REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No 55262/2021

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

DATE: 28 June 2022

SIGNATURE:

In the matter of:

Minaar Deon Conrad — Applicant

and

Key West Body Corporate — Respondent

Summary: Urgent application for an execution of the adjudication order in terms of section 53 of the Community Schemes Ombud Service Act 9 of 2011 to be stayed pending finalisation of the appeal.

Non-joinder an issue in question. Section 57 of Superior Court Acts 10 of 2013 - adjudicator's decision on review.

Section 56 of the Community Schemes Ombud Service Act 9 of 2011 - an order handed down by an adjudicator must be enforced as if it were a judgement of the High Court or Magistrates Court.

Section 57 of the Act provides the process to be followed by an appellant in launching such an appeal.

JUDGMENT

Maumela J.

1. This application came before court on an urgent basis. In it, the applicant requests that the execution of the adjudication order in terms of section 53 of the Community Schemes Ombud Service Act 9 of 2011 granted on 12 July 2021 by the Community Schemes Ombud Service Adjudicator, Andre Andreas, be stayed pending finalisation of the appeal noted by the Applicant in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 in this Honourable Court under appeal case number A325/2021 and ancillary relief.[1]

2. The Respondent opposes the application on the following grounds:
   2.1. lack of urgency;[2]
   2.2. non-joinder of Tyrone Zacks, being the co-owner of two units in the sectional title scheme together with the applicant;[3]
   2.3. that exceptional circumstances exist that warrant this court not to grant a stay of the adjudication order;[4] and
   2.4. That the merits of the appeal do not favour the Applicant.[5]

3. There is also an application for the intervention/joinder of Tyrone Zacks as Applicant to the urgent application. Although the Respondent's notice of intention to oppose was amended to include opposition to the aforementioned application, no answering affidavit was filed in respect thereof and as such, it stands uncontested.

PRELIMINARY ISSUES:

4. This matter was previously removed from the roll by agreement on the 22nd of November 2021. Costs were reserved[6]. The Respondent failed to file its answering affidavit within the allotted time-frames. As the matter was not ripe for hearing, and as matters with the similar circumstances were removed from the roll, the matter would not have proceeded. The full circumstances in

[1]. Applicant's notice of motion p 001-01 to 001-04.
[2]. Respondent's answering affidavit par 10 to 18 p 010-02 to 010-04.
[3]. Respondent's answering affidavit par 19 to 25 p 010-04 to 010-05
[4]. Respondent's answering affidavit par 26 to 41 p 010-05 to 010-10
[5]. Respondent's answering affidavit par 42 to 53 p 010-10 to 010-13
[6] Court order dated 22 November 2021 P 003-01 to 003-03

respect of the aforementioned are contained in the Applicant's replying affidavit.[7]

5. The Applicant submitted that the removal was not due to his fault as the answering affidavit was only for after-hours on Friday 19 November 2021, after the application had to be submitted in full and was only uploaded on Case-Lines on Saturday 20 November 2021 where after the Applicant began with thereof.

RE: NON-JOINDER:

6. On receipt of the Respondent's answering affidavit, the Respondent noted a point *in limine* in respect of the non-joinder of Tyrone Sacks. Although the Applicant has a direct interest in the appeal and the urgent application and therefore possessed the necessary *locus standi* to note the appeal and to bring the urgent application, the issue of non-joinder still had to be addressed.

7. The Applicant submits that the non-joinder occurred in error due to the adjudication order only referring to the Applicant as party to the CSOS proceedings whilst it is clear from the order itself that there was more than one complainant involved[8]. He submits that this is further corroborated by the extract appearing in paragraph 48 of the Respondent's answering affidavit that clearly commences with the words "we have bought our unit..."[9]

8. The application for the intervention/joinder was issued[10] and in order to provide the Respondent with sufficient time to answer thereto, the earliest date to set the matter down was the 14th of December 2021, even *in lieu* of the hardship suffered by the Applicant. The replying affidavit was left over to deal with any issue on receipt of such answering affidavit.

