

SOUTH AFRICA / JUDGMENT

**Van Neijeren N.O and Another v
Vulintaba Country Estate Homeowners
Association and Others (7422/2022P)
[2023] ZAKZPHC 114 (17 October 2023)
[2023] ZAKZPHC 114**

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Combrinck AJ

CASE / FILE NUMBER

7422/2022P

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FLYNOTES:

PROPERTY – Community Schemes – Conduct
rules – Change
prohibiting short-term letting of properties – When owner
purchased property such letting was allowed –
Passing of
special resolution meant that conduct rule allowing subletting
ceased to exist – Owner bound by such resolution
taken and
amendment brought about – Ruling against owner at CSOS –
Appeal dismissed – Community Schemes
Ombud Service Act 9 of
2011, s 38.
IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG
Case
no: 7422/2022P
In

the matter between:

JOHANNES
VAN NEIJEREN N.O
FIRST APPELLANT
LOUIS
WINSTONE KRUGER N.O
SECOND APPELLANT
and
VULINTABA
COUNTRY ESTATE HOMEOWNERS
ASSOCIATION
FIRST RESPONDENT
THE
OMBUD OF THE COMMUNITY
SCHEMES
OMBUD SERVICE ACT
SECOND RESPONDENT
HOWARD
FELIX
THIRD RESPONDENT

JUDGMENT

Combrinck AJ

Introduction

- [1] The appellants are the trustees of the Mediray Trust ('the Trust') which appeals in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 ('the CSOS Act') against the decision of the third respondent ('the appeal').
- [2] The third respondent adjudicated and decided the Trust's application which was brought in terms of section 38(1) of the CSOS Act. What was sought by the Trust in that application will be set out later.
- [3] The first respondent opposes the appeal. The second respondent is cited as an interested party.
- [4] The Trust owns immovable property, located in the Vulintaba Country Estate, Newcastle ('the estate'), which it took transfer of on 4 March 2015.
- [5] All owners of property on the estate are members of the first respondent, which was constituted and governed by a Memorandum of Incorporation introduced in 2013 ('the 2013 MOI'). This document empowers the board of directors of the first respondent to make Conduct Rules that bind the first respondent's members.

- [6] It is not in dispute that every prospective homeowner, upon purchasing property within the estate, enters into a contract whereby the owner (or prospective owner) agrees to become a member of the first respondent and to be bound by the rules made, and decisions taken, by the first respondent. The Trust, like the other residents and the first respondent itself, is 'bound by the rules which have contractual force'.^[1]
- [7] When the Trust purchased the property, the 2013 MOI was in force, as was the 2014 version of the Conduct Rules, which included a rule that allowed for the renting or leasing of the properties owned by members, upon written consent first having been obtained from the first respondent.
- [8] On 23 February 2019, at a special general meeting of the first respondent, the 2013 MOI was amended in certain respects. These amendments to the 2013 MOI were registered with the CIPC in 2019 bringing about what the parties describe as the '2019 MOI'.
- [9] On 14 April 2021, homeowners in the estate were notified of a decision, taken on 1 April 2021 by the board of the first respondent, amending the Conduct Rules through the introduction of a rule that reads:
- 'No homeowner will be allowed to conduct and/or run any form of a bed and breakfast service on the estate.'
- [10] It was this decision that prompted the Trust's application in terms of section 38 of the CSOS Act ('the CSOS application').
- [11] In paragraph 2.3 of the CSOS application, the Trust sought an order declaring that the amendment to the Conduct Rules on 1 April 2021 does not apply to the property of the Trust and for such amendment to be declared invalid, unreasonable and that it must be removed. In paragraph 2.4, it sought an order declaring that the resolution passed at the directors' meeting on 1 April 2021 was invalid or not executable, and in paragraph 2.5, sought an order declaring that the resolution passed at the meeting held by the directors on 1 April 2021 to be void on the ground that it unreasonably interferes with the previous vested rights of the Trust as the owner of the property.
- [12] The third respondent ruled against the Trust and dismissed its application, essentially finding that the Trust's challenge to the 1 April 2021 amendment was without merit.
- [13] There is another development that is relevant to this appeal, which took place after the 1 April 2021 amendment of the Conduct Rules.
- [14] In terms of a special resolution passed at an annual general meeting ('AGM') of the first respondent held on 21 August 2021, the first respondent's 2019 MOI was amended by the insertion of paragraph 24.5.2 which provides:

