PRAG NO AND ANOTHER v TRUSTEES, MITCHELL'S PLAIN INDUSTRIAL ENTERPRISES SECTIONAL TITLE SCHEME BODY CORPORATE AND OTHERS 2021 (5) SA 623 (WCC)

Citation	2021 (5) SA 623 (WCC)
Case No	260/2020
Court	Western Cape Division, Cape Town
Judge	Sher J and Saldanha J
Heard	July 16, 2021
Judgment	July 16, 2021
Counsel	*J Bence* for the appellants.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Sectional title — Body corporate — Duties — Duty to insure sectional title scheme's buildings — Scope of — Sectional Titles Schemes Management Act 8 of 2011, ss 3(1)*(h)* and *(k)*.

Housing — Consumer protection — Community schemes ombud — Appeal against adjudicator's order — Adjudicator's jurisdiction — Whether competent to adjudicate damages claim brought by owner of unit.

Headnote : Kopnota

The Harprag Trust (the Trust) owned a unit in Mitchell's Plain Industrial Enterprises Sectional Title Scheme. The respondent was its body corporate. After a fire damaged the unit in July 2017, the scheme's insurers advised the respondent that pending the filing of valid electrical and fire-equipment certificates of compliance by all the owners of units in the scheme, insurance cover for damage caused by fire would be suspended. Before these were forthcoming, in July 2019 the Trust's unit was destroyed in a fire. The resulting insurance claim submitted by the Trust against the scheme's insurers was repudiated.

The Trust applied to an adjudicator appointed in terms of the Community Schemes Ombud Services Act 9 of 2011 (the CSOS Act) for an order that the scheme pay to it a sum in lieu of damages allegedly sustained by the Trust pursuant to the fire, together with lost rental which it suffered as a result. The Trust based these claims on the failure by the respondent body corporate to ensure that at all material times the buildings in the scheme were insured for their replacement value, in breach of its statutory duty in terms of ss 3(1)*(h)* and *(k)* of the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA). These subsections respectively oblige body corporates 'to insure the building or buildings [in a sectional title scheme] and keep it or them insured to the replacement value thereof against fire and such other risks as may be prescribed' and 'to pay the premiums on any insurance policy effected by it'. The alternative bases for the Trust's claims were that the relief prayed for was competent under s 39(1)*(e)* and/or s 39(6)*(a)* of the CSOS Act (see [19] – [21]).

The adjudicator dismissed the application on the basis that the relief sought fell outside of his statutory jurisdiction. In the Trust's statutory appeal to the High Court:

Held

As to the scope of duties imposed by STSMA, ss 3(1)(h) and (k)

While the body corporate had a statutory duty to insure all buildings belonging to the scheme, which necessarily included individually owned sections and those parts of the building(s) owned by all members of the scheme in common undivided shares, as common property, it was not intended that an individual owner would have a right to sue it for any damages which may have been sustained in respect of the owner's individual section only. Under the STSMA a body corporate's duties primarily related to the scheme's common property, ie the common interests of members of the scheme, not

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the interests of an individual member. An individual section belonged to an individual owner; they would ordinarily be responsible for any loss suffered in relation thereto. A breach of these provisions was not intended to afford the owner of an individual section a right to sue a body corporate for damages which may have been sustained in respect of that section only, where only the individual interests and rights of the owner had been affected, and not the common, ie communal, interests of owners of sections or units in the scheme (See [13] – [15].)

As to adjucator's jurisdiction under CSOS Act

The orders which can be made by an adjudicator in respect of the different categories which are provided for in s 39 of the Act were primarily directed at matters having a bearing on the sectional title community concerned as a whole, ie on members of the sectional title scheme itself, and not on individual members. The CSOS Act envisaged disputes between members of a sectional title scheme and the administrators thereof, not those personal to owner. Here the damages claims were personal to the Trust as the individual owner of a section in the scheme and did not pertain to the scheme itself, and so did not fall within the CSOS Act's ambit and could not competently be brought under it. (See [16] – [19].)

Cases cited

Coral Island Body Corporate v Hoge 2019 (5) SA 158 (WCC): referred to

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13): dictum in para [18] applied

Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another 2020 (1) SA 651 (GJ): considered

Tikly 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): applied.

Legislation cited

The Community Schemes Ombud Services Act 9 of 2011, s 39: see *Juta's Statutes of South Africa 2020/21* vol 6 at 4-171

The Sectional Titles Schemes Management Act 8 of 2011, ss 3(1)*(h)* and *(k)*: see *Juta's Statutes of South Africa 2020/21* vol 6 at 4-157.