9. The full set of facts pertaining to the above appear from the Applicant's replying affidavit.[11] Supplementary answering affidavit of the Respondent was served and uploaded on Case-Lines on Sunday, the 12th of September 2021. The Applicant pointed out

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7. Applicant's replying affidavit par 3 to 3.7 p 019-04 to 019-05
8. CSOS adjudication order, annexure "D" p 003-14 to 003-24.
9. Respondent's answering affidavit par 48 p 010-12.
10. Joinder application sections 014 to 016.
11. Applicant's replying affidavit par 3.8 to 3.13 p 019-06 to 019-07.

that it is clear that the Respondent is in the practice of serving and filing affidavits over weekends as once again an affidavit, titled Respondent's supplementary answering affidavit was served on the 12th of September 2021[12].

10. He points out that the affidavit deals with the alleged present breach of the Applicant's letter issued in August 2021; forbidding any short-term rentals in the sectional title scheme. The Applicant submits that the purpose of this affidavit is once again to facilitate the removal of the matter from the roll. This is corroborated by the fact that no new practice note was filed by the Respondent.

11. The Applicant submitted further that no cognizance should be given to this affidavit. He points out that in any event, the content thereof takes the matter no further and it further contains submissions of alleged rentals where it is clearly not the case as the owners of the units also occupied units together with these individuals. The only contentious unit that may have breached the moratorium imposed in August 2021 is unit 124 and it would have been expected that security would have dealt with the matter. In the Respondent's answering affidavit, in enabling it conceded that no rentals were possible in respect of unit 97.[13]

THE APPLICABLE LAW IN RESPECT OF AN APPLICATION FOR THE STAY OF THE ADJUDICATION ORDER PENDING APPEAL:

12. The Judge President of this Division issued a directive in terms of section 14(1) of the Superior Court Acts 10 of 2013, constituting a Full Court for the purpose of determining the manner and procedure to be followed when noting such an appeal. In the case of *Stenersen & Tulleken Administration CC v Linton Park Body Corporate & Another*[14], the Court was called upon to determine which category of appeals an appeal brought in terms of section 57 of the Act falls under and what process must be followed by an appellant in launching such an appeal. It was held that an appeal in terms of section 57 is a true appeal in the strict sense and it involves a consideration of whether the adjudicator's decision was

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12. Respondent supplementary answering affidavit p 022-01 to 022-14.
13. Respondent's answering affidavit, annexure "GM12.1" p 010-102.
14. Stenersen & Tulleken Administration CC v Linton Park Body Corporate & Another 2020 (1) SA 651 (GJ).

right or wrong, on the material before him with the proviso that the right of appeal is limited to questions of law only.

13. The applicant points out that the abovementioned is further amplified by section 56 of the Community Schemes Ombud Service Act 9 of 2011 which provides that an order handed down by an adjudicator must be enforced as if it were a judgement of the High Court or Magistrates Court. Section 57(3) of the Community Schemes Ombud Service Act 9 of 2011 however states that 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 and the adjudication order is therefore not automatically suspended in terms of section 18(3) of the Superior Courts Act 10 of 2013.

14. As an adjudication order was found to be an appeal in the strict sense, section 18(3) of the Superior Courts Act 10 of 2013 cannot be disregarded. In terms of section 18(3)(1), the execution of a decision which is the subject of an appeal is suspended, pending the outcome of such appeal, unless under exceptional circumstances the court orders otherwise. In terms of section 18(3)(3) of the Superior Courts Act 10 of 2013, a court may only order otherwise, if the party that applied to the court to order otherwise in addition proves on a balance of probabilities that it would suffer irreparable harm if the court does not do so.

15. Of further significance is the fact that the SCOS adjudicator enjoys the same privileges and immunities from liability as a judge of the High Court[15] and his order is enforceable in the court having jurisdiction, be it the High Court.[16] The unfortunate happenstance is that an application for a stay of an adjudication order was not dealt with in the decision in the *Stenersen & Tulleken Administration CC v Linton Park Body Corporate & Another* case[17] and recourse to decisions of other Divisions finding that an appeal of this nature should be in the form of a judicial review to be brought on motion does not therefore provide clarity in this regard.

