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

Case No: 2293/2020P

In the matter between:

JAN CHRISTIAAN ELLIS	**APPLICANT**
and	
TRUSTEES OF PALM GROVE BODY CORPORATE	**FIRST RESPONDENT**
COMMUNITY SCHEMES OMBUD SERVICE	**SECOND RESPONDENT**
S PATHER N.O	**THIRD RESPONDENT**

ORDER

(a) the applicant's appeal in terms of s 57 of the CSOS Act is upheld;

(b) the third respondent's award made on 2 September 2019 is set aside;

(c) the first respondent is ordered to pay the applicant's costs on the scale of an opposed motion;

(d) until such time as a practice directive is in place, the procedure to be followed in this division in appeals brought in terms of s 57 of the CSOS Act will be as stated in paragraphs 10 and 11 of this judgment.

JUDGMENT

Delivered on ……...

Poyo Dlwati J

[1] The issue in this matter is whether the adjudicator, the third respondent, erred on a point of law when determining the first respondent's complaint against the applicant resulting in the award that she issued. Put differently, was her award in accordance with s 39 of the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act). This court also has to determine a procedure to be followed in this Division pertaining to appeals brought in terms of s 57 of the CSOS Act.

[2] During 2017, the applicant was the chairperson of the first respondent. He was removed from that position during 2018. Thereafter, on 8 June 2018, the Trustees of the first respondent referred a dispute for adjudication to the Community Schemes Ombud Service (the second respondent) in terms of s 39 of the CSOS Act. The second respondent appointed the third respondent to adjudicate the dispute. Subsequent to the third respondent's adjudication, she made the following award:

> '(a) the respondent, Mr Jannie Christiaan Ellis is found to have acted in breach of his fiduciary relationship with the body corporate in respect of the "new" CCTV installation and the contract awarded to Chrissonia, as outlined above;
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> (b) As a consequence, the body corporate suffered damages in the amount of One Hundred and Seventy Two Thousand Two Hundred and Thirty Five Rand (R176 235.00) for which he is liable;
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> (c) the said sum of R176 235.00 must be paid to the body corporate within thirty (30) days of the date of receipt by all parties, of this order;
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> (d) Alternatively, the parties may consent to the completion by Chrissonia, of the contract for which it was paid, within thirty days (30) of the date of receipt by all parties, of this order. If the parties consent to the alternative in respect of the Chrissonia contract, the amount of R159 345.00 must be deducted from the total amount payable in terms of paragraph 24.3 above, the balance being R16890.00 to be paid as directed in paragraph 24.3; and
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> (e) if no consensus is reached in respect of completion of Chrissonia contract, the sum specified in paragraph 24.3 remains due and payable as directed therein.'

[3] The applicant, aggrieved by the decision of the third respondent, exercised his right in terms of s 57(1) of the CSOS Act[1] and launched an application in this court and sought an order to set aside the third respondent's award. He also sought an order for costs against any party opposing the relief sought and that such costs be costs of the appeal/application. The parties exchanged affidavits and the matter was set down as an opposed application before Seegobin J.

[4] On 12 March 2021, Seegobin J made the following order:

'1. The late noting and prosecuting of this appeal against the adjudication order granted by the third respondent dated 8 September 2019 be and is hereby condoned;

2. The second and third respondents are directed to deliver a report or affidavit explaining whether the third respondent had the requisite authority to determine the dispute lodged by the first respondent against the appellant with the second respondent under case number C505001803/KZN/18 on or before 5 April 2021.

3. The application/appeal be and is hereby adjourned sine die to be enrolled before a full bench for purposes of determining practice directives in relation to the procedure to be followed in this division pertaining to appeals brought in terms of s 57 of the Community Schemes Ombud Service Act 2011 (CSOS) and more specifically whether;

(a) such appeal be heard before more than one judge; and

(b) whether appeals in terms of s 57 of CSOS shall be brought on notice of motion or in accordance with the provisions of rule 50 of the Uniform Rules of Court.

4. Costs in the cause.'

[5] This matter served before us in terms of that order. Perhaps as a starting point it is worth noting that the second respondent issued a practice directive in 2019 about a process to be followed in lodging the appeals.[2] The directive seems

[1] Section 57(1) of the CSOS Act provides that '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'.

