IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: A270/2021

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

19/06/2024
DATE

[redacted]
SIGNATURE

In the matter between:

KIBO PROPERTY SERVICES (PTY) LTD	Appellant
And	
BOARD OF DIRECTORS AMBERFIELD MANOR HOA NPC	First Respondent
J W SWART	Second Respondent
S C DU PREEZ	Third Respondent
J V WIESNER	Fourth Respondent
H BHUGWANDASS	Fifth Respondent
THE COMMUNITY SCHEMES OMBUD SERVICE	Sixth Respondent
ADVOCATE M A MAVOAZE	Seventh Respondent

JUDGMENT

MKHABELA AJ (KUMALO J CONCURRING):

Introduction

[1] This is an appeal in terms of Section 57 (1) of the Community Schemes Ombud Service Act 9 of 2011 (CSOS Act) against an order made by an adjudicator who heard the matter in respect of a dispute between the parties.[1]

[2] The appellant is the registered managing agent for Amberfield Manor Homeowners Association and was the respondent in a dispute referred to the Community Schemes Ombud Service (CSOS) by the Second to Fifth respondents, purportedly acting on behalf of the HOA.

[3] The first respondent is the Board of Directors of Amberfield Manor Homeowners Association NPC ("HOA"), a community scheme as defined in section 1 of the CSOS Act.

[4] The second to fifth respondents are erstwhile directors of the HOA and homeowners in the HOA.

[5] The Community Schemes Ombuds Service, is a juristic person established in terms of section3 of the CSOS Act, cited as the sixth respondent.

[6] The seventh respondent was the adjudicator who was appointed to adjudicate the dispute by the CSOS, in terms of section 38 of the CSOS Act. I shall herein refer to the first respondent as 'the HOA' the second to fifth respondents as 'the erstwhile directors', the sixth respondent as 'the CSOS'' and the seventh respondent as 'the adjudicator'.

The dispute

[7] On 31 October 2020, the HOA submitted a request for a special general meeting to be held before 31 October 2020 to the homeowners. The purpose of the special general meeting was to inform the second to fifth respondents who were then directors of the HOA that they were no longer directors of the HOA.

[1] Act 9 of 2011 (CSOS).

[8] The assertion that the erstwhile directors were no longer directors of the HOA was grounded on clause 5.1.4 of the Memorandum of Incorporation (MOI) which provides as follows:

> "Each elected Director of the company will serve on the Board for a term of 12 months. At all times 2 (two) directors must serve on the board that has previously served on the Board for a period of 12 (twelve) months for previous years."

[9] The HOA alleged that it was never the intention of the Companies Act or MOI to create a vacuum absent the leadership of the HOA.

[10] The HOA alleged that clause 5.1.4 allowed for two directors with previous experience.

[11] The HOA then sought the following relief from the CSOS:

11.1 That an order be granted stating that the meeting that was convened on 12 November 2020 which elected new directors of the HOA is declared invalid for lack of compliance with the due process envisaged in the MOI.

11.2 That an order should be granted cancelling the meeting on 12 November 2020.

11.3 That an order be granted to the effect that clause 5.1.4 of the MOI in its narrow interpretation is unreasonable and prejudicial to the HOA and its members.

11.4 That an order be granted to amend clause 5.1.4.

11.5 That an order be granted directing the managing agent to distribute a letter to the members in terms of Section 39(5)(a) of the CSOS Act.

[12] On 9 December 2020, the CSOS sent an email to the appellant requesting its response to the allegation made by the HOA.

12.1 The appellant was requested to file its response on or before 17 December 2020. The appellant did not respond for reasons that will be clearer later in this judgment.

[13] The application for the relief sought by the HOA was lodged with the CSOS on 6 November 2020 by the fourth respondent, purportedly acting on behalf of the HOA as one of the directors of the HOA.

[14] The application was lodged as an urgent application with the intention to interdict the intended special general meeting scheduled to take place on 12 November 2020.

[15] On 22 December 2020, the CSOS informed the parties that the Ombud was of the view that there was no reasonable prospect of a negotiated settlement of the dispute as contemplated in Section 47 of the CSOS Act.

