IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 7214/2020P

In the matter between:

THE ROYAL PALM BODY CORPORATE	**APPLICANT**
and	
VAHLATI INVESTMENTS (PTY) LTD	**FIRST RESPONDENT**
R T REDDY N.O.	**SECOND RESPONDENT**

ORDER

I make the following order:

1. The applicant's appeal in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011, is upheld with costs.
2. The orders of the second respondent under case numbers CSOS 03401/KZN/19 and CSOS 03625/KZN/19 are set aside and replaced with the following orders in each case;
   2.1 'The applicant's claim is dismissed'.

JUDGMENT

Mathenjwa AJ

Introduction

[1] This is an appeal in terms of section 57 of the Community Schemes Ombud Services Act 9 of 2011 (the CSOS Act), against the orders of the adjudicator, the second respondent.

[2] The applicant is the Royal Palm Body Corporate, a sectional title scheme incorporated in accordance with the laws of the Republic of South Africa.

[3] The respondent, Vahlati Investments (Pty) Ltd, a private company incorporated in accordance with the laws of the Republic of South Africa, referred a dispute for resolution to the Community Schemes Ombud Service in terms of section 43 of the CSOS Act.

[4] The second respondent made orders against the applicant and the applicant appeals against these orders. The first respondent opposes the application and raises points *in limine*. I first deal with the points *in limine* before proceeding to the merits of the complaint.

Points *in limine*

[5] The respondent, firstly relying on the case of *Sternesen and Tulleken Administration CC v Linton Park Body Corporate and another* 2020 (1) SA 651 (GJ), contends that the applicant failed to cite the correct respondents because it

failed to cite both the adjudicator who made the determination and the Community Scheme Ombud Services (the ombud) as respondents.

[6] Secondly, it is contended that in terms of section 57 of the CSOS Act and the Practice Directive 26.4 on dispute resolution no 1 of 2019, the application was not served on the applicant's registered address, but it was served on Unit 410 which is a hotel room in Royal Palm Hotel.

[7] Thirdly, it is contended that the applicant brought the notice of appeal on 30 June 2020, which notice omitted to relay the court case number. The applicant argued that it subsequently elected on 21 October 2020 to appeal the adjudicator's order. Therefore, its contended, the thirty days allowed for delivery of the notice of appeal after the delivery of the adjudicator's order dated 22 June 2000 had elapsed.

[8] Fourthly, it is contended that the applicant in the first instance elected to proceed with the incorrect procedure in their notice of appeal on 30 July 2020 and in the second instance further elected to proceed with their appeal on notice of motion on 21 October 2020. Therefore, it is argued there are two separate pending applications seeking the same relief against the same parties.

[9] Finally, it is contended that in terms of regulation 14(4) of the Sectional Titles Schemes Management Regulations of 7 October 2016 (the 2016 Regulations), trustees are required to take decisions by resolutions adopted by majority vote. It is argued that it appears that there are six trustees on the resolution; only four of, the six trustees apparently signed the resolution. It is unlikely that a trustees meeting occurred as purported on 12 August 2020, since South Africa was in lockdown, it is argued.

[10] Briefly, the applicant responded to the respondent's point *in limine* as follows:

'Firstly, the CSOS [the ombud] was served with notice of appeal timeously and they acknowledged receipt thereof; the adjudicator was cited in the proceedings and served with papers: the application was served at the *domicilium citandi et executandi* of the respondent. The appeal, was served timeously, and pursuant to the direction of the Honourable Judge President a case number was not allocated as it was directed that the appeal be heard as an application; the issue of lis *pendens* does not hold water, because there is only one appeal with a case number proceeding before the Court, and finally it is contended that the meeting was permissible notwithstanding the level of the national lockdown. Consequently, the trustees met and took the resolution on 12 August 2020.'

[11] Having considered both the respondent and applicant's versions on the point *in limine*, I agree with the applicant that the issue of non-joinder is neither here nor there in that the applicant served the papers to the ombud, the adjudicator and further cited the adjudicator as the second respondent. Both the ombud and the adjudicator elected not to participate in the proceedings. As pointed out by the applicant in paragraph 15 of its replying affidavit, the respondent was served at its *domicilium citandi et executandi* in accordance with the requirements of rule 3(2) of the applicant's management rules and rule 4(5) of the 2016 Regulations. Therefore, the issue of non-service does not stand. It is further evident from the resolution of the trustees annexed as 'FA1' that the resolution was signed by five trustees.

[12] The version of the applicant that the application was launched within the thirty days' period allowed for appeal, but not accorded a case number pursuant to the direction of the Honourable Judge President and subsequently proceeded with the appeal on notice of motion on the same papers on 21 October 2021, is not disputed by any evidence to the contrary.

