TRUSTEES, AVENUES BODY CORPORATE v SHMARYAHU AND ANOTHER 2018 (4) SA 566 (WCC)

Citation	2018 (4) SA 566 (WCC) D
Case No	A 31/2018
Court	Western Cape Division, Cape Town
Judge	Binns-Ward J and Langa AJ E
Heard	May 10, 2018
Judgment	May 10, 2018
Counsel	*RDE Gordon* for the applicant (appellant). F
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

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

Housing — Consumer protection — Community Schemes Ombud — Application for dispute resolution — Standing to make application — Requirements — Applicant must be materially affected by community-scheme related matter, and must have material interest in scheme — Both requirements must be met for standing to be established — Community Schemes Ombud H Service Act 9 of 2011, ss 38(1) and 39(1).

Headnote : Kopnota

Section 57(1) of the Community Schemes Ombud Service Act 9 of 2011 (the Act) provides that '(a)n 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'. Here the appellants (the Trustees) exercised I their right of appeal in terms of s 57(1) by filing with the registrar of the High Court a notice of appeal incorporating their grounds of appeal, annexing a number of documents but no affidavits; and serving copies on the first respondent's (Mr Shmaryahu's) attorneys and on the second respondent, the Community Scheme Ombud Service (the Ombud), but not on other interested parties, notably the adjudicator. An appeal in terms of J s 57 is not one provided for in the rules of court, and no procedure has been

prescribed for it under the Act or the regulations promulgated in terms A thereof. This raised the issue of whether the appeal was lodged in a procedurally regular manner.

The other issues related to merits of grounds of appeal. After the sale of his unit in the sectional title scheme — when he was no longer a member of the body corporate — Mr Shmaryahu demanded that the Trustees supply him with information enabling him 'to investigate the formula used in respect of the B monthly levies paid and whether they were . . . within the confines of the law'. Not satisfied with the response, he applied for dispute resolution under s 38(1) of the Act, alleging that as a result of illegal extensions made to some units, and some garages having been converted to living spaces, those owners were paying less than their share of rates and levies. As relief he requested that it be ordered that all units be remeasured by an C independent land surveyor so as to determine the correct amount of levies payable. The adjudicator's order confirmed the essence of Mr Shmaryahu's complaint: that his levy contributions should be adjusted ex post facto in accordance with a recalculated participation quota (see [23]).

In terms of s 38(1) of the Act '(a)ny person may make an application [for dispute resolution] if such person is a party to or affected materially by a dispute'. D The Trustees submitted that the adjudicator had erred in law in two regards. Firstly, she ought to have upheld their objection that she lacked jurisdiction to deal with the application. This on the basis that Mr Shmaryahu was not an owner or occupier in the sectional title scheme, nor did he have a material interest in the scheme, with the result that the application did not raise a dispute as defined in the Act. Secondly, her order E purported to fix the Trustees with a liability that was incompatible or inconsistent with sectional title legislation.

Held as to the correct procedure for lodging appeals under s 57(1) of the Act

An appeal in terms of s 57 was not a 'civil appeal' within the meaning of the F Superior Courts Act 10 of 2013. What may be sought in terms of s 57 was an order from this court setting aside a decision by a statutory functionary on the narrow ground that it was founded on an error of law. The relief available in terms of s 57 was closely analogous to that which might be sought on judicial review. The proper manner in which such an appeal should be brought is upon notice of motion supported by affidavit, which G should be served on the respondent parties by the sheriff. The adjudicator, and not just the Ombud, should also have been cited as a respondent. It was also desirable that when, as happened in the present matter, the adjudicator's order has been registered as an order of court in terms of s 56 of the Act, notice of the proceedings also be given to the registrar or clerk of the court concerned. Setting aside of the order should as a matter of good order H result in the registrar or clerk concerned expunging the registration of it from the court's records. (Paragraphs [25] – [26].)

