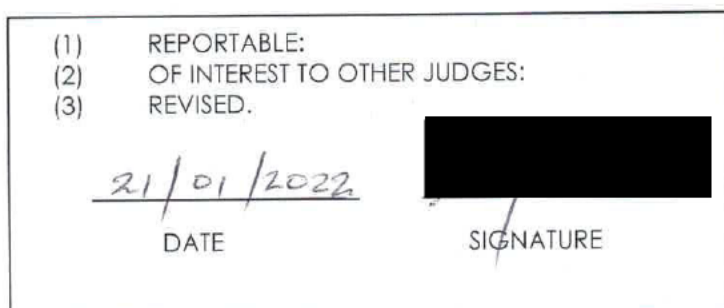
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 33185/2021



(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

21/01/2022

DATE SIGNATURE

In the matter between:

WINGATE BODY CORPORATE	**Applicant**
And	
NOBULUNGISA PAMBA	**First Respondent**
KANYA KOPELE	**Second respondent**

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] The Applicant, a body corporate established in terms of the Sectional Title Schemes Management Act 8 of 2011, has brought this application on urgent basis in terms of Rule 6 (12) of the Uniform Rules of the Court seeking a final interdictory order against the Respondents, who are residents in a unit in the complex. The application is opposed by the Respondents.

THE FACTS / DISPUTE

[2] The dispute between the parties concerns the use of common property situated next to the respondents' residential unit and is used by them as their carport. The refusal by the respondents to grant access to plumbers contracted by the Applicant to replace aged water pipes running underneath the carport is in the heart of the dispute. The deponent to the founding affidavit, Mrs Wendy Kotze, alleges to be the chairperson of the board of trustees of the Applicant and to have taken the decision to institute these proceedings against the Respondents subsequent to the board taking a resolution mandating her as the chairperson to do so.

[3] Mrs Kotze alleges that the conduct of the respondents is obstructive to the operations and to the prevention of recurrent water pipe bursts causing high water bills. In addition, damage caused by the water leakages has resulted in a threatened repudiation of complex's insurance claims arising from the leakages. The frequency of the water leaks has kept increasing for months and four major leaks had occurred in month of February 2021 alone.

[4] In the second instance, Mrs Kotze alleges that the respondents harass and intimidate the trustees, including her and her husband, and the contracted plumbers. She further alleges that the respondents' shouting and verbal abuse affects her 29 years old daughter who suffers from borderline mental retardation and psychosis.

THE RELIEF SOUGHT

[5] In consequence of the above, the Applicant seeks the following orders against the Respondents:

5.1 Prohibiting the Respondents from interfering with the business operations and contractual relationship between the Applicant and Ablaze Plumbing, the contracted company;

5.2 Prohibiting the respondents from interfering with the Applicant's functions and powers, and the exercise thereof by the trustees, and;

5.3 Prohibiting the Respondents from threatening or intimidating the Applicant's Board of Trustees or its contractors.

RESPONDENTS' RULE 7 (1) NOTICE

[6] The respondents dispute that Mrs Kotze is the chairperson of the board of trustees and her authority to institute these proceedings. In response to the respondents' rule 7(1) notice, the attorneys for the Applicant filed the resolution referred to above which was signed by the board of trustees on different dates, but failed to file the requested minutes of the meeting in which the resolution to appoint Mrs Kotze as the chairperson was taken. The respondents dispute the legitimacy of these proceedings as a result and seek a dismissal thereof with punitive costs.

POINTS IN LIMINE RAISED BY THE RESPONDENTS

[7] The respondents have raised two points in limine to the Applicant's claim; a premature approach to the court and the disputed alleged position of chairperson and authority of Mrs Kotze to institute these proceedings.

PREMATURE APPROACH TO THE COURT

[8] At paragraph 7 of their Answering Affidavits, the respondents take the point that the relief sought by the applicant falls within the purview and ambit of orders the Community Schemes Ombud Services, ('CSOS') adjudicator is statutorily empowered to make in disputes concerning the administration of a sectional title development scheme. The respondents contend that the Applicant ought to have approached the CSOS as the primary forum and that the failure to do so renders the applicant's approach to the court premature and is fatal to the proceedings.

