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

Case No: 12399/2021

In the matter between:

THE COMMUNITY SCHEMES OMBUD SERVICE **Applicant**

and

STONEHURST MOUNTAIN ESTATE OWNERS ASSOCIATION **Respondent**

Coram: Justice J I Cloete

Heard: 30 May 2022

Delivered electronically: 17 June 2022

JUDGMENT

CLOETE J:

[1] The issues for determination in this opposed application are as follows. First, whether an order of Samela J made on 3 March 2021 ("the Samela order") was erroneously granted in respect of the limited aspect of costs against the applicant (the "Service") in favour of the respondent (the "Association"). Second, if this is the case, whether the Service is precluded from obtaining variation or rescission of the impugned portion of the Samela order in circumstances where both it and a related party had filed a notice to abide.

[2] Following a dispute between the Association and certain of its members, one of the members referred the matter to the Service for adjudication. The Service in turn appointed the related party, a Mr Ralawe, to adjudicate the dispute. He handed down an adjudication order ("the ruling") on 22 October 2020.

[3] Aggrieved by the ruling, the Association launched an application in this court on 19 November 2020 under case number 17266/2020. The Service was cited as the first respondent and Ralawe (in his official capacity as adjudicator) as the second respondent. The other respondents were members of the Association who took no part in those proceedings, and accordingly no more need be said about them.

[4] The relief sought was comprised of two parts. In Part A (which was brought as one of urgency) the Association asked that *'to the extent necessary'* the operation of the ruling be stayed pending the determination of Part B; and that *'the first respondent and any other respondents who oppose... are ordered jointly and severally'* to pay the Association's costs. Neither the Service nor Ralawe opposed.

[5] In Part B the Association sought a range of relief, namely that its appeal against the ruling be upheld, alternatively reviewed and set aside; that the initial application by the aggrieved member to the Service be dismissed, alternatively refused; a declaration pertaining to the interpretation of a certain clause in the Association's constitution; and the same relief in respect of costs as claimed in Part A.

[6] The matter came before Bozalek J on 9 December 2020. He granted the substantive relief in Part A; directed that Part B be postponed to a date to be arranged with the Registrar and Judge President; and ordered that the costs of Part A stand over for determination with Part B. On 14 December 2020 the Service and Ralawe served a notice to abide. On 15 December 2020 the Judge President ordered that the relief in Part B be heard on the first available date on the semi-urgent roll, which was 3 March 2021, when the matter came before Samela J.

[7] After hearing the submissions of counsel for the Association, the learned Judge granted all but the review relief (which was not necessary since it was claimed in the alternative) and further ordered that the Service bear the Association's costs including those pertaining to Part A.

[8] The manner in which the Association's relief for costs (in both Parts A and B) was crafted is not a model of clarity. On the one hand it could mean that only if the Service opposed would costs be sought against it. On the other it could mean that costs were sought against the Service irrespective of whether or not it opposed. However in the Association's founding affidavit it was made clear that even if the Service abided, costs would nonetheless be sought against it, and both parties approached the matter before me on that basis.

[9] The Service derives its existence, powers and duties from the Community Schemes Ombud Service Act ("the Act").[1] One of the purposes of the Act, as

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[1] No. 9 of 2011.

set out in s 2(c), is to provide a dispute resolution mechanism for community schemes such as the Association.

[10] Section 3(1) establishes the Service as a *'juristic person'*. In terms of s 3(2) the Service operates as a national public entity listed in terms of the Public Finance Management Act[2] with its executive authority vested in the Minister of Human Settlements. In terms of s 4(3) the Service acts through its Board.

[11] In turn, s 14(1) provides that the Board must, with the approval of the Minister, appoint a chief ombud to assist the Service in meeting its objectives. Section 21(2)(b) obligates the chief ombud to appoint full-time and part-time adjudicators with (i) suitable qualifications and experience necessary to adjudicate disputes under the supervision of an ombud or deputy ombud; and (ii) suitable qualifications and experience in community scheme governance. In practical terms therefore, when a dispute is referred to the Service, it in turn refers it on to one of its adjudicators (such as Ralawe) for adjudication.

[12] Section 33 of the Act deals with limitation of liability and provides that:

> *'Neither the Service nor any employee of the Service is liable for any damage or loss caused by –*
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> *(a) the exercise of a power or the performance of a duty under this Act; or*
> *(b) the failure to exercise a power, or perform a duty under this Act,*
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> *unless the exercise of or failure to exercise the power, or performance or failure to perform the duty was unlawful, grossly negligent or in bad faith.'*

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[2] No. 1 of 1999.

[13] In addition s 37 deals with privileges, immunities and non-waiver and stipulates in s 37(1) that:

> *'(1) In performing their functions in terms of this Act, the chief ombud, an ombud, a deputy ombud and an adjudicator have the same privileges and immunities from liability as a judge of the High Court.'*

[14] In the matter that served before Samela J the Association set out its complaints as follows. First, the ombud accepted the member's application which culminated in the adjudicator's ruling due to an error of law, in that the Service lacked the required jurisdiction. Second, the ruling directly and materially affected one of the Association's members who had not received the required prior notice, rendering the proceedings before the adjudicator procedurally unfair.

[15] Third, after initially having indicated that he would deal with the jurisdiction issue first, the adjudicator instead dealt with this issue at the same time as the merits and a related complaint pertaining to whether the member concerned had first exhausted her internal remedies. Fourth, the adjudicator should have dismissed the complaint on the basis that it was frivolous, vexatious, misconceived or without substance.