Held as to the merits of the grounds of appeal

The orders that s 39 of the Act empowered an adjudicator to make afforded remedies having a bearing on the community, and only incidentally on an I individual member. An individual's right to claim relief in terms of the Act was dependent on his or her being materially affected by one of these community scheme related matters. Even then, an individual's right to avail themselves of the special statutory dispute resolution mechanism was also dependent on them having 'a material interest in the scheme'. Both requirements must be satisfied for standing, as an applicant in terms of s 38, to be established. (See [18] – [19].) J

No A longer being a member of the body corporate, Mr Shmaryahu's only interest in the remeasurement and possible consequential readjustment

of levies was purely financial and wholly personal, and not an interest in the community scheme. His application therefore did not concern a dispute between persons with a material interest in the scheme. Accordingly, the dispute did not conform to the defined meaning of the term in s 1 of the Act, and in the result it was not cognisable by the Ombud. The objection to the Ombud's jurisdiction should have been upheld. (See [28] – [29].)

Even if the Ombud had enjoyed jurisdiction, the order made by the adjudicator was beyond his powers and legally incompetent. It purported to oblige the Trustees to adjust the first respondent's liability in respect of contributions during the period of his membership of the body corporate in accordance with an amended participation quota for the section he had owned that was to be registered only long after the first respondent had disposed of his unit. As should be evident from the description of the relevant provisions of the governing legislation (see [12]), a unit owner's proportionate liability to pay contributions was statutorily determined with reference to the *registered* participation quota in respect of the section concerned. Furthermore, any amendments to the participation quotas consequent upon the approval and registration of sectional plans of extension in a scheme became effective only upon the registration of the plans of extension, and then only prospectively from the date of registration. Also, the order granted did not comfortably match any of the remedies that the adjudicator was empowered to grant in terms of s 39 of the Act (see [17] – [18]). It was quite obviously not within her competence to make an order that would have an effect in conflict with the provisions of the legislation governing the community scheme in question (see [30]).

Cases cited

Tikly and Others v Johannes NO and Others 1963 (2) SA 588 (T): dictum at 590 – 591 applied.

Legislation cited

The Community Schemes Ombud Services Act 9 of 2011, ss 38, 38(1) and 57: see *Juta's Statutes of South Africa 2016/17* vol 6 at 4 – 203 and 4-205.

Case Information

RDE Gordon for the applicant (appellant).

A statutory appeal against a decision of an adjudicator.

Order

1. The appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 is upheld with costs.
2. The order made by the adjudicator in terms of s 54 of the said Act is set aside.

Judgment

Binns-Ward J (Langa AJ concurring):

[1] In these proceedings the court is seized of a statutory appeal against an order made by a part-time adjudicator in a matter submitted by the first respondent for determination in terms of the Community Schemes Ombud Service Act 9 of 2011 (the Act). Section 57(1) of the Act provides that —

> '(a)n applicant, the association [1] 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 object of the Act (which was assented to and brought into operation on the same dates, respectively, as the Sectional Titles Schemes Management Act 8 of 2011) [2] is to provide a service and the mechanisms for the expeditious, informal and cost-effective resolution of disputes 'in community schemes'. [3] 'Community schemes' are, by definition, 'any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a shareblock company, a home or property owners association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing cooperative as contemplated in the South African Co-operatives Act 14 of 2005. [4]

[3] The appellants are the trustees for the time being of The Avenues Body Corporate. The Avenues is a sectional title development scheme, and therefore a 'community scheme' within the meaning of the Act. The trustees, collectively, as the persons responsible for administering the functions and powers of the body corporate, [5] are an 'association' within the meaning of the Act.

[4] The first respondent (who was the applicant in the matter determined by the adjudicator) was between August 2013 and November 2016 the registered owner of a unit in the sectional title development scheme. In February 2017, more than two months after he had ceased to be a member of the body corporate, having sold his unit, the first respondent caused his attorneys to write to the managing agents of the scheme and the trustees, advising that he had come to realise that the levies that he had paid during the time he had owned a unit in the scheme had been premised on the application by the managing agent and the trustees of 'an irregular levy formula'. He demanded that certain information be provided to him to enable him 'to investigate the formula used . . . in respect of the monthly levies paid and whether they were in accordance with the Sectional Titles Act 95 of 1986, and within the confines of the law'. He intimated that should his demand not be acceded to he would approach 'an appropriate forum' to compel the managing agent and the body corporate to grant him access to the information that he required.