[2] PART EIGHT – APPEAL PROCESS
34 WHEN TO LODGE AN APPEAL

to be the procedure followed in all the provinces subsequent to a decision of the Western Cape High Court. I do not intend to say much on this practice directive as we deem it not to be binding on this court other than that we regard it as a mere directive by the second respondent on what those intending to lodge such appeals should do. Indeed, and during argument on this issue, we were referred to three matters, where different procedures seemed to have been followed by the various divisions of the high court. One matter is from Gauteng and two from the Western Cape. The first is *Trustees, Avenues Body Corporate v Shmaryahu and another*,[3] the second is *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and another*[4] and the last is *Kingshaven Homeowners' Association v Botha and others*.[5]

[6] The Western Cape High Court in *Shmaryahu*,[6] considered the procedure to be followed in prosecuting an appeal in terms of s 57 of the CSOS Act. It held that:

> '[25] . . . 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

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34.1 A person, who is not satisfied with the adjudicator's order, may lodge an appeal in the High Court on the question of law.
34.2 Following the High Court decision in the Western Cape High Court, on the matter of the Trustees for the time being of the Avenues Body Corporate v Shmatyahu and Another the following procedure is prescribed for all appeals in terms of section 57 of the CSOS Act until such time that the Full Bench of the High Court has made a determination or order on the process to be followed for appeals under section 57 of the CSOS Act;
34.2.1An appeal in terms of S57 is a 'civil appeal' within the meaning of the Superior Courts Act 10 of 2013.
34.2.2 What may be sought in terms of S57 is an order from this court setting aside a decision by a statutory functionary on a narrow ground that it was founded on an error of law.
34.2.3 The relief available in term of S57 is closely analogous to that which might be sought on judicial review.
34.2.4 The appeal should be brought by notice of motion supported by affidavit(s), which should be served on the respondent parties by the sheriff.
34.2.5 Both the adjudicator and the CSOS should be cited as a respondent.
34.2.6 Whilst the adjudicator or CSOS might be expected in the ordinary course to abide the judgment of the court, there will be cases in which the adjudicator or CSOS 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 the adjudication order.
34.2.7 If the adjudicator's order has been registered as an order of court in terms of S57 of the Act, notice of the proceedings must be lodged with the registrar or clerk of the court concerned; for the expunging of the registration from the court's records.

[3] *Trustees, Avenues Body Corporate v Schmaryahu and another* 2018 (4) SA 566 (WCC).
[4] *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and another* 2020 (1) SA 651 (GJ).
[5] *Kingshaven Homeowners' Association v Botha and others* [2020] ZAWCHC 92.
[6] *Trustees, Avenues Body Corporate v Schmaryahu and another* para 25, Binns-Ward J with Langa AJ concurring (footnotes omitted).

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 NO 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 . . .'.

[7] In *Stenersen*,[7] the court noted and observed that in that division (Gauteng), a practice had developed whereby appellants had successfully dealt with the matter by delivering the notice of appeal and followed the procedures set out in the Uniform Rules of Court for noting an appeal. It held that:

> 'The determination of the questions of fact is exclusively afforded to the adjudicator who conducts the proceedings inquisitorially and has powers to investigate, examine documents and persons, and to conduct inspections. For this reason, an appeal court should adopt a deferential attitude to the determination of the adjudicator on questions of fact.'[8]

It then concluded by holding that '[for] or 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)'.[9] It differed from *Shmaryahu* as it believed that the appeal in s 57 was an appeal in the ordinary strict sense. In its opinion, the court

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[7] *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and another* para 7 (footnotes omitted).
[8] *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and another* para 32.
[9] *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and another* para 38.

was limited to the record and the adjudicator's order and reasons. In such an appeal, the question for decision was whether the order of the statutory body performing a quasi-judicial function was right or wrong on the material facts, which it had before it.

