

SOUTH AFRICA / JUDGMENT

Baxter v Ocean View Body Corporate and Others (A170/2022) [2022] ZAWCHC 234; 2023 (2) SA 205 (WCC) (16 November 2022)

[2022] ZAWCHC 234

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward, De Wet

CASE / FILE NUMBER

A170/2022

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FLYNOTES:

LEVIES AND EXCLUSIVE USE AREAS

Property

– Body corporate – Levies – Raised on exclusive use areas – Where owner responsible for maintenance and

repair – Sectional Titles Schemes Management Act 8 of 2011, s 3(1)(c).

Property

– Sectional title – Community Schemes Ombud –

Appeal – Time limit – Court's powers to grant

condonation – Community Schemes Ombud Service Act 9 of 2011, s 57.

Republic

of South Africa

IN THE HIGH COURT OF

SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: A170/2022

Before: The Hon.Mr Justice Binns-Ward
and
The
Hon. Ms Acting Justice De Wet
Decided
on the papers without an oral hearing
Date
of Judgment: 16 November 2022
In

the matter between: KEVIN
BAXTER Appellant
OCEAN
VIEW BODY
CORPORATE First
Respondent
COMMUNITY
SCHEMES OMBUD SERVICES Second
Respondent
N
FOCA
N.O. Third
Respondent

JUDGMENT

BINNS-WARD J and DE WET AJ:

- [1] This is an appeal in terms of s 57(1)[1] of the Community Schemes Ombud Service Act 9 of 2011 ('the CSOS Act') wherein the appellant, who is the owner of a unit in a sectional titles development scheme, seeks orders (i) setting aside the decision of the third respondent, the Adjudicator, dated 13 June 2022, that upheld the Body Corporate's decision to levy a contribution computed at R23.00 per square metre on the unit owners' exclusive use balcony areas, (ii) reinstating the previously levied contribution of R3.00 per square metre and (iii) directing that all amounts debited in excess of the latter amount be credited to the appellant's account. The first respondent is the Body Corporate of Ocean View, a development scheme registered in terms of the Sectional Titles Act 95 of 1986. The second respondent is the Community Schemes Ombud Service, a juristic person established in terms of s 3 of the CSOS Act.
- [2] The first respondent filed a notice to abide the decision of the court on condition that no costs order is sought against it. The second and third respondents did not participate in these proceedings

and it is assumed that they also abide the decision of the court. With the consent of the appellant and the first respondent, the

appeal is being disposed of on the papers, without an oral hearing.

- [3] The appeal was brought by way of motion proceedings in accordance with the guidelines stated in *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC), ('Shmaryahu'). It was, however, brought outside the 30-day time period prescribed in s 57(2) of the CSOS Act. Condonation for the late lodging of the appeal was accordingly also sought.
- [4] It is appropriate to treat first of the condonation application. The question whether it is within the court's powers to grant condonation was not addressed in the appellant's written argument. It does not follow that the court has such powers in every case in which a time limit for the institution of court proceedings is statutorily prescribed and has not been complied with; see e.g. *Mohlomi v Minister of Defence* [1996] ZACC 20 (26 September 1996) ZACC 23; 1996 (12) BCLR 1559; 1997 (1) SA 124 (CC) at para 17, where Didcott J noted that the courts have no inherent power to condone non-compliance with statutorily prescribed time limits.
- [5] There does not, however, need to be to be an express provision in the statute conferring a power of condonation. Depending on the context, the existence or conferral of such a power might in a given case be implied upon a proper construction of the relevant provisions of a statute. Such an exercise was undertaken by the late Appellate Division in analogous circumstances in *Phillips v Directeur vir Sensus* 1959 (3) SA 370 (A).
- [6] The judgment in *Phillips* was concerned with whether a court could condone non-compliance with a prescribed time limit in an appeal from a decision of the Race Classification Board that was brought after the expiry of the time prescribed therefor in the Population Registration Act,
1950. The appeal court acknowledged that condonation could not be granted if the time limit provision in point was a so-called 'vervaltermym' or 'expiry period', with the implication that if the relevant right were not exercised within the prescribed time it would ipso facto be extinguished. Having determined that the time limit in issue was not such a provision, the court reasoned that functions of the Board were essentially that of a tailor-made adjudicative body that corresponded closely with those of an ordinary court. The court reviewed various common law authority that supported the incidence of the power of courts to condone the bringing of appeals outside the prescribed time limits and had regard to what the adverse practical effects would be were the statute in question construed to exclude such a power. It concluded, on the basis of a broad contextual analysis, that the statute fell to be construed to imply a power in the court to condone non-compliance with the prescribed time limit for the lodging of an appeal.
- [7] In our view, very similar considerations apply in the current matter. The prescribed time limit does not appear to us to fit the characteristics of an expiry period provision, and the exclusion of a

