IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A4/2022

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

21/02/2024
DATE

[redacted]
SIGNATURE

In the matter between:

SILVER LAKES HOMEOWNERS ASSOCAITION Appellant

and

C J LEONARD First Respondent

THE COMMUNITY SCHEMES OMBAUD SERVICE Second Respondent

THE ADJUDICATOR: AJ ANDREAS. N. O Third Respondent

Neutral Citation:

JUDGMENT

MALUNGANA AJ (MALINDI J Concurring)

Introduction

[1] The sequel to this appeal is the ruling and order handed down by the adjudicator in terms of the provisions of Community Schemes Ombud Service Act, No. 9 of 2011 (the "Act" or "CSOS Act").

[2] The appellant is the Homeowners Association of Sliver Lakes residential estate, whilst the first respondent is a member of association by virtue of having acquired ownership of the residential estate in the said estate.

[3] Pursuant to the dispute that was submitted to the Community Schemes Ombud Service Tribunal by the first respondent, the adjudicator handed down the order setting aside the decision of the appellant's Penalty Dispute Committee (board of directors), which found that the first respondent had contravened the rules and code of conduct of the appellant.

[4] Aggrieved by this turn of events, the appellant noted an appeal against the decision of the adjudicator as contemplated in section 57 of the Act. The nature of the relief usually sought in terms of rule 57 is analogous to that sought in the judicial review. Despite the fact that it is not brought by way of notice of motion supported by an affidavit there was no objection the manner in which it was brought. We, nonetheless proceeded to hear the matter.

Facts and brief history of the dispute

[5] The dispute arises from series of contraventions relating to the rules and code of conduct of the appellant allegedly committed by the first respondent. On 05 November 2020, the first respondent was found to have contravened the appellant's rules of conduct for the Clubhouse as noted in its Constitution.[1] Amongst other contraventions he was accused of having used a foul and offensive language towards various staff members of the association. After considering the matter, the appellant's disciplinary committee imposed a penalty of R10 000.00 upon the first respondent. In addition, he was barred from accessing certain facilities within the estate, and to make personal contact with staff members.

[6] Unhappy with the decision imposed by the disciplinary committee, the first respondent lodged an objection with Penalty Dispute Committee, which after considering the matter confirmed the earlier decision of the appellant, and increased the penalty from R10 000 to R20 000.

[7] On 02 February 2021, the first respondent referred the dispute to the Community Scheme Ombudsman Tribunal in terms of the Community Schemes Ombud Services Act, No. 9 of 2011.

[8] On 15 December 2021 the adjudicator handed down his ruling and order:

[1] Case lines 003-77-003-79

(a) declaring that the process embarked upon by the appellant was unfair. Unreasonable and inconsistent and/or procedural unfair, and

(b) directing the appellant to remove the penalty imposed on the first respondent levy statement within 14 days of the order.

Grounds of the appeal

[9] The appellant in this appeal has raised several grounds upon which it claims the adjudicator has committed misdirection in law.

First ground

(a) the adjudicator erred in failing to deal with the preliminary issue relating to the late submission of the first respondent's complaint to the tribunal;

(b) the adjudicator erred in not deciding on the merits of the time- bar defence;

(c) the adjudicator erred in failing to uphold the time bar defence;

(d) the adjudicator ought to have found that the first respondent is contractual bound to comply with the appellant's rules, including rule 15.2.1 read with rule 15.3. Consequently, the first respondent was time-barred from lodging the complaint, *alternatively* he had waived his rights to do so;

Second ground

(a) the adjudicator erred in finding that the procedure as outlined in rule 11 of the rules was not complied with;

(b) the learned adjudicator failed to properly interpret rules 11;14 and 15;

(c) the adjudicator ought to have found that the appellant was entitled to any of the individual options available in subparagraphs or combination of rule 11.1.1-11.1.5;

(d) the adjudicator erred in finding that the appellant failed to comply with rules;

(e) the adjudicator erred in holding that the appellant failed to submit evidence that the procedure outlined in the conduct of the rules was followed prior to the imposition of the penalty;

(f) the learned adjudicator erred in holding that the appellant failed to submit evidence to the effect that the first respondent was afforded an opportunity to have his side heard as demanded by the *audi alterem partem rule.*

(g) the learned adjudicator ought to have found that rule 11 provides for five alternative steps which the appellant's board was entitled to adopt at its discretion.

Third ground of appeal

(a) the adjudicator erred in holding that the appellant was obliged to provide the first respondent with an opportunity to make representations *"so as to remedy the alleged breach;"*

(b) the adjudicator ought to have found that the appellant fully complied with the rules and that the imposition of the penalty was proper and in compliance with the rules, rule 11 read with rule 15.

Fourth ground of appeal

(a) the adjudicator erred in allowing the adjudication to proceed without full oral submissions and/or legal argument from the

appellant; in so doing breached the appellant's rights to fair hearing.