Case Information

J Bence for the appellants.

A statutory appeal against rulings of an adjucator. The order dismissing the appeal is at [35].

Judgment

Sher J (Saldanha J concurring):

[1] This is a statutory appeal [1] in terms of the Community Schemes

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Ombud Services Act [2] (the CSOS Act) against the decision of an adjudicator, whereby he dismissed an application by the Harprag Trust for an order that the body corporate of the Mitchell's Plain Industrial Enterprises Sectional Title Scheme should pay to it the sum of R455 757, 65, in lieu of damages which were allegedly sustained by the Trust pursuant to a fire which occurred in a sectional title unit which it owns, together with a further claim for payment of the sum of R22 942,50 for lost rental which it allegedly suffered as a result of the fire.

[2] The adjudicator dismissed the application in limine on the grounds that the relief which was sought fell outside of his statutory jurisdiction.

The factual background

[3] The appellants are the trustees of the Harprag Trust (the Trust), which owns unit 6 in the scheme, ie an individual section demarcated as such on the sectional plan, together with an undivided pro rata share in the common property. As such, the Trust is a member of the scheme's body corporate and was previously represented thereon by the first appellant, as a trustee.

[4] On 18 July 2019 a fire broke out in the section (which was being utilised by a tenant for commercial purposes at the time), which resulted in its total destruction. The Trust submitted a claim for the repairs of the damage which had been sustained to the scheme's insurers, but it was repudiated.

[5] The insurers had settled a previous claim which had been submitted by the Trust pursuant to a fire which had occurred in the section two years earlier, in July 2017.

[6] In September 2017 the insurers advised the body corporate that pending the filing of valid electrical and fire-equipment certificates of compliance by all the owners of units in the scheme, insurance cover for damage caused by fire would be suspended.

[7] On 21 November 2017 the scheme's managing agents requested the Trust to provide the required certificates of compliance by no later than the end of the month and warned that in the event of a failure to do so any future claim in respect of fire damage might be declined. In the absence of any response, on 12 April 2018 a further request for the

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certificates to be submitted was sent to the Trust, which was also not acceded to.

[8] Pursuant to an inspection which was conducted by fire-protection experts, early in April 2019 the managing agents provided the body corporate with a quote in the amount of R128 337,83 for work which needed to be done in order to render the scheme compliant, in accordance with fire regulations. However, the trustees of the body corporate declined to give their approval thereto and were still reluctant to do so even after the second fire on 18 July 2019, and the Trust only filed an electrical certificate of compliance in respect of its unit in August 2019.

An assessment

[9] This court has previously pointed out [3] that the object of the CSOS Act is to provide a mechanism for the informal, expeditious and cost-effective resolution of disputes between owners of units in a sectional title scheme and its administrators via an ombud, who is given wide powers to resolve such disputes by way of qualified conciliators and adjudicators. In this regard an adjudicator has express statutory powers [4] to make a number of far-ranging orders in respect of financial, 'behavioural', governance, management, regulatory and other issues pertaining to a sectional title scheme.

[10] In their application to the ombud the appellants did not identify which provisions of the CSOS Act they sought to rely on for the relief which they sought. They attached a letter from their attorneys dated 16 September 2019 in which it was alleged that the damages which the Trust had sustained in the fire were attributable to a failure by the body corporate to ensure that at all material times the buildings in the scheme were insured for their replacement value, in breach of its statutory duty in terms of ss 3(1)*(h)* and *(k)* of a related Act, the Sectional Titles Schemes Management Act [5] (the STSMA).

[11] In terms of the STSMA [6] the body corporate of a sectional title scheme is responsible for the control, administration and management of the common property of the scheme, ie the land on which the scheme is located, together with such parts of the buildings in the scheme which are not included in individual sections, for the benefit of all owners.

[12] To this end [7] the body corporate must establish and maintain an administrative and reserve fund which is reasonably sufficient to cover the estimated annual running and future operational costs of the repair,

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maintenance, management and administration of the common property and for the payment of rates and taxes and municipal charges, as well as for the payment of insurance premiums relating to buildings and land; and for this purpose it must raise the necessary amounts required by levying contributions on owners in proportion to their participation quota in the scheme. In terms of the Act [8] the body corporate has an obligation to maintain and keep all common property and plant, machinery, fixtures and fittings which are used in connection with it, in a state of good and serviceable repair.

