Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 12572/2019
(Including related proceedings in case no. 9939/2020)

Before: The Hon. Mr Justice Binns-Ward

Hearing: 8 September 2020
Judgment: 10 September 2020

In the matter between:

THE RAPALLO BODY CORPORATE Applicant

and

THABASILE CYLVIA DHLAMINI N.O. First Respondent
(In her capacity as an adjudicator in terms of the
Community Schemes Ombud Service Act 9 of 2011)

THE COMMUNITY SCHEMES OMBUD, WESTERN CAPE Second Respondent

THE TRUSTEES OF THE GAVIN COHEN FAMILY TRUST Third Respondent

THE TRUSTEES OF THE ROBERT COHEN FAMILY TRUST Fourth Respondent

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JUDGMENT
(Delivered by email to the parties and release to SAFLII.)

BINNS-WARD J:

[1] The apartment building called Rapallo is a familiar landmark on the Sea Point beachfront. It is a sectional title scheme. The Rapallo Body Corporate has applied in these proceedings to have an order made against it by an adjudicator, in terms of s 54 of the

Community Schemes Ombud Service Act 9 of 2011 ('the CSOS Act'), set aside. The adjudicator's order was made in favour of the third and fourth respondents ('the owners'), who are the registered joint owners of one of the sections in Rapallo. They had applied, in terms of the CSOS Act, for an order of the sort contemplated in s 39(1)(e) of the Act directing the Body Corporate to repay the sum of R130 884 that it had exacted from them, purportedly in terms of rule 7 of the applicant's conduct rules.

[2] The applicant is an 'association' within the meaning of that word as defined in s 1 of the CSOS Act. It brings these proceedings by way of an appeal in terms of s 57 of the said Act, which provides that an association that is dissatisfied by an adjudicator's order may bring an appeal to the High Court, but only on a question of law. The adjudicator was cited as the first respondent and the Community Schemes Ombud Service, represented by the local ombud, as the second respondent. The first and second respondents abide the judgment of the court.

[3] Section 10 of the Sectional Titles Schemes Management Act 8 of 2011 ('the STSMA') prescribes that the body corporate of a sectional title scheme must be regulated and managed, subject to the provisions of the Act, by means of rules to be comprised of 'management rules' and 'conduct rules', respectively. Rule 7.1 of the Rapallo conduct rules determines that no alterations, renovations of, or improvements to, any apartment may be carried out '*except in strict compliance with the ensuing provisions of* [that] *conduct rule*'. Insofar as relevant, 'the ensuing provisions' provide that any alterations or renovations undertaken by section owners have to be approved in advance by the trustees of the body corporate. The trustees are empowered to engage architects or professional consultants to assist them in their assessment of any project proposals that are submitted to them under the rule. Any expense incurred by the trustees in this regard is for the unit owner's account and the trustees are empowered to charge a scrutiny fee.

[4] The trustees are empowered by conduct rule 7.2 to make any approval granted for any alterations, renovations or improvements '*subject to any reasonable conditions they may deem appropriate*'. Should the trustees' approval be forthcoming, the section owner is required, in terms of rule 7.4, to sign a written acknowledgement and undertaking in favour of the Body Corporate in a form approved by the trustees, in which the owner acknowledges that he or she is fully acquainted with rule 7 and any conditions imposed by the trustees, and undertakes to be bound by them.

[5] Conduct rule 7.4(d) provides as follows:

> The owner must pay to the body corporate –
>
> - If not already paid, the charges of the architect or consultant engaged by the trustees in terms of 7.2 above,
> - a fair and reasonable amount determined by the trustees as a charge by the body corporate in connection with the acknowledgements and undertakings mentioned in 7.2 above, and
> - a deposit, the amount of which shall be such as will have been determined by the trustees to be applicable for the time being in this respect, to be held by the body corporate and applied, insofar as may be required, towards the costs of making good any damage to the common property or any section caused by the implementation of the project or any related activities and the costs of all necessary cleaning up and rubble removing removal resulting from the project or from such making good - all of which costs shall be the liability of the owner and which deposit shall not limit such liability, provided that if there is an eventual excess of the amount of the deposit over the amount of the liability, such excess shall be refunded to the owner.

[6] Rule 7.4(e) provides:

> The owner must give the supervisor at least 48 hours' prior written notice of commencement of the work and in such notice also state the intended completion date of the project.

