they did not do anything. It contends that the aforesaid actions by the Respondents alone warrant that the court finds urgency in this matter.

THE BOARD OF DIRECTORS QUESTION.

13. The Applicant contends that it is not necessary for this court to decide who the legitimate Board of Directors is because that falls within the subject matter of the appeal. It points out that its *locus standi* was not attacked by the Respondents. It makes the point that the Respondents' only basis in asserting that they are the Directors is by relying on extremely vague terms on the CSOS order against which an appeal has been brought.

14. The Applicant points out that in their Answering Affidavit, the Respondents never provided answers in their heads of argument or during oral argument pertaining to the following pertinent aspects:
    14.1. Where in the CSOS order is it stated that they are Directors;
    14.2. The Memorandum of Incorporation, (MOI)[3], of Amberfield only provides for a one year term for Directors in terms of clause 5.1.4, (founding affidavit annexure FA7 at CL010-20), as follows: "*Each elected Director of the Company will serve on the Board for a term of 12 (TWELVE) months. At all times at least 2 (TWO) Directors must serve on the Board that has previously served on the Board for a period of at least 12 (TWELVE) months for previous years."*
    14.3. That where the term expires without an AGM and election, and there is no board appointed as such, the MOI provides at clause 4.2 for members' rights to request a meeting and to hold a meeting in terms of clause 4.2.3;
    14.4. Such a meeting was requested by the members and happened, and the relevant Applicants and new board was appointed on 12 November 2020 (to which the Respondents failed to answer to);[4]
    14.5. That the Respondents made two concessions under oath in the answering affidavit that they are not directors.

15. The applicants argue that the Respondents failed to prove that they are directors, despite various bald and unsubstantiated allegations in their answering affidavit, heads of argument and oral argument. They state that the Respondents also failed to upset the appointment

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[3]. It is settled law that an MOI is a statutory instrument *inter se* the company and parties bound to it, as well as a contractual document. See Cilliers & Benade *Corporate Law* 79-80. See also ***Re Richmond Gate Property*** [1964] 3 All ER 936; and Davies *Gower's Principles of Modern Company Law* 115. See further ***De Viliers v Jacobsdal Saltworks*** 1959 (3) SA 873 (O) (the court relied *inter alios* on the English case of ***Hickman***). See also the Appellate Division (as it then was) case of ***Gohlke and Schneider v Westies Minerale (Edms) Bpk*** 1970 (2) SA 685 (A) 692.

[4]. Annexures FA8 to FA9 at CL011-1 to CL012-12 and FA11 at CL014-1 – CL014-8.

of the current directors which was done on the 12th of November 2020. They state that the CSOS order fails to provide any substantive reasoning why the meeting of the 12th of November 2020. They point out that this order was set aside, and the order and the prayer only granted because the Respondents requested it. It is on the basis that this court grants a suspension of the CSOS order. The Applicants are entitled to the consequential declaratory relief.

APPLICANTS' CASE.

Urgency.

16. Based on the nature of the statutory relief sought, (suspension pending an appeal) and the delay which would have been occasioned had the matter been heard in the normal course, this matter is found to be urgent in nature. The court finds that no substantial redress in due course can be attained. The essence of the statutory relief is aimed at negating the implementation of the adjudication order.

17. The Applicants argue that in terms of the interdictory relief, (which further lends credence to urgency), the Respondents; armed with the adjudication order which was granted on an *ex parte* basis, incorrectly presented themselves as directors of Amberfield:
    17.1. The Respondents wish to call an AGM despite the fact that only an appointed board has the capacity to do so.[5]
    17.2. The Respondents represent themselves as directors, whilst it is common cause that they have been removed from the records of Amberfield at the Companies and Intellectual Property Commission (CIPC). The Respondents took no steps in relation to the aforesaid).[6]

18. It is evident that the relief sought is aimed at restoring the *status quo,* pending the appeal aimed at securing the continuity of the HOA and the legitimate board and to avoid interference by the Respondents in the operations by the HOA. The Uniform Rules of Court in Rule 6(12), contain the regulatory framework for bringing an urgent application.

