IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG

CASE NO: AR99/18

In the matter between:

THE BODY CORPORATE OF DURDOC CENTRE **APPELLANT**

and

DR DINESH SINGH **RESPONDENT**

ORDER

In the result the following order is made:

1. The appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 is upheld with costs.
2. The order made by the adjudicator in terms of s 54 of the said Act is set aside.

JUDGMENT

STEYN J (MADONDO DJP concurring)

[1] This is an appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 (hereinafter referred to as the CSOS).

[2] The appellant, who is the Body Corporate of Durdoc Centre, applied for condonation in that it failed to comply with the time limit as per s 57(2)[1] of the CSOS. The application was not opposed and granted.

[3] The respondent is the manager of the company Ashdin Holdings (Pty) Ltd which owns a number of units at Durdoc Centre. The appellant manages the centre on behalf of the various owners[2] and the trustees serving on the body corporate are responsible for raising the levies, which includes the amounts charged for the consumption of electricity. It is common cause that the units owned by the company were not supplied with electricity. In the period of the complaint, Dr Singh lodged an application for dispute resolution with the Community Schemes Ombud on 5 September 2017 on behalf of the applicant in which he claimed reimbursements for 'the electricity portion of my levy as I have not received electricity.' (My emphasis).

[4] The dispute was opposed by the appellant and the dispute was referred for adjudication in terms of s 38[3] of the CSOS.

[5] The dispute was adjudicated and on 11 November 2017 the adjudicator delivered her order and found that the appellant had been enriched by the respondent's

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[1] Section 57(2) of the CSOS provides for an appeal to be lodged within 30 days after the date of delivery of the order of the adjudicator.

[2] The body corporate derives its power from s 8 of the Sectional Titles Schemes Management Act 8 of 2011.

[3] Section 38 of the CSOS reads: '(1) Any person may make an application if such person is a party to or affected materially by a dispute.

(2) An application must be-

(a) made in the prescribed manner and as may be required by practice directives;

(b) lodged with an ombud; and

(c) accompanied by the prescribed application fee.

(3) The application must include statements setting out-

(a) the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39;

(b) the name and address of each person the applicant considers to be affected materially by the application; and

(c) the grounds on which the relief is sought.

(4) If the applicant considers that the application qualifies for a discount or a waiver of adjudication fees, the application must include a request for such discount or waiver.'

contribution towards the electricity consumed by the units. The adjudicator directed the appellant to reimburse the respondent and ordered that the amount be computed by calculating 20 per cent of the electricity amount included in the appellant's annual budget multiplied by the respondent's participation quota, being 0.1694. It was also ordered that the reimbursement be calculated from the date of ownership, i.e. 7 October 2015.

[6] The appellant raises the following grounds on appeal:

(a) that the adjudicator erred in finding that the defendant before the tribunal had the necessary *locus standi* to bring the dispute;

(b) that the adjudicator erred in finding that the cause of enrichment had been established in respect of the claim; and

(c) that the defendant had proved the extent of his alleged impoverishment.

[7] At the onset it is important to keep in mind that the appellant's right of appeal is limited to questions of law only. Section 57(1) of the CSOS provides:

'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'(My emphasis)

[8] In terms of s 54(1) of the CSOS the adjudicator must make the following orders if the application is not dismissed:

'*(a)* granting or refusing each part of the relief sought by the applicant;
(b) in the case of an application which does not qualify for a waiver of adjudication fees, apportioning liability for costs;
(c) including a statement of the adjudicator's reasons for the order; and
(d) drawing attention in the prescribed form to the right of appeal.'

[9] The respondent prayed for the following order to be made by the adjudicator:

'4.2.1 To get compensation for the electricity as per the PQ in the monthly levies.

4.2.2 For the Body Corporate to arrange for the supply of electricity to the mezzanine level at Durdoc Centre.'[4]

[10] The adjudicator did not grant the second order prayed for by the applicant.[5] The adjudicator granted the relief as per the first prayer. For the sake of completeness I will repeat the adjudicator's order in its entirety:

'7.1 That the Respondent reimburse the Applicant for the electricity consumption of the private sections contained in the Body Corporate annual budget.