[7] Rule 7.5 is also relevant. It reads as follows:

> In addition to the payments provided for in 7.4 above and elsewhere in this conduct rule, the owner shall compensate the body corporate for the general disruption, wear and tear caused by the project by means of successive equal monthly payments to be made throughout the duration of the work on the due dates of the owner's monthly contributions to the body corporate's levies fund. The amount of each such payment shall be a fair and reasonable sum determined by the trustees as being generally applicable to the circumstances for the time being. The first payment shall be made in the month in which the work commences and payment shall continue until the project is completed and all work (sic), workmen and materials have left the site.

[8] The owners of the apartment in question are the trustees for the time being of two trusts. As required by conduct rule 7.4(b), their representative duly signed an undertaking to be bound by rule 7 and the body corporate trustees' determinations. The signed documentation included a recordal, s.v. '*Conditions of Approval of Project*', that the disruption fee payable in terms of conduct rule 7.5 would be R3 300 per calendar month.

[9] Paragraph 2 of the '*Conditions of Approval*' read as follows:

> The project must be completed in its entirety within ... days (including weekends and public holidays) from the date of its commencement ("the Specified Period"). If it is extended beyond the Specified Period, then without prejudice to any other right or remedy available to the Body Corporate, the Owner must pay to the Body Corporate, in addition to the disruption fee for the period of the extension, a penalty of R500,00 for every working day for which the project is so extended, and if it is extended for more than 25 working days beyond the Specified Period, such penalty shall rise to R1000,00 per working day for such further extended period. These penalties are to be payable monthly in arrear simultaneously with the corresponding disruption fees.

It will be noted that the space in the typescript for the number of days in the 'Specified Period' to be inserted was left uncompleted in the signed document. That did not mean, however, that the document would not be susceptible to rectification if the period had in fact been specified. The owners contended that because the period had not been specified in the document, they could not be liable to pay the penalties. It is evident, however, from an annexure to the acknowledgement and undertaking signed on behalf of the owners that the estimated time for the completion of the renovation works had been '*4-5 months*' and that the '*actual date commenced work*' was '*2/4/17*'. There is an endorsement that the '*actual date stopped work (complete)*' was '*2017/12/15*'. Whether the indicated dates corresponded with the facts is not a matter for determination in this appeal, confined as it is to questions of law. The adjudicator did not make any determination in this regard.

[10] The owners also contended that the project period had been extended because of delays occasioned by the allegedly unreasonable demands of the trustees. Those issues (i.e whether there were delays and, if so, whether they were occasioned by the unreasonable demands of the trustees) are factual questions, however, upon which the adjudicator did not make any determination.

[11] It is not evident to me how the issue relating to the owners' liability for the disruption penalties related to the questions of law that the applicant raised on appeal, but I have touched on the matter because (without objection from applicant's counsel) the owners' counsel argued it in these proceedings, and it would probably be helpful in the circumstances for this court to deal with the question to minimise the prospect of the parties' dispute giving rise to yet further proceedings on other questions in law in the future. It is apposite in that regard also to consider the owners' contention that the recovery of disruption penalties from them was subject to conduct rule 10, which provides, amongst other matters, that the trustees may not claim or demand any penalty unless they have first given the offending member written notice to cure the breach within a period of 21 days, and the offending member has

thereafter failed to do so. (This was a matter raised in the Paddocks Attorneys' opinion attached to the CSOS application, but it was not addressed in the adjudicator's decision.)

[12] There is no merit in the owners' contention. The penalties to which rule 10 pertains are penalties that may imposed '*arising from breaches of the rules*'. The disruption penalties purport to be compensatory payments stipulated by the trustees in terms of rule 7, which has nothing to do with breaches of the rules. Whether rule 7 permits of the stipulation of disruption penalties, either as a payment stipulated in terms of rule 7.5, or by way of a condition of approval, is an open question that was not argued before me.