‘24.5.2 No member shall be allowed to use or allow any other person to use any building on any land for a bed and breakfast facility, overnight short- term rental facility or to lease out such property for a rental period less than six months, unless such owner is allowed to do so in terms of the approved scheme and zoning rights therein contained.’

Additionally, the Conduct Rules were also amended by the introduction of the same prohibition.

[15] This then presented a significant change and departure from the 2014 Conduct Rules which allowed the short-term letting of properties in the estate.

The

issues

[16] In the appeal the Trust developed its argument as follows.

[17] The 2013 MOI and the 2014 version of the Conduct Rules were in force when the Trust acquired the property which it rented out as short-term accommodation in accordance with the provisions of the 2013 MOI and the Conduct Rules.

[18] The Trust argues that the notice given by the first respondent of the special general meeting of the first respondent to be held on 23 February 2019 did not comply with the provisions of the 2013 MOI and section 16(1) of the Companies Act 71 of 2008 (‘the Companies Act’). The minutes of the meeting, moreover, recorded that it was decided at the meeting that the amendments to the MOI would only be for discussion purposes and these were never properly voted on. Consequently, the 2013 MOI was not lawfully amended at the 23 February 2019 meeting and its provisions remained unaltered. In those circumstances, the amendments to the 2013 MOI registered with the CIPC in 2019 were unlawful.

[19] From there the argument goes that the special resolution that was passed on 21 August 2021 was also unlawful because there had not been compliance with the extant provisions of the 2013 MOI.

[20] In the final result, the MOI and the Conduct Rules were not lawfully amended which means that the Trust can continue the short-term letting of its property in accordance with the 2013 MOI and Conduct Rules. Thus, the third respondent misdirected himself in the dismissal of the Trust’s application and the appeal should succeed.

[21] Finally, the Trust argues that it acquired a vested right to let out its property, which could not be interfered with.

[22] In response to the Trust’s argument, the first respondent asserts that:

- (a) the Trust had not properly sought to challenge the validity of the 2019 MOI in the CSOS application before the third respondent, had sought no relief in that regard in that application, and is precluded

from raising that as an issue in this appeal. This I shall refer to as ‘the first preliminary argument’;

- (b) the issue as to the amendment of the 2013 MOI is a factual issue which the Trust is precluded from raising in this appeal. This I shall refer to as ‘the second preliminary argument’;
- (c) the 2013 MOI, in any event, was lawfully amended at the special general meeting held on 23 February 2019, and that the 2019 MOI, brought about by the amendment of the 2013 MOI, was lawfully registered with the CIPC;
- (d) the resolution, amending the 2019 MOI and Conduct Rules, was lawfully passed at the AGM held on 21 August 2021;
- (e) the requirements of both the 2013 MOI and the 2019 MOI were complied with for purposes of the passing of the special resolution on 21 August 2021;
- (f) there is no merit in the Trust’s ‘vested right’

argument; and

- (g) the appeal must be dismissed.

The third respondent’s decision

[23] Before dealing with the first respondent’s two preliminary arguments, the nature of the decision taken by the third respondent should conveniently be dealt with first.

[24] The relief originally sought by the Trust in the CSOS application, as indicated, related to the 1 April 2021 amendment to the Conduct Rules. Notwithstanding subsequent developments, involving the first respondent’s introduction of the 2019 MOI and the subsequent special resolution taken at the AGM on 21 August 2021, the Trust did not amend the original relief that it sought.

[25] Accordingly, the third respondent determined the relief sought by the Trust in paragraphs 2.3 to 2.5 of the CSOS application, in so doing deciding:

‘66. Adjudicator finds that the applicant’s argument to set aside the resolution of the (sic) 1 April 2021, which prevents the applicant from operating a short term leasing/B & B business: In terms of section 39 (3)(d), 39 (4)(c) and 39(4)(e) failing in consideration of the Nicholl case.’