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[5]. FA par 8.5, CL—2-20.

[6]. FA par. 9.3 annexure FA21; FA par. 9.5 annexure FA22; FA par 9.6: sixth Respondent threatening to terminate management agreement with first Applicant. Of course, he cannot do so, he is not a director, and even if he was, it would have been breach of contract. FA par. 9.7, annexure FA23: fourth Respondent, Mr. Swart, issued an invoice just over R15 000.00 for work he purportedly undertook obo the HOA; which invoice he made out to the directors and not Amberfield HOA, and which he approved as ostensible director; which is highly irregular.

Rule 6(12) (b) thus sets out the test for when an application will be regarded by a court as urgent, and whether the Applicant can seek substantial redress in due course to protect his rights. The applicants argue that they have met these requirements for this matter to be regarded as urgent. They also make the point that there are no prospects of substantial redress in the event where the application is not granted.

19. The Applicants argue that despite a seemingly widespread view to the contrary, the test is not whether there is harm; no matter how serious, or of what duration. As it were, harm is not the requirement laid down by Rule 6(12) and should not be read into it. The aforesaid was confirmed by this court in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd*[7] (East Rock Trading).

20. In the case of *East Rock Trading*, the court succinctly set out the test for urgency as follows: *"[T]he procedure set out in rule 6(12) is not there for taking. An Applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress." It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an Applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case."*

21. The import of this is that the test for urgency begins and ends with whether the Applicant can obtain substantial redress in due course. It means that a matter will be urgent if the Applicant can demonstrate, with facts, that it requires immediate assistance from the court, and that if that application is not heard earlier than it would be in due course, any order that may later be granted will by then no longer be capable of providing the legal protection required.

22. By now, the criterion for determining urgency should be clear. An absolute requirement was echoed in the simplest of terms

[7]. [2011] ZAGPJHC 196.

in *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others [2014] ZAGPPHC 400: "It seems to me that when urgency is in issue the primary investigation should be to determine whether the Applicant will be afforded substantial redress at a hearing in due course. If the Applicant cannot establish prejudice in this sense, the application cannot be urgent."*

23. Once urgency is established, a court will often take further considerations into account when exercising its discretion to enrol an application on the urgent roll. In the main, the considerations are whether the Applicant unduly delayed before bringing the application; whether he/she unnecessarily truncated the time periods for the parties to take procedural steps; non-compliance with local practises and the Rules in general; whether they approached the court without notice to an affected party; and the effect on the administration of justice if the application is heard as and when requested. These may be called the secondary considerations.

24. In the case of *East Rock Trading*, where the secondary consideration in issue was an alleged undue delay, the Court held: *"In my view, the delay in instituting proceedings is not on its own a ground for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the Applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the Applicant would want the Court to believe… The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application."*

25. The Applicant submits that the same reasoning should apply to all secondary considerations. That a court must dispense justice when it is needed and that in an urgent application, it should always investigate whether an Applicant cannot be afforded substantial redress in due course and, upon affirmation of that, be loath to refuse to enrol and hear the application, even if a secondary consideration was not met.

26. *In casu,* the Applicants afforded a reasonable timeline to the Respondents. The application was issued on the 9th of September 2021, where opposition was to be provided by the 14th of September 2021; and an answering affidavit by the 21st of September 2021. The

matter was properly set down and enrolled on the 23rd of September 2021 for hearing on Tuesday the 28th of September 2021. In terms of urgency and absence of substantial redress in due course, this is one of those matters where the merits and urgency are intrinsically linked.

