# SORRENTO SECTIONAL TITLE SCHEME BODY CORPORATE v KOORDOM AND ANOTHER 2022 (6) SA 499 (WCC)



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| **Citation** | 2022 (6) SA 499 (WCC) |
| **Case No** | 5439/2021 |
| **Court** | Western Cape Division, Cape Town |
| **Judge** | Carter AJ |
| **Heard** | May 26, 2022 |
| **Judgment** | May 26, 2022 |
| **Counsel** | *G Viljoen* for the applicant.<br>*A Walters* for the first respondent. |
| **Annotations** | Link to Case Annotations |

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**Flynote : Sleutelwoorde**

**Costs** — Special order — Punitive costs order — Incorrect forum — Community Schemes Ombud appropriate forum but matter brought in High Court — Successful applicant awarded costs on tariff applicable in proceedings under ambit of ombud — Community Schemes Ombud Service Act 9 of 2011.

**Housing** — Consumer protection — Community Schemes Ombud — Ombud appropriate forum but matter nevertheless brought in High Court — Successful applicant awarded costs on tariff applicable in proceedings under ambit of ombud — Community Schemes Ombud Service Act 9 of 2011.

**Headnote : Kopnota**

The applicant filed a notice of motion in the High Court, on an urgent basis, to compel the respondents to grant access to a unit owned by second respondent in the Sorrento Sectional Title Scheme, for the purposes of conducting a further leak detection test and inspection.

This was after second respondent thwarted various requests to gain access, through managing agents, loss adjusters, leak-detective agents and the applicant's attorneys. After the matter was struck off the urgent roll, second respondent changed his stance and granted the demanded access. The only remaining issue was costs.

**Held**

Neither party appeared to have considered approaching and engaging with the Community Schemes Ombud under the Community Schemes Ombud Service Act 9 of 2011. The Act provided for the Ombud to enjoy jurisdiction, by way of prayers for relief which were relevant to this matter. As stated by this court before, 'judges and magistrates . . . should . . . use their judicial discretion in respect of costs to discourage inappropriate resort to the courts in respect of matters that could, and more appropriately should, have been taken to the Community Schemes Ombud Service'.

This matter should never have been brought before this court as first instance; the issues fell squarely within the ambit of the Ombud and would have been expeditiously dealt with at no cost, as the employ of legal representatives was not permitted. Litigants and their respective legal advisors must take heed of the availability of the Ombud in matters that were uncomplicated, required a more conciliatory approach and at vastly less costs, with a considerably more expedient manner of processing.

The applicant would therefore be granted costs on the tariff applicable in respect of proceedings under the ambit of the Ombud. (See [15], [18] – [19], [22].)

**Cases cited**

*Coral Island Body Corporate v Hoge* 2019 (5) SA 158 (WCC): applied

*Heathrow Property Holdings No 3 CC and Others v Manhattan Place Body Corporate and Others* 2022 (1) SA 211 (WCC) ([2021] 3 All SA 527): applied

*Limpopo Legal Solutions v Eskom Holdings SOC Ltd* 2017 (12) BCLR 1497 (CC) ([2017] ZACC 34): applied

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*Marais v City of Cape Town* 1997 (3) SA 1097 (C): applied

*Prag NO v Trustees, Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body Corporate and Others* 2021 (5) SA 623 (WCC): referred to

*Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) ([1999] 4 All SA 331): applied

*SS v VV-S* 2018 (6) BCLR 671 (CC) ([2018] ZACC 5): referred to.

**Legislation cited**

The Community Schemes Ombud Service Act 9 of 2011: see *Juta's Statutes of South Africa 2021/22* vol 6 at 4-164.

**Case Information**

*G Viljoen* for the applicant.

*A Walters* for the first respondent.

An application for a mandamus.

**Order**

1. The applicant is granted costs on the tariff applicable in respect of proceedings under the ambit of the Ombud.
2. The respondents are to pay the costs of KLS Consulting Engineers (Pty) Ltd jointly and severally, the one paying the other to be absolved.

