

LEVY DETERMINATION DISPUTED: OMBUD, TRUSTEES OR THE COURT – WHO DECIDES ON CORRECT AMOUNT?

Kobi v Trustees For The Time Being Of The De La Rey Body Corporate and Others (A68/2022) [2023] ZAFSHC 128; 2024 (1) SA 174 (FB) (14 April 2023)

There are a number of judgments from our higher courts pronouncing on disputes relating to the extent of a CSOS adjudicator's powers to make orders. This matter is another example: A dispute between an owner and trustees about alleged erroneous levy calculations was referred to the CSOS and ultimately, to adjudication. The adjudicator dismissed the matter, stating that the CSOS did not have jurisdiction. The outcome of the subsequent appeal to the high court was that the adjudicator's finding was wrong. The dispute concerned financial issues in respect of which "an order declaring that a contribution levied on owners is incorrectly determined ..." (as contemplated in s 39(1)(c) CSOS) was sought. Such dispute was clearly within the adjudicator's ambit.

The Judgment can be viewed [here](#)

FACTS

Ms Kobi is. The scheme is one that falls within the meaning of a 'community scheme' as defined in the Community Schemes Ombud Service Act ("CSOSA").

Ms Kobi, the owner of a unit in the De La Rey sectional title scheme, and the scheme's body corporate were at odds regarding a levy account which she alleged was incorrectly calculated. She advised that she used to receive her levy statements from National Real Estates ("NRE"), the managing agent. Then, in 2015, the body corporate entered into an agreement with Propell Specialised Finance (Pty) Ltd ("Propell") in terms whereof Propell would make loans available to the body corporate, the security for which was a cession of the body corporate's claims (for levy payments) against owners. The agreement also made Propell a collecting agent.

Subsequent hereto, Ms Kobi received statements from both NRE and Propell for amounts that appeared to have been incorrectly calculated. The amounts due differed vastly, with that of NRE for instance reflecting an amount of R75K for the billing period of May 2021, whilst an amount of R313K was indicated on the statement of Propell for the same period.

Ms Kobi raised her concerns with the body corporate, but no resolution was achieved and hence her referral of the dispute in respect of these financial issues to the Community Schemes Ombud Services (the "CSOS"). In that forum, Ms Kobi's claim was dismissed. The CSOS adjudicator held that:

- (i) the relief sought does not fall within the ambit of the 'permitted' forms of relief (as listed in s 39 of CSOSA) that can be handed down by CSOS;
- (ii) that the relief sought by Ms Kobi would have the effect that the CSOS 'steps into the shoes of the trustees and have the ability to read the minds of the parties in order to reach consensus on what is reasonable'; and therefore
- (iii) that CSOS lacked jurisdiction to preside over the dispute.

Ms Kobi then appealed to the High Court, seeking an order confirming that the adjudicator had erred in law by finding that the CSOS lacks jurisdiction to entertain the specific complaint; and that the finding had to be set aside and referred back to the CSOS for adjudication.

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HELD

Did the adjudicator err in dismissing Ms Kobi's claim?

- The relevant sections of CSOSA for determining this matter are:
Section 38
“(1) Any person may make an application if such person is a party to or affected materially by a dispute.
...
(3) The application must include statements setting out—
(a) the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39;
(b) the name and address of each person the applicant considers to be affected materially by the application; and
(c) the grounds on which the relief is sought.... “(own emphasis)
Section 39
“An application made in terms of section 38 must include one or more of the following orders:
(1) In respect of financial issues—
(a)
(b) ...
(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; ... “(own emphasis)

Applied to the facts

- In terms of s 38(1) above, any person may make an application to the CSOS if such a person is a party to or affected materially by a dispute. Ms Kobi was clearly materially affected by the levy calculation, and her conduct in disputing it evidenced her efforts to resolve it amicably.
- In addition, it is clear from the documents that were before the adjudicator that the dispute concerned financial issues requiring “an order declaring that a contribution levied on owners is incorrectly determined or unreasonable” as contemplated in s39(1)(c) of CSOSA, plainly within the ambit of CSOSA.
- The adjudicator's finding is therefore wrong. And, apart from a failure to recognise that it had jurisdiction, the adjudicator could or should have made use of the powers of investigation (in terms of s 51 of CSOSA) in the circumstances. These allow an adjudicator to raise questions and ask for further documents, in order to make a determination whether the levy was incorrectly calculated.

CONCLUSION

The adjudicator's order was set aside and the matter referred to CSOS for re-adjudication.