

SOUTH AFRICA / JUDGMENT

**Mogashoa and Others v Zwavel's
Nest Homeowners Association (Pty)
Ltd and Others (30715/2021) [2024]
ZAGPPHC 986 (26 September 2024)
[2024] ZAGPPHC 986**

COURT

North Gauteng High Court, Pretoria

BEFORE

Williams

CASE / FILE NUMBER

30715/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

number: 30715/2021

(1)

REPORTABLE: (2)

OF INTEREST TO OTHER (3)

JUDGES: REVISED.

Date: 26 September 2024

Signature

In

the matter between:

MALOSE
C MOGASHOA
First applicant
MMAPULA
L
KEKANA
Second applicant
JACOB
J
MABASA
Third applicant
And
ZWAVEL'S
NEST HOMEOWNERS ASSOCIATION
(PTY)
LTD
First respondent
COMMUNITY
SCHEMES OMBUD SERVICE, GAUTENG
Second respondent
KAREN
BLEIJS (ADJUDICATOR)
Third respondent

JUDGMENT

WILLIAMS, AJ

- [1] The applicants each own immovable property in Zwavel's Nest. Their erven are vacant, since they have allegedly failed under the Homeowners Association Rules, to build timeously. The first respondent ("the Homeowners Association") levied penalties provided for in the Homeowners Association Rules ("the Rules").
- [2] The third respondent ("the adjudicator") was then approached. She determined, under the Community Schemes Ombud Service Act, 9 of 2011 ("the COSAS Act") that, indeed, the applicants are liable for the penalties as provided for in the Rules.
- [3] The applicants now wish to appeal the adjudicator's decision, under section 57 of the COSAS Act.
- [4] A decision by the adjudicator is enforceable, as the case may be, in a Magistrate's Court or a High Court, as if it was issued by a Magistrate or by a Judge. The implication is that an appeal under section 57 of the COSAS Act ought to be heard by at least two Judges. The reported judgments dealing with section 57 indeed reveal that two or three Judges usually preside in such appeals.

- [5] Here the applicants have purported to launch an appeal, by the filing of this application under a Notice of Motion, supported by an affidavit.
- [6] A Full Court of the Gauteng Division, Johannesburg, has held that a section 57 appeal “is an appeal in the ordinary strict sense ...”. Such appeal “... should be brought by way of a Notice of Appeal ...”, wherein in the grounds of appeal are fully set out. Pertinently, the Full Court said that the process that should be followed is that “... prescribed for all appeals ...”. [1]
- [7] The adjudicator made her adjudication on 7 May 2021. Under section 57 an appeal must be lodged within 30 days after delivery of the adjudicator’s order. The present application is dated 21 June 2021 and was served on 2 July 2021, a few days late, outside of the 30 days’ period. Hence the applicants also seek in its Notice of Motion that the late filing of the purported appeal be condoned. I express no view on the merits of such application for condonation, be it in these proceedings or in other proceedings.
- [8] Because the applicants proceeded by way of Notice of Motion, rather than filing a Notice of Appeal, the first respondent objected under Rule 30. This gave rise to a Rule 30 application dated 29 March
2022. The failure to file a Notice of Appeal was specifically targeted as an irregular step. Although raising some technical issues, the applicants did not address the substance of the complaint, being the failure to follow the procedure prescribed by the Full Court. Nothing really turns on this. On 27 March 2024 the first respondent withdrew its Rule 30 application/ notice.
- [9] By then the first respondent, under a Notice of Set Down dated 6 February 2024 (served on 9 February 2024), had set this (the main) application down for hearing during the week of 15 April 2024.
- [10] In a Notice of Motion dated 12 April 2024, the applicants brought an application seeking to set aside, as an irregular step, the enrolment of the main application. Applicants are seeking a postponement.
- [11] The first respondent persists to argue the main application. It laments the applicants’ tardy prosecution of its application/appeal. The applicants counter this, alleging they are prejudiced by the main application being set-down, in the face of the (then) pending Rule 30 application. The applicants say they did not even file Heads of Argument in the main application.
- [12] Both the Rule 30 application brought by the first respondent, as well as the main application, traverse one critical point, before one gets to the merits or demerits of what the adjudicator decided. Can the purported appeal brought under a Notice of Motion in the instant proceedings, survive. The applicants wish to “convert” the proceedings into an appeal.