power of condonation could readily conduce to incorrect decisions that could, and should be, rectified being irremediably visited upon members of community schemes. It is unlikely that the legislature could have intended such an effect. It would be irreconcilable with the objects of the Act. The whole object of the CSOS Act is to facilitate the cost-effective and relatively informal resolution of community scheme related disputes; cf. *Coral Island Body Corporate v Hoge* [2019] ZAWCHC 58 (23 May 2019); 2019 (5) SA 158 (WCC) at para 8-11. Its provisions should not be read in a way that would unreasonably limit the proper ventilation of such disputes, including in appeals from the decisions of the Ombud Service. The CSOS Act does not contain any procedural directions concerning the lodging and prosecution of the appeals permitted in terms of s 57. The courts have consequently had themselves to determine certain of the material procedures to be followed. The necessary implication is that the legislature intended to leave the procedural aspects of s 57 to the courts to regulate.

[8] In *Phillips*, the appeal court described the role of the prescribed 30-day time limit for the lodging of appeals applicable in that matter as follows:

‘Die dertig dae bepaling is klaarblyklik ingevoer om ’n vertraging in die daargestelling van ’n juiste register te voorkom. Maar dit spreek vanself dat ’n termynbepaling wat verlengbaar is nie outomaties verleng sal word nie, dog slegs waar voldoende rede vir kondonasie aangevoer is. Gevolglik sou verlenging nie in stryd wees nie met ’n bedoeling dat bespoediging van die administratiewe werking van die wet nie belemmer moet word nie.’[2]

[9] By parity of reasoning, we have concluded that upon a proper contextual consideration of the provisions of s 57(2) of the CSOS Act, the court does have the power, on good cause shown, to condone non-compliance with the 30-day time limit therein prescribed.

[10] The delay in lodging the appeal in the proper form was because the appellant’s attorneys had initially understood that the applicable procedure was that determined upon in *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another*

[2019] ZAGPJHC 387 (24 October 2019); 2020 (1) SA 651 (GJ) for such appeals brought in the Gauteng Division. In the face of this court’s decision in *Shmaryahu* supra, which was confirmed, post *Stenersen*, in *Kingshaven Homeowners’ Association v Botha and others*

[2020] ZAWCHC 92 (4 September 2020), their reliance on the Gauteng decision was plainly misdirected. They were disabused when their reliance on *Stenersen* in an appeal in terms of s 57 for another client resulted in that matter being struck from the roll on account of its non-compliance with the procedural guidelines established for use in such cases in this (and also the KwaZulu-Natal[3]) Division; see *Trustees of Alessio Body Corporate v Cottle and Others* [2022] ZAWCHC 233 (15 August 2022).

[11] The appellant’s initial failure to follow the established procedure was unreasonable in the circumstances, but the resultant delay – which was by no means inordinate – has not occasioned material prejudice to the other parties. Unsurprisingly in the circumstances, there was no opposition to condonation being granted. It also counted in the appellant’s

favour that his appeal appeared to us to have merit, and that it would therefore be in the interests of justice for it to be entertained despite the delay. An order condoning the appellant's non-compliance with the prescribed time limit will therefore be granted.

[12] We turn then to deal with the merits of the appeal.

[13] On 17 November 2021, the Body Corporate resolved to increase the levy raised on the exclusive use balcony areas from R3 to R23 per square metre. The increase was ostensibly to defray the cost of insurance, maintenance and other expenses and to make provision towards the scheme's 10-year maintenance plan. It was further resolved that the increase would operate retrospectively.

[14] The appellant lodged a dispute with the second respondent, and sought orders in terms of s 39(1)(c) of the CSOS Act in the subsequent adjudication process (i) declaring that the contribution levied on the exclusive use balcony use owners had been incorrectly determined in conflict with s 3(1)(c) of the Sectional Titles Schemes Management Act 8 of 2011 ("the STSMA"), (ii) directing that the contribution be adjusted to the correct or a reasonable amount; and (iii) further, in terms of s 39(1)(e) of the CSOS Act, directing that all amounts paid by him in excess of the adjusted amount be credited to his levy account.

[15] Section 3(1)(c) of the STSMA provides as follows:

'3. Functions of bodies corporate.-

- (1) A body corporate must perform the functions entrusted to it by or under this Act or the rules, as such functions include-
- (c) to require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the

provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs.'