(b) the adjudicator erred and/or failed to comply with paragraph 8 of the Community Schemes Ombud Service Directive, dated 23 June 2020, which provides:

(i) in paragraph 8.3 thereof-to conduct the adjudication telephonically or virtually, and /or

(ii) in paragraph 8.7 to call for further final submissions written argument "*before he or she will deliberate and publish the Adjudication Order.*"

Fifth ground of appeal

(a) the adjudicator erred in failing to properly apply the onus of proof in respect of the first respondent;

(b) the adjudicator erred in applying the reverse onus of proof on the appellant, when the burden thereof rested upon the first respondent;

Sixth ground of appeal

(a) the adjudicator erred in considering the further submission of the 16 April 2021 delivered by the first respondent which were not brought its attention. In so doing, the adjudicator negated, *alternatively* denied the appellant's rights to natural justice and thereby infringing upon its constitutional rights.

Discussion and submissions

[10] In the heads of argument, counsel for the appellant set out a number of procedural defects relating to the manner in which the adjudicator conducted the inquiry. The most substantial argument relates to the fact that the adjudicator failed to deal with the point *in limine* which it raised regarding the first respondent's late referral of the matter to the Ombud's Tribunal. According to the appellant the point *in limine* would have been dispositive of the matter.

[11] Rule 15.3 of the appellant's rules reads:

> *"Should the affected Member be aggrieved by the decision of the Directors he shall, within 14 (fourteen) days of receipt of delivery of written notification of the Directors' decision, refer such a dispute as provided for in the Community Scheme Ombud Service Act, 211, failing which it shall be deemed that the Member has accepted the decision of all the Directors."*

[12] In response to the first respondent's application the appellant averred in paragraph 2 of its submissions as follows:[2]

"IN LIMINE:

In terms of rule 15.2.1 from Annexure "CL7" (the rule of the Respondent) of the Applicant's application, the Applicant 's submission to the Respondent is out of time.

The Applicant was informed on 5 November 2020 (See Annexure "R1") of the penalty and transgressions and only replied thereto on 20 November 2020 as per Annexure "CL2.".

On 22 December 2020 the Applicant was informed about the Penalty Dispute Committee's decision regarding his written submission (see Annexure "R2") and only referred the matter to CSOS on 2 February 2021) (see Annexure "R3"), not complying with rule 15.3 of the rules of the Respondent. The Ombud is referred Annexure "CL7" of the Applicant's submission. Just in light of the above, the Applicant's application should be dismissed with cost."

[2] Case lines 003-72. Correspondence from the appellant to the Ombud's Service dated 16 April 2021.

[13] On 23 April 2021, the first respondent replied to the appellant's point *in limine*.[3] The relevant portion of his reply reads:

> *"Ad Point in Limine*
>
> 1. *At the outset we deem it necessary to record that the SLHOA is disingenuous and extremely opportunistic in raising the point in limine.*
>
> 2. *Our client was informed of the penalty that was instituted against him on 5 November 2020.*
>
> 3. *Our client duly replied to the penalty on 20 November 2020.*
>
> 4. *In terms of paragraph 15.2.1 of Annexure "CL7".*
>
> > *"A member who disputes that he has committed a breach of any obligations in terms of MOI and/or the Rules, shall deliver submission, in Writing, to the Directors within a period of 14 (fourteen) days from the date of expire of the period of demand contained in the notice Deliver to the affected Member."*
>
> 5. *In the absence of anything to the contrary, on can accept that 14 days refer to 14 working days, which effectively means that our*

[3] Case lines 003-94. Correspondence from the 1st respondent dated 23 April 2021.

client had up to 25 November 2020 to provide the Directors with objection. The reply that was therefore filled on 20 November 2020 was done timeously in terms of the rules as set out in Annexure "CL7."

6. The SLHOA thereafter replied to our client's objection on 22 December 2020. As per our initial; complaint to your office, this was done <u>without prejudice.</u>

7. Our office duly replied to their aforesaid letter on 4 January 2021, a copy of which is attached hereto as Annexure "X1"

8. Despite our offices requesting feedback by no later than 18 January 2021, no such feedback was forthcoming. Our office therefore and on 20 January 2021 sent a follow up letter, a copy of which is attached hereto Annexure "X2".

9. Our office eventually received a reply on 21 January 2021, which letter was conveniently once again marked <u>without prejudice.</u> We attach the aforesaid letter hereto as Annexure "X3". Save for the fact that none of the requested documentation was forthcoming, the SLHOA effectively informed our client that he should approach the Community Scheme Ombudsman.

10. In terms of paragraph 15.3 of Annexure "CL7".

"Should the affected Member be aggrieved by the decision of the Directors he shall, within 14(fourteen) days of the receipt of delivery of a written notification of the Directors' decision, refer such dispute as provided for in the Community Scheme Ombud Service Act, 2011, failing which it shall be deemed that the Member has accepted the decision of the Directors."