**Judgment**

**Carter AJ:**

**Introduction**

[1] This matter was initially brought before this court on an urgent basis. It has its origins in and goes back to 29 March 2021, when the applicant filed its notice of motion. This ostensibly, for one specific reason, to compel the first and second respondents to grant access to unit 101 of the applicant, more commonly known as Sorrento, for the purposes of conducting a leak detection test and inspection. The facts in this matter are in my view fairly crisp and relatively simple. In order not to overemphasise all the issues, I accordingly summarise the facts as follows.

[2] During October of 2020 damp marks appeared on the ceiling of unit 100. [1] Various attempts were undertaken to seek access to the second respondent's unit which was eventually inspected on 11 November 2020. No leaks were found in unit 101 belonging to the second respondent. However, on 25 January 2021, the owner of unit 100, Mr Gavin Oddy, informed the applicant that the damp problem had not been resolved. What then transpired [2] was an ongoing effort to gain further access to the second respondent's unit but with little success. Various requests to gain access, through the managing agents, [3] loss





adjusters, leak-detective agents [4] and the applicant's attorneys, all fell on deaf ears and the second respondent thwarted any possible requests for access to unit 101 without any justifiable reason, in my view.

[3] Whilst nothing had materialised, and in my view as a direct result of the recalcitrant actions by the second respondent who delayed and refused access to unit 101, the applicant then resorted to bringing an urgent application. The application, inter alia, requested an order that access be granted to unit 101 within 48 hours of an order being granted. The matter was set down for Tuesday 20 April 2021, but was eventually only heard by Acting Judge Pangarker on 30 April 2021, when the matter was struck off the urgent roll.

[4] In his answering affidavit the second respondent maintained that a leak-detection inspection was conducted on his unit in late November 2020, and no leaks were found. There was therefore, in the second respondent's opinion, no reason why another inspection should be conducted. [5] Evidently the second respondent had a change of mind and he accepted that the applicant is entitled to conduct reasonable inspections from time to time in order to properly manage the common property of Sorrento. [6] Accordingly the respondents subsequently permitted access to their unit and a second leak detection test was conducted. Prayer two of the applicant's notice of motion thus became a nullity and all that was left to be decided was the issue of costs, which I shall now turn my attention to.

**Locus standi**

[5] As a precursor the issue of authority to institute the urgent application by the applicant was a fundamental argument raised by counsel for the respondents. The basis for the aforementioned emanates from the two resolutions that were signed by the trustees of the applicant, the first one dated 19 March 2021, which was signed by two trustees, and the second one dated 20 April 2021, signed by all five trustees. Counsel for the respondents argued that the first resolution is null and void, as it was signed on a round robin basis and not signed by the majority of the trustees.

[6] I do not agree with the contention that the first resolution is defective because it does not record the date, place and time, nor that it was signed on a round robin basis. It is common practice, what with the onslaught and the lagging effects of Covid-19, that trustees, shareholders, governing bodies and directors meet virtually and sign documents via round robin. To suggest (as counsel for the respondents did, and with a rather cheap shot, at that) that, because same is not catered for in the Management Rules of the applicant, any resolution would be fatally





defective, is implausible and unreasonable. [7] Regulation 5 of the Management Rules specifically caters for a trustee meeting by 'any other method' which in my view would encompass and encapsulate the extension of the method of signing resolutions. It would be absurd to consider or apply anything to the contrary.

[7] Further, the first resolution is in my view clear in its content as to what the intended purpose thereof was. There can be no doubt thereon, as the urgent application was brought, and ensuing litigation commenced, through the duly appointed management agent of the applicant. Regulation 10(1)*(b)* of the statutory management rules states:

> 'No document signed on behalf of the body corporate is valid and binding unless it is signed on the authority of a trustee resolution by —
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> *(a)* two trustees or the managing agent, in the case of a clearance certificate . . . ; and
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> *(b)* two trustees or one trustee and the managing agent in the case of any other document.'

Notwithstanding the above, a 'trustee resolution' in practice can take the form of either being a general or special resolution. Because this is not specifically stated in the Management Rules, a resolution is a resolution if signed in the manner dictated above. The content would surely not be considered null and void simply because the word 'special' is recorded thereon. The resolution was special in nature and specific in intent.