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[15]. Practice directive 26.4 of the practice directive on dispute resolution no 1 of 2019.
[16]. Section 56 of the Community Schemes Ombud Service Act 9 of 2011.
[17]. Ibid.

16. The above was in part addressed in *Kibo Property Services (Pty) Ltd and Others v Purported Board of Directors Amberfield Manor Hoa NPC and Others*[18] where it was found that the Applicant should make out a case that:
    16.1. there is an appeal pending; and
    16.2. that the suspension sought in terms of the statutory relief is aimed at securing the effectiveness of the appeal.

17. The requirements for an interim interdict that may assist the court in respect of the above are:
    (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.

18. The requirement of harm plays no factor and as stated in the aforementioned matter that[19]: *"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"*

19. As was already confirmed in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd*[20], in terms of Rule 45A of the uniform rules of court: *"The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act."* That is indeed correct and it is submitted that that an appeal in the strict sense should be dealt with under the Superior Courts Act.

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[18]. Kibo Property Services (Pty) Ltd and Others v Purported Board of Directors Amberfield Manor Hoa NPC and Others (45733/2021) [2021] ZAGPPHC 700 (25 October 2021) at 9.
[19]. Kibo Property Services (Pty) Ltd and Others v Purported Board of Directors Amberfield Manor Hoa NPC and Others (45733/2021) [2021] ZAGPPHC 700 (25 October 2021) at 23
[20]. East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd [2011] ZAGPJHC 196.

20. If the above is proven, the Respondent can in terms of section 18(3) of the Superior Courts Act only request a stay to not be granted if:
20.1. the Respondent makes application for such request; and
20.2. exceptional circumstances exist therefore.
It was argued that there is no counter-application to negate a stay of the order.

21. In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[21], the Court succinctly set out the test for urgency as follows: *"The procedure set out in rule 6 (12) is not there for the taking, the applicant has to set forth explicitly the circumstances which he advanced render the matter urgent more importantly, the applicant must state the reason why he states that he cannot be afforded substantial address 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 cause laid down by the rules it will not obtain substantial address."*

22. The applicant submits that the test for urgency begins and ends with the question whether an applicant can obtain substantial redress in due course. Therefore, this matter will be deemed to 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.

23. In the case of *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others*[22], the court set out to the requirement towards urgency in the following simple terms: *"It seems to me that when urgency is in issue, the primary investigation should be to determine whether the Applicant will be afforded substantial address at a hearing in due course. If the Applicant cannot establish prejudice in the sense, the application cannot be urgent."*

24. In the case of *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[23] at page 400, the court stated

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[21]. (11/33767) [2011] ZAGPJHC 196 (23 September 2011).
[22]. [2014] ZAGPPHC 400.
[23]. Supra.

further: "*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. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.*[1]
[9]. It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. 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. If, however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application."

25. The Applicant makes the point that it does not only rely on the aspect of loss of income. He points out that the income from the rental gets utilized to service the bond for purposes of the units and in that regard, there are no other funds available at his disposal. He makes the point therefore that if he were to receive an adverse credit record, he will be able to obtain a Fidelity fund certificate or to rise any income as an Estate Agent which eventually to has more than potential to ruin his financial capacity.

URGENCY.

26. It was submitted that the Applicant does not only rely on the loss of income as the Respondent wishes to make it seem, as:[24]
    26.1. The income derived from rental is used to cover the bond of the units and as no other funds are available and the ban on short-term rental negated the income in *toto*, the Applicant stands to forfeit units to the bank;
    26.2. As the Applicant is an estate agent he sustains himself from that and the rental income received and if he receives and adverse credit record he will not be able to obtain a fertility fund certificate to even derive income as estate agent that will lead to utter financial ruin; and

[24]. Applicant's founding affidavit par 17.1, 17.2 and 17.4.2 p 002-16 to 002-17.

26.3. such financial ruin is imminent if a stay is not grant and cannot be the remedied in due course.