[13] It follows that all the points *in limine* raised by the respondent should fail. I now turn to the merits of the case before this Court.

Merits

[14] Briefly the applicant's grounds of appeal are that:

'1. The learned adjudicator erred in declaring that the annual general meeting of the appellant of 25 June 2019 was void and invalid.

2. The learned adjudicator erred in declaring that the appellant's management rule 57(2)(c) was invalid and of no force and effect because it did not comply with the provisions of the Sectional Titles Schemes Management Act 8 of 2011 and the 2016 Regulations promulgated under the Act.

3. The learned adjudicator erred in ignoring that the appellant was incorporated in terms of the Sectional Titles Act 95 of 1986 and the Regulations promulgated thereunder contemplated a set of management rules that could be amended or varied by a developer or the body corporate itself;

4. The learned adjudicator should have found that the management rules were registered in terms of the 1986 Act and Regulations and therefore erred in ignoring the principle that where a law repeals any other law, the repeal shall not affect any right or privilege which was acquired or which accrued under the repeated law:

5. Finally, the learned adjudicator erred in applying the declarations of invalidity of the appellant's management rules retrospectively to an Annual General Meeting that occurred one year prior to this award.'

[15] I now turn to the relevant provisions of the law that regulates the dispute before court.

The law

[16] The applicant was incorporated in terms of the Sectional Titles Act 95 of 1986 (the old Act of 1986). Section 35(2) of the old Act of 1986 made provision for the creation of Management Rules of the body corporate (the 1988 Management Rules), which may be added to, amended or repealed from time to

time by the body corporate. The applicant adopted the 1988 management rules in terms of the Act. Rule 57(1) of the 1988 Management Rules provides that 'no business shall be transacted at any general meeting unless a quorum of persons is present. . . at the time when the meeting proceeds to business', and rule 57(2)*(c)* provides that a quorum at a general meeting shall be the number of owners holding at least 20 percent of the votes by representatives recognised by law and entitled to vote.

[17] In 2011, Parliament adopted the Sectional Titles Schemes Management Act 8 of 2011 (the new Act of 2011) which commenced on 7 October 2016. Section 20 of the new Act of 2011 amended certain provisions of the old Act of 1986.

[18] Section 10(1) of the new Act of 2011 provides that:

'A scheme must as from the date of the establishment of the body corporate be regulated and managed, subject to the provisions of this Act, by means of rules.'

Thus, like the old Act of 1986, the new Act of 2011 requires the schemes to be managed by means of management rules.

[19] Section 10(12) of the new Act of 2011 provides that any rules made under the Sectional Titles Act are deemed to have been made under this Act. Section 19(a) of the Act provides that:

'The Minister may after consultation with parliament make regulations regarding –

(a) any matter required or permitted to be prescribed by regulation under this Act…'

[20] Pursuant to the provision of section 19 of the Sectional Titles Schemes Management Act, the Minister prescribed the 2016 Regulations. Regulation 6(1) of the 2016 Regulations provides that:

'Rules, as prescribed and as amended by a body corporate in accordance with section 10 of the

Act, must be considered to be and interpreted as laws made by and for the body corporate of that scheme.'

It is pointed out at paragraph 18 supra that section 10 of the new Act of 2011 preserves the management rules adopted under the 1986 Act, as management rules under the new Act of 2011. Rule 6(2) of the 2016 Regulations under the new Act of 2011 creates management rules for all schemes.

[21] Rule 19(1) of the Management Rules under the 2016 Regulations, provides that:

'Business must not be transacted at any general meeting unless a quorum is present or represented.'

Rule 19(2)*(b)* provides that

'A quorum for a general meeting is constituted

(a) . . .

(b) by members entitled to vote and holding one third of the total votes of members in value,

provided that in calculating the value of votes required to constitute a quorum, the value of votes of the developer must not be taken into account'.

[22] Section 1 of the new Act of 2011 defines a developer as:

'person who is the registered owner of land, situated within the area of jurisdiction of a local municipality, on which is situated or to be erected a building or buildings which he or she has divided or proposes to divide into two or more sections in terms of a scheme, or his or her successor in title and includes, for the purposes of rebuilding any building that is deemed to have been destroyed as contemplated in section 17, the body corporate concerned'.

Analysis of the law

[23] It is apparent from the reading of section 10(2) of the new Act of 2011, that the management rules adopted under the old Act of 1986 were not repealed, but preserved and incorporated as the rules under the new Act of 2011. These rules continued to be valid unless they are substituted, added to, amended or

repealed by resolution of the body corporate in terms of section 10(2)*(a)* of the new Act of 2011.