[8] In my view the second resolution, having been signed by all five trustees of the applicant, was simply an extension and underscored the content and purpose of the first resolution. To infer that the second resolution was 'installed' for the purposes of remedying a purported shortcoming in the first resolution, is in my view incorrect and rejected. The signing of the second resolution did not provide the applicant with any additional material or substantial advantage. By not signing same, it would have, at further costs, merely postponed the inevitable day of reckoning, irrespective of the virtual impasse that the parties were confronting. In similar vein, Fitzgerald AJ in *Marais v City of Cape Town*[8] had the following to say:

> 'In the contractual field an agreement concluded by an agent on behalf of his principal is not a nullity for want of authority at the time of contracting. For that reason it is capable of ratification. The same in my view applies to an action instituted on behalf of a litigant.'

[9] The trustees of the applicant complied with rule 11(1)*(a)* of the Management Rules in order to give effect to or ratify the first resolution,





which should be seen as commendable corporate governance compliance by a board of trustees. Trustees typically do not meet daily or weekly but normally once a quarter. It is therefore not uncommon for them to manage the affairs of the body corporate as they deem fit and in the best interests of the owners. Ad hoc and informal meetings are often held in order to deal with incidents without having to call or convene a formal meeting of the trustees. To thus infer and consider the actions of the applicant, to have held a trustees' meeting in terms of s 11(1)*(a)* of the Management Rules, as being untoward, or for sinister reasons and/or ulterior motives, is not sustainable and inconclusive on the papers, and is therefore rejected.

[10] The definition of 'ratification' is as follows: 'the action of signing or giving formal consent to a treaty, contract or agreement, making it

officially valid.' [9] This is precisely what all the trustees implemented by signing the second resolution, thereby approving and confirming the acceptance of the cause and intent of the first resolution. This is further confirmed and underscored by the applicant in his replying affidavit whereby he states as follows —

> 'insofar as it is necessary to mention, all five of the trustees were aware of the original resolution as attached to the founding affidavit and in agreement with its content authorising these legal proceedings, despite the fact that only two signed it. As the portfolio manager, I was the person that obtained the instructions to proceed.' [10]

[11] What can clearly be garnered/gleaned from Mr Cloete's remarks is that throughout the entire process all the trustees were aware of and informed of what was transpiring. Nothing new was raised in the second resolution, save for the mentioning of the second respondent's name. Trustees that serve on bodies corporate are simply representatives (duly elected by the owners), usually not qualified in the managing and functioning of their respective bodies corporate. They are laypeople that rely upon qualified and knowledgeable managing agents, as is the case with Trafalgar Property Management (Pty) Ltd, duly represented by Mr Cloete, who deposed to the founding affidavit. To argue as counsel for the respondents did, that certain words, being 'is' and 'to' in the second resolution, must be understood and attributed prospectively in interpretation, is with respect splitting hairs and a matter of semantics. The same argument applies to the contention that the word 'ratification' is not recorded in the second resolution. The intent and purpose of the contents of the second resolution did not change anything and were in my view an affirmation of that which was stated in the first resolution.

[12] Counsel for applicant made reference to the view held by Harms JA in *Smith v Kwanonqubela Town Council*, [11] which I consider to be as applicable to the current matter, where the learned judge stated the following:

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Carter AJ

> 'It is in general essential for a valid ratification —
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> "that there must have been an intention on the part of the principal to confirm and adopt the unauthorised acts of the agent done on his behalf, and that the intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be.
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> . . .
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> [T]he decision to proceed with the case evinces a clear intention to ratify whatever action was taken, irrespective of the legal niceties involved.'

The managing agent ensured that all the trustees were 'kept in the loop' as to what had transpired over several months, with little cooperation from the second respondent, and was then authorised to take such legal action as per the wording on both resolutions.

[13] I am of the view therefore that the applicant was duly authorised through its managing agent to bring the urgent application in the form of a mandamus and the meeting was therefore properly constituted for purposes of this matter. The two trustees that signed the first resolution were not, in my view, by any stretch of the imagination, on a frolic of their own and were not at any time not acting in the best interests of the applicant in fulfilling their fiduciary duties as trustees.