[5] Section 38(1) of the Act provides '(a)ny person may make an application [for dispute resolution] if such person is a party to or affected

materially by a *dispute*'. Section 38(2)*(a)* provides that such an application falls to be 'made in the *prescribed* manner and as may be required by practice directive'. (My italicisation.) Those provisions fall to be construed with regard to the specially defined meanings of the words 'dispute' and 'prescribe'. 'Dispute' is defined in s 1 to mean 'a dispute in regard to the administration of a community scheme *between persons who have a material interest in that scheme*, of which one of the parties is the association, occupier or owner, acting individually or jointly'; and 'prescribe' is defined to mean 'prescribe *by regulation made under this Act*'. (Emphasis supplied.) It is only in respect of 'disputes', as defined, that the Ombud Service may entertain applications.

[6] Not satisfied with the response that he received, the first respondent submitted an application for dispute resolution to the Western Cape office of the Community Schemes Ombud. Regulation 19 of the Regulations on the Community Schemes Ombud Service, 2016, [6] prescribes that —

> '(a)n application referred to in s 38(1) of the Act must be made by submission of an application by physical delivery or electronically, in accordance with the practice directive issued by the chief ombud'.

[7] I have not been able to find a relevant practice directive by the Chief Ombud, who is vested by s 36 with the authority to 'issue practice directives with regard to any matter pertaining to the operation of the Service'. A four-stage dispute resolution procedure, evidently framed with reference to the provisions of the Act, has, however, been published on the Service's website. The web page explains that the process commences with the submission of a duly completed pro forma application for dispute resolution form, a copy of which can be downloaded from the site. The first respondent submitted his application using the pro forma document. Whether the publication on the Service's website properly complies with the requirements of s 38(2)*(a)* or the aforementioned reg 19 is questionable, but as no point was taken about the validity of the institution of the proceedings, and as we have concluded that the adjudicator's order should in any event be set aside, we have been prepared for present purposes to assume that the first respondent's application was effectively submitted to the ombud.

[8] In his application for dispute resolution the first respondent articulated his complaint as follows in the section of the form headed 'Details of application/alleged breach':

> 'Failure to provide us with information regarding the sectional title levy calculations. We have established discrepancies with other owners having extending [sic] their units without the required municipality approval. Therefore paying less rates and levies. Garages also being converted into living spaces.'

In the section of the form headed 'Relief sought: What remedy are you requesting? How do you want the problem to be solved?', the first respondent stated: 'Want all the units to be remeasured by a land

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surveyor (independent). To determine correct amounts payable (ie levies). Only then we will know if a refund is due.' (It will be noted that the relief sought in the application differed somewhat from that demanded in the preceding correspondence, but nothing turns on that.)

[9] It was clear enough from the first respondent's application to the Ombud Service that he considered that in the context of various unspecified extensions to and conversions of some of the sections in the sectional title development, a remeasurement was required to achieve a fair and legally compliant determination of the levies payable by the individual members of the body corporate. [7] He apparently wanted the need for a remeasurement to be confirmed and, if it was, to be reimbursed in the sum of the difference between the contributions he had actually paid and the amount for which he would have been liable had those contributions been calculated with regard to the aforementioned extensions and conversions.

[10] The validity of the first respondent's claim fell to be determined with regard to the relevant provisions of the regulating legislation.

[11] During all but the last few weeks of the period of the first respondent's ownership of a unit in the sectional title development [8] his liability to contribute by way of payment of levies to a fund sufficient for the repair, upkeep, control, management and administration of the common property, and for the payment of rates and taxes and any other local authority charges for the supply of utilities and services to the building(s) or land, as well as any insurance premiums which were applicable thereto, was regulated in terms of the Sectional Titles Act 95 of 1986. Subject to certain exceptions, [9] none of which was alleged by any party to be applicable in the current case, the extent of his liability in this respect, proportionate to that of the other members of the body corporate, was statutorily determined by the 'participation quota' pertaining to his section. [10]

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[12] In terms of s 32(1) of the Sectional Titles Act —

> 'the participation quota of a section shall be a percentage expressed to four decimal places, and arrived at by dividing the floor area, correct to the nearest square metre, of the section by the floor area, correct to the nearest square metre, of all the sections in the building or buildings comprised in the scheme'.