27. Having had regard to the aforesaid, the court finds that this matter is urgent. It finds that in the event where the application is not granted, no substantial redress shall be attainable in due course. Insofar as may be relevant, the Respondents referred the dispute to CSOS on the 27th of May 2021. The Third Respondent issued the adjudication order, (FA12), on the 6th of July 2021, with the variation thereto; (FA 13), issued on the 23rd of August 2021. It is common cause that the Applicants became aware of the adjudication order on the 5th of August 2021 when the Respondents started acting on it. From the 5th of August 2021 to the 23rd of August 2021, various sets of correspondence; (FA14 to FA19), were exchanged between Kibo, the Respondents and the Third Respondent, aimed at highlighting the deficiencies in the CSOS order.

28. The trigger for urgency was not when the term of the Respondents expired in February 2020, but when they started acting in terms of the default CSOS order. The CSOS order was varied, which was of little to no consequence on the 23rd of August 2021, at which stage it became evident that an appeal should be lodged. From the date of the response by the Respondents on the 27th of August 2021 to the 26th of August 2021, which is the date of letter of demand recorded above the Respondent were allowed sufficient time. It is trite law that where an Applicant first seeks compliance before lodging the application, it cannot be said that the Applicant has been dilatory in bringing the application or that urgency was self-created.[8] Given the date of the 27th of August 2021, the attitude of the Respondents to the letter of demand and the nature of the relief sought all prove that mediation is and remains a fallacy.

STATUTORY RELIEF.

29. The Applicants have proven that an appeal is pending and that much is common cause. In terms of the relief sought being aimed at securing the effectiveness of the appeal, the Applicants made their case out in paragraph 8 of the founding affidavit. The Respondents failed to answer to paragraph 8 and in fact conceded the relief

[8]. *Nelson Mandela Metropolitan Mun v Greyvenouw CC* 2004, 2 sa 81 (SE) at 94C-D. See also *Kumah v Minister Home Affairs* 2018 2 SA 510 GJ at 511D-E.

pending the appeal as set out below. The statutory relief can thus be granted.

INTERDICTORY RELIEF.

30. The Applicants deal in the founding affidavit with the interdictory relief sought at paragraph 9. The Respondents did answer to paragraph 9. At paragraph 41 of the answering affidavit, the Respondents baldly deny paragraph 9.1 of the founding affidavit:
    30.1. The Applicants argue that the Respondents could not have assumed the functions and responsibilities of directors because they, the Applicants prevented them from doing so;
    30.2. What is problematic for the Respondents is that the Applicants have shown, as set out above, that they assumed the functions as such and represented themselves as directors.

31. The Applicants point out that at paragraph 42 of the answering affidavit, the Respondents' attempt to deal with paragraph 9.2 of the founding affidavit:
    31.1. Paragraph 9.2 of the founding affidavit states that the CSOS order is interpreted by the Respondents as confirmation that they are directors, which is not the case. Upon a proper reading of the CSOS order, it becomes clear that such an interpretation is not correct and it is in fact opportunistic;
    31.2. The Respondents' answer to that is to agree to the content of paragraph 9.2 of the founding affidavit. In any event, before court, not once did the Respondents refer the court to the CSOS order to substantiate their contentions in this regard.

32. The Applicants argues that its *prima facie* right is based on the suspension sought in terms of the statutory relief on the one hand, and on the other hand, the common cause expiry of the term of the Respondents:
    32.1. Regardless of the appealed CSOS order which incorrectly provides without any basis in fact or law that the 12th of November 2021 AGM was invalid;
    32.2. It is common cause that the term of the Respondents expired on the 20th of February 2020 and that they have been removed from the records at the CIPC; and
    32.3. Thus, they are not directors;
    32.4. The Applicants submit that no artificial argument as to the proper interpretation of the MOI can escape that logical

conclusion.

33. It was held in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[9] that the proper approach to the interpretation of a document is to have regard to the language of the document, read in the light of its context, apparent purpose and the factual background against which it came into existence.[10] The ruling in this case supports the findings herein and the interpretation that the Respondents' term ended at the expiry of 12 months on the 21st of February 2020 as per the MOI.