[8] In a similar matter, namely *Kingshaven*,[10] also from the Western Cape High Court, the applicant brought proceedings on notice of motion seeking to appeal the decision of the adjudicator. Binns-Ward J again held that such appeals 'being limited to questions of law, they do not involve a rehearing of and fresh determination of the merits (as distinct from just the result), and they would not allow for the introduction of additional evidence or factual information'. He was of the view that '[where] not expressly provided for by the enabling statute, the appropriate form for the bringing to court of a statutory appeal is a matter to be regulated by the courts with an eye to practicality'.[11] He further agreed with the view expressed by other judges 'seized of appeals limited to questions of law that it can often be difficult to distinguish the factual questions from the legal ones in a case'.[12] And further, that at times it would be difficult to decide a question of law in isolation from the facts.[13]

[9] Motivating for the motion procedure, Binns-Ward J further held[14] that the motion procedure had the added advantage that it informs the respondent parties what they must do if they wish to oppose the appeal, and by when they should do so. He pointed out that the procedure advocated for in *Stenersen* did not offer such directions. He also stated that sometimes, the decision in question could be subject to an application for judicial review, alternatively an appeal in terms of

[10] *Kingshaven Homeowners' Association v Botha and others* para 13.
[11] *Kingshaven Homeowners' Association v Botha and others* para 15.
[12] *Kingshaven Homeowners' Association v Botha and others* para 18.
[13] *Kingshaven Homeowners' Association v Botha and others* para 18.
[14] *Kingshaven Homeowners' Association v Botha and others* para 23.

s 57, and in such circumstances dichotomous proceedings would need to be instituted, even if they would in all probability be heard together.

[10] In this division,[15] although not concerned with the procedure to be followed in lodging the s 57 appeal, the court did not raise any difficulties in adopting the procedure followed and prescribed in *Shmaryahu.* We do not see any reason to depart from this procedure. Binns-Ward J has demonstrated in his two judgments[16] why it is beneficial to adopt the motion procedure. I do not intend to repeat his reasons but just to add that that procedure would enhance the CSOS Act's objective, namely to have such matters adjudicated and dealt with expeditiously and cost-effectively. The facts contained in those affidavits will assist in bringing the point of law to the fore as it has been acknowledged that at times it is difficult to decide a point of law in isolation from the facts.

[11] In order to curtail costs, there has to be a limit on the length of the affidavits to be filed. In my view, the applicant to such an appeal will have to file a notice of motion to be served on the respondents so that they may respond if they wish to within the time limits provided for in Uniform Rule 6(5). The affidavit accompanying such a notice should not be longer than ten (10) pages, so as to curb the costs, and it must succinctly state the grounds upon which it is averred that the adjudicator erred on a point of law together with a brief background about the facts leading to such a dispute. Should the respondent wish to respond, their affidavit(s) also should not be longer than (ten) 10 pages with the applicant's replying affidavit limited to six (6) pages. Once the affidavits have been filed, the appeal will follow the practice directives provided for opposed motions including the filing of the heads of argument, should same be opposed. In this way, the

[15] *Durdoc Centre Body Corporate v Singh* 2019 (6) SA 45 (KZP).
[16] *The Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and another* 2018(4) SA 566 (WCC) and *Kingshaven Homeonwers Association v Phillipus Botha and others* [2020] ZAWCHC 92.

appeal will serve before a single judge as an unopposed or opposed motion. A practice directive to this effect will ensure that the matter does not drag out unnecessarily.

[12] I turn now to deal with the issues raised in this appeal, namely, whether the award granted by the third respondent is in accordance with the relief, which could be granted in terms of s 39 of the CSOS Act. If one has regard to the first paragraph of the award, which reads:

> '24.1 the respondent, Mr Jannie Christiaan Ellis is found to have acted in breach of his judiciary relationship with the body corporate in respect of the "new" CCTV installation and the contract awarded to Chrissonia as outlined above'.

In my view this is more a declarator which the adjudicator has made after hearing the evidence and I do not have any difficulties with it.

[13] However, what then follows in paragraphs 24.2 to 24.3 is in my view an award for damages. This is clear in the first line of paragraph 24.2, which reads:

> 'as a consequence, the body corporate suffered damages in the amount of R176 235.00 for which he is liable.'

The next paragraph orders the appellant to pay such an amount to the first respondent. However, as correctly argued by Mr Sewpal, on behalf of the appellant, such a relief is not provided for in s 39 of the CSOS Act. Mr Randles, on behalf of the first respondent, argued that the relief granted by the third respondent is in accordance with s 39(1) *(e)* of the CSOS Act[17]. This, however, cannot be. As I have alluded to above, the award made, on a proper interpretation and reading of the whole award in context, is akin to an award for damages consequent upon the finding that the appellant was found to have breached his fiduciary duties.