The relevant floor areas are indicated on the sectional plan [11] prepared by a qualified architect or land surveyor in terms of s 5 of the Sectional Titles Act, and the corresponding participation quotas are required to be indicated on a schedule annexed to the plan. [12] After being approved by the surveyor-general, [13] sectional plans are registered by the registrar of deeds when the sectional title register is opened. [14] A sectional title unit owner's real rights of ownership are vested by registration in the sectional title register. The participation quota attached to the first respondent's section, and indeed also those attaching to each of the other sections in the scheme, was a matter of public record and he would not have been reliant on information obtained from the appellants to verify them. If the registered participation quotas in respect of The Avenues Sectional Title Development Scheme required adjustment because of the subsequent extension of some of the sections, new measurements and the registration of amended plans known as 'sectional plans of extension' would have to be undertaken to achieve that. [15] Any consequential adjustment to the originally determined participation quotas would become effective only upon registration of the sectional plans of extension.

[13] The appellants referred the first respondent's application to their attorneys, who wrote to the Ombud Service by letter dated 1 June 2017 raising the following legal points:

> [13.1] That the first respondent was not an owner or occupier in the sectional title scheme, nor did he have a *material interest* in the scheme, with the result that the application did not raise a *dispute* as defined in the Act. Accordingly, so it was contended, the Ombud Service lacked jurisdiction to entertain the application.

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> [13.2] That, having regard to s 11 of the Sectional Titles Management Act (which for all relevant purposes has, with effect from 7 October 2016, substituted s 32(3) of the Sectional Titles Act) and to s 24(8) of the Sectional Titles Act, the levies payable by the first respondent were determined by his *registered* participation quota, and that any adjustments thereto effected consequent upon any extensions to any sections in the scheme would come into effect only *prospectively with effect from the date of registration* of the pertinent sectional plans of extension.

[14] The appellants' attorneys also advised that their instructions were that a handful of owners in the scheme may indeed have extended their sections without the requisite approval and that an investigation was under way in this regard. They reported that the appellants had appointed a land surveyor for the purposes of ascertaining whether or not extensions had been effected, and if necessary, remeasuring the affected units. It was pointed out that should any extensions be verified appropriate steps would be taken, and 'the relevant extensions registered with the deeds office'. It follows from the relevant working of the Sectional Titles Act summarised earlier that the registration of the extension of any existing sections in the scheme would result in a proportionate reduction of the respective participation quotas of the unaltered sections and a related increase in those of the extended sections. The changes would bring about a commensurate adjustment in the level of the contribution levies payable by the unit owners; the owners of the extended units would thereupon have to contribute relatively more and the owners of the unaltered units relatively less.

[15] The first respondent's attorneys, to whom a copy of the appellants' attorneys' aforementioned letter to the Ombud Service had been provided, addressed a response to it to the Service. They contended that the Service had jurisdiction because the first respondent *was* a person with a material interest in the scheme. No particulars were given of the grounds upon which the contention was founded. The attorneys reiterated that the first respondent's request for information from the appellants was 'in order to make an assessment, based on the reasons provided in the application [as to which see [8] above], to determine if the applicant has a financial claim against the association'.

[16] The Service convened a conciliation hearing on 28 June 2017, [16] and when that proved fruitless, referred the matter for adjudication. [17] (It may be inferred that the ombud must have considered that the matter constituted a 'dispute' as defined in s 1 of the Act, [18] for had she not done so she should have rejected the application for want of jurisdiction, in terms of s 42 of the Act.)

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[17] The adjudicator was empowered to dismiss the application, [19] or to make an order 'granting or refusing each part of the relief sought by the applicant'. [20] The character of the various types of substantive relief that an adjudicator is empowered to grant in terms of the Act appears from the provisions of s 39. [21] The section has a bearing on what might constitute a 'material interest' in a scheme for the purposes of the Act, a question to which I shall have to return presently in relation to the appellants' jurisdictional challenge. It is therefore useful to dwell for a bit on its provisions.