**Costs**

[14] I needed to traverse the entire background to this matter in order for me to finally address the issue of costs, which, as stated above, I have been called upon to do.

[15] It is noteworthy that it is a law of long standing that, when a High Court has a matter before it that could have been brought in a magistrates' court, it has no power to refuse to hear the matter. Similar considerations apply here. Notwithstanding the aforementioned, I got the distinct impression that neither counsel had considered the avenue of approaching and engaging with the Community Schemes Ombud (Ombud) whose powers and dutiful, significant purpose [12] fall under the Community Schemes Ombud Service Act (the Act). [13]

[16] Further, the courts' concurrent jurisdiction with the Ombud is well established, albeit that the Ombud has wider jurisdiction on certain issues and less on others. Both the *Heathrow Property Holdings NO 3 CC and Others v Manhattan Place Body Corporate and Others*; [14] and *Prag NO v Trustees, Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body*

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Carter AJ

*Corporate and Others*[15] grappled with the question of when the Ombud enjoys jurisdiction in matters pertaining to sectional title schemes and when, on the other hand, the appropriate forum is the High Court.

[17] In the *Heathrow* matter Justice Sher held that:

> 'In the result, I am of the view that where disputes pertaining to community schemes such as sectional title schemes fall within the ambit . . . of the CSOS Act, they are in the first instance to be referred to the Ombud for resolution in accordance with the conciliative and adjudicatory process established by the Act, and the court is not only entitled to decline to entertain such matters as a forum of first instance, but may in fact be obliged to do so, save in exceptional circumstances. Such matters will not be matters which are properly before the High Court and on the strength of principle which was endorsed in *Standard Credit* (and a number of courts thereafter including the Constitutional Court in *Agriwire*), it is accordingly entitled to decline to hear them, even if no abuse of process is involved. In this, as far as the High Court is concerned the processes which have been provided for the resolution of disputes in terms of the CSOS Act are in my view tantamount to internal remedies (to borrow a term from the Promotion of Administrative Justice Act) which must ordinarily first be exhausted before the High Court may be approached for relief.
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> . . .
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> What will constitute exceptional circumstances entitling a litigant to approach the High Court directly will have to be determined on a case-by-case basis.'

[18] The Act provides broad micro-requirements for the Ombud to enjoy jurisdiction, by way of prayers for relief, of which in my view a number would have relevance to this matter. [16] None of these options were considered or applied by any of the parties to this litigation. In *Coral Island Body Corporate v Hoge*[17] Binns-Ward J succinctly summarises the situation as follows:

> 'Another was the social utility to be achieved by the provision of a relatively cheap and informal dispute resolution mechanism for the disposal of community scheme related issues. It requires little insight to appreciate that those commendable policy considerations would be liable to be undermined if the courts were indiscriminately to entertain and dispose of matters that should rather have been brought under the Ombud Act. Whilst judges and magistrates may not have the power to refuse to hear such cases, they should in my view, nonetheless use their judicial discretion in respect of costs to discourage the inappropriate resort to the courts in respect of matters that could, and more appropriately should, have been taken to the Community Schemes Ombud Service.'

[19] In applying the above legal guidance to the present case, I am of the view that this matter should never have been brought before this court as

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Carter AJ

first instance. This is underscored by the fact that the urgency in the matter was rejected by Pangarker AJ referred above. There are no exceptional circumstances pertaining to this matter, but rather issues that fall squarely within the ambit of the Ombud, that can and would have been expeditiously dealt with at no cost, as the employ of legal representatives is not permitted.

[20] However, on 20 April 2021, the day before the matter was set down for hearing, the respondents made an unconditional offer of settlement in which they conceded the relief sought in the application (after taking legal advice), [18] save for costs of this application and for the applicant having to carry the costs of the water ingress inspection. [19] These terms were rejected by the applicant based on the rationale that the respondents' conduct in defending this application was frivolous and vexatious. [20] To compound matters further for the applicant, the respondents, conveyed to the agent of the applicant that the body corporate: '(S)hould refrain from misusing body corporate funds by wanting to appoint an attorney, if the Community Scheme Ombud's Service is available for such matter. They are welcome to lodge the matter with CSOS.' [21]