34. Regarding injury and a reasonable apprehension thereof, the applicant cites the following:
    34.1. The undertaking sought was not provided;
    34.2. It is evident from the answering affidavit, heads of argument of the Respondent and oral address that the Respondents continue to believe, albeit it without an iota of evidence substantiating such belief, that they are the directors of the board of Amberfield, and
    34.3. The said misplaced belief is in contradiction to a multitude of objective facts advanced by the Applicants.

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9. *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) 2012 ZASCA 13 (15 March 2012) [18]. The court held *inter alia* that a narrow peering at words in isolation should be avoided, together with a restrictive consideration of words without regard to context. The purpose of the provision is encompassed in the enquiry and words must be interpreted sensibly and not in an unbusinesslike fashion, with the foundational principles in *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 ZASCA 7; 2009 4 SA 399 (SCA) were reiterated. In *Securefin* the Supreme Court of Appeal considered the extent of evidence lead in relation to the interpretation of written texts. The foundational principles were set out at [39]: *In relation to the interpretation of contracts, the SCA found that the integration (or parole evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a juridical act, extrinsic evidence may not contradict, add to or modify its meaning. Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses. Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent. Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything"), to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible."* The court held that the time has arrived to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances." The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice.

10. *Endumeni* was again considered in *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* (106/2018) 2018 ZASCA 176 (3 December 2018) and referred to with approval. See also *Bothma-Batho Transport (Pty) Ltd v S Bothma & Seun Transport (Pty) Ltd* 2014 (2) SA 494 (SCA) and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) [28].

34.4. Injury is patent where the Respondents will continue to represent themselves as directors of Amberfield.

35. There is not an alternative suitable legal remedy available, despite desperate attempts by the Respondent during oral argument to quote from random sections in the CSOS Act. Only a court of law can grant the statutory and interdictory relief sought. In terms of balance of convenience, the balance is overwhelmingly in favour of the Applicants for the reasons aforesaid, but specifically in that the relief is of an interim nature and that it will not be difficult or costly for the Respondents to adhere to the interim relief.

THE RESPONDENTS'S CASE.

36. The Respondents delivered an answering affidavit and did not oppose the merits or urgency therein. They only stated that they will oppose the cost order sought. At paragraphs 26 and 27 of the answering affidavit, (CL 037-9), the deponent on behalf of the Respondents stated the following under oath: *"The fact that I do not oppose the Applicants' application is by no means indicative of an intention to concede to the allegations in the Applicants' Founding Affidavit and must therefore not be construed as such." "The reasons for not opposing the Applicants' application in my personal capacity is simply that I have no intention to run the risks of attracting personal liability in litigation costs in circumstance where I have acted in my capacity as director of the Eighth Respondent."*

37. At paragraph 37 of the answering affidavit, (CL 037-10), the deponent on behalf of the Respondents stated the following: *"For pure financial reasons it seems irresponsible and equally superfluous to oppose this application, for I will personally gain nothing from doing so."* The aforesaid is echoed in the Respondents' heads of argument.[11] Despite the aforesaid, the Respondents contended in their heads of argument that the Applicants must make out a case for urgency and the requirements for the relief sought.[12]

38. The First Applicant points out that the Respondents made the following concessions under oath:

38.1. At paragraph 32 of the answering affidavit: *"It is prudent to point out that albeit that we were late in calling a general meeting before our term expired on 21 February 2020 for purposes of appointment of directors [...]"*

[11]. Respondents' heads of argument paragraphs 2, 3, 4 and 5.
[12]. Respondents' heads of argument paragraph 6.

38.2. At paragraph 40 of the answering affidavit the deponent stated:
"I can also not act on behalf of the Eight Respondent because the Eight Respondent is under the management and control of the Applicants and according to the Applicants and the managing agent, the First Applicant in this matter."