[24] As stated supra the 2016 Regulations created the management rules for body corporates, without repealing the management rules created under the old Act of 1986, and preserved by section 10 of the new Act of 2011. Consequently, there are two separate sets of management rules existing parallel to each other. Further, it is evident that the provisions of the two management rules conflict with regard to a quorum that should be present at a general meeting and the categories of members who are entitled to vote at the meeting.

[25] In terms of rule 57(2)*(c)* of old Act of 1986, the quorum at a general meeting is constituted by 20 percent of the votes by representatives who are entitled to vote, and developers who are also members of the body corporate are not excluded from voting at a general meeting. On the other hand, in terms of rule 19(2)*(b)* of the management rules under the 2016 Regulations under the new Act of 2011, the quorum at a general meeting is constituted by one third of the votes by representatives who are entitled to vote but the developer is not allowed to vote at the general meeting.

[26] Before considering the fundamental tenants on the interpretation of statues, I first consider the effect of the conflicting rules on the decision of the adjudicator.

[27] I now turn to the order of the adjudicator.

Order of the adjudicator

[28] It is common cause that at the impugned general meeting of 25 June 2019, 44.74 percent of the persons holding voting rights were present. This

number exceeded the threshold of 20 percent in terms of the management rules prescribed under the old Act of 1986 and exceeded one third prescribed by the management rules under the 2016 Regulators of the new Act of 2011. It is further common cause that the vote of Gateway Royal Palm (Pty) Ltd constituted 36 percent, that made up the 44.74 percent votes counted at the meeting. Further it is not disputed that Gateway Royal Palm had developed the applicant, and that it is no longer the owner of the land, but one of the owners of the applicant.

[29] Faced with the conflicting provisions of the legislation, the adjudicator ruled that rule 57(2)(c) of the old 1988 Management Rules was declared invalid and of no force and effect as it does not comply with the new Act of 2011 and the 2016 Regulations thereof; the management rules were to be brought in line with the new legislation and the implementation of any resolutions passed at the general meeting of 25 June 2019 was suspended.

[30] In determining the legality of the order of the adjudicator, I now turn to the principle of interpretation of statutes and apply such interpretation to the facts.

Interpretation of the law

[31] First and foremost the interpretation of statutes is regulated by the Interpretation Act 33 of 1957. The fundamental tenant of statutory interpretation is further developed by case law.

[32] Section 12(1) of the Interpretation Act provides that:

‘Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted’.

[33] This provision of the Interpretation Act does not squarely resolve the conflict in the current case, because although the new Act of 2011 repealed the old Act of 1986, section 10 of the new Act of 2011 preserves the management rules of the old Act of 1986 and renders them to operate parallel with the management rules under the new Act of 2011.

[34] When resolving inconsistency between two existing statutes the Supreme Court of Appeal in *Khumalo v Director-General of Co-operative and Development and others* 1991 (1) SA 158 (A) at 163C, held that:

'where a later statute is irreconcilable with an earlier one, the latter must be regarded as having been impliedly repealed'.

[35] There is however an exception to this principle. This principle does not apply if the later statue is general and the earlier one special in its ambit. (See *Khumalo* supra at 163C-D).

[36] This general principle of statutory interpretation supports the order of the adjudicator that the old management rules adopted under the old Act of 1986 are repealed by the new management rules adopted under the 2016 Regulations of the new Act of 2011. It should be recognised that the old management rules apply only to the applicant whereas the new management rules apply countrywide to all body corporates. Further, it cannot be said that rule 57(2)*(c)* of the old 1988 Management Rules is a special provision that applies only in respect of certain situations or kind of body corporates distinguishable from the situation addressed by the new management rules. Both provisions, of Rule 57(2)*(c)* of the old rules and rule 19(2)*(b)* of the new management rules relate to the same issue of the quorum for a general meeting of the body corporates of same kinds. Therefore, in my view the adjudicator was correct in finding that

rule 57(2)*(c)* of the old management rules was repealed by the provisions of the new management rules created by the 2016 Regulations under the 2011 Act.

[37] The next issue for determination is whether the adjudicator was correct in excluding the vote of the Gateway Royal Palm (Pty) Ltd at the annual general meeting.

[38] Once again, I turn to the provisions of the Interpretation Act and determine whether Gateway Royal Palm (Pty) Ltd was entitled to vote at the meeting.

[39] I have dealt with the definition of a developer in paragraph 21 supra. More important in that the definition is that a developer is a person who is the registered owner of land.

[40] The golden rule in the interpretation of statutes is: 'the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity' (See *Cool Ideas 1186 CC v Hubbard and another* 2004 (4) SA 474 (CC) para 28). This principle is qualified by another rider that the relevant statutory provisions must be properly contextualised and interpreted properly.

