NEW CLARIFICATIONS ON APPEALS AGAINST CSOS ADJUDICATION ORDERS

By now, we know that in terms of s 57(1) of the Community Schemes Ombud Service Act[1] ("the CSOS Act"), an applicant, the community scheme, or any affected person who is dissatisfied with an adjudication order of the CSOS may appeal to the High Court on a question of law only. In the recent case of *Ncala v Park Avenue Body Corporate*[2] (the *Park Avenue* case), the Johannesburg High Court (two judges presiding) handed down judgment on 9 May 2022, in which the court clarified a couple of important issues about appeals in terms of s 57 of the CSOS Act.

As an aside, the *Park Avenue* case also makes for interesting reading and consideration in that the appellant (the unit owner) who is visually impaired, was unsuccessful in his claims and allegations against the Body Corporate where he sought a declaratory order to the effect that the Body Corporate had infringed on his constitutional rights to dignity and equality. The unit owner was unsuccessful in his bid to have alterations made to an exclusive use area and argued that the Body Corporate's refusal to permit the alterations infringed on his rights to dignity and equality as a disabled person. An analysis of these issues is a topic for another day.

Let's now turn to this judgment's impact on s 57 appeals to the High Court in terms of the CSOS Act.

No leave to appeal is required

In *Park Avenue*, the Body Corporate unsuccessfully contended that the appellant had failed to make out reasonable prospects of success on appeal and had no prospects of success on appeal.[3] The court held that there is no room for applying a prospects of success test in an appeal in terms of s 57 of the CSOS Act for several reasons, including:[4]

(i) that there is no reference to prospects of success or a leave to appeal process in terms of s 57 of the CSOS Act;

(ii) that a dissatisfied party has a statutory right of appeal against an order of an adjudicator in terms of s 57 of the CSOS Act; and

(iii) that it would be inappropriate to require the adjudicator to grant leave to appeal first, because the adjudicator is not a judge, and it may mean that the dissatisfied party may never be able to seek redress from a court if the adjudicator decided not to grant leave to appeal.

While this principle was also confirmed in *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another*[5] (the *Stenersen* case), it has been reaffirmed in the *Park Avenue* case. In the *Stenersen* case, the full bench (three judges presiding) already held that no leave to appeal is required to be given.[6]

Leave to appeal is not required as it would prolong the finalisation of the matter which is contrary to the intention of the legislature in limiting the appeal process in the CSOS Act.[7] It is safe to say that even before the *Park Avenue* judgment, this was fairly well known and understood in the industry. What was perhaps not so well known, was whether or not an appeal in terms of s 57 of the CSOS Act could be lodged more than 30 days after the delivery of the adjudication order.

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[1] Act 9 of 2011.
[2] (A3029/2019) ZAGPJHC (9 May 2022). This recent case is marked as reportable by the court, but has not yet found its way into the law reports or onto the SAFLII website, hence there is no law report citation at this time.
[3] Para 107.
[4] Paras 107 to 109.
[5] 2020 (1) SA 651 (GJ).
[6] Para 31.
[7] The *Park Avenue* case, para 144.

The appeal must be lodged within 30 days otherwise it lapses

In terms of s 57(2) of the CSOS Act, an appeal against an adjudication order must be lodged within 30 days after the date of the delivery of the adjudication order.

The court in the *Park Avenue* case had to decide whether the High Court had the implied power to condone non-compliance with the statutory period for lodging an appeal, where the appeal is lodged more than 30 days after the adjudication order has been delivered.[8] The appeal was lodged 67 days late and therefore the unit owner had to make a formal application for condonation.[9]

The unit owner contended that the High Court had the inherent power and jurisdiction to condone the late filing of the statutory appeal, that it is in the interests of justice, and that the High Court has inherent power to protect and regulate its own process and to develop the common law.[10] The Body Corporate argued that the High Court has no jurisdiction to interfere with an adjudicator's order where the appeal is lodged after the prescribed 30-day period because the purpose of the CSOS Act was for the quick and speedy resolution of disputes, and delays in the prosecution of appeals are neither in the interest of justice, nor in the interest of the general community which the CSOS Act serves (community schemes, owners and occupants of community scheme units).[11]

After considering other statutes which impose time limits for instituting proceedings in the High Court,[12] as well as notable case law from the Constitutional Court and the Supreme Court of Appeal,[13] the court held that, when properly construed and having regard to the CSOS Act as a whole, there is no residual power for a High Court to condone non-compliance with an appeal lodged out of time (i.e. more than 30 days after the delivery of the CSOS adjudication order).[14]

The court compared the provisions of the Arbitration Act[15] where the party who believes that there is a basis to review the arbitrator's award has six weeks within which to apply to have the award set aside.[16] The Arbitration Act expressly gives the court the power to condone non-compliance with any of its provisions on good cause shown, whereas there is no such provision in the CSOS Act.[17]

The court stated further that CSOS Act aims to resolve disputes between parties in a community scheme in a speedy manner and once again cited the *Stenersen* case, wherein it was pronounced that speed, economy and finality were the reasons that the legislature limited the appeal process in the CSOS Act.[18] According to the court in the *Park Avenue* case, it would run counter to the legislature's intention to import a residual power to condone non-compliance with the 30-day period within which an appeal must be lodged.[19]

The court in the *Park Avenue* case stated that:[20]

> *"Prompt resolution of disputes allows residents to move on from the dispute and remove simmering tensions. Over a long period of time these disputes, if not promptly resolved may exacerbate tensions. It is important for residents to have disputes finalised as quickly as possible. A residual power to condone does not accord with these principles."*

To this end, and considering the inter-judicial debates between the Western Cape High Court, the Pietermaritzburg High Court and the Johannesburg High Court on issues relating to the proper mode for prosecuting an appeal in terms of s 57 of the CSOS Act, we may not have heard the end of debates surrounding whether a High Court has the power to condone the late filing of such an appeal.

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[8] Paras 120 and 140.
[9] Para 14.
[10] Paras 121 and 126.
[11] Paras 121 and 127.
[12] Para 123.
[13] Paras 125 to 139.
[14] Para 142.
[15] Act 42 of 1965.
[16] Section 33(2) of the Arbitration Act.
[17] Para 146.
[18] Para 143. See also para 31 of the *Stenersen* case.
[19] Para 144.
[20] Para 145.

To be on the safe side, you must lodge your appeal within 30 days of receiving the CSOS adjudication order if you are unhappy with it and there is a question of law to be challenged. There is no need to make out a case for prospects of success since there is no requirement for leave to appeal to be granted before lodging your statutory appeal in terms of s 57 of the CSOS Act.

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