

INCONSISTENT APPLICATION OF RULES IN AN HOA & THE CSOS ADJUDICATOR'S RESPONSIBILITY

Reddy and Another v Cedar Lakes Homeowners Association NPC and Others (A018904/2022) [2024] ZAGPJHC 468 (17 May 2024)

One would think that, with photographic evidence showing that an HOA had previously allowed deviations from its architectural rules, an adjudicator would critically probe why it then refused another owner's request for a similar alteration. The absence of an examination of the facts presented moved the disgruntled owner to appeal to the High Court. As an appeal against a CSOS ruling is only available in respect of a point of law (and not regarding factual conclusions), was the adjudicator's finding appealable? Yes, as the court indicated in this matter.

The [judgment](#) and summary below highlight the reasoning of the court.

FACTS

The Emerald Trust ('the Trust') owns an immovable property within the Cedar Lakes Estate ('the Estate'). The Estate is governed by a homeowners' association ('the HOA'), incorporated as a non-profit company. The Trust (via its trustees) is bound to the rules of the HOA, which include the Estate's Memorandum of Incorporation and Architectural Rules, by virtue of the sale agreement it concluded as well as its title deed's conditions.

The main objectives set out in the Estate's Memorandum of Incorporation include "to ... protect communal interests ... of the Members ... including... by maintaining ... the appearance of ... buildings and improvements." Its Architectural Rules in turn provide, with reference to garage doors, that it allows timber doors but requires that "any other finish must first be approved" by the HOA.

The trustees commenced with improvements to the property. It included removal of a generator as well as installation of a new garage door with a mirror exterior finish. The trustees had not applied for the necessary consent from the HOA, but was requested to do so. However, after the request for approval was submitted, approval was denied, the HOA stating that mirror/glass doors were not allowed. The trustees responded stating that it appeared unreasonable to withhold approval since so many deviations of a similar nature had been approved in the past. In fact, the trustees argued, their garage door design included more wood finishes than other garage doors for which approval was given. They also provided photographs confirming this. The HOA did not respond.

The Trust then referred the matter to the Community Schemes Ombud Service ('CSOS'), established in terms of the Community Schemes Ombud Service Act 9 of 2011 ('the CSOSA'). The CSOS adjudicator issued his findings in July 2022. Although he provided reasoning to underpin his finding that the HOA had failed to apply its discretion fairly when it came to removal of the generator, he found that regarding the garage doors, there was no evidence to show that the HOA had acted unreasonably. The Trust was ordered to remove the garage door.

The Trust argued that the adjudicator was wrong, because despite (i) its photographic evidence showing garage doors in the Estate finished-off with materials other than timber (and in particular of mirrored garage doors); and (ii) the absence of any reply or explanation from the HOA to gainsay the reasoning and/or the apparent inconsistency of the refusal to grant consent, the adjudicator found that the HOA had not acted unreasonably.

The Big Small Firm

stbb.co.za

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town
Claremont
Fish Hoek
Helderberg

T: 021 406 9100
T: 021 673 4700
T: 021 784 1580
T: 021 850 6400

Blouberg
Tyger Valley
Illovo
Fourwavs

T: 021 521 4000
T: 021 943 3800
T: 011 219 6200
T: 010 001 2632

Centurion
Bedfordview
East London

T: 012 001 1546
T: 011 453 0577
T: 043 721 1234

The Trust therefore appealed to the High Court in terms of section 57 of the CSOSA, arguing that the adjudicator erred in failing to exercise his discretion reasonably, properly and fairly in light of the evidence produced by the Trust.

HELD

- An appeal in terms of section 57 of the CSOSA to a High Court is allowed only on a question of law.

Conduct of the adjudicator

- In the present matter, the single reason for the conclusion reached by the adjudicator regarding the garage door, was that “there is no evidence ... to show that the HOA acted unreasonably when applying its discretion.”
- Section 50(a) of the Act provides that an “adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator- (a) must observe the principles of due process of law.”
- The corollary of this obligation in the adjudication would have been to give effect to the right on the part of the HOA to explain its apparent inconsistent application of the rules. But there was no such response.
- The adjudicator therefore did not exercise his inquisitorial or investigative powers where it was required - especially since the inconsistency complaint relating to the HOA’s exercising of its powers was central to the Trust’s dispute that was referred to the CSOS.

Conduct required from an adjudicator

- In *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and another*, the High Court considered the nature of an appeal pursuant to section 57 of the Act and held, amongst other things, as follows:
 - “[32] The determination of the questions of fact is exclusively afforded to the adjudicator who conducts the proceedings inquisitorially and has powers to investigate, examine documents and persons, and to conduct inspections. For this reason, an appeal court should adopt a deferential attitude to the determination of the adjudicator on questions of fact.
 - [33] Put differently, the appeal court is limited to considering whether the adjudicator —
 - [33.1] applied the correct law;
 - [33.2] interpreted the law correctly, and/or
 - [33.3] properly applied the law to the facts as found by the adjudicator.
 - [34] The conclusions drawn from the evidence (ie the 'findings of fact') by the adjudicator cannot be reconsidered on appeal.
 - [35] In essence, by limiting the scope of an appeal to questions of law only, the court of appeal is only tasked with deciding whether the conclusions of law reached by the adjudicator were right or wrong. This determination can only be made based on the facts in existence at the time the order was given, and as they appear from the record.”
- and
 - “... an appeal in terms of s 57 of the Act is a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination to be made by the court of appeal is whether that decision was right or wrong in respect of a question of law.”
- Section 50(c) of the Act compels an adjudicator “to consider the relevance of all evidence”. Use of the word “must” in the sub-section underscores the obligation. The sub-section adds that the adjudicator is “not obliged to apply the exclusionary rules of evidence as they are applied in civil courts,” which may broaden the spectrum of evidence which encompasses that which is to be considered by an adjudicator.
- The apparent omission on the part of the adjudicator to consider the evidence of inconsistency in approval of a like-mirrored garage door by the HOA, which criticism and evidence were squarely placed before him by the Trust, leads to the conclusion that such relevant evidence was not considered.
- A failure by the adjudicator to consider the inconsistent application of the rules by the HOA, demonstrated by the facts put up by the Trust, is an error of law.

| SUMMARY OF JUDGMENT |

- The adjudicator ought thus to have taken the evidence of inconsistent approval that was placed before him into account when considering whether the HOA acted unreasonably in taking its decision. If he had done so, this should have led him to the conclusion that the HOA acted inconsistently, and thus unreasonably, by ordering removal of the garage door.
- The failure to consider relevant evidence led to the wrong conclusion culminating in his order for removal of the garage door.

CONCLUSION

The appeal was upheld.