11. *As per the above and in the absence to anything to the contrary, one can accept that 14 days refer to 14 working days, which effectively means that our client's had up to 10 February 2021 to refer this matter to your office. Our client's application was delivered to your offices on 4 February 2021, which was therefore done timeously in terms of the rules as set out in Annexure "CL7". Proof of our client's application being submitted to your office on 4 February 2021 is attached hereto marked "X4".*

12. *We therefore beg that you disregard the SLHOA* point *in limine as same not only has no basis in law, but is blatantly untrue."*

[14] The appellant submits that it did not have sight of the first respondent's further submission as it was not served with the copy of thereof. It only learned about it in the process of compiling the record from the documents it received from the CSOS. The adjudicator 's omission to furnish the appellant with further submission not only violate the provisions of CSOS

Practice Directive, but has caused the appellant considerable harm. It argues further that according to the CSOS Practice Directive on Dispute Resolution published on 23 June, at para.8, "all parties will and must be copied in all correspondence at all times."

[15] I am in agreement with the appellant's submission in this regard. In terms of paragraph 26 of the amended Practice Directive on Dispute Resolution (released on 01 August 2019), the adjudicator shall act with fairness and impartiality. He should, in terms of par 26.5.3 ensure that each party is furnished with a copy of any written submissions sent to or from either party. The failure by the adjudicator to observe these provisions is inconsistent with the SCOS Act and procedural fairness.

[16] According to the appellant's counsel, the first respondent's contention that the 14 days' period set out in the appellant's rules refer to '14 working days', is misplaced. The appellant argues that the time period in question does not arise from the statute and there is no special definition given to a 'day' in the rules of the appellant. Therefore, an ordinary civil method calculation should be applied.

[17] In this regard Counsel for the appellant referred us to the ***Ex parte Minister of Social Development and Others*** **2006 (4) SA 309 (CC) at par 24**, in which the Court held:

"This Court has as yet not considered the computation of time or time periods. The general common law rule is that, the calculation of time method is applicable, unless a period of days prescribing by law or contracting parties intended another method to be used."

[18] I align myself with the principle enunciated by the Constitutional Court in the above decision. I therefore agree with the appellant' submission that civil method's calculation is applicable in this matter.

[19] The first respondent submitted in its written heads of argument[4] that clause 1.6 of the appellant's rules makes provisions for the waiver of or extension of time in exercising any right under the rules, and the letter from the appellant dated the 22nd of December 2020 should be construed as a waiver. Nothing turns on this submission. It apparent from the first respondent's reply to the appellant's submission that this defence is unsustainable. 'An intention to waive must be inferred reasonably; no one can be presumed to have waived rights without clear proof. The test for such intention is objective. Some outward manifestation in the form of words or conduct is required; silence and inaction will do when a positive duty to act or speak arises. Mental reservations not communicated have no legal effect." See *Premier Attraction 300 CC t/a Premier Security v City of cape Town,* (592/2017) [2018] ZASCA 69 (29 May 2018). On the objective facts none of these elements can be inferred from first respondent's proposition.

[4] Case lines 008- Para 4.3-6.1

[20] The first respondent further argues that the adjudicator has dealt with the 'time bar' defence in paragraph 24 of the order. I find myself unable to agree with the first respondent in this regard. I could not discern from his ruling/order where the adjudicator made a finding on this issue. He merely mentioned it as one of the submissions made by the appellant. This much is apparent from his ruling that there was no preliminary issue which he had to decide.[5] There is absolutely nothing before us indicating that the adjudicator dealt with the point *in limine* raised by the appellant.

[21] I turn finally to the conclusion made by the adjudicator that the appellant failed to furnish him with further evidence to prove that the procedure outlined in clause 11 of the appellant 's rule were followed.[6] I have difficulty with this conclusion. To my mind the adjudicator plays an active role in the adjudication process. There is no basis for such finding which was arbitrarily made. In terms of s 50(1) he is empowered to require the applicant, the managing agent or any person relevant to the application, and to obtain information or documentation from such persons. In terms of s 50 of the CSOS he should observe the principles of due process in the investigation of the application.

[22] Section 50 of the CSOS provides:

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[5] Case lines 003-116. Para 6 of the adjudicator's decision
[6] Case lines 003-124. Para 56 of the adjudicator's decision

"50. The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator-

(a) must observe the principles of due process of law; and

(b) must act quickly, and with a little formality and technicality as is consistent with proper consideration of the application; and

(c) must consider the relevant of all evidence, but is not obliged to apply the exclusionary rules as they are applied in civil courts."

[23] In my assessment of the stated grounds of appeal advanced by the appellant on the point of law, I find that the adjudicator had erred in law in the following respects:

[23.1] By failing to failing to deal with the appellant's point *in limine* (time bar);

[23.2] By failing to observe the practice directive, and the relevant provisions of the CSOS Act (ss 50 and 51).

[23.3] By failing to properly interpret clause 11 of the rules of the appellant.

[24] For all the reasons stated above, my view the appeal must succeeds with costs. In the result the order is made:

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

[24.2] The order made by the adjudicator in terms of section 54 of the said Act is set aside.

[24.3] The First Respondent is ordered to pay the costs of the appeal.

[redacted]

P MALUNGANA

Acting Judge of the High Court

I agree.

[redacted]

G MALINDI

Judge of the High Court

APPEARANCES

For the Appellant	: Adv RJ Groenewald
Instructed by	: VZLR Attorneys
For the Respondent	: Adv M de Meyer
Instructed by	: F van Wyk Inc