[13] The owners were required to pay a deposit of R50 000. The charges levied by the Body Corporate in terms of rule 7 were set out in a spreadsheet attached as annexure C2 to the owners' answering affidavit, the content whereof was admitted in the Body Corporate's reply:

1.	Scrutiny fee:	R750
2.	Acknowledgment and undertaking fee:	R500
3.	Building disruption fees (charged on a per diem basis):	R26 550
4.	Project extension penalties (15 days at R500 per day):	R7 500
5.	Project extension penalties (49 days at R1000 per day):	R49 000
6.	Penalty for 'unlawful core drilling':	R12 711
7.	Penalty for damage caused to unit 101:	R1 188
8.	Penalty for damage caused to unit 301:	R699
9.	Building renovation expense claim:	R9576

(I am unable to reconcile the abovementioned figures with the amount of R130 884 claimed by the owners in their application under the CSOS Act, and counsel were unable to assist me. It is not necessary, however, to make any determination in these proceedings of the amount or as to the owners' entitlement to payment of it, as it is clear that the application will have to be considered afresh by the adjudicator.)

[14] The adjudicator's decision indicates that she treated the application as being for the repayment of the amounts charged by the Body Corporate '*in respect of disruption fees,*

extension penalties, drilling penalties and damages to other units'.[1] According to my calculation, the amount involved was R97 648. In argument, however, the owner's counsel, who also represented them before the adjudicator, suggested that the adjudicator's description of the ambit of the charges in dispute had been inaccurate, and that the dispute had concerned all the payments made by the owners to the Body Corporate in respect of the apartment renovation project. The difficulty in this regard is that it is not clear from the owners' application in terms of s 38 of the CSOS Act what amount was being claimed, and how it was constituted. This was unsatisfactory.

[15] Whilst an application in terms of the CSOS Act is not required to conform with the formality of a pleaded case before a court, it is nevertheless evident from the provisions of the Act that the nature and ambit of the relief claimed is meant to be objectively ascertainable with reasonable certainty from the content of the application. There is nothing arcane about that proposition. The natural rules of justice require that a party called upon to meet a claim should be informed with reasonable certainty what the claim is.

[16] Section 38 of the Act requires that an application in terms of the CSOS Act must be made in the prescribed manner. The '*prescribed manner*' involves the completion by an intending applicant of an '*application for dispute resolution form*'. The form contains a section entitled '*Details of application/ Alleged breach*', in which an applicant is meant to summarise the nature of his or her claim. The particular section of the form includes a direction to applicants as follows: '*Please legibly set out all the facts which you consider to have bearing on this application, including dates, places and persons involved*'. The owners completed this section of the form by stating '*Please see confirmatory legal opinion of Paddocks Attorneys* [the owners' attorneys]'. The attached opinion covered a range of matters, but nowhere identified the amount claimed by the owners or set out how it was computed. Under the section of the application form headed '*Relief Sought*', which was accompanied by an explanatory note to applicants stating '*What remedy are you requesting? How do you want the problem to be solved?*', the owners wrote '*Section 39(1)(e) Community Schemes Ombud Service Act 9 of 2011 – Repayment of deposit and refund of various other charges, including fines, penalties, legal fees and wasted costs*'.

[17] Insofar as the claim was too vaguely stated in the application form, the Ombud Service should have called for clarification of the application in terms of s 40(a). Whether

[1] Para 14 of the decision.

this was done or not, I am unable to say on the basis of the information placed before the court in this application. I have discussed the matter at some length because it was not altogether clear to me how all of the questions of law that were the subject of the appeal arose in the context of the owners' application under the CSOS Act. While I could recognise that they arose from the adjudicator's decision, it was not clear to me how the issues involved had been germane to the application that the adjudicator had to decide. That was also an unsatisfactory feature of the case.

[18] The respondent's counsel stressed that the nature of the proceedings before an adjudicator is inquisitorial in character. He appeared to suggest that this allowed for considerable latitude in the delineation of the ambit of the application and the nature of the relief. Whilst, it is clearly correct that the proceedings before the adjudicator are inquisitorial (the Act speaks of the adjudicator's task as being '*to investigate* [the] *application*'[2]), the ambit of the investigation must be defined by the application. Any investigation that proceeds on a basis insufficiently cognisant of the requirement that there be reasonable clarity and certainty as to the nature and ambit of the claim is liable to give rise to problems for all concerned.