27. The Applicant contends that the balance of convenience favours him with specific reference to the hardship suffered. The Respondent suffers no prejudice as the allegations of nuisance are not limited to the Airbnb's. If cognizance is taken of the Respondent's answering affidavit and specifically the annexure thereto, the Respondent cannot even muster 15 complaint notes over a span of 4 years to prove otherwise except he redacted documents in encompassing all the annexures, attempting to paint a bleak picture.

28. The Applicant contends that it is obvious that no alternative remedy exists for him, except this application, until the appeal is finalised. The allegation that no appeal exists is replied to in the Applicants replying affidavit specifically indicating that the appeal was noted but unfortunately case number could not be allocated due to the only case number in existence being the CSOS adjudication number.[25] A full set of correspondence is also attached evidencing the aforementioned circumstances experienced.

FATAL NON-JOINDER.

29. The Applicant submits that a non-joinder is only fatal to an application if it is left unattended and it can be cured by an application to intervene or to join a party to the proceedings. It submits that in this instance, there is an application for the intervention, alternatively joinder of Tyrone Sacks setting out compelling reasons therefore.[26] It makes the point that this application is in any event uncontested and should therefore be granted.

THE ALLEGED *MALA FIDES* OF THE APPLICANT THAT CONSTITUTES EXCEPTIONAL CIRCUMSTANCES WHY A STAY SHOULD NOT BE GRANTED:

30. The Applicant argues that in its answering affidavit, the Respondent did not directly mention the circumstances that are exceptional and which constitute a basis on which a stay should not be granted. He points out that the Applicant merely relies on an

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[25]. Applicant's replying affidavit par 10.1 to 10.5 p 019-10 and annexure "J".
[26]. Founding affidavit in the joinder application par 4 to par 10.3 p 015-03 to 015-07.

annexure.[27] The Applicant replies in detail to that annexure.[28] He argues that to repeat a discussion of each and every document in this argument would be a duplication and a repetition of the replying affidavit and it will serve no purpose.

31. The Applicant points out that what is evident is that the complaints are limited to a group of individuals, dubbed the anti-Airbnb group. The complaints span over a period of 4 years and do not even exceed 20 in total. The Applicant argues that if the best evidence the Respondent could muster includes duplications and complaint notes indicating that nothing was amiss then the circumstances the Respondent wishes to create are blown out of proportion. The same applies to the WhatsApp messages that are severely redacted and therefore does not contain the sentiment of all owners. It would have been quite interesting to note the number of complaints in respect of the corporate units, but unfortunately the Respondent only concentrate on the Airbnb's without providing a picture of nuisance in the sectional title scheme as a whole.

THE MERITS OF THE APPEAL.

32. The Respondent alleges that most of the grounds mentioned in the notice to appeal were not canvassed in the adjudication. The Applicant denies this and points out that it was specifically replied to.[29] In essence, the Respondent alleges that the complaint was solely about the constitution and procedure followed during the annual general meeting and nothing else and in this regard reliance is placed on the finding of the adjudicator that the meeting was properly constituted.

33. The Respondent is in this regard as the adjudicator refused to entertain any adjudication on the reasonableness of the decision adopted during the Annual General Meeting and to declare such decision void as it was erroneously held that the adjudicator has no *locus standi* to adjudicate thereon.[30] This *in lieu* of the fact that section 39 of the Community Schemes Ombud Service Act 9 of 2011 provides the necessary *locus standi* in sections 39(4)(c) and (e) in respect thereof[31] and it reads as follows:

33.1. *"(c). an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general*

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27. Respondent's answering affidavit par 26 to 40 p 010-5 to page 010-10.
28. Applicant's replying affidavit par 17 to 38 p 019-14 to page 019-36.
29. Applicant's replying affidavit par 40.3, par 45 to 45.3,
30. Annexure "D" to the Applicant's founding affidavit par 46 to 51 and c of the order p 003-22 and 003-23.
31. Applicant's founding affidavit par 12.4 p 002-12.

meeting of the association—
(i). was void; or
(ii). is invalid;

(e). an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers."

