TRUSTEES, ALESSIO BODY CORPORATE v COTTLE AND OTHERS 2023 (4) SA 274 (WCC)

Citation	2023 (4) SA 274 (WCC)
Case No	A 38/2022
Court	Western Cape Division, Cape Town
Judge	Baartman J and Golden AJ
Heard	August 15, 2022
Judgment	August 15, 2022
Counsel	An attorney from the firm *Biccari Bollo Mariano Inc*. The first respondent in person.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Housing — Consumer protection — Community Schemes Ombud — Appeal against adjudicator's order — Appropriate procedure — Community Schemes Ombud Service Act 9 of 2011, s 57.

Headnote : Kopnota

Appellant was the body corporate of a sectional title scheme and respondent (Cottle) was a section owner (see [2]). The trustees of the scheme resolved to raise a special levy, and Cottle objected to its application to him. The trustees disagreed (see [3], [5] and [7]). Cottle then referred the dispute to the Community Schemes Ombud Service and the Ombud referred it to its adjudicator. The adjudicator found for Cottle (see [9] – [10]).

The body corporate then employed s 57(1) of the Community Schemes Ombud Service Act 9 of 2011 to appeal the adjudicator's decision to the High Court. It brought the appeal by way of notice of appeal (see [1] and [13]).

At the hearing the court posed the question — in view of Western Cape authority — whether it ought to have been brought on notice of motion, and answered the question, concurring with the authority, in the affirmative (see [12], [17] and [21]).

The court accordingly struck the appeal from the roll (see [24]).

Cases cited

Ellis v Trustees of Palm Grove Body Corporate and Others [2021] ZAKZPHC 97: referred to

Kingshaven Homeowners' Association v Botha and Others [2020] ZAWCHC 92: followed

Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another 2020 (1) SA 651 (GJ): not followed

Tikley and Others v Johannes NO and Others 1963 (2) SA 588 (T): referred to

Trustees, Avenues Body Corporate v Shmaryahu and Another 2018 (4) SA 566 (WCC): followed.

Legislation cited

The Community Schemes Ombud Service Act 9 of 2011, s 57(1): see *Juta's Statutes of South Africa 2021/22* vol 6 at 4-174.

Case Information

An attorney from the firm *Biccari Bollo Mariano Inc*.

The first respondent in person.

An appeal against a decision of a Community Schemes Ombud Service adjudicator.

Order

The appeal is struck from the roll with costs.

Judgment

Golden AJ (Baartman J concurring):

[1] This is a statutory appeal against an adjudication order made by the third respondent in his capacity as adjudicator in terms of s 54 of the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act). Section 57(1) of the CSOS Act provides as follows:

> '**57 Right of Appeal**
>
> (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 issue before the adjudicator arises from a dispute which was referred to it by the first respondent, Mr Lee Cottle (Cottle), who is the owner of apartment 1 in the Alessio Sectional Title Scheme (Alessio) situated at 5 North Umbria Road, Sea Point, Cape Town, and which is managed by the appellant as the body corporate. There are only four apartments in the building. Save for Cottle's apartment which is located on the ground floor with its own entrance, apartments 2, 3 and 4 each occupy a floor in the building.

[3] The appellant resolved to raise a special levy in the amount of R295 000 to pay for the replacement of the lift. The special levy was payable by all members of the scheme (of which there are only four), including Cottle. Counsel for the appellant confirmed in the hearing that the appellant required Cottle to pay a full equal share of the replacement costs.

[4] It is the appellant's position that Cottle is obligated to contribute to the replacement costs of the lift which it asserts forms part of the common property of the scheme, irrespective of whether Cottle enjoys the use thereof.

[5] Cottle referred a dispute to CSOS on the basis that he did not consider it fair and reasonable that he was required to contribute to the purchase of a new lift for the building, which, in his view, was for the exclusive use of the owners who occupied apartments 2, 3 and 4.