[18] It provides for the possibility of a number of different types of order being made in respect of seven expressly specified categories of 'issues', viz (i) 'financial issues'; [22] (ii) 'behavioural issues'; [23] (iii) 'scheme governance issues'; [24] (iv) issues 'in respect of meetings'; [25] (v) 'in respect of management services'; [26] (vi) 'in respect of works pertaining to private areas and common areas'; [27] and (vii) 'in respect of general and other issues'. [28] It is evident from the character of each of the categories of issues that they pertain primarily to matters germane to the community schemes, and only incidentally to related personal or individual interests or rights. That much may be illustrated with regard to the detailed provisions in regard to just one of the specified categories, 'financial issues'. The orders that may be sought in relation to that category are —

(a) an order requiring the association to take out insurance or to increase the amount of insurance;

(b) an order requiring the association to take action under an insurance policy to recover an amount;

(c) an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way;

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(d) an order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order;

(e) an order for the payment or repayment of a contribution or any other amount; or

(f) an order requiring a specified tenant in a community scheme to pay to the association and not to his or her landlord, all or part of the rentals payable under a lease agreement, from a specified date and until a specified amount due by the landlord to the association has been paid: Provided that in terms of such an order —

(i) the tenant must make the payments specified and may not rely on any right of deduction, set-off or counterclaim that he or she has against the landlord to reduce the amount to be paid to the association;

(ii) payments made by the tenant to the association discharge the tenant's liability to the landlord in terms of the lease; and

(iii) the association must credit amounts received from the tenant to the account of the landlord.

It is clear from the context, in my view, that all of the available remedies bear on the community, and only incidentally on their effect on an individual member. Inasmuch as it could be argued that paras *(c)* and *(e)* above might apply to the first respondent's claim, the argument is only superficially attractive. The 'contribution' referred to in these paragraphs is a contribution that would have been levied on the community, not a charge levied on an individual — other than as part of such individual's proportionate share of a charge on the community as a whole. This follows from the use in para *(c)* of the phrase 'a contribution levied on owners or 'occupiers' instead of 'a contribution levied on an owner or occupier'. There is no reason to understand that the legislature intended that a different meaning should be attached to 'contribution' in para *(e)* to that which it bears in para *(c)*.

[19] An individual's right to claim relief in terms of the Act is dependent on them being materially affected by one or other of these community scheme related matters. Even then the individual's right to avail themselves of the special statutory dispute resolution mechanism is also dependent on them having 'a material interest *in the scheme*'. Both requirements must be satisfied for standing as an applicant in terms of s 38 to be established.

[20] An applicant for relief in terms of the Act is required to identify in its application which of the orders particularised in s 39 it seeks. In the current matter the first respondent did not expressly do that, but his attorneys subsequently stated (in their response to the appellants' attorneys' aforementioned letter of 1 June 2017) [29] that his claim was for orders in terms of —

(a) s 39(1*)(d)* of the Act, viz 'an order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order';

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(b) s 39(1)*(e)* of the Act, viz 'an order for the payment or repayment of a contribution or any other amount';

(c) s 39(7)*(a)* of the Act, viz 'an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association to make such information or documents available within a specified time'; and

(d) s 39(7*)(b)* of the Act, viz 'any other order proposed by the chief ombud'.

[21] It should have been readily apparent on the facts of the case that only the order described in item *(b)* of the preceding paragraph might arise for consideration; and then only if making it would result in the determination of a 'dispute' as defined, and would give rise to an obligation on the respondent that was not inconsistent with the legislation regulating the type of scheme that was involved. There was no complaint about the scheme's books of account and there was nothing an auditor could contribute to altering the registered participation quotas that governed the calculation of members' financial contributions. It should also have been clear on the facts that all of the information or documentation that the first respondent required in order to determine the extent of his proportionate liability to contribute financially to the scheme was a matter of public record. He had no need of information from the trustees. There was, moreover, nothing to indicate that an order of the character contemplated in s 37(7)*(b)* had been proposed. [30] The first respondent's attorneys' invocation of the provision in the abstract was therefore conspicuously meaningless.

[22] Proceedings before an adjudicator in terms of the Act are conducted informally. The procedure is inquisitorial [31] and legal representation is not permitted, unless the adjudicator and the parties otherwise agree, or after considering — (i) the nature of the questions of law raised by the dispute; (ii) the relative complexity and importance of the dispute; and (iii) the comparative ability of the parties to represent themselves in the adjudication, the adjudicator concludes that it would be unreasonable to expect a party to deal with the adjudication without legal representation. [32] There is no indication that a record was kept of the hearing before the adjudicator in the current matter, and all we have of relevance, apart from a copy of the first respondent's application and the

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abovementioned correspondence, is her summary of the parties' submissions in her statement of reasons. [33] It does not appear, from that, that there was any factual dispute between the parties. It appears to have been common ground that there had been unauthorised extensions to certain sections in the scheme. In that regard it was recorded by the adjudicator that the affected owners had been required by the appellants to submit detailed plans in respect of the extensions to the appointed land surveyors (Stern & Ekermans) [34] by the end of November 2017, obviously for the purpose of enabling extension sectional plans to be registered.