39. They also point out that the Respondents do not provide any basis in terms of which they can contend that they are still directors. Despite the concessions in the answering affidavit, and despite showing the recalcitrant nature of the Respondents:
    39.1. Deponent states on oath at paragraph 2 that he is a director of Amberfield;
    39.2. At paragraph 6 of the answering affidavit, much ado is made about the personal capacity of the Respondents vis-à-vis that of a director, in an attempt to escape liability in terms of a costs order;
    39.3. At paragraph 9, a bald allegation is made in respect of the legitimate board and contra the aforesaid concessions
    39.4. The deponent to the answering affidavit states that the legitimate board is an alleged legitimate board, does not deal with the requested meeting and election in terms of section 4.2 of the MOI by the members, when the legitimate board was elected on 12 November 2020, or why Respondents say it was not a legitimate requested board meeting;
    39.5. At paragraph 18 of the answering affidavit, an attempt is made to absolve liability as directors is bad in law, they were not directors from 12 February 2020 on their own version, the interdicts and costs is sought after the LOD was met with resistance and no undertaking was provided, costs should thus follow suit.

40. The Applicant points out that opposition by the Respondents is overly general and fails to deal with the expiry of the Respondents' term on the 21st of February 2020. It does not explain why they acted as Directors whilst they were no longer competent to do so.

<u>SECTION 18 OF THE SUPERIOR COURTS ACT 10 OF 2013.</u>

41. The Respondents raised a peculiar point in their practice note and heads of argument for the first time, that the Applicants have failed

to set out grounds that necessitated the urgent application in terms of section 18 of the Superior Courts Act 10 of 2013.[13]

42. The Applicant submitted that the Superior Courts Act[14] is not applicable *in casu* as held in: *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another*[15] (*Avenues*) and *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another*[16] *(Stenerson)* and as per the CSOS *Practice Directive on Dispute Resolution* 1 of 2019. It argues that the point raised by the Respondents is nonsensical, because section 18 does not apply *in this* case*,* for the reasons set out below, but specifically in that the CSOS order is not an order of the court.[17]

43. Section 57 of the CSOS makes it clear that pending an appeal in terms of section 57, a party may apply to court for a suspension of the order. The CSOS *Practice Directive on Dispute Resolution* 1 of 2019 provides explicitly that an appeal in terms of the CSOS Act is not an appeal as envisaged in the Superior Courts Act 10 of 2013.

44. The Practice Directive reads:[18]

WHEN TO LODGE AN APPEAL.

"*34.1. A person who is not satisfied with the Adjudicator's order, may lodge an appeal in the High Court on a question of law.*

34.2. Following the High Court decision in the Western Cape High Court, in a matter of The Trustees for the time being of the Avenues Body Corporate v

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[13]. See Respondents' practice note paras 7.2 and 8.2. See further Respondents' heads of argument para 8 where counsel for the Respondents incorrectly state as follows: "However, Section 18(1) of the Superior Court Act (sic) (it should be "Courts") does not create a basis in law for the automatic suspension of the operation and execution of a court order." The Respondents are of course wrong on this score. Section 18(1) provides explicitly for a suspension of an order of court pending an application for leave to appeal or an appeal. The Respondents misread and misinterpreted section 18 *in toto.* Section 18 provides that a Respondent may apply to court, pending an appeal (which caused the suspension of an order) to execute the order, with certain strict requirements.

[14]. Act No 10 of 2013.

[15]. (A31/2018) [2018] ZAWCHC 54; 2018 (4) SA 566 (WCC) (10 May 2018).

[16]. (A3034/2018) [2019] ZAGPJHC 387; 2020 (1) SA 651 (GJ) (24 October 2019).

[17]. It is also not clear why the Respondents attempted to rely on this point and argument to that effect was confused and confusing. The Respondents' practice note avers as follows at paragraphs 7.2 and 8.2: *"The Applicants further failed to set out grounds that necessitated this application in face of (sic) the provisions of Section 18 of the Superior Courts Act" "Did the Applicants established (sic) grounds that necessitated this application in consideration of Section 18 of the Superior Courts Act." (sic)*. Yet, in the heads of argument of the Respondents, at paragraph 81, the Respondents state that they ostensibly could not muster exceptional circumstances, and thus could not oppose the suspension order sought. Paragraph 81 of the Respondents' heads of argument is directly in contrast with their practice note (paragraphs 7.2 and 8.2).