[16] The Ombud then referred the dispute for adjudication in terms of Section 48 read with clause 21.5.7 of the Practice Directive on Dispute Resolution.

The Adjudicator's order

[17] The dispute came before the seventh respondent who acted as an adjudicator. In his view there were three issues before him for determination:

17.1 First, it was whether the second to fifth respondents were still lawful directors of the HOA in the light of clause 5.1.4 of the MOI.

17.2 Second, was whether the meeting that was held on 12 November 2020, which was labelled a special general meeting, was valid and if it was to be found invalid, that its consequent resolution would have to be declared void and of no force or effect.

17.3 Third, was whether the order directing the managing agent to distribute the letter in question was valid or not.

[18] The Adjudicator found in favour of the HOA in so far as the second part of clause 5.1.4. According to the adjudicator, the wording that reads as follows was confusing:

> "At all times 2 (two) directors must serve on the Board that has previously served on the Board for a period of at least 12 (twelve) months for previous years."

[19] The adjudicator was of the view that this second part of clause 5.1.4 was confusing and asserted that the clause required some amendment.

[20] In so far as the special general meeting of 12 November 2020, the adjudicator held that it was invalid.

[21] The adjudicator considered that the notice calling for the special general meeting was to the effect that the appellant should schedule a special general meeting before 31 October 2020. Further, that the appellant should inform the erstwhile directors that they were no longer directors of the HOA. The notice warned further that the second to fifth respondents would be held liable for any claims and liabilities arising from decisions taken from 20 February 2020.

[22] After quoting clause 5.3.7 of the MOI which made provision for the removal of a director after having been given adequate notice and a reasonable opportunity to respond, the adjudicator held that the decision to remove the erstwhile directors was unlawful.

[23] The assertion of unlawfulness was attributed to the finding that the decision to remove them was not taken in a general meeting of the HOA and was not subjected to a vote.

[24] Accordingly, the adjudicator held that the decision to remove the erstwhile directors was invalid and of no force or effect.

[25] The adjudicator's order is dated 6 July 2021. After this order, it was brought to the attention of the adjudicator that the notice dated 9 December 2020 that was sent by email by the CSOS did not reach the appellant. The reason being that it was sent to a wrong email address.

[26] The fact that the email sent by the CSOS dated 9 December 2020 did not reach the appellant was confirmed by the erstwhile directors to the adjudicator.

[27] This concession led to the adjudicator issuing a variation of his first order after receiving written submissions from the appellant. The variation order did not alter the previous order in any material respects. In this regard, the adjudicator stated the following:

> "Upon perusal of the respondent's submission I could not find anything new that can render the adjudication order in its entirety null and void to justify it being set aside."

[28] For the sake of completion, the adjudication 's order is reproduced in its entirety and reads as follows:

> "65. In the circumstances, the following order is made:
>
> 65.1 The Applicant's Clause 5.1.4 of the Memorandum of Incorporation is declared vague and ambiguous.
>
> 65.2 The Applicant is ordered to convene a Special General Meeting to decide on the amendment of Clause 5.1.4 to clarify the issue of eligibility of members to serve or appointed as directors of the Amberfield Manor Home Owners Association within 60 days of receipt of this order.
>
> 65.3 The Applicant is ordered to convene a Special General Meeting (SGM) within 30 days after the amendment of the Clause 5.1.4 of the MOI in order for members of the HOA to vote and elect new directors to serve on the board of the HOA in accordance with the amended MOI.
>
> 65.4 The meeting convened by members on the 12th of November 2020 as well as resolutions taken by members in that meeting are declared null and void and of no effect or force.
>
> 65.5 The decision to remove directors or Board of Directors taken by members by means of petition outside a formal general meeting is similarly declared invalid and of no effect or force.
>
> 65.6 The Respondent, managing agent is ordered to distribute the letter addressed to the members within 7 days of receipt of this order.
>
> **COSTS**
>
> 66. There is no order as to costs."

[29] In the variation order, the adjudicator stated as follows:

"The Adjudication order will remain save paragraph 65.6 referred to hereabove which will be set aside on the ground of ambiguity and vagueness."