[19] Any notion that the relatively informal and inquisitorial character of proceedings before an adjudicator justifies the conduct of such proceedings on the basis of anything other than a sufficiently clearly stated claim is unfounded. It is belied by the provisions of the Act and the prescribed procedure, which, in addition to the aspects that I have already touched on, makes express provision for the discretionary amendment of applications. The fact that an application may be amended only in the discretion of the ombud, and then on such specified conditions as the ombud may impose '*at any time before the ombud refers the application to an adjudicator*', confirms the legislative intention that the battle lines between the parties must be clearly drawn before the adjudicator's investigation commences.[3] I suggest that adjudicators should be conscientiously astute to this before they embark upon any investigation. It seems to me, having regard to the provisions of Chapter 3 of the CSOS Act in general, that the responsibility of ensuring that an application under the Act complies with the requirement that a claim must be formulated with sufficient certainty lies primarily on the ombud, for the nature of and basis for the relief sought in the application is not clear, further information should be requested by the ombud in terms of s 40. And if that does not cure the

[2] Section 50 of the CSOS Act.

[3] Section 45 of the CSOS Act.

problem, or an appropriate amendment is not sought and granted in terms of s 45, the application should be rejected by the ombud in terms of s 42.

[20] The adjudicator's decision suggests that the owners had contended that the charges levied in terms of conduct rule 7 in respect of their building renovations could be competently imposed only in terms of resolutions by the trustees that had to be adopted and recorded as prescribed in terms of the management rules. In other words, it would appear that according to the owners, each of the imposts on them in terms of rule 7 was required to have been determined by a minuted trustees' resolution. The adjudicator upheld the owners' contentions in this regard, and inferred that the required resolutions could not have been taken because, despite request by the owners (apparently in the course of the CSOS Act proceedings, not in terms of rule 27(5) of the management rules by which they could have obtained direct personal access to the Body Corporate's records), the Body Corporate had failed to produce the minutes evidencing their adoption. The adjudicator evidently declined to accept the oral evidence of the trustee who testified on behalf of the Body Corporate at the hearing that the necessary decisions had indeed been made by the trustees. She would appear to have considered the existence of a minuted resolution to have been a formal prerequisite for the decisions' validity.

[21] It is not clear to me on the material before the court in these proceedings how this became an issue. There was no suggestion in the owners' application in terms of the CSOS Act that they had not applied to the trustees in terms of rule 7 of the Body Corporate's conduct rules for permission to undertake the renovation project. Nor was there any suggestion, that I have been able to identify, that they had proceeded with the renovations other than on the understanding that they had obtained the trustees' approval as required in terms of the rule. So quite how, and when, the allegation arose that the renovation application had not been approved by the trustees is not clear.

[22] The adjudicator also upheld a contention that the undertaking signed by the owners' representative, as required in terms of rule 7.4(b), was ineffectual because it '*contained further conditions in addition to registered conduct rule 7*.' One of the conditions that was relevant in this regard was that there should be '*absolutely no core drilling into concrete*' unless authorised by the trustees', which permission could not be unreasonably withheld. She reasoned in this regard that '[t]*he said document* [i.e. the undertaking] *is clearly a supplementary document to the registered conduct rules and I agree with* [the owners] *that the said document to be binding must comply with the legislation* (sic) *condition governing*

the establishment of rules at a scheme. Section 10 of the STSMA [i.e. the Sectional Titles Scheme Management Act 8 of 2011] *prescribes the procedure for creating rules at a scheme. Section 10 states that "(2) The rules must provide for the regulation, management, administration, use and*

> *(b) Conduct rules, as prescribed, which rules may, subject to the approval of the chief ombud, be substituted, added to, amended or repealed by the developer When submitting an application for the opening of a sectional title register, an which rules may be substituted, added to, amended or repealed by special resolution of the body corporate , as prescribed: Provided that such conduct rules may not be irreconcilable with any prescribed management rule contemplated in paragraph (a)*
>
> *(3) The management or conduct rules contemplated in subsection (2) must be reasonable and apply equally to all owners of units".*'

The adjudicator also appears to have accepted a contention that the acknowledgement and undertaking executed on behalf of the owners had been of no effect because it had not been countersigned by two trustees. In this regard she was influenced by prescribed management rule 10(1) which states, insofar as relevant, that no document signed on behalf of the body corporate is valid and binding unless it is signed on the authority of a trustee resolution by two trustees or one trustee and managing agent.

