REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A3029/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

9 May 2022

In the matter between:

MELUSI EMMANUEL NCALA Appellant

and

PARK AVENUE BODY CORPORATE Respondent

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be 9 May 2022.

OSSIN AJ (MMP Mdalana-Mayisela J concurring)

INTRODUCTION

[1] The appellant, Mr Ncala, is the registered owner of a sectional title unit in a scheme called Park Avenue ['the complex']. The respondent, Park Avenue Body

Corporate ['the Body Corporate'], is a body corporate as contemplated in section 2 of the Sectional Title Scheme Management Act ['the STSMA'].[1] The complex comprises about 122 sectional title units.

[2] The Body Corporate manages the complex in terms of *inter alia* the STSMA and its Conduct Rules ['the Conduct Rules]. The Conduct Rules are registered as required by the STSMA. They are contractually binding on the Body Corporate and all owners and occupants of sectional title units in the complex.

[3] The Body Corporate was the applicant in a compulsory statutory dispute resolution process held in terms of the Community Schemes Ombud Service Act ['CSOSA'].[2] Mr Ncala was the respondent in that process.

[4] A juristic entity called the Community Schemes Ombud Service ['the Service'], is established by CSOSA.[3] In May 2018 the Body Corporate submitted its application to the Service. Its complaint centred around Mr Ncala's breach of the Conduct Rules through Mr Ncala utilising common property in contravention thereof.

[5] Mr Ncala's unit is situated on the ground floor of one of the complex's blocks of buildings. The first floor (top floor) houses another unit. The common property utilised by Mr Ncala is an area immediately adjacent to the kitchen of Mr Ncala's unit. The kitchen of the ground floor unit leads directly into this area. This is an unroofed semi-enclosed area consisting of two and a half walls. The two and a half walls enclosing this area are approximately two metres high. These walls, together with the wall of the block itself, approximate an incomplete square. Outside access to this area is through an opening between the half wall and the block. In other words, occupants of the ground floor unit can access it through the ground floor unit's kitchen, and other residents can access it from the outside. A series of washing lines run parallel to the block on the opposite side of the kitchen door and hang from the half wall to the full wall opposite it. I will refer to this area as the washing line area. This area is duplicated outside the other blocks in the complex.

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[1] 8 of 2011
[2] 9 of 2011
[3] Section 3(1)

[6] In its application, the Body Corporate identified several breaches by Mr Ncala in the form of alterations made by Mr Ncala to the washing line area: (1) installation of plumbing and pipes onto the exterior wall of the block next to the kitchen door for purposes of a washing machine ['the plumbing'], (2) installation of a washing machine, (3) installation of a security gate at the entrance to the washing line area, and (4) construction and installation of a corrugated plastic sheet roof ['the plastic roof'] to cover that portion of the washing line area which housed his washing machine, an area covering about 1/3 of the total square meterage of the washing line area. Flowing from these breaches, the Body Corporate sought an order for (1) the removal of the washing machine from the washing line area into Mr Ncala's unit, (2) the removal of all plumbing, (3) Mr Ncala to return the washing line area to its original state, and (4) Mr Ncala to pay the legal costs in relation to the dispute. The Body Corporate did not seek orders for the removal of the security gate and plastic roof because these items had already removed, by the Body Corporate, prior to launching the application.

[7] The nub of Mr Ncala's opposition to the application centred around the fact that he is blind. Although Mr Ncala accepted that the washing line area was common property, he contended that, because of his visual impairment, the Body Corporate ought to have allowed him to install the washing machine, the security gate, and the plastic roof. He contended that the relief sought by the Body Corporate was *"frivolous, vexatious, misconceived or without substance"*, and sought orders which would effectively allow him to use his washing machine in the washing line area.

[8] CSOSA makes provision for a conciliation process, and, if unsuccessful, referral of the dispute to an adjudicator. Conciliation of the dispute was unsuccessful, and the dispute was then referred to an adjudicator.