[23] The adjudicator made the following order:

'In terms of Section 54(4) of the CSOS Act the following order is hereby made by the Adjudicator and such Order shall be complied with on or before 31 January 2018 by the Respondent (ie the appellants), subject to the conditions below:

7.1 To partially grant the Applicant's prayers for relief sought under paragraph 4 and to order the Respondent to calculate the levies paid by the Applicant by determining the participation quota of the Applicant in relation to the participation quota as established in terms of the new registered sectional title scheme based on the revised participation quotas, subject to —

The draft sectional plan of consolidation to be submitted to the Surveyor-General on or before 31 January 2018 to be accompanied by a certificate by the local authority approving the consolidation and a schedule specifying, in the manner prescribed, the participation quota of the new section created, being the aggregate of the quotas of the sections that are to be consolidated.'

The nature of the order granted, and which the first respondent F appeared in person at the hearing of the appeal to defend, confirms that the essence of the first respondent's complaint, and the object of his application, were that his levy contributions should be adjusted ex post facto in accordance with the recalculated participation quota in respect of his unit as reflected on the schedules to the draft sectional plans of extension [35] that it was plainly intended should be submitted [36] in order G to regularise the changes some of the members of the body corporate had effected to their sections.

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[24] A The appellants, who were dissatisfied with the order, exercised their right of appeal in terms of s 57 of the Act by filing with the registrar of the court a 'notice of appeal in terms of section 57 of the Community Schemes Ombud Service Act No 9 of 2011'. A copy of the notice was served by the appellants or their attorneys on the first respondent's attorneys and on the Service's Cape Town offices. The notice incorporated B four 'grounds for [the] appeal'. Annexed to the notice were copies of the adjudicator's order endorsed by the clerk of the magistrates' court, Cape Town, and of the adjudicator's statement of reasons. A volume entitled 'Record on Appeal', consisting of a collation of documents related to the proceedings in terms of the Act, was filed separately, and C some time later, under cover of a filing sheet evidencing service on the first respondent's attorneys and the Service's office in the same manner as the 'Notice of Appeal'. We raised with the appellants' counsel whether the ad hoc procedure adopted by the appellants to initiate these D proceedings had been proper or appropriate.

[25] The appeal is not one for which provision is made in terms of the rules of court, and no procedure has been prescribed for it in terms of the Act or the regulations made thereunder. It is well recognised that the word 'appeal' is capable of carrying various and quite differing connotations. One therefore has to look at the language and context of the E statutory provision in terms of which a right of appeal is bestowed in a given case to ascertain the juridical character of the remedy afforded thereby. An appeal in terms of s 57 is not a 'civil appeal' within the meaning of the Superior Courts Act 10 of 2013. [37] What may be sought in terms of s 57 is an order from this court setting aside a decision by a F statutory functionary on the narrow ground that it was founded on an error of law. The relief available in terms of s 57 is closely analogous to

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that which might be sought on judicial review. The appeal is accordingly A one that is most comfortably niched within the third category of appeals identified in *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T)[38] at 590 – 591.

[26] The proper manner in which such an appeal should be brought in B the circumstances is upon notice of motion supported by affidavit(s), which should be served on the respondent parties by the sheriff. It would also have been indicated for the adjudicator, and not just the Service, to have been cited as a respondent. While the adjudicator might be expected in the ordinary course to abide the judgment of the court, there will be cases in which the adjudicator might nevertheless consider that it C might be helpful to file a report for the court in respect of any aspect of fact or law not dealt with in his or her statement of reasons that might have assumed significance in the context of the nature of a particular challenge advanced on appeal. It is also desirable that when, as happened in the current matter, the adjudicator's order has been registered as an D order of court in terms of s 56 of the Act, notice of the proceedings also be given to the registrar or clerk of the court concerned; for the setting-aside of the order should as a matter of good order result in the registrar or clerk concerned expunging the registration of it from the court's records. However, as no one objected to the procedure used by the appellants, and as effective notice of the appeal appeared to have E been achieved, [39] we agreed to entertain the appeal notwithstanding the procedurally irregular manner in which it had been brought. (Litigants should not be misled by this into assuming that similar indulgence will be afforded in like matters in the future.)