[23] In addition, the adjudicator upheld the owners' contention that the Body Corporate was not empowered to recover from them any amount in respect of damages incurred to other units in the scheme in consequence of their building alterations. In this regard, the adjudicator appears to have been influenced by the judgment of the appeal court in *Stad Tshwane Metropolitaanse Munisipaliteit v Body Corporate Faeriedale* [2003] ZASCA 50 (22 May 2003); 2003 (6) SA 440 (SCA), in which it was held that a body corporate that sought to claim compensation from the local authority for the damage occasioned to certain units by a falling tree lacked legal standing, and that its cognisable claim was restricted to compensation for damage occasioned to the common property. Nothing comparable to conduct rule 7 featured in the *Faeriedale* matter, and I think the judgment is therefore distinguishable. It is not necessary for me to make any determination in this regard, however, because the applicant is not pursuing an appeal against this part of the adjudicator's decision, which appears to affect R1 887 of the owners' claim.

[24] The applicant contends in the founding affidavit, which was made by its attorney of record, that the adjudicator's decision was predicated on a number of errors of law. It argues that the levying of the various charges by the trustees was authorised by the rules of conduct, and that no empowering resolution was therefore required. It also contends that the uncontroverted evidence of the trustee who testified at the hearing that the levies imposed had been decided upon by the trustees was sufficient proof that the necessary decisions had been taken, and that the adjudicator erred in inferring that the body corporate's failure to produce the pertinent minutes related to such decisions demonstrated that they had not been validly or effectively made. The third point advanced in support of the body corporate's appeal was that the adjudicator had erred in law by holding that the undertaking signed on behalf of the owner had no binding effect because the various conditions imposed on the owners by the terms thereof that were not merely reflective of the terms of rule 7 required to be expressly incorporated in the conduct rules by special resolution as provided for in s 10(2)(b) of the STSMA in respect of additions or amendments to conduct rules, and because it was not countersigned by two trustees.

[25] In my judgment, it is clear that the adjudicator did make various material errors in law.

[26] The adjudicator was misdirected in apparently understanding that the effect of prescribed management rule 27(2), which requires a body corporate to maintain documentary records concerning its administration, including minutes of general and trustee meetings, setting forth the following information-(i) the date, time and place of the meeting; (ii) the names and role of the persons present, including details of the authorisation of proxies or other representative; (iii) the text of all resolutions; and (iv) the results of the voting on all motions, implied that any resolution or decision by the trustees that had not been minuted in the detail prescribed in the management rule was null and void or ineffectual.[4] The record-keeping obligation imposed by the rule does not in any manner derogate from the decision-making powers of the trustees. Any decisions or resolutions taken or adopted by the trustees are effective if they are taken at a meeting of trustees, duly convened in compliance with prescribed management rule 11, and by a majority vote, as provided in terms of management rule 14. Those are primarily factual issues, which are susceptible to proof by any means of

[4] The Prescribed Management Rules and the Prescribed Conduct Rules are prescribed in terms of s 10(2) of the Sectional Titles Schemes Management Act 8 of 2011. The rules are set forth in Annexures 1 and 2, respectively, to the Sectional Titles Schemes Management Regulations, 2016, GN R1231 of 7 October 2016.

relevant and admissible evidence, including the pertinent minutes. The effectiveness of such decisions is, however, not dependent upon them being minuted.

[27] The evident purpose of the obligation on a body corporate to keep an up to date record of its trustees' resolutions is to promote openness, accountability and transparency by requiring the maintenance of a record of information that should be readily available to members and registered mortgagees should they wish to ascertain what the trustees have decided. It is also a requirement that promotes good administration by providing for certainty, thereby diminishing the scope for dispute. A minute of a trustees' resolution is a consequence of the resolution's adoption; not a prerequisite condition for its adoption. The absence of a minute is therefore, in itself, not dispositive of the question whether a decision was taken.

[28] It is clear then that the adjudicator should have recognised that the acknowledgment and undertaking signed by the owners in terms of conduct rule 7.2 constituted an acknowledgment and acceptance by them that the relevant determinations required of the trustees in terms of the rule had been made. This is a factor that should have weighed heavily with her in assessing the testimony of the trustee who gave evidence at the hearing to the effect that such decisions had been made by the trustees. The acknowledgment and undertaking by the owners denoted an acceptance by them that the pertinent decisions had been made by the trustees. I have already explained that whilst a minute of the decisions would serve as confirmation, prima facie, that the decisions had been made, the absence of a minute would not, of itself, establish that the decisions had not been made.