7.2 That the reimbursement be calculated on 20% of the electricity amount included in the Body Corporate annual budget and multiplied by the Applicants (*sic*) PQ being 0.1694.

7.3 That the reimbursement be calculated from date of ownership being 7th October 2015.

7.4 That the applicant be reimbursed this amount monthly hereafter, the credit to be shown on the monthly levy statement.'

Locus Standi

[11] Did the adjudicator err in allowing Dr Singh to lodge the dispute with the Community Schemes Ombud, i.e. did Dr Singh have sufficient standing to lodge a dispute? In my view it is necessary to deal with the standing of Dr Singh first. If he lacked the necessary standing to lodge the dispute then there is no need to decide on the other grounds of this statutory appeal. During oral argument counsel for the appellant supplemented the written heads with reference to *Sentrakoop Handelaars Bpk v Lourens & another* 1991 (3) SA 540 (W). Essentially it was averred that Dr Singh was not the owner of the units nor was he an affected party or a party who could lodge a dispute. The adjudicator when the matter was heard was of the view that it was merely the applicant's authority to act for the company who owns the units that was challenged. The papers that served before the statutory tribunal do not form part of the appeal before us. In the adjudicator's findings she summarised the applicant's version as follows:

[4] See page 42 of the record.
[5] See page 45 of the record.

'The Applicant's authority to act for the owner of the section, Ashdin Property Holdings (Pty) Ltd, was questioned. The Applicant subsequently provided the resolution taken by the Board of Directors of Ashdin Property Holdings (Pty) Ltd stating:

> "That Dinesh Singh (70072351650589) in his capacity as Manager, is singly authorised to apply to the CSOS, negotiate the terms and conditions for resolution of the dispute with Durdoc BC with electricity to supply to mezzanine. He must seek to get compensation for the electricity paid as per PQ in the monthly levies and arrange for the supply of the electricity to the mezzanine level of Durdoc Centre. D Singh is authorised to sign any documents and engage in verbal negotiations in this matter that will be considering (sic) binding to Ashdin Property Holdings."'[6]

[12] When the appeal was heard it was argued that the adjudicator was mistaken by equating authority with legal capacity to litigate. Any determination of a party's standing to institute proceedings is determined on facts and the legal framework impacts on the facts. In my view once the applicant's *locus standi* was challenged, the adjudicator ought to have made a finding on it before the merits were considered. She did not make a finding on this issue.

[13] Conradie J in *Watt v Sea Plant Product Bpk and others* [1998] 4 All SA (C) at 113h -114d distinguishes between locus standi and authority succinctly. The court held:

'*Locus standi in iudicio* is an access mechanism controlled by the court itself. The standing of a person does not depend on authority to act. It depends on whether the litigant is regarded by the court as having a sufficiently close interest in the litigation. In *Jacobs en 'n Ander v Waks en andere* 1992 (1) SA 521 (A) at 533J-534A Botha JA described the requirement for *locus standi* as " 'n voldoende belang … by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem behoort te word". In *Jacob's* case the question was what interest the applicants had in the invalidation of a resolution of a local authority. The court commented-

> "Aldus beskou, spreek die férte sterk ten gunste daarvan dat die Hof toe-ganklik behoort te wees vir hierdie applikante, en gevolglik moet die

[6] See page 41 of the record.