[18]. *Stenerson* [26].

Shmaryahu and Another, the following procedure is prescribed for all appeals in terms of s 57 of the CSOS Act, until such time that the Full Bench of the High Court has made a determination or order on the process to be followed for appeals under section 57 of the CSOS Act:

34.2.1. An appeal in terms of s 57 is not a 'civil appeal' within the meaning of the Superior Courts Act 10 of 2013.

45. In the Gauteng Division, Johannesburg; held per Matojane J, Adams J and Nobanda J in *Stenerson*[19] the court held as follows on this point:

45.1. Section 36(1) of the CSOS Act mandates the Chief Ombud to issue practice directives regarding any matter pertaining to the operations of CSOS;[20]

45.2. The Practice Directive on Dispute Resolution 1 of 2019 came into effect on 1 August 2019 and incorporated the findings of the Western Cape High Court in Part 8 of the Practice Directive, which deals with the appeal process.[21]

46. The Western Cape Division per Binns-Ward J and Langa J in *Avenues*[22] held in this regard as follows: *"The appeal is not one for which provision is made in terms of the rules of court, and no procedure has been prescribed for it in terms of the Act or the regulations made thereunder. It is well recognised that the word 'appeal' is capable of carrying various and quite differing connotations. One therefore has to look at the language and context of the statutory provision in terms of which a right of appeal is bestowed in a given case to ascertain the juridical character of the remedy afforded thereby. An appeal in terms of s 57 is not a 'civil appeal' within the meaning of the Superior Courts Act 10 of 2013.*[23] *What*

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[19]. *Stenerson supra*.

[20]. *Stenerson* [24].

[21]. *Stenerson* [24].

[22]. *Avenues supra.*

[23]. *Avenues* footnote **[37]**. The reference to a 'civil appeal' in s 14 of the Superior Courts Act is to an appeal to the High Court from the judgment or order of a lower court; not to an appeal of the third type mentioned in *Tikly v Johannes* 1963 (2) SA 588 (T) at the place mentioned later in this paragraph. The fact that an adjudicator's order may be registered as an order of court for enforcement purposes in terms of s 56 of the Act does not make it an order of such court for the purposes of an appeal. The registrar or clerk of court who registers such an order in terms of s 56 does so on the basis that the adjudicator's order is valid unless and until it is set aside, and does not signify by its registration that the court endorses its correctness. **Its registration is an administrative, not a judicial act. Any scope for doubt in this regard is excluded by the language of s 56, which provides for the enforcement of an adjudicator's order '*as if it were*' an order of a court of competent jurisdiction.** If the adjudicator's order is to be challenged that must be done in terms of s 57. **Section 57 (which, as mentioned, gives rise to a different type of appeal to that from the judgment of a court) applies irrespective of whether the impugned order has been registered by a clerk of court or registrar.** (Emphasis provided).

may be sought in terms of s 57 is an order from this court setting aside a decision by a statutory functionary on the narrow ground that it was founded on an error of law. The relief available in terms of s 57 is closely analogous to that which might be sought on judicial review. The appeal is accordingly one that is most comfortably niched within the third category of appeals identified in Tikly v Johannes,[24] at 590-591."[25] (Emphasis provided).

FINDINGS.

47. The Applicants point out that on the Respondent's own version, their term expired, and they are not Directors, (despite approbating and reprobating this version, which can only be the only true version based on clause 5.1.4 of the MOI). The Applicants submit that in any event, the question of who the members of a legitimate board are, is only an enquiry which the appeal court will determine, because it directly affects the appeal and the *locus standi* of the Respondents in the CSOS dispute referral, where they represented to the CSOS that they are the Directors of Amberfield, after the expiry of their term.

48. The Applicant argues that the CSOS dispute was referred without any notice to it and that much is common cause because the Respondents have not answered to the Applicants' case in that regard. The Applicant submits that this court does not need to make the aforesaid determination, and is only called upon to determine the two sets of relief as set out above.