[27] As mentioned, the appellants stated four grounds for their appeal. F In view of the restricted basis for appeal permitted in terms of s 57 of the Act it would have been preferable if they had stated the points of law in respect of which they contended that the adjudicator had erred. In my assessment the stated grounds of appeal nevertheless sufficiently clearly advanced the contention that the adjudicator had erred in law in the following respects: G

[27.1] By failing to uphold the appellant's objection to her jurisdiction to deal with the application; and

[27.2] by making an order that purported to fix the appellants with a liability that was incompatible or inconsistent with the pertinent H provisions of the governing legislation, be it the Sectional Titles Act and/or the Sectional Titles Schemes Management Act.

[28] In my judgment both points of law taken by the appellants are sound. I

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[29] A No longer being a member of the body corporate, the first respondent's only interest in the remeasurement and possible consequential readjustment of levies was a purely financial one. Indeed, he expressly confirmed that his purpose was to ascertain whether he might have a claim for a refund. His interest at the time he made his application was wholly personal, and not *in the community scheme*. The first respondent's B application therefore did not concern a dispute between persons with a material interest in the scheme. Accordingly the *dispute* did not conform to the defined meaning of the term in s 1 of the Act, and in the result it was not cognisable by the Ombud Service. The objection to the Service's jurisdiction should have been upheld by the ombud or, failing C that, by the adjudicator.

[30] But even if the Service had enjoyed jurisdiction, the order made by the adjudicator was beyond her powers, and legally incompetent. It purported to oblige the appellants to adjust the first respondent's liability in respect of contributions during the period of his membership D of the body corporate in accordance with an amended participation quota for the section he had owned, that was to be registered only long after the first respondent had disposed of his unit. As should be evident from the description of the relevant provisions of the governing legislation given earlier in this judgment, a unit owner's proportionate liability E to pay contributions is statutorily determined with reference to the *registered* participation quota in respect of the section concerned. Furthermore, any amendments to the participation quotas consequent upon the approval and registration of sectional plans of extension in a scheme become effective only upon the registration of the plans of extension, and then only prospectively from the date of registration. Quite apart from F the fact that the order granted did not comfortably match any of the remedies that the adjudicator was empowered to grant in terms of s 39, [40] it was quite obviously not within her competence to make an order that would have an effect in conflict with the provisions of the legislation governing the community scheme in question.

[31] G In the result the following order is made:

1. The appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 is upheld with costs.
2. The order made by the adjudicator in terms of s 54 of the said Act is set aside.

Applicant's H (Appellant's) Attorneys: *Edward Nathan Sonnenbergs*, Cape Town.

1 In terms of s 1 of the Act, '"association" means any structure that is responsible for the administration of a community scheme . . .'.
2 11 June 2011 and 7 October 2016, respectively.
3 See the long title and s 2.
4 Section 1, sv 'community scheme'.
5 In terms of s 8 of the Sectional Titles Schemes Management Act 8 of 2011.
6 Published under GN R1233 in *GG* 40335 of 7 October 2016.
7 It appears that the 'extensions' involved the owners of some units in the scheme increasing the physical dimensions of their sections, and the 'conversions' concerned some owners converting the garage space in their units (which was levied differently to dwelling space) into dwelling space.
8 That is, until the commencement of the Sectional Titles Schemes Management Act 8 of 2011 on 7 October 2016.
9 See s 32(4) of the Sectional Titles Act (the subsection has since been repealed by s 20 of Act 8 of 2011).

10 Section 32(3) of the Sectional Titles Act (now substituted by s 20 of Act 8 of 2011); see s 11 of the Sectional Titles Schemes Management Act for the currently applicable provision. 'Participation quota' is defined in s 1 of the Sectional Titles Act as —

'in relation to a section or the owner of a section, means the percentage determined in accordance with the provisions of section 32 (1) or (2) in respect of that section for the purposes referred to in section 32 (3), and shown on a sectional plan in accordance with the provisions of section 5(3)(g); . . .'.