> bevinding wees dat hule wel *locus standi* het om die nietigverklaring van die besluit aan te vra"(536C-D).
>
> The question then, to be posed in *casu* is whether at the time summons was issued the trustees' interest in the trust was too remote. The answer to this question depends upon the nature of a trustee's appointment. Where a trustee has been appointed – in a trust deed or otherwise – the appointment is not void pending authorization by the Master in terms of section 6(1) of the Act (cf. *Metequity Limited and another* v *NWN Properties Limited and others* [1997] 4 All SA 607 (T) at 611*a-d*). Although a trustee's power to act in that capacity is suspended by section 6(1) of the Act, he or she would, in my view, have a sufficiently well defined and close interest in the administration of the trust to have *locus standi in iudicio*. Any conclusion that the second and third defendants were by section 6(1) of the Act deprived of *locus standi in iudicio* (which would mean not only that they could not be sued but also that they could not approach the court to protect the interests of the trust) would not give effect to the intention of the legislature. Whilst recognising the desire of the legislature to regulate the rights and duties of trustees in the Act, one should, I think, be slow to conclude that it would have desired to accomplish this by controlling their access to, or accountability in, a court of law.'[7]

[14] The adjudicator evaluated the evidence submitted to her as follows:

'**5. EVALUATION OF EVIDENCE SUBMITTED**

It is common cause that the cost of the electricity consumption of the majority of the scheme, excluding 10 sections only, is included in the levy in terms of the Management Rules and that, of this cost, approximately 80% is for the electricity consumed on the common property.

The Respondent's comment that the Applicant did not resolve the issue when he was a Trustee and Chairman is irrelevant.

The Respondent's position that the Body Corporate cannot connect the meter to this section is correct. Ethekwini Municipality will only accept an application from the owner of the property.

[7] At 113h to 114d.

The Applicant is correct in his comment that the BC is being enriched by his contribution toward the electricity consumed by the sections. He must however accept that 80% of the expenditure is for the consumption of electricity on the common property in which he owns an undivided share calculated on the PQ for the section. The Applicants PQ is 0.1694.

The Respondents request that, if the Applicant is reimbursed any portion of the levy, that this only be calculated from 4th May 2016 is irrelevant. If there is to be any refund, the Applicant is entitled to a refund from the date on which he became owner of the section.'[8]

[15] I agree with the conclusion reached by Binns-Ward J in *Trustees, Avenues Body Corporate v Shmaryahu & another* 2018 (4) SA 566 (WCC) that this statutory appeal is analogous to relief usually granted in a judicial review. It was held:

'[25] 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. What 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 and others v Johannes N.O and Others* 1963 (2) SA 588 (T) at 590-591.

[26] The proper manner in which such an appeal should be brought in the circumstances is upon notice of motion supported by affidavit(s), which should be served on the respondent parties by the sheriff. It would also have been indicated for the adjudicator, and not just the Service, to have been cited as a respondent. While the adjudicator might be expected in the ordinary course to abide the judgment of the court, there will be cases in which the adjudicator might nevertheless consider that it might be helpful to file a report for the court in respect of any aspect of fact or law not dealt with in his or her statement of reasons that might have assumed significance in the context of the nature of a particular challenge advanced on appeal. It is also

[8] See pages 43 and 44 of the record.

desirable that when, as happened in the current matter, the adjudicator's order has been registered as an order of court in terms of s 56 of the Act, notice of the proceedings also be given to the registrar or clerk of the court concerned; for the setting-aside of the order should as a matter of good order result in the registrar or clerk concerned expunging the registration of it from the court's records. However, as no one objected to the procedure used by the appellants, and as effective notice of the appeal appeared to have been achieved, we agreed to entertain the appeal notwithstanding the procedurally irregular manner in which it had been brought. (Litigants should not be misled by this into assuming that similar indulgence will be afforded in like matters in the future.)' (footnotes omitted) (My emphasis)

[16] The right to lodge a dispute has been prescribed by legislation as a right that accrues to owners of units who are materially affected by a community scheme related matter. The applicant was neither the owner of these units nor did he have a material interest in the existing scheme. He lacked the necessary standing to institute the dispute that was adjudicated before the Ombud.

[17] Accordingly the appeal should be upheld on the narrow issue of law.

[18] In the result the following order is made:

1. The appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 is upheld with costs.

2. The order made by the adjudicator in terms of s 54 of the said Act is set aside.

STEYN J

I agree

MADONDO DJP

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Date of Hearing	:	22 March 2019
Date of Judgment	:	13 May 2019