[26] The third respondent found that Nicholl[2] ventilates and eloquently explains the various points of dispute between the parties in the application before him. In particular, he relied on paragraph 49 of that judgment which is to the effect that the amendment to the Conduct Rules was reasonable and should apply to all residents and owners of the sectional title, which amendment a majority voted in favour of.

- [27] By implication, the third respondent's decision was that the resolution of the board of directors of the first respondent, passed on 1 April 2021, was lawful in all respects. Unfortunately, the reasoning underpinning such a finding of lawfulness is absent in his decision.
- [28] Section 57 of the CSOS Act directs that an appeal against the third respondent's decision can only be brought on a question of law. In this regard, the approach to be taken by the court in relation to the third respondent's decision and in the adjudication of an appeal of this nature, is succinctly stated by the court in *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and another*[3] as follows:
- [33] Put differently, the appeal court is limited to considering whether the adjudicator —
- [33.1] applied the correct law;
- [33.2] interpreted the law correctly, and/or
- [33.3] properly applied the law to the facts as found by the adjudicator.
- [34] The conclusions drawn from the evidence (ie the 'findings of fact') by the adjudicator cannot be reconsidered on appeal.
- [35] In essence, by limiting the scope of an appeal to questions of law only, the court of appeal is only tasked with deciding whether the conclusions of law reached by the adjudicator were right or wrong. This determination can only be made based on the facts in existence at the time the order was given, and as they appear from the record. This demonstrates not only the need to finally resolve disputes of fact at adjudication level, but also the necessity of avoiding or limiting the number of appeals brought to the High Court, thereby alleviating the burden of the High Court in dealing with matters of this nature. This ensures that cases are dealt with in an uncomplicated and expeditious manner. To conclude otherwise would defeat the purpose of what the CSOS Act seeks to achieve.'
- [29] I will deal elsewhere in this judgment with the conclusions of law reached by the third respondent in relation to the resolution of 1 April 2021 and, in doing so, will address this appeal in the light of the above approach to be taken.
- [30] Notably, the issues in this appeal are issues unrelated to the resolution of 1 April 2021 and the third respondent's decision in that regard. This anomaly is considered when dealing with the preliminary arguments below.

Discussion

The first preliminary argument: no relief sought concerning the validity of the 2019 MOI

- [31] It is indeed so that the relief sought by the Trust in the CSOS application did not include an order declaring the amendments to the 2013 MOI unlawful, and from the record it appears that this issue was not raised at the outset in the Trust's submissions before the third respondent.
- [32] The Trust argues that the minutes of the special general meeting held on 23 February 2019, first made its appearance in the record when it was introduced in the first respondent's submissions submitted to the third respondent. Until then, the Trust had been under the impression that the 2013 MOI was the only version and was applicable at the time of it bringing its application. It was not aware of the calling of the special general meeting for 23 February 2019 and had not had sight of those minutes, thus no relief was sought in that regard.
- [33] The Trust's argument is borne out by the record.
- [34] In paragraph 4.1.8 of the CSOS application dated 8 July 2021, it makes reference to the 2013 MOI and states 'that no amendments have been effected thereto'. In paragraph 4.2, reference is further made to the Conduct Rules which are the 2014 version and that 'no further amendments have been made, save for the rule to which an objection has been raised and to which this application relates'.
- [35] This position is further borne out in the Trust's initial written submissions at paragraphs 2.7 and 2.8, where it is submitted that 'the first time that the purported amendment of the MOI and the rules relating to rentals reared its head, was the purported amendment thereof in August 2021'.
- [36] The first reference to the 2019 MOI is in the first respondent's submissions of 29 September 2021, at paragraph 6. In the Trust's response to the first respondent's submissions dated 11 October 2021, the first respondent's reliance on the alleged 2019 MOI is contested and it is again reiterated that the only MOI is the 2013 MOI.
- [37] The minutes of the special general meeting of 23 February 2019 is first mentioned and put up in the first respondent's final submissions. In the Trust's replying submissions it again challenges the lawfulness of the amendment of the 2013 MOI and again contends that reference may only be made to the 2013 MOI. Paragraph 11 of those submissions records specifically that the procedure set forth in clause 6.3 thereof has not be complied with and consequently, the resolution passed on 21 August 2021 is invalid.
- [38] These circumstances adequately explain why no relief was sought by the Trust, at the outset, in relation to the 2019 MOI and I am satisfied that the Trust cannot be faulted in that regard.