An identical definition of the term is given in s 1 of the Sectional Titles Schemes Management Act.

11 'Sectional plan' is defined in s 1 of the Sectional Titles Act as —

'in relation to a scheme, means a plan approved by the Surveyor-General—

(a) which is described as a sectional plan;

(b) which shows the building or buildings and the land comprised in the scheme, as divided into two or more sections and common property; and

(c) which complies with the requirements of section 5,

and includes a sectional plan of subdivision, consolidation or extension as provided for in this Act'.

12 In terms of s 5(3)*(g)* of the Sectional Titles Act.

13 In terms of s 7 of the Sectional Titles Act.

14 In terms of s 12 of the Sectional Titles Act.

15 See s 24 of the Sectional Titles Act.

16 In terms of s 47 of the Act.

17 In terms of s 48 of the Act.

18 See [5] above.

19 In terms of s 53 of the Act. Despite the fact that the ombud is meant to confirm that the Service has jurisdiction before a matter is referred to an adjudicator, it cannot have been the legislative intention that an adjudicator to whom an application was referred would be required to proceed to make an order in favour of an applicant in the face of a challenge by the respondent to the adjudicator's jurisdiction that the adjudicator considered to be well founded.

20 In terms of s 54*(a)* of the Act.

21 When s 38(3)*(a)*, s 39 and s 54(1)*(a)* of the Act are read together, it is clear that an adjudicator's power to grant an applicant positive relief is limited to the granting of one or more of the orders particularised in s 39.

22 Section 39(1).

23 Section 39(2).

24 Section 39(3).

25 Section 39(4).

26 Section 39(5).

27 Section 39(6).

28 Section 39(7).

29 See [13] above.

30 Section 39(7)*(b)* provides:

'An application made in terms of section 38 must include one or more of the following orders:

. . .

(7) In respect of general and other issues —

. . .

(b) any other order proposed by the chief ombud.'

31 In terms of s 50 of the Act.

32 In terms of s 52 of the Act.

33 The appellant's counsel stated in his heads of argument that the adjudicator had undertaken to reconstruct a record from her notes, but that nothing had come of the undertaking. The first respondent on the other hand stated that the proceedings had been recorded, and that he had expected that a transcript would have formed part of the papers before us. Whatever the correct factual position, in the absence of a transcript of the proceedings, it did not seem to us to be material as there were no disputes of fact and the parties' respective legal contentions were sufficiently evident from the material that had been placed before us.

34 Incorrectly described as 'quantity surveyors' in the adjudicator's statement of reasons.

35 The adjudicator's mention in the order of a 'draft sectional plan of consolidation' appears, in the context of the discernible facts, to have been an intended reference to the draft sectional plans of extension that would be required to regularise the sectional title development scheme's sectional plan and participation quotas.

36 In terms of s 24 of the Sectional Titles Act.

37 The reference to a 'civil appeal' in s 14 of the Superior Courts Act is to an appeal to the High Court from the judgment or order of a lower court, not to an appeal of the third type mentioned in *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at the place mentioned later in this paragraph. The fact that an adjudicator's order may be registered as an order of court for enforcement purposes in terms of s 56 of the Act does not make it an order of such court for the purposes of an appeal. The registrar or clerk of court who registers such an order in terms of s 56 does so on the basis that the adjudicator's order is valid unless and until it is set aside, and does not signify by its registration that the court endorses its correctness. Its registration is an administrative, not a judicial, act. Any scope for doubt in this regard is excluded by the language of s 56, which provides for the enforcement of an adjudicator's order 'as if it were' an order of a court of competent jurisdiction. If the adjudicator's order is to be challenged that must be done in terms of s 57. Section 57 (which, as mentioned, gives rise to a different type of appeal to that from the judgment of a court) applies irrespective of whether the impugned order has been registered by a clerk of court or registrar.

38 Also reported at [1963] 3 All SA 91 (T).

39 We were assured by the appellant's counsel from the bar that the adjudicator was aware of the appeal and that she had advised the appellant's legal representatives that she abided the judgment of the court.

40 See n21 above.