[30] Aggrieved by the adjudicator's order and the variation order, the appellant lodged an appeal in terms of Section 57(1) of the CSOS Act which provides that:

"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."

[31] The appellant's grounds of appeal could be summarised as follows:

31.1 The adjudicator erred in allowing the adjudication to proceed on an *ex parte* basis and without determining whether the appellant had notice or not (the appellant did not have notice of the proceedings).

31.2 The adjudicator erred in allowing the adjudication to proceed without oral or written submissions from the appellant, which negated the appellant's right to a fair hearing.

31.3 The adjudicator erred by not finding that the first respondent (as ostensibly represented by the second to fifth respondents) is not the Board of Directors of the Amberfield HOA and accordingly had no *locus standi* to bring the application for dispute resolution in terms of the provisions of the Ombud Act.

31.4 The adjudicator erred by not finding that the term of office of the alleged directors acting as board (applicant) came to an end on 21 February 2020 and that they thus had no *locus standi* to bring the application for dispute resolution in terms of the CSOS Act.

31.5 The adjudicator erred by declaring that clause 5.1.4 of the MOI is vague and ambiguous.

31.6 The adjudicator erred by ordering that a special general meeting be convened to decide on the amendment of clause 5.1.4 and to clarify the issue or legibility of members to serve or appointed as directors of the HOA as set out in paragraph 65.2 of the adjudication order, and such error resulted based on the aforesaid grounds.

31.7 The adjudicator erred by ordering that a special general meeting be convened for purposes of electing new directors as no such order could have been granted as per the aforesaid grounds.

31.8 By declaring that a special general meeting held by members on 12 November 2020 as well as the resolutions taken by them in the meeting to be null and void and of no effect or force (based on the aforesaid grounds).

31.9 The adjudicator erred by holding that the members had taken a decision to remove directors from the Board of Directors by means of a petition outside a formal general meeting and accordingly by declaring such invalid and of no effect or force in terms of paragraph 65.5 of the adjudication order where the adjudicator could not have taken such a decision as the 12 November 2020 meeting was validly held.

31.10 The adjudicator erred by not holding that the special general meeting held by the members of the HOA on 12 November 2020 was:

31.10.1 requested and/or requisitioned by members of the HOA in terms of the provisions of clause 4.2.1, alternatively clause 4.2.2 of the MOI;

31.10.2 the special general meeting held by the members of the HOA on 12 November 2020 was validly convened and held *inter alia* in accordance with the provisions of clause 4.2 and other applicable provisions of the MOI.

[32] The appeal is opposed by HOA and the erstwhile directors. The CSOS and the adjudicator took no part in the proceedings in this court and one would the assume that they will abide the judgment that I will make in due course.

[33] The grounds of appeal by the HOA and the erstwhile directors are twofold fold and could be summarised as follows:

33.1 First, the matter has become moot.

33.2 Second, the grounds of appeal do not constitute a question of law.

The issue

[34] The issue that falls crisply for determination in this appeal is whether the erstwhile directors had *locus standi* to submit a dispute to the CSOS on behalf of the HOA. If the answer to this question is in the negative, it would be the end of the matter and the adjudicator's and the variation orders would have to be set aside.

[35] On the other hand, if the answer is in the affirmative, it would trigger a comprehensive evaluation of the entire adjudicator's order in order to determine whether it was wrong on other basis as contended in the grounds of appeal.

[36] An enquiry whether the erstwhile directors were legitimate members of the board, and could therefore represent the HOA by referring a dispute to the CSOS, must proceed from the terms of the Association's constitution in particular the MOI.

[37] Clause 5.14 of the Memorandum of Incorporation provides *inter alia* that each director of the company will serve on the Board for a term of 12 months.

[38] The cannons of interpreting documents are now firmly established. The Supreme Court of Appeal in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] authoritatively laid down the proper approach.

[39] It was held that one must have regard to the language of the document, read in the light of its context, apparent purpose and the factual background against which it came into existence.