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[17] Section 39(1)*(e)* of the CSOS Act reads: '(1) In respect of financial issues –
. . .
(e) an order for the payment or repayment of a contribution or any other amount . . .'

[14] The principles applicable to interpretation of statutes are trite. The Constitutional Court in *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and others*[18] reiterated the principles laid down in *Natal Joint Municipal Pensions Fund v Endumeni Municipality*[19] that a contextual and purposive approach must be applied to statutory interpretation. It held that courts must have due regard to the context in which the words appear, even where the words to be construed are clear and unambigous. In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*,[20] Moseneke DCJ held that a contextual approach requires that legislative provisions are interpreted in the light of the text of the legislation as a whole (internal context). In my view, therefore, the proper interpretation of s 39(1) *(e)* refers to a 'payment or repayment of a ***contribution*** [my emphasis] or any other amount'. To stretch any other amount to cover an award for damages would be against the purpose and context of the text. In any event, if it were a repayment or payment of a contribution then such an award would probably have to be made against Chrissonia (the applicant's company) and not the applicant himself.

[15] Mr Sewpal submitted that the third respondent erred on a point of law by conflating the provisions of s 8(4)[21] of the Sectional Titles Schemes Management Act (the Act) and those of the CSOS Act. In his contention, she had no jurisdiction to order the relief that she granted. I agree with this submission as the duties and fiduciary relationships of trustees are dealt with under the Act. If one looks at the

[18] *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and others* [2019] ZACC 47, 2020 (2) SA 325 (CC) para 4.1
[19] *Natal Joint Municipal Pensions Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA) para 18.
[20] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.
[21] Section 8(4) of the section Titles Scheme Management Act 8 of 2011 reads:
'Except as regards the duty referred to in subsection (2)*(a)*(i), any particular conduct of a trustee does not constitute a breach of a duty arising from his or her fiduciary relationship to the body corporate if such conduct was preceded or followed by the written approval of all the members of the body corporate where such members were or are cognisant of all the material facts'

facts leading to the decision and the award, they were predicated on the appellant's role as the chairperson of the body corporate and that would be when the issues of fiduciary duties come into play and not a dispute in the community scheme per se. That issue is covered by the Act and not the CSOS Act, hence, such a dispute fell outside the ambit of the CSOS Act and the third respondent.

[16] This view was further emboldened by the first respondent in its answering affidavit[22] where it placed reliance on the provisions of s 8 of the Act. The complaint itself was premised on the appellant's breach of his fiduciary duty as a trustee and hence the third respondent's findings and declarator in that regard.

[17] Mr Randles was constrained to concede that paragraph 24.4 of the order was incompetent to be an order and as paragraph 24.5 was consequential to paragraph 24.4 it had to fall away. For these reasons, I do not deem it necessary to deal with the other issues raised in the appellant's heads of argument. To sum up, I am of the view that the third respondent erred in entertaining a matter outside the ambit of the CSOS Act. Her award was not one of the reliefs to be granted under the provisions of s 39 therein. The appeal must therefore succeed. It follows that the costs must follow the result. The scale, however, will be that of an opposed motion and not an appeal as the proceedings were launched on a notice of motion.

Order

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

(a) the applicant's appeal in terms of s 57 of the CSOS Act is upheld;

(b) the third respondent's award made on 2 September 2019 is set aside;

[22] Paragraph 34 at page 129 of the papers.

(c) the first respondent is ordered to pay the applicant's costs on the scale of an opposed motion;

(d) until such time as a practice directive is in place, the procedure to be followed in this division in appeals brought in terms of s 57 of the CSOS Act will be as stated in paragraphs 10 and 11 of this judgment.

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POYO DLWATI J

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SEEGOBIN J

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JAPPIE JP

APPEARANCES

Date of Hearing : 20 October 2021
Date of Judgment : 07 December 2021
Counsel for Applicant : Mr Sewpal
Instructed by : P Ramjathan & Associates

Counsel for Respondent : Mr Randles

Instructed by : Fourie Stott Attorneys