[13] Similarly, there are a number of other provisions in the STSMA which make it abundantly clear that a body corporate's duty in relation to the sectional title scheme it administers primarily relates to the scheme's common property, ie to the common interests of members of the scheme, and not to the interests of an individual member. In this regard s 13(1)*(c)* of the STSMA provides that an owner must repair and maintain its own section, and this obligation does not fall onto the body corporate. Consequently, as an individual section belongs to an individual owner they would ordinarily be responsible for its upkeep and for any loss which may be suffered in relation thereto.

[14] Thus, whilst a body corporate has a statutory duty to insure all buildings that belong to the scheme, ie all structures of a permanent nature which are erected therein and which are shown on a sectional plan of the scheme [9] (which will necessarily include those sections which are individually owned, as well as those parts of the building(s) which are owned by all members of the scheme in common undivided shares as common property), in my view it was not intended that an individual owner would have a right to sue it for any damages which may have been sustained in respect of the owner's individual section only. [10]

[15] In my view, the obligation in terms of ss 3(1)*(h)* and *(k)* of the STSMA to insure the buildings in a sectional title scheme and to keep them insured for their replacement value against fire and such other risks as may eventuate, and to pay the insurance premiums owing in respect of such insurance, is one aimed at protecting the common interests of owners in the scheme, and not the personal interests of an individual owner, such as the Trust, and considering the various sections I have referred to in the context of both the STSMA and the CSOS Act as a whole — and adopting a purposive and sensible interpretation thereto, ie one which has regard for the language of the provisions concerned, the

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context in which they are to be found, and the apparent purpose to which they are directed [11] — a breach of these provisions was not intended to afford the owner of an individual section a right to sue a body corporate for damages which may have been sustained in respect of that section only, where only the individual interests and rights of the owner have been affected, and not the common, ie communal, interests of owners of sections or units in the scheme. [12] To allow otherwise would shift an individual owner's obligation to safeguard and protect its rights and interests in the section it owns, and the risk of damage thereto, to other members of the scheme, at their cost.

[16] As was pointed out in *Shmaryahu*, [13] the orders which can be made by an adjudicator in respect of the different categories which are provided for in s 39 of the Act are primarily directed at, and pertain to, matters which bear on the sectional title community concerned as a whole, ie on members of the sectional title scheme itself, and not on individual members. Such orders will generally only be incidental to the personal interests or rights of individual members.

[17] As a result, in *Shmaryahu* it was held, on appeal, that a claim by a former member of a sectional title scheme for an ex post facto adjustment and refund of excess levy contributions which had previously been paid over, in accordance with a recalculated participation quota, was a financial claim which was wholly personal to the member and not to the sectional title community he had belonged to, and in the circumstances it concerned a dispute which was personal to him and not one between members of the sectional title scheme and the administrators thereof, as was envisaged by the Act. Consequently, the dispute did not fall within the ambit of the Act and was not subject to resolution by the ombud, and the adjudicator did not have any jurisdiction to entertain it. The determination which the adjudicator arrived at and the order which he made were therefore set aside.

[18] In my view, the same holds good for the dispute in this matter, not only in respect of the principal claim for reimbursement of the sum of R455 757,65, but also in respect of the claim for lost rental [14] which appellants' counsel conceded was not one which could competently be brought in terms of the Act.

[19] This claim was also one for damages which were personal to the Trust as the individual owner of a section in the scheme, and did not pertain to the scheme itself, and in my view on the strength of the

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decision in *Shmaryahu* it also did not fall within the ambit of, and could not be claimed by way of, s 39(1)*(e)*, as the appellants contended before the adjudicator.

[20] I hasten to point out that this does not mean that in appropriate circumstances the owner of an individual section, or of a unit (ie a section together with its pro rata undivided share in the common property) in a sectional title scheme, will not have a right to sue a body corporate for damages, provided a case for this is made out.

[21] Perhaps because of these difficulties, in their submissions to the adjudicator the appellants sought, in the alternative, to locate their claim as one which fell within the ambit of s 39(6)*(a)* of the Act. The section provides that an adjudicator may make an order requiring a body corporate to have repair or maintenance work carried out, not only in respect of common areas but also in regard to 'private' areas, which include sections which are individually owned.

[22] However, as the adjudicator pointed out, the obvious difficulty with this contention is not only that the work which was necessary to reinstate unit 6 to its former condition had involved a complete rebuild rather than mere repairs, but it had also already been carried out by the time the matter was adjudicated upon. Thus, in the circumstances, what the Trust in fact sought to recover was a reimbursement of the expenses it had incurred and not an order for repairs to be carried out, and as the adjudicator correctly pointed out, such an order was not one which could competently be made in terms of this provision of the Act.