[39] The validity of the 2013 MOI and whether or not it was lawfully amended was addressed by both the Trust and the first respondent in their submissions to the third respondent. As the provisions of the MOI determine whether or not the resolution taken on 1 April 2021 was valid, the amendment to the MOI, in my view, was a live issue before the third respondent which he was required to consider in arriving at his decision.

[40] He, however, did not consider the issue. In this regard, section 50(c) of the CSOS Act enjoins the third respondent to consider the relevance of all evidence when investigating the application.[4]

The second preliminary argument: the amendment of the 2013 MOI is a factual issue

[41] Section 57 of the CSOS Act, as indicated, directs that an appeal against an adjudicator's decision can only be brought on a question of law.

[42] Trollip J, in *Tikly and others v Johannes NO and others*[5] determined that appeals can fall in one of three different categories:

'The word "appeal" can have different connotations. In so far as is relevant to these proceedings it may mean:

(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information . . .;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong . . .;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly . . .'[6]

[43] There are divergent views on the category within which section 57 appeals fall, a debate that I, for reasons that will become apparent, need not enter into for purposes of this matter.[7]

[44] In support of its argument that the amendment to the 2013 MOI, although a factual issue, is one that can be determined on appeal, the Trust has placed reliance on various authorities.

[8] It argues that the third respondent had not considered the evidence pertaining to the purported amendment of 2013 MOI, made no factual finding in that regard and that this court can make that finding, if deemed necessary, in order to determine the question of law relied upon by the Trust in its appeal.[9]

[45] I am in agreement with the Trust's argument that I can, for purposes of determining if the amendment of the 2013 MOI was lawful or not, make findings of fact, as my findings would, in circumstances where the third respondent has not come to any conclusions on the evidence that relates to this issue, not amount to a reconsideration of existing findings of fact.

- [46] It is accordingly open to me to make findings of fact in regard to the notice given in respect of the special general meeting which was held on 23 February 2019 and in respect of the resolutions taken at the meeting.
- [47] It is not in dispute that sufficient days' notice was given in respect of the special general meeting to be held on 23 February 2019 and that the minutes of that meeting are the only memorial of what was resolved there.
- [48] The notice reflects that the only item on the agenda was the amendments to the MOI, with discussion to take place between 9h00 and 10h00 and voting to take place at 10h00. It can accordingly not be disputed that voting on the amendments to the MOI was intended to take place.
- [49] The minutes deal with the amendment of the 2013 MOI by, inter alia, the deletion of clause 6.3 and the introduction of a new clause 35. It is common cause between the Trust and the first respondent that the minute is the only evidence available and records what transpired at the meeting in relation to the amendment of the 2013 MOI.
- [50] That evidence informs if there has been compliance with the 2013 MOI and section 16(1) of the Companies Act. Such compliance or non-compliance determines the lawfulness of the amendments to the MOI, which is then a question of law.
- [51] That being so, the second preliminary argument raised by the first respondent is disposed of.

Amendment of the 2013 MOI

- [52] Clause 6.3 of the 2013 MOI provides as follows:

'6.3 Constitutional General Meeting

The association shall be entitled to convene a Constitutional General Meeting ("CGM") for purposes of effecting or, where applicable, confirming any amendment, addition or deletion to:

6.3.1 the MOI; and/or

6.3.2 any Rules made pursuant to the provisions of clause 11.6; and/or

6.3.3 any previously passed Special Resolution.'