[9] The adjudication was conducted on 5 October 2018. The adjudication took the form of an oral hearing supported by various written documents which had already been submitted by the parties to the Service. These documents were the Body Corporate's written application, Mr Ncala's answering submissions, and the Body Corporate's responding submissions.

[10] The hearing was conducted informally, with all participants and witnesses being simultaneously sworn in at the beginning of the session. The participants were Mr Gidlow (for the Body Corporate) and Mr Ncala. Mr Ncala was supported and assisted by Mr Mkwanyana and Mr Isaac Ncala.

[11] The adjudicator delivered her order on 30 November 2018 ['the adjudication order']. For the most part, the adjudicator found in favour of the Body Corporate. The adjudication order read as follows:

> 66. [The Body Corporate] must restore the gate to the common property washing area at the cost of [the Body Corporate] by no later than 31 November 2018. [The Body Corporate] must provide the keys for the gate to [Mr Ncala] and the neighbour who uses the same washing area by no later than 31 November 2018.
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> 67. The contribution levy of R15,00 per month, that is levied to all owners shall be levied to [the Body Corporate] and the neighbour who resides at the upstairs unit.
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> 68. There is no finding against [the Body Corporate] for removing [Mr Ncala's] illegal structure from common property.
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> 69. [Mr Ncala] must relocate the washing machine from the common property to the inside of the primary section and remove the piping and tap installed on common property and restore the damaged area to its original state by no later than 15 December 2018.
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> 70. Should [Mr Ncala] fail to remedy the situation by 15 December 2018 [the Body Corporate] must remedy the status quo and [Mr Ncala] to pay the costs of rectification. NB: [The Body Corporate] may put the amount on the levy statement.
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> 71. The onus was on [Mr Ncala] to familiarise himself with the Laws that govern sectional title schemes. Therefore, ignorance of the law is no excuse.

72. [Mr Ncala] must pay to [the Body Corporate] the amount of R950,00 ... which is 50% of the R1 900,00 ... charged for the removal of the gate and roof sheeting. This payment must be done by no later than 15 December 2018. NB: [the Body Corporate] may credit [Mr Ncala's] levy statement with the amount of R950,00.

73. [The Body Corporate] must return the loose sheeting materials to the [Mr Ncala] by 30 November 2018.

74. No legal costs granted. Each party must pay its own legal costs.

75. [Mr Ncala] breached the [Body Corporate's] conduct rules and must comply with the conduct rules.

76. [Mr Ncala] (*sic*) adhere to the [Body Corporate] conduct rules.

[12] Section 57(1) of CSOSA provides that any party who is dissatisfied with an adjudicator's order may appeal to the High Court but only on a question of law.[4] This appeal must be lodged within 30 days after delivery of the adjudication order.[5] Mr Ncala was dissatisfied with the adjudication order. He lodged his appeal, by way of a notice of appeal, on 8 March 2019. On 17 April 2019, the Body Corporate gave notification of its opposition to Mr Ncala's appeal.

[13] In his notice of appeal, Mr Ncala appeals against the adjudicator's rulings of law *"in particular, against [the adjudicator's] failure in making her adjudication to have due regard to [Mr Ncala's] fundamental rights to dignity and equality as a disabled person."* Apart from seeking costs of the appeal, Mr Ncala seeks an order setting aside the adjudication order and substituting it with the following orders:

1. The conduct of [the Body Corporate] is declared to be an infringement of [Mr Ncala's] right to dignity and equality;

2. [The Body Corporate] is directed to replace the gate and corrugated plastic sheeting removed from [Mr Ncala's] washing area at its own costs;

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[4] Section 57(1)
[5] Section 57(2)

3. [The Body Corporate] is direct *(sic)* to replace [Mr Ncala's] washing machine with a new of one similar make and model to that which was removed by [the Body Corporate].

4. [The Body Corporate] is directed to take all reasonable steps to accommodate [Mr Ncala's] needs as a person living with a disability; and

5. [The Body Corporate] is ordered to pay [Mr Ncala's] legal costs.