49. It submits further that in terms of the statutory relief, and to secure the effectiveness of the pending appeal, a suspension is warranted. It stated that one cannot have a situation where the Respondents act as if they are a force unto themselves, without any basis at law or on fact to do so. On the basis of the above, the Applicant submits that it has fulfilled the requirements for the Interdictory Relief sought to be granted.

COSTS.

50. The Applicants submit that where a party's conduct is found to have been vexatious[26], that may form a basis for an order that costs be

[24]. 1963 (2) SA 588 (T), also reported at [1963] 3 All SA 91 (T).
[25]. *Avenues* [25].
[26]. In general, see LAWSA Volume 10, 3rd Edition at paragraph 284 from where the quoted case law *infra* has been obtained. *Sabena Belgian World Airlines v Ver*

paid on an attorney-and-client scale[27]. They argue that even where it has not been proven that such a party intended to be vexatious, such an order may be granted.[28] They pointed out that vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for such litigant's harassed opponent to be out of pocket in the matter of his or her own attorney-and-client costs, but this is not an exhaustive list.[29]

51. It made the point that unreasonableness in the conduct of litigation may also lead to an award of attorney-and-client costs.[30] It submitted that based on the above, a costs order on a punitive scale is warranted in this case although such a decision is in the discretion of the court.

52. In their supplementary heads, members of the board contest the claim that the term of their board has expired. Their board was appointed subject to a specific term which is supposed to have ended on the 21st of February 2021. However, it was submitted on behalf of the Respondents that on the 10th of March 2020, an attempt was made to hold an Annual General Meeting (AGM). The purpose of the meeting was to elect new directors.

53. The Respondents charge that they were prevented from holding this meeting by the Applicants and specifically the First Applicant. The Applicants contested the legitimacy of the board, arguing that the purported chairperson and directors were no longer directors in terms of the MOI. The Respondents contend that members of the board do not seize to be directors as soon as the term for the board

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Elst 1980 2 SA 238 (W) (vexatiousness and attempt to mislead the court); *Thunder Cats Investments 49 (Pty) Ltd v Fenton* 2009 4 SA 138 (C) pars 33–34 (**putting opponents to unnecessary trouble and expense which they ought not to bear**). *Ernst & Young v Beinash* 1999 1 SA 1114 (W) 1148D–G; *SA* (**vexatiousness and absence of a *bona fide* defence**).

27. *Mahomed & Son v Mahomed* 1959 2 SA 688 (T) (litigant's conduct vexatious and an abuse of the process of the court).

28. *Marsh v Odendaalsrus Cold Storages Ltd* 1963 2 SA 263 (W).

29. *Ward v Sulzer* 1973 3 SA 701 (A) 706H. See also *Lutzkie v SAR & H* 1974 4 SA 396 (W) 398–399; (patently unfounded, frivolous, vexatious and fanciful defences); *Bernert v Swranepoel* 2009 4 All SA 440 (GSJ) 443*b–d* (use of dubious tactics, unfounded and scurrilous allegations and derogatory language; withholding material information from the court).

30. *ABSA Bank Ltd* (*Volkskas Bank Division*) *v S J du Toit & Sons Earthmovers (Pty) Ltd 1995 (3) SA 265* (C) (where the plaintiff caused the defendant unnecessary trouble and expense); Sentrachem the *Sentrachem Ltd v Prinsloo* 1997 2 SA 1 (A) 21–22; *Mokhethi v MEC for Health, Gauteng* 2014 1 SA 93 (GSJ) pars 25–26 38 (baseless refusal by MEC to admit correctness of opponent's expert reports).

ends. They contend therefore that the date of the 21st of February 2020, which is the date on which the term for the membership of the board ends, does not necessarily signal the end of the directorships of the members thereof.