[40] Clause 5.1.4 of the Memorandum of Incorporation does not present any interpretation challenges. On a purely grammatical reading of the clause the term of the erstwhile directors had lapsed by February 2020. This could be gleaned

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[2] 2012 ZASCA 13 (15 March 2012) at [18]

from the erstwhile directors' submission of their dispute, purporting to be acting on behalf of the HOA.

[41] Having been aware that their term of office had lapsed, it appears that their justification to insist on calling themselves directors of the HOA was always predicated on their interpretation of the second part of clause 5.1.4 which provided that 2 (two) directors must serve on the Board that has previously served on the Board for a period of 12 (twelve) months for previous years.

[42] A further contention by the erstwhile directors was that it was never the intention of the Companies Act or Memorandum of Incorporation to create a vacuum.

[43] The adjudicator was alive to the fact that the dispute or application to the CSOS was lodged by the fourth respondent on 6 November 2020.

[44] The fourth respondent had intended to secure a ruling to stop or interdict a special general meeting that was scheduled to take place on 12 November 2020.

[45] It was necessary for the adjudicator to determine first whether the erstwhile directors were legitimate members of the Board of the HOA.

[46] However, it appears that the adjudicator misdirected himself by focussing on the second part of clause 5.1.4.

[47] On his own version, the Adjudicator states that the first part which reads as follows: *"each elected director of the Company will serve on the board for a term of 12 months"*, does not offer any interpretation challenge.

[48] Once this was evident that the clause was not presenting any interpretation challenge, the adjudicator was obliged as a trier of fact to give effect to the language of clause 5.1.4 concomitant with language, and apparent purpose of the clause.

[49] In failing to give effect to the unequivocal language of clause 5.1.4, the adjudicator failed to adjudicate on the clear question of law that was before him.

[50] The result was to clothe the erstwhile directors with legitimacy to represent the HOA in circumstances that was contrary to clause 5.1.4.

[51] In the circumstances, this court as an appellate court is at large to interfere with the findings of the adjudicator given the fact that what was before the Panel was a question of law.

[52] Accordingly, the appellant's ground of appeal to the effect that the adjudicator erred by not finding that the term of office of the alleged directors acting as members of the Board of the HOA came to an end on 21 February 2020 and thus had no *locus standi* to bring the application for dispute resolution in terms of the CSOS Act, is well founded.

[53] Since the above finding is dispositive of the entire appeal, it is unnecessary to consider the appellant's other grounds of appeal.

[54] Equally, in the light of the affirmative answer to the first question to the effect that the issue for determination is the question as to whether the erstwhile directors had, locus standi to represent the HOA is in the negative, it is also not necessary to consider the second question which relate to the other grounds of appeal.

[55] There is no doubt that the adjudicator's order falls to be set aside. His reasons in declaring that the special general meeting of 12 November 2020 was invalid is glaringly absent. So is his reliance on the clause that dealt with the removal of directors who are in office and whose term is still valid. The erstwhile directors were not removed as the appellant correctly contended, rather their term of office lapsed. Period.

[56] Similarly, his reasons to authorise the HOA to convene a special general meeting to decide on the amendment of clause 5.1.4.

[57] It should have been evident that the meeting to amend clause 5.1.4 would have to be initiated by the very erstwhile directors whose term had already lapsed.

[58] It defies logic because it was not apparent to the adjudicator that the term of office of the erstwhile directors had lapsed. On his version, the adjudicator was of the view that the first part of clause 5.1.4 did not pose any interpretation challenge.

[59] The finding that the erstwhile directors were not legitimate directors of the HOA was also echoed by His Lordship Maumela J in this Court[3].

[60] Maumela J granted an interdict that suspended the adjudicator's order pending the outcome of this appeal. His judgment was attached as part of the papers in this appeal. It is evident in those proceedings that the erstwhile directors did not seriously dispute the fact that their term of office had lapsed and therefore were not directors of the HOA when they purportedly referred the dispute to the CSOS on behalf of HOA.

[61] I now turn to the respondents' reasons as to why the appeal should not be entertained. It must be remembered that one of the reasons is that the matter has become moot and therefore not appealable.