[23] In a last attempt to bring the claim within the ambit of the CSOS Act, the appellants sought on appeal to rely on the provisions of s 39(6)*(b)*(ii), which allow an adjudicator to make an order that an applicant be paid an amount as determined, in lieu of reimbursement for repairs which have been carried out on private or common areas. It is notable that the provision in question grants an adjudicator the power to make such an order against the 'relevant person', in contrast to the other subsections, which expressly provide for orders to be made against an 'association', ie the structure which is responsible for the administration of a sectional title scheme, such as a body corporate. [15] But, given that an association is included in the definition of a person, the provision would not necessarily appear to be a bar to an order being made against a body corporate in appropriate circumstances.

[24] However, and leaving aside the issue of whether the provision can find application where what is claimed amounts to the costs of a complete rebuild of a section rather than repairs to it, even though such an order might notionally be possible, there are in my view a number of fundamental hurdles which face the Trust and which militate against it being granted in this matter.

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[25] In the first place, and as I have previously pointed out, as a matter of law the Trust as the owner of unit 6 is responsible for maintaining it, and guarding it against the risk of harm, and it would ordinarily have to bear the consequences of any failure on its part to do so and any loss which may be sustained as a result of damage, unless it was insured. And in this regard the reason why the section was not insured was that the Trust failed to provide valid and up-to-date certificates of compliance to the body corporate, so that it could discharge its statutory duty. In such circumstances it could hardly be fair or correct for an order to issue effectively directing the body corporate to bear the loss which came about as a result of the Trust's own remissness. To make such an order would be to shift the responsibility for, and the cost of the loss pertaining to an individually owned section, to the other owners of sections in the scheme. This would not only go against a long-standing principle of the common law of ownership but would encourage delinquency on the part of individual owners in a sectional title scheme, who could look to other members of the scheme for recompense in the event of any loss they suffered in respect of their individually owned sections, due to their own neglect or failures.

[26] In second place, and as previously pointed out, in the affidavit [16] which he filed in support of the appeal [17] first appellant alleged that the basis for the Trust's claim was that the body corporate had negligently failed to comply with its statutory 'duty of care' to ensure that the buildings in the scheme were properly insured, which resulted in damages being suffered by the Trust. It is trite that in referring to a 'duty of care' the appellant was using terminology which is more appropriately used in English tort cases, where wrongfulness and culpa, ie fault, are conflated. In our law we speak of a legal duty, which pertains to wrongfulness, and which is determined by the expectations and norms of the

community's boni mores, to which a further ingredient of culpa in the form of negligence is added, before liability will ensue. Be that as it may, in argument before us appellants' counsel conceded that, framed as it was, the appellants' claim essentially constituted a delictual claim for damages.

[27] In my view it was never intended that such a claim could be adjudicated upon by the ombud in terms of the CSOS Act, which is aimed [18] at resolving disputes in regard to the administration of a community scheme between persons (which by definition [19] include not only individual members of a scheme but also any association, ie any

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structure which is responsible for its administration) who have a material interest therein. [20]

[28] If one considers the terms of the CSOS Act as a whole, and the kinds of matters in respect of which an adjudicator can make orders in terms of s 39 of the Act, they either concern regulatory/governance issues [21] pertaining to the administration of a sectional title scheme, or behavioural issues [22] pertaining to the conduct of members of the scheme inter se (which commonly would cover so-called nuisance or neighbour disputes). It was clearly not intended that the ombud would have the power to adjudicate on delictual claims for damages, which involve weighty considerations pertaining to wrongfulness (which depend on prevailing societal norms and public policy) and fault, and the quantification and determination of the quantum of any damages which may have been sustained pursuant thereto, which are matters which are best left for judicial officers and courts.

[29] In addition, to allow the Trust to proceed in terms of s 39(6)*(b)*(ii) would allow it to claim delictual damages without showing any fault on the part of the body corporate, in circumstances where it was the one at fault, and where it was responsible for being unable to claim any compensation by way of an indemnification in terms of the scheme's insurance policy. Had this been a delictual claim which required determination in a court it would have been defeated on these grounds, ie on the basis that it had not been shown that the body corporate had been at fault and that its conduct, as opposed to that of the Trust, had caused the loss which had been suffered. This too could never have been intended by the lawmaker, and to allow a claim in such circumstances would subvert the basis and principles of delictual claims for damages.