54. The Respondents point out that on the 12th of November 2020, the First Applicant convened a meeting where new directors were elected. It points out however that this process was challenged by the Respondents which is the result of the Adjudication Order annexed to the Founding Affidavit as annexure “FA12” and “FA13”. On the 5th of August 2021, the Sixth Respondent informed the First Applicant of the Adjudication Order and that in order to give effect to the order invited the First Applicant for a meeting. On the 26th of August 2021, the Sixth Respondent informed the First Applicant that a board meeting has to be called in order to comply with the Adjudicator’s Orders.

55. On the 26th of August 2021, the First Applicant caused a letter to be written to the Respondents’ Attorney, informing the Respondents that the term of the old board of directors has expired and they were required to give an undertaking that they will not purport to be directors or perform the execute functions of directors. In a letter dated the 27th of August 2021, which is attached to the Founding Affidavit as annexure “FA25”, the Respondents affirmed that they dispute the understanding that their term has ended. They contended that they are still the directors of the board despite the fact that the term of their board has ended. They argue therefore that they are still directors.

56. The Respondents seek to rely on Section 10 of the Companies Act 71 of 2008, as amended which addresses the aspect of: *the Modified application with respect to non-profit companies.* They argue that by virtue of the application of this section, they are still the *de jure* board of executors in place. They contend that *“a non-profit company is not required to have members, but its Memorandum of Incorporation may provide for it to do so.”* They argue that Section 58 of the Companies Act provides for the shareholder’s right to be represented by proxy. They also contend that this is provided for in the Memorandum of Incorporation.

57. In this case, it was submitted and all of the Respondents conceded that the term for the board has expired. It is also clear that there is no statutory provision which provides for the outgoing board to

continue as if it's term has not expired. If a board came into existence and resumed a term on the basis of provisions in a statute, surely the position after the expiry of the term of the outgoing board has to be determined on the basis of the provisions of the same statute that brought such board into place and granted it a term. Should that term end, surely it can only be on the basis of a provision in the statute that brought it into existence; or some other statutory provision, that such board can continue to be in existence and to execute functions of a board.

58. It is clear that the board of directors was never intended to exist indefinitely. It was incumbent upon the Board of Directors, realizing that the end of their term is approaching, to take necessary steps to ensure continuity by among others ensuring the ascendancy of a new board. The board entailing the Respondents in this case did not do this. Having failed to do that, it now seeks to turn that failure into a reason on the basis of which to continue remaining in place, executing the functions of a legitimate board. This kind of approach could not have been intended in the formulation of the applicable legislation.

59. The Respondents also contest urgency in this matter despite the fact that the term of their Board of Directors has ended and they have not taken any positive steps to ensure the coming aboard of a new Board of Directors. This is not what was envisaged when the relevant legislation was promulgated. It is on that basis that the court has to intervene.

60. In the result, having read the documents filed on record, and having heard counsel for the parties, an order is made in the following terms:

ORDER.

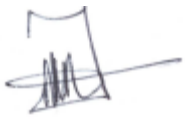
60.1. That the matter be dealt with as one of urgency in terms of Rule 6(12) of the Rules of this Court and that the normal High Court Rules relating to applications be dispensed with and that insofar as the applicant has not complied with the Rules of this Court, that failure to do so be condoned;

60.2. That a stay of operation in terms of section 57(3) of the Act of the order of Advocate MA Mavodze (acting as adjudicator for

the second Respondent), handed down 6 July 2021 and varied on 23 August 2021;

60.3. That the Fourth to Seventh Respondents are interdicted and restrained from acting or representing to be directors of Amberfield Manor Homeowners Association NPC.

60.4. That costs on a scale as between attorney and client, be paid by the Fourth to Seventh Respondents, jointly and severally, the one paying the others to be absolved.



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T. A. Maumela.
Judge of the High Court of South Africa.

RERERENCES

For the Applicant:	Adv. FJ Labuschagne
Instructed by:	EW Serfontein & Associates Inc.
For the 4th to 7th Respondent:	Adv. W Burger
Instructed by:	Pritchard Attorneys Inc
Judgment heard:	28 September 2021
Judgment delivered:	25 October 2021