

DISPUTE REFERRAL TO THE OMBUD: ESSENTIALLY THERE FOR ISSUES THAT BEAR ON THE COMMUNITY, SAYS THE COURT

Prag N.O and Another v Trustees for the time being of the Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body Corporate and Others (A260/2020) [2021] ZAWCHC 132 (16 July 2021)

This is an interesting judgment following on a claim by an owner for damages arising from a fire that gutted his section, against the body corporate. The claim was lodged at the Community Schemes Ombud for payment of the costs of repair to the unit. Apart from many other disputes addressed in the judgment, the court made it clear that the Ombud's preliminary rejection of the claim was right, as it did not have jurisdiction. This was because the fire damaged the section only and thus, on the facts of this matter, did not involve a matter relating to the common property in the scheme. Thus, when considering lodging a dispute at the Ombud's office, it is savvy to first get expert advice.

As an aside, it is also important for bodies corporate/sectional title owners to note why the sectional title scheme's insurer refused the claim.

The Judgment can be viewed [here](#).

FACTS

The trustees of the Harprag Trust (the Trust) owned a unit in the Mitchell's Plain Industrial Enterprises sectional title scheme ("the Scheme").

In July 2019 a fire broke out in the section (which was being utilised by a tenant for commercial purposes at the time) and 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.

Previously, in July 2017, the insurers had settled a claim which had been submitted by the Trust pursuant to a fire which had occurred in the section. Thereafter, 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. The Scheme's managing agents requested the Trust (and other owners) to provide the required certificates of compliance and warned that in the event of a failure to do so any future claim in respect of fire damage might be declined. No response was received, and a follow-up request in April 2018 was also not heeded.

Further, pursuant to an inspection which was conducted by fire protection experts in April 2019, the managing agents provided the body corporate with a quote in the amount of some R 128K for work which needed to be done in order to render the Scheme compliant, in accordance with fire regulations. 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. The Trust only filed an electrical certificate of compliance in respect of its unit in August 2019.

The Trust alleged that the damages it 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 sections 3(1)(h) and (k) of the Sectional Titles Schemes Management Act (the "STMSA"). It lodged a claim with the Community Schemes Ombud against the body corporate, claiming the sum of R 455K in lieu of damages which were allegedly sustained by the Trust pursuant to the fire, together with a further claim for payment of the sum of R 22K lost rental which it allegedly suffered as a result of the fire. The adjudicator dismissed the application in the preliminary stage before looking into the merits at all, finding that the relief which was sought fell

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outside the statutory jurisdiction of the Ombud's Office.

HELD

Was it a claim for the Ombud to assess?

- The Community Schemes Ombud Services Act ("CSOS Act") provides 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. The Ombud is given wide powers to resolve such disputes by way of qualified conciliators and adjudicators.
- In turn, the STSMA holds the body corporate of a sectional title scheme responsible for the control, administration and management of the common property of the scheme - i.e. in respect of 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. To this end, the STSMA requires of the body corporate to establish and maintain both an administrative and reserve fund which is reasonably sufficient to cover the estimated annual running and future operational costs of the repair, 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. In addition, the body corporate must 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. **There are, similarly, a number of additional provisions in the STSMA which clearly illustrate that a body corporate's duty in relation to the sectional title scheme it administers primarily relates to the scheme's common property i.e. to the common interests of members of the scheme and not to the interests of an individual member.**
- Section 13(1)(c) of the STSMA follows on this, and provides that an owner must repair and maintain its own section. 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.
- Accordingly, whilst a body corporate has a statutory duty to insure all buildings that belong to the scheme i.e. all structures of a permanent nature which are erected therein and which are shown on a sectional plan of the scheme (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), the STSMA does not intend 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. *(Note specifically that this matter does not relate to the situation 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.)*
- The obligation (in terms of subsections 3(1)(h) and (k) of the STSMA) to insure the buildings in a sectional title scheme 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.
- Considering the various sections referred to above in the context of both the STSMA and the CSOS Act as a whole, **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 (communal) interests of owners of sections or units in the scheme. 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.

- The orders which can be made by an adjudicator of the Ombud's office (in respect of the different categories of claims which are provided for in section 39 of the CSOS Act) are primarily directed at, and pertain to, matters which bear on the sectional title community concerned as a whole i.e. 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.
- The dispute in this matter is wholly personal to the member, the Trust, and not to the sectional title community as a whole, and in the circumstances it concerns a dispute which is personal to the owner and not one between members of the sectional title scheme and the administrators thereof, as is envisaged by the CSOS Act. Consequently, the dispute does not fall within the ambit of the CSOS Act and was not subject to resolution by the Ombud. This holds true for the principal claim for reimbursement and also for the claim for lost rental.
- The claim was, in addition, 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.
- This does not mean that, in appropriate circumstances, the owner of an individual section (or of a unit i.e. 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 properly made out.

Can the claim be based on the alleged lack of maintenance by the body corporate?

- The Trust sought, in the alternative, to locate its claim as one which fell within the ambit of section 39(6)(a) of the CSOS Act. The section provides that an adjudicator of the Ombud's office 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. However, as the adjudicator pointed out, the obvious difficulty with this contention is not only that the work which was necessary to reinstate the Trust's unit 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 CSOS Act.

Can an order to effect repairs to a private area be granted under the CSOS Act in the circumstances?

- In a last attempt to bring the claim within the ambit of the CSOS Act, the Trust sought to rely on the provisions of section 39(6)(b)(ii), which allows 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 to private or common areas.
- 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 of repairs to it, even though such an order might notionally be possible there are a number of fundamental hurdles which face the Trust and which militate against it being granted in this matter. The Trust as the owner of the section 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. Further, the Trust alleged that the basis for its 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. It however was never intended that such a delictual claim could be adjudicated upon by the Ombud in terms of the CSOS Act.

CONCLUSION

In the circumstances the adjudicator was correct in holding that he did not have jurisdiction to entertain the dispute, and the appeal failed.