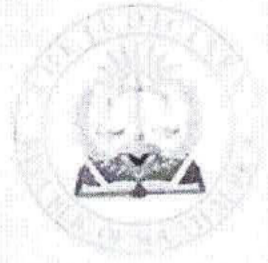


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 32190/21

DOH: 22 February 2022

- 1) REPORTABLE: NO
2) OF INTEREST TO OTHER JUDGES: NO
3) REVISED

SIGNATURE

DATE

2022/03/08

In the matter of:

DOORNHOEK EQUESTRIAN ESTATE
HOMEOWNERS ASSOCIATION
(Reg No: 2007/004715/08)

APPLICANT

And

THE COMMUNITY SCHEMES OMBUD SERVICE

FIRST RESPONDENT

**ADV THEMBI PRECIOUS BOKAKO
JOHAN HENDRIK TOLSTOI KRUGER
PRETORIUS BROERS KONSTRUKSIE (PTY) LTD
(Reg No. 2004/031079/07)**

**SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

**JOHAN PAUL CASPER KRUGER
THE DOORNHOEK RESIDENTS ACTION GROUP**

**FIFTH RESPONDENT
AMICUS CURIAE**

JUDGEMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES.
ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 8 MARCH 2022**

Bam J

1. This is an interlocutory application in terms of Rule 30 of the Uniform Rules to set aside and declare as an irregular step the Notice of Appeal and Record served and filed by the applicant on 1 September 2021. The application is brought by the third, fourth and fifth respondents, collectively referred to as respondents. For convenience, I refer to the parties as they are in the main proceedings.

A. INTRODUCTION OF THE PARTIES AND ISSUES

2. The fourth and fifth respondents are members of a joint venture known as De Rust JV in terms of which they agreed to develop certain properties. The properties with which the underlying litigation is concerned are situated in the Doornhoek Equestrian Estate.
3. During December 2019, the De Rust JV, duly represented by its authorised representative, concluded an agreement with the Doornhoek Equestrian Estate (Pty) Ltd, and a third party referred to in the papers as Jononox (Pty) Ltd. The agreement contained a clause which stated that the units to be developed by the JV shall be subject to the condition that permanent occupiers thereof shall be 40 years and older and that no children shall live in the Doornhoek Equestrian Estate. Clause 26.6 of the applicant's Constitution contains the exact same clause.
4. A dispute arose as the third, fourth and fifth respondents claimed that the clause is invalid, unlawful, unreasonable, irrational and discriminatory and is in violation of the South African Constitution. Consequently, the third respondent, as project manager of the joint venture, lodged a dispute with the first respondent.
5. The second respondent, the adjudicator who dealt with the dispute, held that the clause was unlawful and ordered that it be struck from the applicant's Constitution. It is this decision that saw the applicant lodge its application with this court on 29 June 2021 to appeal the adjudicator's decision in terms of section 57 of the Community Schemes Ombud Service Act¹, the Act. The appeal was lodged by way of Notice of

¹ Act 9 of 2011

Motion, with Part A consisting of an urgent motion to stay the operation of the second respondent's order pending finalisation of Part B, being the appeal. The urgent motion was heard by Neukircher J on 21 July 2021 after which she granted the order summarised here below:

1. Pending finalisation of the appeal ...the operation of the adjudication order by the Second Respondent dated 13 May 2021 and delivered on 21 June 2021 is stayed.
 2. Pretorius Broers Konstruksie (Pty) Ltd and Johan Paul Casper Kruger are joined in this application as the Fourth and Fifth respondents.
 3. The Doornhoek Residents Action Group is admitted as *amicus curiae*.
 4. Permission is hereby granted to the Fourth and Fifth Respondents to file an affidavit in response to the relevant paragraphs of the Applicant's replying affidavit, dated 15 July 2021, which affidavit must be filed on or before 16h00 on Wednesday 28 July 2021.
 5. The applicant is directed to file its heads of argument in the appeal, referred to in paragraph 1 supra, on or before 16h00 on Wednesday 11 August 2021.
 6. The fourth and Fifth Respondents are directed to file their heads of argument in the appeal on or before 16h00 on Wednesday, 18 August 2021.
 7. The amicus curiae is directed to file its heads of argument in the appeal on or before 16h00 on Wednesday, 25 August 2021.
 8. Any party may approach the Registrar of this Court, with due notice to the other parties, for the allocation of an expedited date of the hearing of the appeal.
 9. The costs in respect of Part A of the notice of motion are reserved for final determination at the hearing of the appeal.
6. The application was set down for argument on 18 October 2021. It is common cause that on 1 September 2021, after close of pleadings and after all the parties had complied with Neukircher J's order, as set out in paragraph 5 of this judgement, the applicant served and filed its Notice of Appeal together with the record. This prompted a notice in terms of Rule 30 (2) (b) from the respondents in which the following was highlighted: (a) The applicant's conduct in filing a Notice of Appeal and Record amounted to an irregular step. (b) The Notice of Appeal and record were

served outside the period of 30 days provided for in section 57 (2) of the Act, without an application for condonation. (c) The procedure adopted by the applicant in filing its application on 29 June 2021 was, in any event, not in conformity with the Full Court's decision of this Division in *Stenersen & Tulleken Administration CC v Linton Park Body Corporate* 2020 (1) SA 651 (GJ).

7. The respondents called upon the applicant to withdraw the irregular step, adding that absent the withdrawal, they intend to apply for an order setting aside the filing of the two documents with a costs order. It is not in dispute that the applicant did not withdraw the two records, hence the present application.