[29] In the face of the acknowledgment and undertaking given by the owners, the adjudicator should have looked to them to adduce cogent evidence that the decisions that they had acknowledged and accepted had been taken before they embarked on their building operations had actually *not* been taken and to show why they were not contractually bound. An obvious question in this regard is why the owners would have proceeded with their renovation project if they believed that the required approval, for which they had applied in terms of rule 7, had not been given. If their case was that the acknowledgment and undertaking had been executed as a result of a material misrepresentation, that should have been clearly stated in their application. [5]

[5] Nothing to that effect was suggested in the opinion from Paddocks Attorneys that was attached to the owners' application in terms of the CSOS Act.

[30] The purpose of the requirement in rule 7.2 that a section-owner who obtains approval to undertake renovations, alterations or improvements has to sign an acknowledgement and undertaking is plain. It is to avoid dispute, and to create a contractual obligation on the owner in favour of the Body Corporate. The undertaking does not require the countersignature of two trustees to be effective, any more than would, say, an acknowledgment of debt executed by an owner in favour of the Body Corporate. The two-signature rule is there to protect the Body Corporate against the incurrence of liabilities on account of the unauthorised acts of a trustee acting alone. It is to protect the Body Corporate against the risk of being bound by the acts of a single trustee on the basis of ostensible authority. The undertaking signed by the owners obligated them, *not* the Body Corporate. This may be demonstrated by the fact that the Body Corporate could waive the conditions of approval, whilst the owners cannot. By its opposition to the owners' application in terms of the CSOS Act, the Body Corporate showed its intention to hold the owners to their undertaking. This has been confirmed by the Body Corporate's prosecution of the current appeal against the adjudicator's decision.

[31] The adjudicator was also fundamentally misdirected in her characterisation of the conditions of approval imposed by the trustees. This was, of course, a question that she could reach only on the assumption that the trustees had in fact made the required decision to approve the owners' renovation application and, in the context thereof, had imposed the conditions that the owners sought – after the event – to avoid.

[32] Accepting, ex hypothesi, that the trustees did approve the owners' application for permission to undertake the renovations, the conditions they imposed did not constitute additions to or amendments of the conduct rules. The authority of the trustees to impose reasonable conditions is in point of fact invested *in terms of the existing rules*. Exercising the power invested in them therefore did not require an amendment of, or addition to, the rules. The power is limited in that any conditions imposed must be 'reasonable'.

[33] The reasonableness of the conditions imposed by the trustees was put in issue in the opinion from Paddocks Attorneys that was attached to the owners application in terms of the CSOS Act, but the respects in which it was alleged that they might have been unreasonable was not particularised. The adjudicator did not make any finding that the conditions that were imposed were unreasonable. She dealt with the issue on the basis of what she held to be the ineffectiveness of the conditions when they had not been confirmed by amendment to the

conduct rules, not on the basis of their content. As I have explained, the basis on which the adjudicator dealt with the issue was misdirected in law.

[34] This is a convenient stage to refer to the challenge raised by the owners to the authority of attorneys Slabbert Venter Yanoutsos to institute the current proceedings on behalf of the Body Corporate. The manner in which such a challenge falls to be made is provided for in terms of rule 7 of the Uniform Rules of Court; cf. *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 19.

[35] In response to a notice by the owners in terms of Uniform Rule 7, Mr Anton Slabbert of the firm of attorneys in question, who was also the deponent to the applicant's founding and replying affidavits in the principal proceedings, made an affidavit confirming that his firm had been instructed to prosecute the Body Corporate's appeal. Mr Slabbert attached a copy of the minutes of a trustees' meeting held on 15 July 2019 in support of his averments. He averred that he had confirmed with Mr Louw, whom he said was the person whose signature appeared on the minute as the chairperson of the trustees at the time, that minutes in question had in fact been signed by Louw. I am satisfied in the circumstances that the institution of these proceedings was duly authorised.