- [53] Notice of a special general meeting was given to the members of the first respondent on 24 May 2018, recording the one item on the agenda to be amendments to the MOI (articles of association) involving the deletion of clause 6.3 and the introduction of a new clause 35. A summary of the proposed amendments, the original MOI, as well as the copy of the amended MOI, were attached to the notice.

- [54] The meeting did not take place on 23 June 2018 and notice was again given on 23 January 2019 for the special general meeting to take place on 23 February 2019. Again, and as indicated, the only item on the agenda was the amendments to the MOI, with discussion to take place between 9h00 and 10h00 and voting to take place at 10h00.
- [55] The minutes of the special general meeting for 23 February 2019 record that there was a quorum of 216 votes, represented by a proxy of 164 votes on behalf of the developer, 38 proxies on behalf of homeowners and 14 homeowners were present.
- [56] At the outset, the developer's right to vote was placed in question and it was agreed that the chairman of the meeting would contact the developer to obtain a mandate. Pending the outcome of that telephone call, it was agreed to continue with the discussion on the proposed amendments to the MOI.
- [57] Because certain 'cosmetic' changes did not require voting, certain provisions of the 2013 MOI were amended, which included the deletion of clause 6.3. The minutes record the reason for the cosmetic deletion of clause 6.3 to be that the term 'Constitutional meeting' does not exist.
- [58] Subsequent to the making of these 'cosmetic' changes, the developer made payment of outstanding levies, and the chairman then stated for the record that the developer now had full voting rights. Further amendments to the MOI were then voted on, one of which involved the introduction of the new clause 35 to the MOI.
- [59] For purposes of this appeal, the upshot of what transpired at the meeting, is that:
- (a) the deletion of clause 6.3, classified as a 'cosmetic' change for which there is no provision in the MOI, was in fact an amendment of the MOI as contemplated in the definition of 'Special Resolution' in clause 2.1.3.1 of the MOI, which thus required the support of at least 75% of the voting rights exercised on the resolution. No voting is recorded to have taken place, with the consequence that the deletion of that clause from the 2013 MOI was unlawful; and
 - (b) the resolution for the amendment of 2013 MOI by the introduction of clause 35 was voted on and was passed as a special resolution amending the MOI. Notably, and in regard to the clauses voted on, which are identified as items 9 through to 23 in the minutes, there is no record to the effect that any objections were made to the proposed amendments and it follows, in my view, that these amendments were approved by all present at the meeting and those amendments were therefore lawful.
- [60] It follows, in my view, that the 2019 MOI featuring the new clause 35, when registered with CIPC, should also have retained clause 6.3 from the 2013 MOI.

The 2019 MOI and the 21 August 2021 AGM

- [61] At a meeting of the board of directors of the first respondent on 1 April 2021, it was unanimously resolved to amend the Conduct Rules to read:

‘no home owner will be allowed to conduct and/ or run any form of a bed and breakfast service on the estate.’

[62] The power of the board to amend the Conduct Rules is provided for in clause 11.6 of the 2019 MOI. Such amendment is required to be confirmed at a general meeting as provided for in clause 6.3.2 of the 2013 MOI, which, as I have indicated, should have been retained in the 2019 MOI.

[63] In accordance with clause 6.2 of the 2019 MOI, notice was given on 15 July 2021 for the convening of the AGM for 2021 to take place on 21 August 2021. The notice records, at item 11, the voting and discussion on the proposed special resolutions, annexures A and B to the notice, with annexure A providing background information relating to the proposed resolution, which is annexure B. The resolution provides for the insertion of paragraphs 24.5.1. and 24.5.2 to the 2019 MOI, the latter reading:

‘24.5.2 No member shall be allowed to use or allow any other person to use any building on any land for a bed and breakfast facility, overnight short term rental facility or to lease out such property for a rental period of less than six months unless such owner is allowed to do so in terms of the approved scheme and zoning rights therein contained.’

[64] The Trust argued that the meeting was not properly convened and could only be convened in terms of clause 6.4 of the 2013 MOI (which is now clause 6.3 of the 2019 MOI) and which allows for the calling of an extraordinary meeting and/or constitutional general meeting on written requisition of members holding not less than 10% of the voting rights of the first respondent.