B. PREJUDICE

8. In their affidavit, deposed to by Dewald Pretorius on behalf of three respondents, and confirmed by the remaining two respondents, the respondents point out that should the notice of appeal and record not be set aside as an irregular step, they will be prejudiced. The respondents aver that they have already responded to the applicant's founding affidavit and filed and served their heads of argument in terms of the court order of 21 July 2021. They say that the whole purpose of the late filing of the Notice of Appeal and Record was aimed at rectifying the shortcomings in the applicant's original application. To an extent, this is conceded by the applicant, as I shall show. The respondents lament the applicant's conduct as bad in law, and that it constitutes litigation by ambush. The respondents add that the applicant, in any

event, had adopted an incorrect procedure in bringing the appeal by way of Notice of Motion. The applicant has failed to withdraw the step, thus compelling the respondents to incur legal expenses to bring this application.

9. The applicant says it only followed the procedure prescribed by the Community Schemes Ombud Service, CSOS, as set out in the Ombud's Practice Directive of 22 May 2019. The Practice Note referred to by the applicant was issued following the pronouncement made by the Western Cape High Court in *Trustees of Avenues Body Corporate v Shmaryahu*, case number A31/2018. The applicant states that its intention in filing the late Notice of Appeal was to identify its grounds of appeal and have a separate record. There was no intention to replace the original application. The further applicant pointed out that the respondents had made no case regarding prejudice. On this basis alone, they submitted, the application ought not to succeed. In any event, suggested the applicant, this court sits in a different division to that which decided *Stenersen*. Accordingly, it is not bound by *Stenersen*. The statement is incorrect and in stark contrast to the submission made by counsel during argument. *Stenersen* was decided by the Full Court of this division; therefore, this court is bound by *Stenersen*.
10. The statement regarding the applicant's intention to have the grounds identified amounts to a concession that the initial application did not identify the grounds. Whether the intention was to augment or replace is not the issue. The applicant had made its case in its original application. It was not appropriate to serve a Notice of

Appeal and a record long after the close of proceedings, well out of the time prescribed in the Act, just so the applicant could improve its original papers. There can be no doubt that the respondents were prejudiced.

11. I note that the Practice Directive of 2019 followed the Western Cape judgement. After the handing down of *Stenersen* judgement, the CSOS once again updated the procedure for section 57 appeals by following the procedure set out in the *Stenersen* judgement. This can be seen from the CSOS Annual Report of 2020/21.

Submissions by the Amicus Curiae

12. Counsel for the amicus submitted that this court, in terms of the *stare decisis* rule, is not bound by the order made in *Stenersen* but by the *ratio decidendi*. Expatiating, counsel referred the court to paragraph 38 of the *Stenersen* judgement: The paragraph reads:

‘ For this reason, we also deem it sufficient for the appeal to be brought by way of a notice of appeal, which sets out the grounds of appeal, as opposed to being brought by way of a notice of motion supported by affidavit(s). ‘

13. It was submitted that paragraph 38 does not close the door to a person who lodges an appeal by way of Notice of Motion, as opposed to a Notice of Appeal. Simply put, the submission is that it is not fatal to lodge an appeal by way of a Notice of Motion as opposed to a Notice of Appeal. Owing to the view I take on the matter, it is unnecessary for the present purposes to answer the question whether it is fatal to

use a Notice of Motion as opposed to a Notice of Appeal in section 57 appeals. The central question in this application is whether the respondents will be prejudiced if the Notice of Appeal and Record that were filed well out of time and post the close of pleadings were allowed to stand. The answer is undoubtedly in the affirmative.

The Law

14. The general principles that have been cited in various cases on the operation of the rule can be summarised as follows: (i) Proof of prejudice is a prerequisite to succeed in an application in terms of rule 30(1)². (ii) The court has discretion in that it may dismiss an application in terms of Rule 30, which has no real benefit to that party being nothing more than a stratagem to have the matter postponed³. The court may set aside the particular step as irregular or improper or make an order as seems appropriate⁴. [See also *Van Zyl v Government of RSA*⁵].

15. Notwithstanding the submissions by counsel, the applicant's affidavit demonstrates prejudice to the respondents. The applicant had made its case in its founding affidavit. To belatedly file a Notice of Appeal in order for the applicant to have its grounds of appeal identified must certainly be prejudicial to the respondents who

² *Knipe and Others v Lotz and Others* (5081/2014, 4817/2014) [2016] ZAFSHC 21 (11 February 2016) at para 8

³ *Kmatt Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd* 2007 (5) SA 475 (W) at 490 paragraphs B-E;

⁴ *Knipe* supra paragraph 28

⁵ [2007] SCA 109 (RSA), at paragraph 45-46

had long answered the applicant's case and already filed their heads of argument. I accept the respondents' statements that they will be prejudiced.

Conclusion

16. I conclude that, left as it is, the applicant's Notice of Appeal and Record which were filed outside the time allowed in the Act, post the close of pleadings and after the parties had exchanged heads of argument, will prejudice the respondents. Thus, the proper course is to set aside the entire Notice of Appeal and Record. The amicus asked that any losing party pay its costs.

Order

17. The application succeeds. The applicant's Notice of Appeal and Record are set aside as an irregular step.
18. The applicant must pay the costs of the respondents and those of the Amicus Curiae for this application.



NN BAM

JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING:

21 February 2022

APPEARANCES

APPLICANT'S COUNSEL:

Instructed by:

Adv Else

Thomas & Swanepoel Inc

% Delport van den Berg

Garsfontein

THIRD, FOURTH AND FIFTH

RESPONDENTS' COUNSEL:

Instructed by:

Adv Botes SC

Flip Coetzer Inc

% Dawie De Beer

Garsfontein

Counsel for the AMICUS CURIAE:

Instructed by:

Adv. Botha

MacRobert Attorneys

Brooklyn