[41] The definition of the developer in the new Act of 2011 is clear, that for someone to be a developer he or she must be an owner of the land on which is situated buildings, which he has divided into sections in terms of a scheme. This provision is coached in the present tense, not in the past tense.

[42] It is common course that Gateway Royal Palm (Pty) Ltd was the developer of the applicant some years ago. It is further not in dispute that it no longer owns the land, but owns 36 percent of the scheme. A question arises

then as to when does someone who owned the land, developed and sold the scheme to the owners ceased to be a developer?

[43] In my view, once a person ceased to be the owner of the land that person is no longer a developer in terms of the new Act of 2011. The definition of a developer is coached in the present tense. This leads to the conclusion that Gateway Royal Palm (Pty) Ltd, was no longer a developer, but, the owner and therefore entitled to vote at the annual general meeting. In my view, the adjudicator erred in excluding the 36 percent votes by the Gateway Royal Palm (Pty) Ltd. This error was based on his failure to determine the definition of a developer in section 1 of the new Act of 2011. This lead to the conclusion that the general meeting of the applicant of 25 June 2019, was quorate.

[44] Mr Shapiro, for the applicant argued in address, that the adjudicator acted ultra vires his powers in declaring rule 57(2)*(c)* of the old 1988 Management Rules invalid. It was further contended that since the respondent's counsel was not opposing that preposition it should stand. I disagree with this proposition in that even if the passiveness of the respondent counsel on this issue could constitute a concession, it would be concession of law. It is settled law that courts are not bound by wrong concession of law. In this regard, Ngcobo J in *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 CC para 67 held that:

'Here we are concerned with a legal concession. It is trite law that this Court is not bound by a legal concession if it considerers the concession to be wrong in law …'

[45] Therefore, regardless of the concession made, where there is doubt that the adjudicator acted ultra vires his power, this court should interprete the empowering legislation and make a finding.

[46] The adjudicator, a statutory functionary, source its authority from section 54 of the CSOS Act. Section 54(1)*(a)* empowers the adjudicator to make an order granting or refusing each part of the relief sought by the applicant. Section 54(3) provides that the order may contain such ancillary and ensuring provisions as the adjudicator considers necessary or appropriate.

[47] Consequently, after finding that the provisions of rule 57(2)*(c)*, of the old 1988 Management Rules were inconsistent with the new rules in terms of the 2016 Regulations, it was within his powers to declare that rule 57(2)*(c)* is invalid, to the extent that it conflicts with the new rules. The declaration of invalidity is ancillary to the order.

[48] It was further contended, that the declaration of invalidity of the appellant's management rules, should not have been applied retrospectively to an annual general meeting that occurred one year prior to the award. In my view, there is no merit in this contention. As it was stated by Kentridge AJ in *S v Mhlungu* 1995 (3) SA 867 (CC) para 65 by 'retroactive legislation is meant legislation . . . which affects transactions completed before the new statute came into operation…'

[49] It is common cause that at the time when the impugned meeting took place the new rules were operative. It is further common cause that the award relates to the validity of the impugned meeting. The declaration of invalidity of the rules is relevant for the determination of whether that meeting was quorate and legally valid or not.

[50] In summary I have found that:

(1) Rule 57(2)*(c)* of the old management rules was impliedly repealed by Rule 19(2)*(b)* of the new management rules under the 2016 Regulations of the new Act of 2011.

(2) The Gateway Royal Palm (Pty) Ltd is not a developer and it attended the applicant's general meeting on 25 June 2019, as the owner.

(3) The general meeting of the applicant on 25 June 2019 was quorate.

Order

[51] It follows that the general meeting of the applicant on 25 June 2019, was validly convened and the resolution passed at that meeting was valid. As pointed out in *Iscor Pension Fund v Murphy NO and another* 2002 (2) SA 742 (T) at 749A-C, that, if the court finds that determination of the adjudicator was not correct in law, it will substitute its own decision.

[52] Consequently, I make the following order:

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

2. The orders of the second respondent under case numbers CSOS 03401/KZN/19 and CSOS 03625/KZN/19 are set aside and replaced with the following orders in each case;

2.1 'The applicant's claim is dismissed'.

_____

MATHENJWA AJ

DATE OF HEARING :	5 May 2021
DATE OF JUDGMENT :	1 June 2021
FOR THE APPLICANT :	Adv W N Shapiro Instructed by Cox Yeats Attorneys Locally represented by Stowell & Co
FOR THE RESPONDENT:	Adv D Moodley First respondent's attorney instructed by Gishen-Gilochrist Inc Locally represented by Anand Pillay Attorneys Inc.