[14] As alluded to above, by the time Mr Ncala lodged his appeal on 8 March 2019, the 30 days within which he was required to do so had expired. In fact, Mr Ncala lodged his appeal 67 days late. Having failed to lodge his appeal timeously, Mr Ncala did not, however, apply for condonation at that stage. He only did so on 16 March 2020 (a year later) by way of a formal application, supported by affidavits. The Body Corporate opposed the application and in turn submitted an answering affidavit, after which Mr Ncala delivered his reply.

[15] Mr Ncala's condonation application and his appeal now serve before us and are the subject matter of this judgment.

[16] Before setting out the relevant facts, I deal with the Conduct Rules and summarise what the Service does, CSOSA's dispute resolution process and the ambit of the Service's powers in regard thereto.

THE CONDUCT RULES

[17] The Conduct Rules are of course binding on all owners and occupants of units in the complex. The stated purpose of the Conduct Rules is *"for the maintenance of common courtesy and regard for the rights of all residents, to sustain the use of common amenities and ensure the upkeep of high standards of living for the mutual benefit of all residents."*

[18] In respect of improvements to common property, the Conduct Rules state that owners are not permitted to make improvements on or to common property unless approval has been given by either a special resolution or unanimous resolution at a

general meeting of owners. The Conduct Rules make it clear that all exterior walls and woodwork including roofs are considered common property.

[19] Even in relation to the interior of a unit, structural alterations to water connections, electrical conduits, and plumbing may only be carried out if (1) full details of these alterations are given to the Body Corporate's trustee's, (2) these details include plans approved by the municipality, (3) these plans are counter-signed by the trustees, and (4) the trustees have given written permission for such alterations.

[20] The Conduct Rules provide that washing may not be hung in any part of a unit which is visible to the general public, and "*in particular, washing and other articles may not be hung outside of any unit, or over walls of the balconies or landings or on the grass of the Common Property.*" In respect of the washing lines installed in the washing line areas, the Conduct Rules state that "*Use of the washing lines located at each block is restricted to the top and corresponding bottom units of the relevant block.*" It appears that the purpose of the walls enclosing the washing line area is to conceal the washing lines and clothes from the general public to keep up aesthetic standards. Another purpose may be to provide some privacy for residents in respect of their washing.

[21] Owners and occupants are liable to the Body Corporate for any damage caused to common property. The damage must be repaired by the owner or occupant. If they fail to do so the Body Corporate is entitled to have the damage repaired and to then be reimbursed in full by them. These costs are deemed to be levies and may be included on the monthly levy statements.

CSOSA: THE SERVICE, THE DISPUTE RESOLUTION PROCESS AND THE AMBIT OF DISPUTES

[22] The Service must establish a national head office and regional offices.[6] The Board of the Service is responsible for the management and governance of the

[6] Section 3(2)

Service ['the Board'].[7] The Chief Ombud (appointed by the Board) is the administrative head of the Service.[8] The administrative head of a regional office is an ombud and deputy ombud appointed by the Chief Ombud.[9]

[23] The functions of the Service include developing and providing a dispute resolution service and providing training for conciliators, adjudicators, and other employees of the Service. Adjudicators (part-time or full-time) are appointed by the Chief Ombud for each regional office. These adjudicators must *"have suitable qualifications and experience necessary to adjudicate disputes"* and *"suitable qualifications and experience in community scheme governance."*[10]

[24] The dispute resolution process entails an initial application to the ombud of the appropriate regional office.[11] The application is made on a pro-forma document. The respondent is afforded an opportunity to respond. Thereafter conciliation is attempted.[12] If conciliation fails, the ombud refers the dispute to an adjudicator.[13]

[25] The adjudicator has investigative powers and is enjoined to *"observe the principles of due process of law"*.[14] The adjudicator is required to *"act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application"*. The adjudicator is not obliged to apply the exclusionary rules of evidence as applied in the civil courts but must consider all relevant evidence.[15] Legal representation is not permitted during the adjudication process save in the event of the consent of all parties and the adjudicator, or where the adjudicator, taking into several factors, considers representation appropriate.[16]