[36] The owners' counsel argued that the content of the minute did not constitute direct evidence of the trustees' resolution and should be excluded on the grounds that it was hearsay. Counsel may be correct that the minute constituted hearsay evidence of the facts therein recorded, but it would be the height of technicality to exclude it on that ground. The owners were persuaded by the minute to accept that the applicant's attorneys were authorised to represent it in the appeal. That being so, it seems illogical for them to contend that it has not been established that the attorney's principals did not decide on the institution of the appeal proceedings. Who else but the Body Corporate would have an interest in appealing against the adjudicator's order? There appears to have been some suggestion by the owners that one of the trustees, a certain Mr Blacher, may have been on a frolic of his own. But there was no appearance by Mr Blacher. The applicant's counsel appeared instructed by the aforementioned Mr Slabbert. He made it clear that he did not appear for Mr Blacher.

[37] As discussed above, the very purpose of the requirement in terms of the prescribed management rules made by the Minister in terms of the CSOS Act that minutes be kept is to facilitate certainty and avoid dispute. Inherent in that, in my view, is an implied intention that they should have prima facie probative effect. To the extent necessary, however, and

having had holistic regard to the factors in paragraphs (i) to (vii) thereof, I hold that the minutes will be admitted as evidence of their content in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

[38] The owners had been in possession of the copy of the minutes for nearly three weeks by the date of the hearing. They would have been entitled to obtain them much earlier if they had exercised their rights under prescribed management rule 27(5). Had it been their intention to suggest that the minutes were inaccurate or a forgery, I would have expected them to have made the necessary investigations to be able to factually sustain any such contentions. I would have thought that if they were genuinely concerned that the Body Corporate had not authorised the appeal, exercising their right in terms of management rule 27(5) to inspect the trustees' minutes would have been their first resort, even before they delivered their answering papers. They have shown no reasonable cause to go behind the minutes or question their accuracy, and without such cause, I do not believe that they were entitled to demand, as they did in a letter addressed by their attorneys to the applicant's attorneys, that every trustee who is recorded as having been party to the minuted decision should make an affidavit.

[39] There was also nothing in the contention by the owners' counsel in his written argument that the institution of the proceedings required a decision by the Body Corporate in general meeting. Section 2(7) of the STSMA provides that a body corporate has perpetual succession and is capable of suing and being sued in its own name in respect of, amongst other matters, any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under that Act or any rule. To the extent necessary, that power is further extended by s 57(1) of the CSOS Act, which, as mentioned at the outset of this judgment, gives a body corporate the right to pursue an appeal against an adjudicator's order. In terms of s 7 of the STSMA, the powers of a body corporate must be exercised by the trustees of the body corporate. The owners have not identified any provisions of the Act, or the pertinent rules, or any restriction or prohibition imposed by a general meeting of owners, that would serve to limit or exclude the exercise by the trustees of the Body Corporate's power to institute the proceedings. Management rule 9, to which the owners' counsel referred, and which provides that the trustees must exercise the powers and functions entrusted to them in terms of s 7(1) of the STSMA '*in accordance with resolutions taken at general meetings and at meetings of the trustees*', merely confirms the effect of s 7. It does not add to or detract from the empowering effect of s 7 or the restriction thereon provided for

in that section. As it was, the institution of the current proceedings was in accordance with a resolution taken at a trustees' meeting.

[40] The trustees would, of course, be ill advised to institute and prosecute litigation on the Body Corporate's behalf without adequate provision for the cost thereof. Should the Body Corporate suffer any loss in consequence of an ill-advised decision, the trustees might find themselves personally liable in terms of s 8(3) of the STSMA. Such exposure to potential personal liability does not, however, detract from the trustees' authority to institute proceedings in the Body Corporate's name. It would, of course, be open to the members in general meeting to restrict or prohibit the exercise by the trustees of the Body Corporate's power to litigate, but, as I have said, the owners have not identified the existence of any such restriction or prohibition.

[41] As the adjudicator's misdirections on the points of law discussed above directly informed her determination of the owners' application adversely to the Body Corporate, the applicant's statutory appeal falls to be upheld. Upholding the appeal, and setting aside the adjudicator's order will not, however, resolve the dispute between the parties, in respect of which there are a number of pertinent factual issues that were not decided by the adjudicator. In the circumstances, the owners' CSOS Act application will have to be remitted to the adjudicator for determination afresh with due regard to this court's judgment on the questions of law put up in the Body Corporate's appeal.