[16] However nowhere in the Association's affidavit (which consisted of 148 paragraphs and ran to 45 pages excluding 48 annexures) was there any allegation that in performing his functions as adjudicator Ralawe acted in a manner that was *'unlawful, grossly negligent or in bad faith'* as required by s 33

of the Act; and in any event, not a single allegation was made that Ralawe, in performing his functions, caused the Association to suffer *'damage or loss'*.

[17] The heads of argument filed on behalf of the Association in the matter before Samela J made no reference to either s 33 or s 37 of the Act. In line with the Association's affidavit in those proceedings, its complaints were set out in those heads of argument and the only ground upon which costs were sought against the Service is contained in the final paragraph thereof:

> *'[in] the light of the bases upon which the Association seeks relief, costs should be borne by... the Service.'*

[18] During argument before me counsel for the Association (who also appeared on its behalf in the proceedings before Samela J) confirmed that the aforementioned legislative provisions were not drawn to the learned Judge's attention either. At least in respect of s 33, this was apparently on the basis that it was not considered relevant. It is therefore fair to accept that the learned Judge was not aware of these provisions when he made the order. Further, he also gave no reasons for his order, presumably because they were not requested by either party. (In this regard the parties appear to be *ad idem* that no appeal lies against the Samela order given s 16(2)(a)(ii) of the Superior Courts Act).[3]

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[3] No. 10 of 2013. See also *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another* 2018 (4) SA 433 (SCA) at paras [8] to [9].

[19] In *Cool Ideas v Hubbard*[4] the Constitutional Court restated the principles pertaining to statutory interpretation as follows:

> *'[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely*
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> *(a) that statutory provisions should always be interpreted purposively;*
> *(b) the relevant statutory provision must be properly contextualised; and*
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'*

[20] It is clear from s 37(1) of the Act that the chief ombud, an ombud, a deputy ombud and an adjudicator are all immune from costs orders. In addition, in terms of s 33, the Service and any of its employees are only liable for loss or damage if they act unlawfully, in a grossly negligent manner, or in bad faith.

[21] The adjudicator in the present matter was only appointed as a result of the Service having performed its statutory duty through its Board and chief ombud. On its literal meaning, the omission of the Service itself from s 37(1) leads to the absurd result that although its functionaries cannot be mulcted with costs orders, the Service nonetheless can. Applying the principles in *Cool Ideas*, it seems to me that to interpret this statutory provision as being specifically designed to exclude the Service from the same immunity would leave it

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[4] 2014 (4) SA 474 (CC).

exposed to costs orders even in circumstances where it performs its statutory duties in good faith.

[22] In addition, and as pointed out by the Service, it is a body created for dispute resolution founded on s 34 of the Constitution, namely that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The Service, which is statutorily bound to facilitate an independent or impartial "tribunal" in the form of the adjudicator, has no legal interest in the outcome of a dispute such as the one between the Association and certain of its members.

[23] The ruling of the adjudicator may have been wrong. However the legislature anticipated that there would be such instances, and for this reason provided, in s 57(1) of the Act, for an automatic right of appeal to the High Court on a question of law.[5]

[24] The relief sought by the Association before Samela J was such an appeal, save for that portion which pertained to declaratory relief. The issue of costs against the Service (and for that matter, the adjudicator) should not even have arisen in relation to the appeal, and as far as the declaratory relief is concerned the Service (and adjudicator) clearly had no interest in the interpretation of a clause in the Association's constitution. It is unsurprising in these circumstances that

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[5] See also *Turley Manor Body Corporate v Pillay and Others* (10662/2018) [2020] ZAGPJHC 190 (6 March 2020) at paras [14] to [15]; *Kingshaven Homeowners Association v Botha and Others* (6220/2019) [2020] ZAWCHC 92 (4 September 2020) at para [25].

they elected to file a notice to abide to protect the public funds which are utilised for their functioning.

[25] The Association criticises the Service for not at least filing an explanatory affidavit setting out the above at the same time as its notice to abide. The short answer to this is that it was not obliged to do so. It was the Association which sought the relief, and which should have drawn Samela J's attention to the relevant provisions of the Act. I have no doubt that, had the learned Judge been made aware thereof, he would not have granted the costs order that he did.

[26] Both counsel relied, for different reasons, on various portions of the recent Constitutional Court judgment in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*[6] in advancing their respective arguments on whether the filing of a notice to abide precludes a party from later asserting that an order was granted erroneously in its absence in accordance with rule 42(1)(a) of the uniform rules of court. In the particular circumstances of this case – and I make it clear that I do not mean to elevate this to some or other general principle – I am persuaded that given the error of law in the Samela order, it would be placing form over substance to debar the Service from relying on rule 42(1) given that the rule of law is a foundational value of our Constitution. Moreover the order (with its consequences) will stand until set aside.[7]

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6 2021 (11) BCLR 1263 (CC).

7 *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) at para [42].

[27] In *Rossiter v Nedbank Ltd*[8] it was stated that:

> *'[16] The law governing an application for rescission under uniform rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission. It is not necessary for a party to show good cause under the subrule…'*

[28] The Service asks for costs as a result of the Association's opposition. In the exercise of my discretion, and given the particular factual matrix, it is my view that this is not warranted.

[29] **The following order is made:**

1. **The order granted on 3 March 2021 under case number 17266/2020 is varied to the extent set out in paragraph 2 below.**

2. **Paragraph 6 of the order referred to in paragraph 1 above is set aside and substituted with the following:**

   '6. There shall be no order as to costs.'

3. **Each party shall pay its own costs.**

J I CLOETE

[8] (96/2014) [2015] ZASCA 196 (1 December 2015).