[26] The adjudication order, as it is referred to in CSOSA, comprises the orders made by the adjudicator and the adjudicator's reasons for the orders.[17] Orders for

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[7] Section 6(1)
[8] Section 14 read with Section 18
[9] Section 21 (2)
[10] Section 21 (2)(b)
[11] Section 38(1) and (2)
[12] Section 47
[13] Section 48(1)
[14] Section 50(a)
[15] Section 50(c)
[16] Section 52
[17] Section 54(1)

payment of money or other orders which fall within the jurisdiction of the Magistrates' Court may be enforced as if such orders were a judgment of that court.[18] Orders falling beyond the jurisdiction of the Magistrates' Court may be enforced as if the orders are a judgment of the High Court.[19]

[27] Any party who is dissatisfied with the adjudicator's order "*may appeal to the High Court, but only on a question of law.*"[20] The appeal against the adjudicator's order "*must be lodged within 30 days after the date*" of its delivery.[21]

[28] Only those disputes which fall within CSOSA's definition of "dispute" are subject to its dispute resolution provisions. A CSOSA dispute is "*a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association,*[22] *occupier or owner, acting individually or jointly.*" A community scheme is "*any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme…*"[23] To qualify as a dispute, therefore, in the context of this matter, the dispute must relate to the administration of a sectional title development scheme and must be a dispute as between an owner and the body corporate. This does not, however, afford the Service carte blanche to make any order in relation to the dispute.

[29] The nature of the relief or orders which the Service is empowered to make is limited by section 38(3). In terms of section 38(3), the application to the ombud must include statements which set out the relief sought and the grounds for such relief. The relief, however, "*must be within the scope of one or more of the prayers for the relief contemplated in section 39.*"[24]

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[18] Section 56(1)
[19] Section 56(2)
[20] Section 57(1)
[21] Section 57(2)
[22] "*association*" is defined as "*a structure that is responsible for the administration of a community scheme.*" A body corporate is such a structure.
[23] See section 1
[24] Section 38(3)(a)

[30] The competent orders or relief listed in section 39 relate to one of seven categories. There are six specified categories of orders: financial issues, behavioural issues, scheme governance issues, meetings,[25] management services and works pertaining to private areas and common areas.[26] The seventh category is "*general and other issues*".[27] Within each category, section 39 sets out the orders or relief which may be granted.

[31] For present purposes the applicable categories of orders relate to meetings, works to private and common areas and general and other issues.

[32] In respect of meetings, in terms of section 39(4)(d), the Service may grant an order "*declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed.*"

[33] In respect of works pertaining to private areas and common areas, the following orders may be granted:

> (b) an order requiring the relevant person—
>
> (i) to carry out specified repairs, or have specified repairs made; or
>
> (ii) to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the applicant;
>
> (d) an order declaring that the association's decision to reject a proposal to make improvements on or alterations to common areas is unreasonable, and requiring the association—
>
> (i) to agree to the proposal; or

[25] Section 39(4)
[26] Section 39(6)
[27] Section 39(7)

(ii) to ratify the proposal on specified terms;

(f) an order declaring that an owner or occupier reasonably requires exclusive use rights over a certain part of a common area, that the association has unreasonably refused to grant such rights and requiring the association to give exclusive use rights to the owner or occupier, on terms that may require a payment or periodic payments to the association, over a specified part of a common area;

[34] In respect of general and other issues, the following orders may be granted:

(a) an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association to make such information or documents available within a specified time; or

(b) any other order proposed by the chief ombud.[28]

THE FACTS

Mr Ncala's purchase of his unit and the alterations

[35] At the end of September 2015, Mr Ncala was introduced to the unit by an estate agent. During the negotiations and discussions, the estate agent advised Mr Ncala that the washing line area formed part of his section, and that he could make alterations to it. Mr Ncala regarded this as important. He had noted that the unit made provision for a washing machine to be installed in the kitchen. He, however, then planned on installing his washing machine in the washing line area.