Conclusion

[30] In the circumstances the adjudicator was correct in holding that he did not have jurisdiction to entertain the dispute, and the appeal must fail.

[31] As far as costs are concerned, second and third respondents (the ombud and the adjudicator) filed a notice to abide when the appeal was lodged, and the body corporate (first respondent) indicated that it was opposing it.

[32] Shortly before the matter was due to be heard in February, it belatedly sought a postponement so that it could file an affidavit in answer to that which had been filed by the appellants in support of the appeal. The basis for its application was that an answering affidavit could not be filed as the chairman, then the only trustee of the body corporate, had resigned, and a replacement had only been appointed late in January 2021, at which time it was resolved that a special levy needed to be

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imposed in order to raise the necessary funds for the body corporate's legal fees. After hearing argument, the postponement was granted and it was directed that the body corporate was to be liable for the wasted costs which were occasioned thereby.

[33] On 10 May 2021, after it had filed its answering affidavit, the body corporate filed a notice to abide, as the appellants had indicated that in the event of the appeal succeeding and the adjudicator's order being set aside they would move for an order that the matter be remitted to the adjudicator for reconsideration, and would not seek an order granting them the substantive relief which they had sought.

[34] In the circumstances it would in my view be fair and proper to direct that there should be no order as to costs.

[35] In the result I would simply make an order dismissing the appeal.

Appellants' Attorneys: *PPM Attorneys Inc*, Bellville.

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1 In terms of s 57 of the Act, which provides that an appeal only lies to this court in respect of a question of law and not in regard to factual issues. In *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC) paras 25 – 26 this division held (per Binns-Ward J, Langa AJ concurring) , with reference to the various types of appeal (as listed in *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590 – 591), that the relief which is available in terms of s 57 is analogous to that which can be sought on review and therefore involves a consideration of whether or not a CSOS adjudicator exercised his powers and discretion 'honestly and properly', and not whether the decision he arrived at was right or wrong. However, in *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ) a full bench of the Gauteng Division disagreed and held that an appeal in terms of s 57 is a true appeal, in the strict sense (ie the second category of appeal referred to in *Tikly*, viz one limited to a determination on the record on appeal, and not a rehearing afresh), and as such it involves a consideration of whether the adjudicator's decision was right or wrong, on the material which was before him.
2 Act 9 of 2011.
3 *Trustees, Avenues Body Corporate v Shmaryahu* above n1 para 2; *Coral Island Body Corporate v Hoge* 2019 (5) SA 158 (WCC) paras 9 and 10.
4 In terms of ss 39(1) – (7) of the Act.
5 Act 8 of 2011.
6 Sections 2(5) and 3(1)*(t)* read together with the definition of common property in s 1.
7 Sections 3(1)*(a)*(i) – (iii) and 3(1)*(b).*
8 Sections 3(1)*(l)* and *(q).*
9 As per the definition of a 'building' in s 1.
10 This is not a case where an individual owner's interests or rights in a share of the common property, such as an exclusive-use right to a parking bay or garage, for example, have been affected. Were it to have been so, and damages had been sustained to the bay or garage as a result of a failure on the part of the body corporate to have insured the land and buildings which comprise the scheme, the individual owner would arguably have been entitled to lodge a dispute against the body corporate for resolution in terms of the CSOS Act.
11 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18.
12 In this regard see the comment made at n10.
13 Above n3 paras 18 and 19.
14 In respect of this claim the appellants sought to rely on the terms of s 39(1)*(e)*, which provides that in respect of financial issues an adjudicator may make an order for the payment, or repayment, of a 'contribution' (ie an amount which has been levied on owners by the body corporate), or any 'other' amount.
15 In terms of s 1 an 'association' means any structure which is responsible for the administration of a community scheme.
16 Paragraphs 18 and 23.9.
17 In accordance with the decision in *Shmaryahu* above n3 paras 25 – 26 the appeal was lodged in the form of a notice of motion with a supporting affidavit, and not by way of a notice of appeal.
18 As per s 2*(c)* of the CSOS Act, read together with the definition of a 'dispute' in s 1.
19 See the definition of 'dispute', 'person' and 'association' in s 1 of the Act.
20 Section 38(1).
21 As per ss 39(1)*(a)* – *(f)*, (3)*(a)* – *(d*), (4)*(a)* – *(e),* (5)*(a)* – *(b)* and (6)*(a)* – *(g).*
22 Section 39(2)*(a)* – *(d).*