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PROPERTY LAW UPDATE

| SUMMARY OF JUDGMENT |

CHALLENGING A GOVERNANCE PROVISION DIFFERS FROM A CHALLENGE TO AN HOA'S MANAGEMENT RESOLUTION: CSOS FINDING OVERTURNED

Mooikloof Glen Estates Homeowners' Association v Solomon and Another (A135/2023) [2024] ZAGPPHC 131 (15 February 2024) [2024] ZAGPPHC 131

In the Memorandum of Incorporation of a homeowners' association established in respect of a new development, there is often a provision obliging purchasers of vacant erven to erect buildings thereon within a certain period, failing which they may face penalties. This matter deals with such an owner's challenge to this requirement on the basis that it is unreasonable and not in the interests of the community as a whole. In the application to the CSOS, the owner was successful. However, this decision was overturned on appeal to the High Court. The Court highlighted that, in essence, the adjudicator failed to distinguish between a challenge to a governance provision in terms of the Community Schemes Ombud Services Act, and a resolution passed by an executive committee of an association regulated by the Companies Act.

The judgment and summary below highlight the consequences.

FACTS

Mr Bhunu is an owner of an erf in the Mooikloof Glen Estate Homeowners' Association ('the HOA'). The HOA was established in 2005 and in its Memorandum of Incorporation ('MoI'), it is recorded that building penalties would be invoked in respect of owners who do not complete the building works on their properties within the period prescribed in the MoI.

In 2012, an Annual General Meeting ('AGM') was held at which a resolution was passed suspending the building penalties. At that stage of the existence of the estate, there were only six completed houses and a number of vacant stands, some in the process of being developed.

Mr Bhunu took ownership of a stand in the estate in 2014.

At the August 2017 AGM, the issue of building penalties was put to a vote. At this stage, 35 homeowners voted in favour of the enforcement of building penalties and 4 against. However, a further grace period of two-years was allowed, taking it to 1 September 2019 when the computation of 12 months would start. Following the advent of Covid19, another AGM was held in (November 2020) to discuss relaxation of building penalties. However 66%, of the owners voted for the building penalties to remain in place. At another AGM in 2022, the retention of building penalties was reiterated.

Dissatisfied with the resolutions and penalties imposed on him, Mr Bhunu brought an application to the Community Schemes Ombud Service (CSOS) for dispute resolution. He sought a determination whether or not the charging of a late building penalty is legal and if so, whether the process followed to do so was valid; or if the rule or process was found to be illegal, that the rule be removed.

The HOA relied on the provisions of section 65(6) of the Companies Act 71 of 2008 ('Companies Act') which determine that "[o]nce a resolution has been approved, it may not be challenged or impugned by any person in any forum on the grounds that it did not satisfy subsection (4)." Sub-section (4) provides in turn that a proposed resolution must be "(a) expressed with sufficient clarity and specificity; and (b) accompanied by sufficient information or explanatory material to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution."

Mr Bhunu however argued that sub-sections 39(4)(c) and (e) of the CSOS Act was applicable in this matter. There it is provided that:

> "An application made in terms of section 38 must include one or more of the following orders:
> …
> (4) in respect of meetings-
> ...
> (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association
> (i) was void; or
> (ii) is invalid;
> …
> (e) an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers."

The CSOS adjudicator found in favour of Mr Bhunu, and the HOA appealed to the High Court.

The right to appeal to a High Court against a finding of a CSOS adjudicator is limited to considering whether the adjudicator (i) applied the correct law; (ii) interpreted the law correctly, and/or (iii) properly applied the law to the facts as found by the adjudicator.

HELD

- The adjudicator erred on a point of law in applying the provisions of the CSOSA ('Community Schemes Ombud Services Act') in the circumstances where section 65(6) of the Companies Act was applicable. The adjudicator in any event did not rely on section 39(4) (c) of the CSOSA, despite that being Mr Bhunu's case, and instead applied the provisions of section 38(3)(d). The latter provides which makes provision for an order that a provision must be amended or removed if it is unreasonable and not in the interests of all owners. The adjudicator found the rule to be unreasonable.
- Section 65(6) of the Companies Act was dispositive of the matter: A valid resolution was [assed at a properly convened meeting with the required notification and description of the proposed resolution, as required in that section. Mr Bhunu could not question the resolution taken at the 2017 AGM, as that would be in violation of section 65(6) of the Companies Act.
- The adjudicator accordingly failed to properly apply the law to the facts presented to her and misapplied the law.

CONCLUSION

The appeal is upheld with costs.

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