[36] Mr Ncala's reason for wanting to install the washing machine in the washing line area was twofold. First, he was concerned that the installation of the washing machine in the kitchen would pose a potential hazard to him: if the washing machine leaked, he would not see the water on the smooth kitchen tiles, he might then slip and suffer personal injury. If the washing machine was installed in the washing line

[28] Section 39(7)

area, water from the washing machine would leak onto a rough surface and in any event drain into a drain situated in the washing line area. The likelihood of Mr Ncala slipping in such event would be greatly reduced. Second, if the washing machine was installed inside the unit, Mr Ncala would have to carry wet laundry from inside the unit to the outside washing line area to dry. His hands would be full, and he would be even more susceptible to slipping and falling.

[37] Mr Ncala's stated reason for installing the plastic roof was to protect his washing machine from the elements. His reason for installing the security gate was so that he could protect his washing machine and any clothes that might be hanging on the washing lines from theft since because he is blind, he would not be able to see if these items were being stolen. It is appropriate to point out, at this stage, that it was not uncommon for owners to install security gates enclosing washing line areas. Security gates enclosing some of these areas had at the time when Mr Ncala was considering his purchase, already been installed. What distinguishes these installations from Mr Ncala's is that these security gates were installed after written permission was sought from and granted by the Body Corporate, and the security gates were uniform in appearance whereas Mr Ncala's security gate was not.

[38] When considering the purchase of the unit, Mr Ncala was not aware that washing line area was common property. Neither did he realize that installation of the washing machine in the washing line area required consent from the Body Corporate and was not aware of the process that needed to be undertaken to do so. Mr Ncala attributed this state of ignorance to the fact that when he bought the unit he was not furnished with an electronic or braille copy of the Conduct Rules. He suggested that this was a failure by any of the Body Corporate, the transferring attorneys, the estate agent, the Body Corporate's managing agent or caretaker of the development.

[39] Mr Ncala then purchased the unit. Just before he moved into the unit in January 2016 with his 12-year-old sister, his mother passed away. His father had passed away prior thereto.

[40] Upon moving into the unit Mr Ncala had copper piping and a tap installed in the washing line area. He also installed a security gate at the outside entrance to the

washing line area, and constructed and installed the plastic roof, described by him as "*a small aesthetically-pleasing plastic corrugated shade sheeting over a portion of the washing area*." He then placed the washing machine in this area, and had it connected.

[41] Sometime after carrying out the alterations, Mr Ncala was, on two occasions in January and February 2016, confronted by the caretaker of the complex, one Margie Venter. According to Mr Ncala, Ms Venter arrived at his unit screaming about a satellite installation that Mr Ncala had carried out in contravention of the Conduct Rules, and the alterations undertaken by him to the washing line area. Ms Venter demanded to know who was the owner of the unit and screamed that the alterations were going to cause problems because they were in contravention of the Conduct Rules. Ms Venter apparently threw a copy of the Conduct Rules on the sofa. Mr Ncala then informed her that he was blind and that he could only read the document electronically. According to Mr Ncala, Ms Venter said to him that this was not her problem.

[42] By way of digression for the moment, Mr Ncala also set out other complaints which he had against Ms Venter, all of which are unrelated to the present issue. These included Ms Venter harassing him and his sister when they went to the complex's pool and threatening them about not being allowed to use the pool. A further complaint arose from an interaction between Mr Ncala and Ms Venter concerning a visit from one of Mr Ncala's friends who is also blind, and who uses a guide dog for assistance. According to Mr Ncala, Ms Venter upon seeing the dog at the complex's pool started shouting at him that dogs were not allowed in the pool area and that he had broken the Conduct Rules. An explanation as to the presence of the guide dog was then given to Ms Venter whereupon she appeared to backtrack from her initial reaction and attempted to pat the guide dog. Soon after the visit Mr Ncala was informed that a complaint had been laid against him for allowing pets into the complex in breach of the Conduct Rules.