34. The Applicant contends that on this ground alone, there is merit in the appeal as the complainant was not fully adjudicate upon. Based on the above, the Applicant submits that he has made a proper case and sought a relief that an order should be granted as per the draft.

35. The Respondent contends that no urgency is attendant to this matter. He points out that where the Applicant claims that he received no income to cover the cost of the bond for the unit, he, (the Applicant), failed to take the court into its confidence by way of providing details regarding the extent to which his estate has been impacted because of not receiving income. The Respondent also points out that the Applicant does not indicate whether this business is his only source of income or whether he has many sources of which this is only one.

36. The Respondent also points out that where the Applicant claims that he has lost a source of income, he fails to take the court into his confidence regarding the extent to which that particular income source affects his overall income. He points out that where the Applicant states that he stands at risk to forfeit the property if no order is granted, he, (the Applicant), also speaks at the same time about a possible future event but has not even been initiated yet.

37. The Respondent takes issue with the fact that the Applicant simply refers to *"other owners"* without attaching their confirmatory affidavits. It is submitted that the Applicant's credit record will be tarnished if he sits in the same position. However, Applicant advanced no confirmatory affidavits by owners hence; he simply refers to them as "other owners". The Applicant submits that he is currently suffering irreparable harm. He states that he cannot afford the bond and as such, he may have to forfeit the unit. However, he did not fully detail his financial situation.

38. The Respondent takes issue with the Applicant claiming that: "*in all likelihood*" the unit would be forfeited whereas previously, he made this seem a certainty. The Applicant claimed that the Respondent does not stand to suffer any prejudice if the CSOS order is not enforceable. However, the Respondent argues that there is a direct and material impact on Respondent and all members, and furthermore an immediate uncertainty shall be created with regards to the rules to be enforced.

39. It submits furthermore that it would not be in the interests of justice to stay the award since that would operate to the prejudice of the majority of the owners within it and would only benefit, (at the very best), 4 unit owners. It is also pointed out that in the alternative, and accepting that no confirmatory affidavits of the other unit owners referred by Applicant are attached; suspending operation of the order would only benefit the Applicant.

40. The Applicant alleges that there is "*no alternative remedy*". However, the relief sought pertains to loss of income for rental and this can be addressed in the ordinary course.

41. The Respondent argues that there is no urgency to this application *inter alia* in that:
    41.1. The CSOS appeal is dated the 11th of November 2021 despite the award having been communicated during July 2021; some 4 months before;
    41.2. Reasons for the delay include hearsay evidence and financial constraints, both being of little value for an argument for urgency;
    41.3. On Applicant's own version, as per a letter from his attorney, Applicant's intention to appeal was already communicated on the 13th of September 2021[32]. In reply, Applicant merely denies same[33];
    41.4. If Applicant had acted timeously after the award was communicated in July 2021, Applicant might well have had the entire matter resolved prior to the festive season and thereby avoided an urgent application. The Applicant well-knowing the Respondent is duty-bound to enforce the rules, waited for November 2021 to launch this application on an urgent basis;

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[32]. See annexure GM4 to Answering Affidavit.
[33]. See paragraph 12 of Replying Affidavit [Case-Lines 019-11].

41.5. As for the appeal itself having been filed with CSOS, the Founding Affidavit falls short of proving that this was indeed filed at CSOS and this renders the entire application premature and without merit on that basis *alone*. In reply, Applicant still offers no proper response for same.

41.6. Notably, in the unreported case of *SIENAERT PROP CC versus CITY OF JOHANNESBURG and CITY POWER (SOC) LIMITED,* (judgment handed down November 2021, in the High Court, Johannesburg), OPPERMAN J stated that "*An application for leave to appeal thus only suspends the operation of an order if that application is lodged timeously. In the present instance, that right lapsed on 15 October 2021 and the application for leave to appeal was only launched on 8 November 2021. The belated delivery of the application for leave to appeal and the condonation application thus do not assist the respondents*"[34];

41.7. In light thereof and *in casu*, the Leave to Appeal had not been properly instituted as it had not been served on CSOS; and

41.8. Furthermore, there is no condonation to date in respect of such Notice of Appeal, (despite the appeal being more than 30 days after having received the award[35]). As such, the appeal has *not* been lodged at CSOS.