[6] His objection was based on the fact that the lift is for the exclusive use of apartments 2, 3 and 4, and that the lift accesses each apartment by directly opening up into the living rooms of each apartment and which is behind a locked front door. Lift access is only via a security key of the owner of the apartment. As the owner of apartment 1, which is located on the ground floor with a separate ground-floor entrance, he does not possess such a lift security key, and cannot access or use the lift.

Golden AJ (Baartman J concurring)

[7] Cottle sought an order declaring that the contribution levied to him for the part and equal payment of the purchase of a new lift is deemed unreasonable. He sought an adjustment of his monthly contribution levy to be corrected.

[8] The adjudicator found that the relief sought by Cottle was supported by the proviso to s 3(1)*(c)* of the Sectional Title Schemes Management Act 8 of 2011 (the Act), and that the body corporate must levy additional contributions from the holder of an exclusive-use right.

[9] When considering the issues of 'common property' and 'exclusive use areas', the adjudicator found that since the lift was exclusively used by units 2, 3 and 4, they should pay for the lift as they use it exclusively. Accordingly, and in terms of s 37(1)*(b)* of the Sectional Titles Act 95 of 1986, the adjudicator found that those who do not have access to exclusive-use areas should not be burdened with the cost of maintenance and repair of areas in respect of which they cannot use or enjoy.

[10] The adjudicator accordingly found in favour of Cottle that the demand for a contribution for the purchase of the lift was unreasonable and that it must be withdrawn. She also found that only the costs of maintaining the lift be deducted from Cottle's account.

[11] Dissatisfied with the adjudication order, the appellant filed its appeal in terms of s 57(1) of the CSOS Act, which now serves before this court.

[12] The issue as to whether the correct appeal procedure was followed was raised with the appellant's counsel at the outset of the hearing, given that the appellant had elected to prosecute its appeal by way of a notice of appeal rather than the procedure which is set out in two decisions of this division. The misplaced opportunity for exercising this choice arises from the differing judicial opinion as to how these appeals ought to be brought. It may not be readily apparent from s 57(1) of the CSOS Act or the Rules of the High Court what procedure should be adopted on appeal, but the authorities of this division have made the procedure clear.

[13] The appellant contends that the correct procedure to follow in order to institute an appeal as contemplated in s 57(1) of the CSOS Act, is that approach which has been set out by the full court in *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ). In *Stenersen* the full court held that an appeal to the High Court against a decision of the adjudicator contemplated in s 57 of the CSOS Act is an appeal in the ordinary strict sense, with the proviso that the right of appeal is limited to questions of law only.

[14] The appellant contends that *Stenersen* sets out the correct procedure to follow on appeal, and is to be preferred over the procedure pronounced upon in the cases of *Ellis v Trustees of Palm Grove Body Corporate and Others* [2021] ZAKZPHC 97; *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC); and *Kingshaven Homeowners' Association v Botha and Others* [2020] ZAWCHC 92.

Golden AJ (Baartman J concurring)

[15] The basis of the appellant's argument that the approach in *Stenersen* is the correct procedure is set out in paras 2.4.1 to 2.4.20 of its heads of argument. It is not necessary for purposes of this appeal to deal with all of them in turn. One such ground for its reliance on *Stenerson* is that an appeal in the ordinary strict sense before the High Court would be governed by the provisions of Uniform Rule 50, as qualified by the provisions of s 57 of the CSOS Act where the appeal is confined only to a question of law. Accordingly, so the appellant argues, it would not be appropriate to adopt the procedure set out in the third category of appeals in *Tikley and Others v Johannes NO and Others* 1963 (2) SA 588 (T), namely, that 'a review, that is a limited rehearing 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'. It further contends that the determination of questions of fact is exclusively afforded to the adjudicator who conducts the proceedings inquisitorially and has powers to investigate, examine documents and persons, and to conduct inspections.

[16] The Western Cape Division has adopted a different view as to the correct procedure on appeal in two decisions.