The Body Corporate's first demand to remove the alterations and Mr Ncala's response (18 February 2016)

[43] On 18 February 2016, Mr Ncala received a letter from the Body Corporate's managing agents. Mr Ncala was informed that the installation of the plastic roof sheeting and the plumbing was not permitted by the Conduct Rules and that the washing line area was common property for which the Conduct Rules set out guidance usage. He was requested to remove the plastic roof sheeting and plumbing.

[44] In respect of the security gate, the managing agents informed Mr Ncala that other residents who had installed security gates had received permission from the Body Corporate on the basis that a key to the security gate was to be supplied to the ground floor unit and upper floor unit, and that a levy of R15 per month for use of the key would be added to that unit's monthly levy statement. In line with this policy, and apparently despite the fact that Mr Ncala had not sought permission from the Body Corporate in this regard, Mr Ncala was requested to supply the top floor unit with a key and pay the R15 per month levy (thereby giving him *ex post facto* permission for the security gate installation).

[45] According to Mr Gidlow, who testified on behalf of the Body Corporate at the adjudication hearing, the trustees were displeased by the unlawful alterations in that the alterations completely disregarded the Conduct Rules, and even the security gate was not of the same standard, aesthetic and colour as other security gates which had been installed in the complex pursuant to written permission granted by the trustees.

[46] After receiving this letter, Mr Ncala sent an email to the managing agents advising that he had been informed by the estate agent that the washing line area was part of his section, and that he had undertaken the alterations for his safety and to accommodate his needs as a person living with a visual impairment. Mr Ncala also requested a copy of the Conduct Rules in electronic format and claimed that he had on several prior occasions made a similar request. Mr Ncala apologised for the manner in which the events had unfolded and offered to provide a copy of the security gate key to the upper floor unit.

[47] Later that same day the managing agents emailed a PDF version of the Conduct Rules to Mr Ncala. The email did not address the balance of Mr Ncala's aforementioned email in respect of the alterations.

[48] Thereafter, Mr Ncala made several further requests for an electronic copy of the Conduct Rules but was advised that it would not be provided to him. According to Mr Ncala he had explained that he required an electronic copy of the Conduct Rules because of his visual impairment.

[49] On 23 February 2016, Mr Ncala wrote to the managing agents complaining that he had been on the receiving end of ill treatment from the development's caretaker ever since taking occupation of his unit and that this needed to be rectified urgently. Mr Ncala once again requested an electronic copy of the Conduct Rules, or if this was not possible a braille copy. He also demanded that all letters and notices to him be relayed in electronic or braille form. Mr Ncala did not, however, in this letter, address the issues surrounding the alterations.

[50] On a Sunday in May 2016, two of the Body Corporate's trustees, one of whom was Mr Gidlow, arrived at Mr Ncala's unit to discuss the issues with him. Mr Ncala invited them inside and a discussion then took place. According to Mr Gidlow this approach was made after owners at the Body Corporate's recent AGM had requested to know what the trustees were doing about the issue. Mr Ncala once again explained his position to them, and they then advised that a proposal would be sent to Mr Ncala as to the way forward. According to Mr Ncala the proposal was never sent. On the other hand, Mr Gidlow testified that a proposal had been communicated to Mr Ncala: either the Body Corporate would send its own contractor to remedy the alterations and the costs of this would be put on Mr Ncala's monthly levy statement, or Mr Ncala could carry out the remedial work at his own expense. According to Mr Gidlow, Mr Ncala rejected this proposal.

[51] There does not appear to me to be evidence of the Body Corporate being made aware of Mr Ncala's visual impairment until after the alterations had been done and Mr Ncala informing the Body Corporate thereafter.

The Body Corporate's second and third demands to remove alterations (5 July 2016 and 14 September 2016)

[52] By July 2016 Mr Ncala had still not removed the alterations. Presumably that is why the managing agents addressed a further letter to him on 5 July 2016, again requesting removal of the alterations.