THE LAW

[9] It is common cause that the Applicant is a body corporate established under the Sectional Title Schemes Management Act 8 of 2011 ('the STSMA'). Section 3(1)(o) of the STSMA makes it mandatory for a body corporate to be registered with Community Schemes Ombud Services, ('the CSOS') which was established in terms of section 3 of the CSOS Act 9 of 2011. The CSOS prescribes the rules, regulations and procedures for the regulation, management, administration, use and enjoyment of section and the common property. The Applicant is consequently mandatorily subject to the rules, regulations and procedures prescribed in the Community Schemes Ombud Services in terms of sections 10(1) and (2) of the Sectional Title Schemes Management Act 8 of 2011 ('STSMA').

PURPOSE, FUNCTION AND AUTHORITY OF THE CSOS

[10] In terms of section 3 of the CSOS Act, the purpose and function of the office of the Ombud include "*providing for a dispute resolution mechanism in community schemes and to regulate, monitor and control the quality of all sectional titles scheme governance documentation*". Section 38(1) regulates applications made in respect of disputes regarding the administration of a community scheme. More relevant for purposes of the present matter are the provisions of section 39(2)(a) of the STSM Act which empower the CSOS to grant orders in

respect of behavioural issues including an order that particular behaviour constitutes a nuisance and require the relevant person to act or refrain from acting, in a specified manner.

[11] Importantly, the CSOS was established, inter alia, for the purpose of providing expeditious and informal cost effective mechanism for the resolution of disputes, including on urgency in terms of Part 7 of the CSOS Practice Directive on Dispute Resolution of 2019. (see *Stenersen and Tulleken Administration CC v Linton Park Body Coprporate & Another (the CSOS joined as amicus curiae [2019] JOL 46104 (GJ) and Heathrow Property Holdings No 3 CC and Others v Manhattan Place Body Corporate & Others [2021] ZAWCC 109).*

[12] The question whether a party in the position of the Applicant has the liberty to choose a forum for the purpose of obtaining relief has been addressed in numerous precedent cases. While it is trite that the High Court has concurrent jurisdiction to hear a matter properly brought before it, the Courts have adopted the view that not all matters brought before them necessarily ought to be entertained by the Courts. The Supreme Court of Appeal, whilst asserting the concurrent jurisdiction of the High Court, has pronounced on a preference for the adjudication, by specialised structures, of matters in respect of which such structures were created specifically to resolve disputes of a particular nature effectively and expeditiously, adding that a court might in such circumstances be entitled to decline to exercise its jurisdiction (see *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission and Others 2013* (5) SA 484 (SCA).

[13] In the Heathrow matter, the Court set out the position thus:

> *"by establishing the CSOS whose personnel is required to consist of suitably qualified adjudicators, the legislature had intended that the CSOS be the primary forum for the adjudication and resolution of disputes in matters such as the present"*. The Court went on to state

that; "*a court is not only entitled to decline to entertain such matters as a forum of first instance, but may in fact be obliged to do so, save in exceptional circumstances. Such matters will not be matters which are properly before the High Court, and on the strength of the principle in Standard Credit (and a number of courts thereafter, including the Constitutional Court in Agri Wire), it is accordingly entitled to decline to hear them, even if no abuse of process is involved.*"

[14] The learned Judge likened the provisions of the CSOS with those of PAJA which make it mandatory for a party to a dispute to initially seek relief in structures that have been statutorily established to deal with the particular dispute. In this regard the Court found that the application before it ought to have been dealt with in terms of the dispute resolution procedures of the CSOS Act and not by the Court and concluded thus;

> "*In the result, I am of the view that where disputes pertaining to community schemes such as sectional title schemes fall within the ambit and purview of the of the CSOS Act, they are in the first instance to be referred to the Ombud for resolution...... In this regard, as far as the High Court is concerned, the processes which have been provided for the resolution of disputes in terms of the CSOS Act are, in my view, tantamount to 'internal remedies' (to borrow a term from the Promotion of Administrative Justice Act), which must ordinarily first be exhausted before the High Court may be approached for relief.*"