(Emphasis supplied.)

[16] Simply said, s 3(1)(c) of the STSMA requires the body corporate to make a policy decision: either the body corporate maintains the exclusive use areas itself and collects the costs of doing so from the owners of the areas, or the trustees amend the conduct rules and make the maintenance (and the costs thereof) the responsibility of the owners (without the need for a contribution towards maintenance).[4]

[17] In this matter, the Body Corporate adopted a conduct rule (Rule 24(4)(a)), which recorded as follows:

‘4. An owner to whom an exclusive use right has been allocated shall:

- (a) Maintain and repair that area as if it were part of his/her/its section and keep it clean and tidy.’

It made the unit holders who had the enjoyment of exclusive use balconies responsible for the maintenance and repair of those areas.

Accordingly, the Body Corporate was prohibited by the proviso to s 3(1)(c) of the STSMA from levying a contribution to defray the cost of maintaining such areas.

[18] The Adjudicator erred by failing to recognise the effect of the proviso to s 3(1)(c) read with the forementioned Rule 24(4)(a) on the determination of the impugned contribution.

[19] The impugned contribution was incorrectly determined by virtue of its conflict with the statutory injunction in s 3(1)(c) of the STSMA. In the circumstances, it is incumbent on the trustees of the Body Corporate to procure an adjustment of the contribution so levied with retrospective effect so as to bring it into compliance with s 3(1)(c) of the Act by excluding from the computation of the levied contribution any provision for the defrayment of any costs for which the said owners are directly

responsible in terms of the rules of the scheme. It was not for the Adjudicator, nor is it for the court to determine what the adjusted contribution should be. It would therefore be inappropriate for us to accede to the appellant’s prayer for the court to direct that the impugned contribution should revert to R3.00 per square metre. The adjustment may be to any rate that the Body Corporate reasonably estimates is necessary to defray the costs for which the owners who have balconied exclusive use areas are not individually liable in terms of the forementioned Rule 24(4)(a).

[20] In the result, an order is made in the following terms:

1. Condonation is granted for the late lodgement of the appeal.
2. The appeal is upheld, with no order as to costs.
3. The order of the third respondent is set aside and replaced with an order in the following terms:
 - (a) It is declared that the contribution of R23 per square metre levied on owners in respect of balconies that are exclusive use areas, in terms of the resolution determined at the annual general meeting of the Ocean View Body Corporate on 17 November 2021 on the basis of an estimate of a necessary provision to defray the necessary costs of rates and taxes, insurance and maintenance in respect of such areas, was incorrectly determined, in contravention of 3(1)(c) of the Sectional Titles Schemes Management Act 8 of 2011 (‘the Act’).

- (b) The trustees of the third respondent are directed to procure the adjustment of the contribution so levied with retrospective effect so as to bring it into compliance with s 3(1)(c) of the Act by excluding from the computation of the levied contribution any provision for the defrayment of any costs for which the said owners are directly responsible in terms of the rules of the scheme (as defined in s 1 of the Act).
- (c) The trustees are afforded 56 calendar days from the date of this order within which to comply with the direction in paragraph (b) hereof.

A.G. BINNS-WARD

Judge of the High Court

A. DE WET

Acting Judge of the High Court

Appellant's counsel: DM Roberts

Appellant's attorneys: STBB

Cape Town

First respondent's attorneys: Bicarri Bollo Mariano Inc.

- [1] Section 57(1) of the CSOS Act provides that: 'Right of Appeal 57.1 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.'

- [1] Section 57(1) of the CSOS Act provides that:

'Right of Appeal

57.1 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] 'The 30-day provision has obviously been inserted to avoid delay in the establishment of an accurate register. But it is axiomatic that a time limit that is extendable will not automatically be extended, rather only where sufficient cause for condonation has been made out. Consequently, extension would not be in conflict with the intention that expedition of the administrative operation of the statute should not be hindered'. (Our translation.)

- [3] See *Durdoc Centre body Corporate v Singh* [2019] ZAKZPHC 29 (13 May 2019); 2019 (6) SA 45 (KZP) and *Ellis v Trustees of Palm Grove Body Corporate and Others*

- [2021] ZAKZPHC 97 (7 December 2021) in regard to the procedure applied in the KwaZulu-Natal Division.

[4] See C G van der Merwe, Sectional Titles, Shareblocks and Time Sharing (looseleaf) para 11.5.4.5 at footnote 297.

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