42. In light of the above, the Respondent argues that the main application lacks urgency and ought to be struck from the urgent roll with punitive costs.

NON-JOINDER[36].

43. The Respondent has not delivered a Notice to Oppose the joinder application, however, it remains incumbent on Sacks to show urgency in respect of such application in order for the relief sought to be granted. Sacks seeks an order that costs be determined in the main application however, Sacks is the party seeking to be joined and therefore the issue of costs should be fairly simple for Sacks or Applicant having to bear the costs thereof, given that there is no opposition thereto. The Respondent submits that the joinder application is just another example of how ill-conceived this urgent application is, much as it shows the haste with which the

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[34]. At paragraph 30.

[35]. Section 57 of the Community Schemes Ombud Service Act 9 of 2011 allows for an appeal to be lodged within 30 days after the date of delivery of the order.

[36]. Paragraphs 19 – 25 Answering Affidavit [Case-Lines 101-4 onwards].

application was brought.

MALA FIDE – EXCEPTIONAL CIRCUMSTANCES FOR NOT GRANTING RELIEF SOUGHT[37].

44. The Respondent argues that even if Applicant is entitled to the relief sought, there exist exceptional circumstances that justify not granting such relief *inter alia* in that the security of residents of Respondent are at risk, fines that can be levied against the owners have little impact on the short-term letters (if any); and various complaints have been received by owners in respect of the short-term letters.

45. The Respondent charges that the Applicant and other owners who engage in short-term letting of their units have continued to flout its rules despite their knowing that doing so is unlawful. At the same time, the Applicant approached this Court, and asks for assistance to have the award stayed, (even though the Applicant acts *mala fide* in the meantime by not upholding the rules as they stand). The Respondent points out that the Applicant comes to court with dirty hands and he seeks assistance by the Court.

MERITS OF APPEAL.

46. CSOS has considered the relevant document in *approving* the amendment of the rules of the Respondent, and *further* considered the matter when Applicant referred his dispute to CSOS. CSOS has therefore found the amendment to the rules to be in order on two separate occasions. The Respondent states that the Applicant furthermore sought relief at CSOS that it was not entitled to seek, CSOS ruled that such relief as incompetent.

47. The Respondent makes the point that the grounds for the referral to CSOS by Applicant were based on fairness and equity, ("reasonableness"), whereas the grounds for appeal are based on the procedure taken to validate the meeting and the reasonableness of the decision itself. Procedural aspects as may be raised by Applicant were *not* before CSOS and consequently, cannot form part of the appeal *in casu*.

48. In the case of *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another*[38] it was held as follows: "*The*

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[37]. Paragraphs 26 – 40 Answering Affidavit [Case-Lines 101-5 onwards], read with the Supplementary Affidavit.

[38]. 2020 (1) SA 651 (GJ).

court is limited to the record and the adjudicator's order and reasons. In such an appeal the question for decision is whether the order of the statutory body performing a quasi-judicial function was right or wrong on the material which it had before it"[39]; and furthermore; "*Accordingly, we find that an appeal in terms of s 57 of the Act is a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination to be made by the court of appeal is whether that decision was right or wrong in respect of a question of law*"[40]. The late lodging of the appeal would also need to be addressed and adjudicated upon.

49. The Respondent raises the point that the Applicant does not represent all remaining owners within it but only a few. Although the conducting of Airbnb was allowed prior to July 2021; such services were formally and by operation of law prohibited once CSOS gave its adjudication order. The Respondent never guaranteed persons who were purchasing units within it that Airbnb would always be allowed. Due to the numerous complaints about the short-term letters, (and documentary proof thereof), the motion was tabled. This was not in an effort to "make an example" of the Airbnb services.