[42] The ordinary rule in litigation is that costs follow the result. The owners' counsel submitted, however, that it might be unfair to apply the rule in the circumstances of this case because the owners might yet prevail on the merits of their application before the adjudicator after it has been remitted by this court. I am not persuaded by the argument. The current proceedings concerned an appeal predicated on errors of law made by the adjudicator. The owners opposed the application and sought to defend the adjudicator's decision. If they wished to avoid exposure to an adverse costs order, they would have been well advised to abide the court's judgment subject only to their application in terms of the CSOS Act being remitted to the adjudicator should the questions of law raised by the applicant be determined in its favour.

[43] It is also necessary to briefly consider an application brought by the owners under a separate case number (case no. 9939/2020) at the end of July 2020 in which the aforementioned Mr Blacher, attorneys Slabbert Venter Yanoutsos Inc. and Mr Anton

Slabbert, respectively, were cited as the first, second and third respondents. In case no. 9939/2020, orders were sought (i) that the application be heard together with the application in respect of the appeal in terms of s 57 of the CSOS Act (referred to as 'the main application'), (ii) that the first, second and third respondents be joined as respondents in the main application, (iii) that Mr Blacher be ordered to pay the costs of the main application, (iv) in the alternative to (iii), that the second and third respondents be ordered to pay the costs in the main application, and (v) that the costs of the application be costs in the main application. The two applications were argued together without an order having been made to formally permit that. By the end of the argument it appeared to be accepted that in the event of the court deciding, as has happened, that the main application was instituted by Slabbert Venter Yanoutsos Inc. on behalf of the Body Corporate, the only material question for determination in case no. 9939/2020 would concern the costs of the application.

[44] It appears from the owners' founding affidavit in case no. 9939/2020 that the application was made because of the failure of the Body Corporate's attorneys to respond to a notice given by the owners in terms of rule 7 of the Uniform Rules of Court for Slabbert Venter Yanoutsos Inc. to satisfy the court that they had been authorised by the Body Corporate to institute the proceedings in the main application. The rule 7 notice was given in September 2019. The owners inferred from the failure of the Body Corporate's attorneys to respond to the notice that the main proceedings had been instituted by Mr Blacher, and not the Body Corporate.

[45] It was only after the application in case no. 9939/2020 was instituted that the minutes of the trustees' meeting of 15 July 2019 referred to in paragraph [35] were made available. Mr Slabbert has made an explanatory affidavit in which he sets out the history which, by a concatenation of circumstances, led to the long delay in responding to the owners' notice in terms of rule 7. There was nevertheless no excuse for the response not to have been provided promptly during September last year.

[46] Ordinarily, I would have considered that the fault of the Body Corporate's attorney in not furnishing a timeous response to the rule 7 would make it fair that the Body Corporate bear the costs of the application in case no. 9939/2020. There are two factors, however, that persuaded me to reach a different conclusion. Firstly, as discussed above, the owners were not content to accept the minutes of the trustees' meeting as sufficient evidence that the Body Corporate had indeed instituted the main application. There is no reason to believe that they would have reacted differently if the minutes had been provided in a timeously given

response to their rule 7 notice. Secondly, the owners resort to rule 7 in the peculiar circumstances, where they had a personal right of access to the records of the trustees' meetings in terms of the Body Corporate's domestic rules, and in a situation when as fellow members they would have had the ability to speak to Mr Blacher's fellow trustees to confirm that the statutory appeal was indeed being pursued by the Body Corporate, and not by Blacher on a frolic of his own, strikes me as having been unreasonable.

[47] In all of the circumstances I shall order that no order will be made in case no. 9939/2020, with the result that the parties in that application will bear their own costs.

[48] An order is made in the following terms:

1. The applicant's appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 is upheld and the adjudication order, dated 21 June 2019, made by the first respondent in Community Schemes Ombud Service case no. CSOS199/WC/18 is set aside.
2. The application in case no. CSOS199/WC/18 is remitted to the first respondent for determination afresh in the light of the judgment of this court in the statutory appeal.
3. The third and fourth respondents shall be liable jointly and severally, the one paying the other being absolved, for the applicant's costs of suit in case no. 12572/2019.
4. It is determined that no order will be made in case no. 9939/2020.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**D. Baguley**
Applicant's attorneys:	**Slabbert Venter Yanoutsos Inc.** **Wynberg** **Norton Rose Fulbright** **Cape Town**
Third and Fourth Respondents' counsel:	**J.P. Steenkamp**
Third and Fourth Respondents' attorneys:	**BBM Inc.** **Cape Town**