[62] It is trite that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinion on abstract propositions of law.[4]

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[3] 45733/2021 delivered on 25 October 2021 in Gauteng Division, Pretoria High Court.

[4] *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (1) BLLR 39 (CC) fn 18; See also *JT Publishing (Pty) Ltd & Another v Minister of Safety and Security & Others* 1996 (12) BLLR 1599 (CC) at [15].

[63] Furthermore, a court has a discretion to entertain the merits of an appeal, even where the matter is moot.[5] In circumstances where a case poses a legal issue of importance for the future that requires adjudication, such scenario would nudge the Court towards an inclination to entertain the appeal.

[64] The facts of the appeal before us are that there was a special general meeting that was held on 12 November 2020. It is common cause that that meeting elected new directors that were subsequently registered with the Companies and Intellectual Property Commission (CIPC).

[65] It is conceivable that the new directors might have taken decisions that had contractual implications for the HOA. If the appeal is not heard, what could be left would be the adjudicator's order which ruled that that meeting was null and void and of no force or effect. This could undoubtedly have serious legal ramifications if the court were to refuse to hear the appeal based on mootness.

[66] The adjudicator's order, being an administration decision will continue to be legal and binding until set aside. It is now firmly established that an administration decision remains valid until set aside by a Court of law.[6]

[67] Moreover, the interpretation of clause 5.1.4 is a legal question that needs to be settled for the future of the HOA.

[68] It is firmly established that a court should exercise its discretion to hear a matter even if it is moot if the issue is a legal issue of consequence for the future of the commercial relationship of the parties.[7] Accordingly, the appeal is not susceptible to be dismissed based on mootness.

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5 *Qoboshiyene NO & Others v Avusa Publishing Easern Cape (Pty) Ltd & Others* 2013 (3) SA 315 (SCA) at [5].

6 *Oudekraal Estates (Pty)Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

7 *Capitec Bank Holdings & Another v Coral Logoon Investments 194 (Pty) Ltd & Others* 2022 (1) SA 100 (SCA) (9 July 2021) at [19].

[69] This leaves the second ground of appeal which is advanced on behalf of the erstwhile directors of the HOA namely that the appeal does not raise a question of law.

[70] Section 57(1) of the CSOS Act provides that an aggrieved party may appeal against an adjudicator's decision, but only on a question of law.

[71] In the case of *KPMG Chartered Accountants (SA) v Securefin Limited & Another*[8], it was stated that:

> "Interpretation is a matter of law and not a fact and, accordingly, interpretation is a matter for the Court and not for the witnesses (or as said in common law jurisprudence), it is not a jury question."

[72] I am therefore not amenable to dismiss the appeal on the grounds that its merits do not raise a question of law.

[73] For all these reasons, I am inclined to uphold the appeal. What is left is the issue of costs. The appellant has been substantially successful. There is no reason why the costs should not follow the result.

Order

[74] I therefore make the following order:

1. The appeal is upheld with costs.

I hand down the order.

[redacted]

R B MKHABELA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

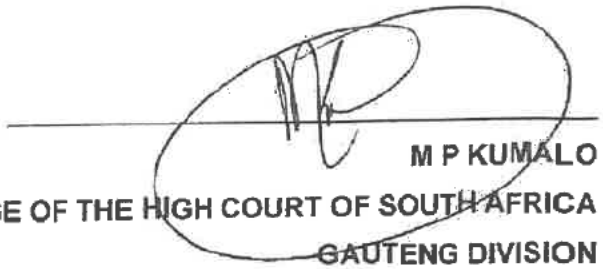
GAUTENG DIVISION

PRETORIA

Electronically submitted therefore unsigned

8 2009 (4) SA 399 (SCA).

I concur.



M P KUMALO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **19 June 2024**.

Appearances

COUNSEL FOR THE APPELLANT:	Adv Johann van Wyk
INSTRUCTED BY:	E W Serfontein & Associates Inc
COUNSEL FOR RESPONDENTS:	Adv W J Burger
INSTRUCTED BY:	Pritchard Attorneys Inc
DATE OF THE HEARING:	7 September 2023
DATE OF JUDGMENT:	19 June 2024