[15] An important underlying reason for the preference of adjudication by specialised structures was expressed by Sher J as follows:

> "*in numerous instances an adjudicator has an equity i.e., fairness based power not only to decide what is reasonable in relation to the conduct of, or the decisions which have been taken by an association such as a body corporate of a sectional title, but also to direct what should [be] reasonably done in place thereof. A High Court does not have such powers. It is confined to reviewing the legality or rationality of the conduct*

of a decision-making body and not the fairness thereof, and when doing so it generally does not have the power to substitute its own decision as to what would be fair or reasonable, in place of the body. The best it can do ordinarily, unless it is clear that no other decision can be made on the issue and the relief which is sought must inevitably follow as a matter of law or logic, is to set aside the decision or conduct concerned and refer the matter back to the body for a decision anew". [*Heathrow Property Holdings* at [paras 52 – 53].

REQUIREMENTS FOR A FINAL ORDER

[16] It is trite that an Applicant seeking an order of a final nature must show that; (a) it has a clear right; (b) that the right is under threat of infringement or that the Applicant has a reasonable apprehension of irreparable harm being inflicted to its right and, (c) that the Applicant has no other alternative, but to approach the Court for the relief sought. It is apparent in the present matter that the Applicant does not meet, at least, the last mentioned requirement as the CSOS is the primary forum to adjudicate on all the issues concerned in this case, including on urgent basis.

PERTINENT FACTS ON URGENCY

[17] The Respondents have disputed the Applicant assertion that the matter is urgent. Importantly and on the Chairperson's own account, major water leakage problems manifested in February 2021 (see para 6.2 and 7.5 of the founding affidavit). The resolution to take action to repair the leakages was taken in June 2021. The resolution for the institution of these proceedings was signed on the 2nd and 4th July 2021. These proceedings were instituted on 05 July 2021, five months after the extent and impact of the water leakage had been noticed. The period between the realisation of the major water leakages and the time of institution of these proceedings barely displays the urgency alleged and relied upon by the Applicant.

[18] The decision to institute these proceedings, in my view, appears to have been pre-determined and other trustees given notification thereof merely for endorsement by them. The notification, by its wording, lacks the characteristics of a resolution that was taken in a properly constituted meeting of trustees and reads thus;

"NOTICE TO ALL TRUSTEES"

"You are hereby notified of the Proposed Resolution detailed below. Please indicate your agreement to the Proposed Resolution by your signature which must be received by the Body Corporate on or before 5 July 2021 (the closing date)".

[19] The above statement legitimises the respondents' contestation of the existence of the meeting in which the resolution was taken and the validity of the resolution *per se*. The failure by the Applicant to furnish the documentation (minutes of the meeting wherein the resolution was taken) inter alia, gives further credence to the respondents' contestations of the validity of the resolution.

FINDINGS AND CONCLUSION

[20] It is apparent from the authorities cited in this judgment that the nature of the disputes in this matter fall squarely within the ambit of adjudication by the CSOS. The argument that the Applicant was entitled to bring these proceedings to court "*because it can*" falls in the face of the authorities cited above. The Applicant has clearly circumvented the mandatory adjudication process of the CSOS. I consequently decline to entertain the matter.

COSTS

[21] It is trite that costs follow the outcome of the case. Each party in these proceedings has asked for costs to be awarded against the other on a punitive scale. I can find no reason why the Applicant should not be ordered to pay the costs of this application.

ORDER

[22] Following the findings in this judgment, the following order is made:

1. The matter is not urgent.
2. The application is dismissed.
3. The Applicant is ordered to pay the costs on an opposed party and party scale.

M. MBONGWE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA.

APPEARANCES

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Matter heard on: 27 July 2021

JUDGMENT HANDED DOWN/ELECTRONICALLY TRANSMITTED TO THE PARTIES ON THE 21st JANUARY 2022.