[65] This argument does not hold true. A special resolution, as defined in clause 2.1.31 of both the 2013 and 2019 MOIs, may be voted on at an AGM of the first respondent as further provided for in clause 6.2. The first respondent’s board, in terms of clause 6.2 is authorized to convene an AGM, and indeed convened such an AGM for 21 August 2021.

[66] The special resolution was passed at that AGM with the required 75% vote being achieved. The vote, in fact, was an overwhelming 98% in favour of the passing of the resolution.

[67] In the result, I find that the amendment to the 2019 MOI, which the Trust seeks to impugn, is valid in all respects and follows from the lawful passing of a special resolution in accordance with the first respondent’s 2019 MOI.

[68] I find further that the passing of the special resolution is not impacted by clause 6.3 of the 2013 MOI, and that it was not necessary to convene a constitutional general meeting in order to pass the special resolution.

Vested right

- [69] This leaves the Trust's argument that the amendment to the Code of Conduct and the MOI interferes with the vested right of the Trust which was afforded to the Trust in 2017 when the Trust erected a dwelling on the property.
- [70] In my view, this argument is also without force.
- [71] The Trust's right to the short-term leasing of the property is a right that was established by virtue of the Conduct Rules that were in existence at the time that the Trust acquired the property.
- [72] As indicated in this judgment, the Trust, upon taking transfer of the property bound itself to the MOI and to the Conduct Rules, which include a stipulation that those rules can be amended.
- [73] Consequently, the right that the Trust relies upon could exist only for so long as the Conduct Rules, allowing it to sublet the property on a short-term basis, remained in existence.

Conclusion

- [74] The third respondent failed to consider all of the facts and the evidence before him in determining the application before him.
- [75] He was required to determine if the 2013 MOI was lawfully amended and in what respect it was amended. He was further required to determine if the amendments to the 2019 MOI and the Conduct Rules at the general meeting held on 21 August 2021 were lawful in all respects.
- [76] The third respondent's decision predicated on the 1 April 2021 resolution of the board of directors ignored other relevant facts on record in the application and ultimately meant that he did not properly apply the law to the facts.
- [77] Although the third respondent did not properly apply the law to the facts, ultimately the amendment to the Conduct Rules and the MOI, by the passing of the special resolution at the AGM on 21 August 2021, meant that the Conduct Rule, allowing the Trust to sublet the property on a short-term basis ceased to exist. The Trust is bound by such resolution taken and the amendment brought about.
- [78] In the circumstances, this appeal must fail.

Order

- [79] I therefore make the following order:

1. The appeal is dismissed.
2. The appellants are directed to pay the first respondent's costs, including the costs consequent upon the employment of senior counsel.

COMBRINCK AJ

Date reserved: 28 July 2023 Date delivered: For applicant: Adv Roberts SC / Adv Roberts Instructed by: For 1st Respondents: Adv De Wet SC Instructed by:

- [1] Abraham and another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) [2014] ZAKZDHC 36 para 5.
- [2] Body Corporate, Paddock Sectional Title Scheme v Nicholl 2020
- (2) SA 472 (GJ).
- [3] Stenersen & Tulleken Administration CC v Linton Park Body Corporate and another 2020
- (1) SA 651 (GJ) paras 33-35 ('Stenersen & Tulleken').
- [4] Stenersen & Tulleken para 19.
- [5] Tikly and others v Johannes NO and others 1963
- (2) SA 588 (T).
- [6] Ibid at 590G-591A.
- [7] See in this regard Trustees, Avenues Body Corporate v Shmaryahu and another 2018
- (4) SA 566 (WCC), Durdoc Centre Body Corporate v Singh 2019
- (6) SA 45 (KZP) para 15, and Stenersen & Tulleken.
- [8] Platt v Commissioner for Inland Revenue 1922 AD 42 at 49-50; Kingshaven Homeowners' Association v Botha and others 2023
- (4) SA 187 (WCC) paras 19-20.
- [9] Kingshaven Homeowners' Association (supra) para 20.

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