In so doing the respondents were expressing their view as to the possible inappropriateness of the applicant resorting to litigating this minor dispute in the High Court. Such action cannot in my view be condoned, especially as further detailed and evidenced in para 7 of the applicant's letter from its attorneys PG Inc, dated 17 March 2021. [22]

[21] Some 198 pages form the record in this matter, much of which could have been circumvented, if the applicant had approached the Ombud in the first place. It is therefore regrettable that the parties could not reach agreement to settle this matter before such lengthy and unnecessary litigation ensued in the High Court. There is a moral and ethical duty upon legal practitioners to act in the best interests of their clients, and this also includes curtailing any legal costs which will be incurred when litigation of this nature is embarked upon. In this regard Binns-Ward J had the following to say:

> 'I think that I am able to take judicial notice that the attorney and own client costs of any applicant in opposed litigation in the High Court, even in a relatively straightforward matter not involving voluminous papers nor meriting the engagement of counsel of more than junior or middle-ranking stuff gown status, would easily exceed R25,000. And such estimate leaves out of account altogether the contingency of the postulated applicant having to pay the other side's costs on a party and party basis should there be an adverse judgment.' [23]

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Carter AJ

Litigants and their respective legal advisors must take heed of the availability of the Ombud in matters that are uncomplicated, and require a more conciliatory approach at vastly less costs, with a considerably more expedient manner of processing. I am finally of the view that this litigation was frivolous or vexatious (depending upon which parties you are viewing from) and manifestly inappropriately brought in the High Court forum. I am considerably swayed by what the court aptly stated in *Limpopo Legal Solutions v Eskom Holdings SOC Ltd*: [24]

> 'Although *Biowatch* changed the costs landscape for constitutional litigants, it gives no free pass to cost-free, ill-considered, irresponsible litigation and applicants seeking to vindicate constitutional rights must respect court processes.'

[22] Accordingly, the following order is therefore made:

1. The applicant is granted costs on the tariff applicable in respect of proceedings under the ambit of the Ombud.
2. The respondents are to pay the costs of KLS Consulting Engineers (Pty) Ltd jointly and severally, the one paying the other to be absolved.

Applicant's Attorneys: *Preshnee Govender Inc*.

Respondents' Attorneys: *Hickman Van Eeden Phillips Inc*.

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1 Unit s 100 and 101 are members of the body corporate comprising 102 units of the applicant.
2 For the period 25 January 2021 to 21 April 2021.
3 Trafalgar Property Management (Pty) Ltd.
4 KLS Consulting Engineers (Pty) Ltd — record p 107.
5 Record p 63.
6 Record p 64.
7 'This round-robin procedure may be profitably used if urgent decisions need to be taken or where there are only a limited number of trivial matters to be determined and it is not considered worth convening a meeting.' Van der Merwe 'Sectional Titles' in Van der Merwe & Sonnekus *Sectional Titles, Share Blocks and Time-sharing* vol 1. This form of signing resolutions has to some extent become a norm, what with the onslaught and unprecedented Covid-19 pandemic in modern times.
8 1997 (3) SA 1097 (C).
9 *Oxford English Dictionary.*
10 Record p 89 para 15.
11 1999 (4) SA 947 (SCA) ([1999] 4 All SA 331).
12 To provide for the Community Scheme Ombuds Service; to provide for its mandate and functions; to provide for a dispute resolution mechanism in schemes; and to provide for matters connected therewith.
13 9 of 2011.
14 2022 (1) SA 211 (WCC) ([2021] 3 All SA 527).
15 2021 (5) SA 623 (WCC).
16 Section 39(4)*(b)* and *(c)* and/or s 39(6)*(a)*, *(c)* and *(e).*
17 2019 (5) SA 158 (WCC).
18 Record p 64 para 9.
19 Record p 64 para 10.
20 Record p 88 para 12.
21 Record p 25.
22 Record p 52.
23 *Coral Island* above n17.
24 2017 (12) BCLR 1497 (CC) ([2017] ZACC 34) — Kollapen AJ (as he then was) made reference hereto in *SS v VV-S* 2018 (6) BCLR 671 (CC) ([2018] ZACC 5).