- [13] The dictates of the Full Court in the Stenersen-matter are clear. I am alive to not let form trump substance, but in my view the present application is not capable of being “converted” into an appeal, at least not without the cooperation of the respondents.
- [14] Rule 27(3) does allow for condonation. The distinction between irregular proceedings being a nullity (and not condonable) and those not being null (and thus condonable), is said not to serve a purpose according to some cases. [2] Nonetheless, the launching of motion proceedings rather than appeal proceedings stands in my view, on a different footing. The Courts approached are different. The Registrar’s office also caters for different sections.
- [15] Also, before the first respondent’s Rule 30 application was withdrawn, a replying affidavit was served on the applicants’ attorneys on 27 July 2022. The applicants were therein referred specifically to the Stenersen-judgment, which makes it clear that appeal proceedings should be pursued, not motion proceedings. The applicants did not, for some years, do anything to remedy this defect. They only requested, plaintively, in correspondence that the first respondent allow the applicants’ some latitude in this regard. Such cooperation has not been forthcoming. Condonation should have been sought from the outset – it is still not sought.
- [16] I turn to the contention that the main application was not set-down regularly. The first respondent, eager to dispose of the matter, rejected the applicants’ contentions that the main application was not properly set-down. In an email it said that it “... proceeded to set the appeal as launched by the applicants down for hearing ...”. The first respondent is obviously minded that the proceedings that serve before me, is not *stricto sensu* appeal proceedings (i.e. can be dealt with by a single Judge), sooner, rather than later. I agree.
- [17] In view of obvious malaise on the part of the applicants, I cannot hold that the first respondent’s setting down of the matter (even the main application) was irregular or unwarranted. I do not agree with the applicants’ contentions that setting down the pending Rule 30 application, albeit withdrawn at a late stage, precluded the main application being set-down.
- [18] As alluded to above, the question is whether the main application (which is not a section 57 COSAS appeal) can be dealt with by a single Judge. I hold that I can deal with such abortive application.
- [19] The application which is before me, although purporting to be an appeal under section 57 of COSAS, is not such an appeal. For reasons already stated, I do not see any realistic prospect that the wrong procedure adopted, can still be condoned. My view is that the present application is an abortive process, which I, sitting as a single Judge, can declare to be irregular and a nullity.

[20] My order does not preclude the applicants, if so advised, from initiating an appeal under a Notice of Appeal, as dictated by the Full Court. That would obviously have to be accompanied by a substantive application for condonation, dealing firstly with the reason why this abortive application was launched a few days out of the 30 days' period.

[21] More importantly, the applicants will also have to explain why the wrong procedure was adopted, and why it took the time that it did to eventually launch an appeal (if applicants indeed do so). Then the exchange of correspondence and alleged unanswered requests can be debated in the context of the delay/condonation. The lamentable time I have taken to deliver judgment, should not count against the applicants. The applicants would also be at liberty to contend (to two judges) that my view (that the motion proceedings were abortive) is wrong.

[22] Again, I do not express any views of the prospects of success in such application for condonation, if applicants attempt to further "appeal" this.

[23] I accordingly make the following order :

1. The application is dismissed;
2. The applicants are ordered to pay the costs of the application (on Scale C), such costs to include the costs of senior counsel.
3. The first respondent is advised to pay the costs of the Rule 30 application (on Scale C).

WILLIAMS AJ

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Date heard : 15 April 2024 Date of judgment : 26 September 2024 Representation for the applicants : Adv C Korf Instructed by Mphahlele & Masipa Inc. Attorneys Representation for the respondents : Adv J Hershensohn SC Instructed by Lombard & Partners Inc.

[1] Stenersen & Tulleken Administration CC v Linton Park Body Park Corporate & Another 2021 (SA) 651 (GJ).

[2] See Krugel v Minister of Police 1981

(1) SA 765 (T); Mynhardt v Mynhardt 1986 (1) SA 456 (T); Motloun & Another v Sheriff, Pretoria East & Others 2020 (5) SA 123 (SCA) and Minister of Prisons & Another v Jongilanga 1985 (3) SA 117 (A)

[2] See Krugel v Minister of Police 1981

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