50. The Respondent states that during a general meeting of November 2019, the motion prohibiting short-term rentals of less than 3 months was not passed. However, the motion to revise the conduct rules of Respondent to include management of short-term rentals was passed. At the next general meeting held in September 2020, the matter put for consideration and voting was to provide members and owners an opportunity to indicate if they still hold the same position regarding short-term letting, (due to various complaints received and as was confirmed in a majority vote). Therefore, the decision to re-visit the short-term letting issue was a decision as taken by the owners and *not* merely by the Trustees and/or managing agent.

51. The Respondent denies the allegations that there was no quorum at such meeting. It contends that because this was a reconvened meeting; a 75% quorum was not required. The Respondent refers to PMR 19(4), the Regulations to the *Sectional Title Schemes Management Act* ("STSMA"), which states as follows: "*If within 30*

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[39]. At paragraph 42.
[40]. At paragraph 43.

minutes from the time appointed for a general meeting a quorum is not present, the meeting stands adjourned to the same day in the next week at the same place and time; provided that if on the day to which the meeting is adjourned a quorum as described in sub rule (2) is not present within 30 minutes from the time appointed for the meeting, the members entitled to vote and present in person or by proxy constitute a quorum."

52. The Respondent argues that the Applicant misread the minutes in paragraph 10.2 of the Founding Affidavit. It points out that no Notice of Appeal was attached to the Founding Affidavit as alleged in paragraph 12.4 of the Founding Affidavit. In reply, the Applicant attempted to correct this fatal defect.

53. The Respondent points out that the reasons proffered by Applicant regarding the delay in bringing this application are not sufficient. It advances *inter alia* the following in supporting the contention that such reasons are in adequate:
    53.1. That such evidence is hearsay and no proof in respect thereof is provided in the Founding Affidavit and
    53.2. That the reasons provided in support of such delay are not so justifiable as to warrant that *any* urgency can be found to be attendant to this matter. The Respondent argues that it is evident that a large part of the delay was caused due to alleged financial difficulties[41], but this cannot be a reason to justify urgency.

54. It is not disputed that the non-joinder alleged in this case was not left unattended. It is trite that a non-joinder is only fatal to an application if it is left unattended and it can be cured by an application to intervene or to join a party to the proceedings. In this case there is an application for the intervention alternatively joinder of Tyrone Sacks setting out compelling reasons therefore.[42] The court also notes that this application is uncontested.

RE: COSTS.

55. The Respondent seeks punitive costs on an attorney- own client scale. It advances the following reason to justify they scale at which it's seeks for the costs to be pitched:
    55.1. The late filing of this application;

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41. Paragraphs 14 -15 of the Founding Affidavit.
42. Founding affidavit in the joinder application par 4 to par 10.3 p 015-03 to 015-07.

55.2. The abuse of the court processes by continually setting this matter on the urgent roll and

55.3. The *mala fide* exhibited by Applicant in; (on the one hand), acknowledging that the adjudication award exists and is operational, (hence the purported urgency and appeal), however, (on the other hand), continuously flouting the rules of Respondent.

56. The Respondent contends that based on the reasons advanced above, the court ought to find that there is no urgency found to be attendant to this application, much as it is an abuse of the process. It argues further that the Applicant has not advanced a satisfactory demonstration of the fact that the appeal has indeed been lodged or, that urgency is indeed attendant to this matter.

57. The court finds that the explanation advanced by the Respondent for having waited long before launching this application is inadequate and it fails to provide justification. The Respondent also makes the point that the Applicant does not stand to suffer any harm if this matter were to be determined in the ordinary course. It points out further that the Applicant was well-aware of the length of time required to have this matter come before therefore, this application stands to be dismissed.

58. Based on the above, this application stands to be dismissed and the following order is made.

ORDER.

58.1. The application is dismissed with costs.

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

REFERENCES

For the Applicant:	Adv. A J Swanepoel
Instructed by:	Vorster Attorneys
For the Respondent:	Adv. Linda de Wet
Instructed by:	Schindlers Attorneys
Judgment heard:	21 December 2021
Judgment delivered:	28 June 2022