[17] In the case of *The Avenues Body Corporate*, Binns-Ward J (Langa AJ concurring) held that an appeal in terms of s 57 is not a 'civil appeal' within the meaning of the Superior Courts Act 10 of 2013, and that the relief available in terms of s 57 of the CSOS Act is closely analogous to that which might be sought on judicial review. According to Binns-Ward J, the appeal is accordingly one that is most comfortably niched within the third category of appeals identified in *Tikly*. The proper manner in which such an appeal should be brought is upon notice of motion supported by affidavits, which should be served on the respondent parties by the sheriff.

[18] Binns-Ward J confirmed the procedure on appeal in a later judgment delivered on 4 September 2020 in *Kingshaven Homeowners' Association*.[1] In para 21 he held that a proper determination on a question of law might also in a given case even be hindered or blocked entirely by a lacuna in the founding facts and in such a matter the question of whether or not the founding facts disclose such a lacuna can also legitimately be a matter for argument. Further, that a close examination of the findings on the merits may only be properly understood upon a consideration of the underpinning evidence and where there would be no question of a neat isolation of a question of law. The learned judge held that advancing and distilling the relevant points of law in such circumstances is better facilitated by way of an exchange of affidavits than on the basis of a notice of appeal setting forth the grounds of appeal. On the other hand, if the question of law in a given case can be simply and succinctly stated, as might frequently happen, proceedings on notice of motion do not have to be voluminous. In such

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a case, the supporting papers should be short and to the point, and the answer might appropriately be given in accordance with rule 6(5)*(d)* of the Uniform Rules, and not on affidavit. [2]

[19] The procedure adopted by this court in *Avenues Body Corporate* and *Kingshaven* was later in the same year endorsed by the full bench of the KwaZulu-Natal High Court in *Ellis v Trustees of Palm Grove Body Corporate*. [3] The court in *Ellis* held that there was no reason to depart from the procedure set out in *Avenues Body Corporate*, acknowledging at the same time the benefits of adopting the motion procedure as set out in *Avenues* and *Kingshaven*. It added that the facts contained in the affidavits will assist in bringing the point of law to the fore as it has been acknowledged that at times it is difficult to decide a point of law in isolation from the facts. [4]

[20] The court in *Ellis* had the following to add in relation to the motion procedure. It held that the appellant in an appeal will have to file a

notice of motion to be served on the respondents so that they may respond if they wished to within the time limits provided for in Uniform Rule 6(5). The affidavit accompanying such a notice should not be longer than 10 pages, so as to curb the costs, and it must succinctly state the grounds upon which it is averred that the adjudicator erred on a point of law together with a brief background of the facts leading to such a dispute. Should the respondent wish to respond, their affidavit(s) also should not be longer than 10 pages with the applicant's replying affidavit limited to 6 pages. Once the affidavits have been filed, the appeal will follow the practice directives provided for in opposed motions, including the filing of heads of argument, should same be opposed. [5]

[21] I am of the view that the procedure as set out in *Avenues Body Corporate* as confirmed by *Ellis* is the correct procedure to adopt on appeal in the Western Cape Division and it is not open to an appellant who chooses to bring the appeal here, to choose the procedure it prefers. This court is in any event bound by the decisions in *Avenues Body Corporate* and *Kingshaven* unless it is of the view that they were wrongly decided. I am of the view that the approach adopted in these decisions is sound and that there is no basis to deviate therefrom.

[22] Since the appellant elected to bring its appeal by way of a notice of appeal as provided for in the ordinary strict sense, the appeal is not properly before this court. It ought to have followed the motion procedure.

[23] For this reason, the appeal falls to be struck. It follows that a determination of the merits of the appeal is not deemed necessary.

[24] I accordingly propose the following order: The appeal is struck from the roll with costs.

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1 [2020] ZAWCHC 92 (4 September 2020).
2 *Kingshaven* paras 21 and 22.
3 [2021] ZAKZPHC 97 (7 December 2021).
4 *Ellis* para 10.
5 *Ellis* para 11.