[53] On 14 September 2016, the managing agents sent a further notice to Mr Ncala. The notice once again informed Mr Ncala that the washing line area was common property, that in terms of the Conduct Rules any improvements to common property had to be approved by special or unanimous resolution at a general meeting, and that no resolutions had been adopted in respect of the washing line area altered by Mr Ncala.

[54] Regarding Mr Ncala's claim that he was not aware the washing line area was common property, the managing agents informed him that the Conduct Rules should have been given to Mr Ncala by the estate agent and that ignorance of the Conduct Rules was no excuse. Mr Ncala was advised that even if the washing line area was not common property, he had still contravened the Conduct Rules in that alterations had to go through an approval process, and that this process had not been followed by him.

[55] The notice further put Mr Ncala on terms to rectify the situation (The bold and underlined portions are as they appear in the notice):

> It is important to note that you have received written notification of the infringement as well as verbally being told during a visit by your trustees. It is therefore now noted that the time for discussing the problem has come to an end and the issue needs resolution. **You are therefore hereby instructed to remove the roof over the washing area, remove any goods stored in this area and return the area to its previous state including repairing any damage to walls and removing any added plumbing by the 1st October 2016 or the managing agent on behalf of the board of trustees for Park Ave will have it removed for you.**

[56] The notice reminded Mr Ncala that in terms of the Conduct Rules if the Body Corporate rectified the alterations, the cost and expense thereof would be for Mr Ncala's account and that this amount was deemed to be an additional levy owed by him to the Body Corporate.

[57] In respect of the Conduct Rules themselves, Mr Ncala was advised *"to go through and understand the rules."* The notice emphasised to Mr Ncala that the Conduct Rules *"are registered at the deeds office as the governing framework for this housing scheme and as such occupants have no choice but to adhere to them. The managing agent in good faith will do whatever is within its capability to help in any way necessary but will not shift their position on the matter."*

[58] Finally, Mr Ncala was advised that should the Body Corporate have to remedy the alterations, any goods found in the washing line area would be regarded as refuse and removed.

Mr Ncala's response and the Body Corporate's reply

[59] Upon receipt of the 14 September 2016 notice, Mr Ncala addressed an email to the managing agent that same day. The substantive contents of this email are repeated in full immediately below:

> It appears that you, and whomever else you have been communicating with, have chosen to be selective in your hearing and reading of this matter which evidently led to your understanding being flawed. I will not risk repeating myself for all the facts are on record.
>
> However, I will state that I do not appreciate the overall manner in which this matter was handled. Moving forward, for I suspect that this matter will now become legal, please reframe from bullying my family and me, and please remember too, as mentioned before, to accommodate me in relation to my disability as we take this matter to the next level. In other words, I expect of you not to dump notes at my property and not to verbally engage me without any formal request.

[60] According to Mr Ncala he sent the above email because by that stage he was feeling totally victimised. Despite the obvious aggressive tone of his email, Mr Ncala, in papers before the adjudicator, described his email as amounting to a request for the Body Corporate to *"kindly accommodate me in my disability."*

[61] The managing agents responded to Mr Ncala by requesting him to comply with their 14 September 2016 notice and to remove the structures by 1 October 2016. The hope was expressed that Mr Ncala would co-operate and do so, and that it would not be necessary for the Body Corporate to undertake the task. Mr Ncala was advised that his email would be sent to the Body Corporate and its attorneys to deal with the matter further.

The Body Corporate's fourth demand to remove the alterations and Mr Ncala's response (11 October 2016)

[62] Mr Ncala did not comply with the 14 September 2016 notice. On 11 October 2016, the managing agents again called on Mr Ncala to comply and advised him that he had been granted an extension until 17 October 2016 to do so. A quote for the foreseen remedial work was also given to Mr Ncala so that he would be aware of the costs which would be passed onto him in the event of the Body Corporate having to undertake the remedial work. The quote included costs for removing the security gate. The quotation for all this work was R1900.00. Mr Ncala was informed that since the remedial work involved removal of plumbing, at some point during this process the water line to his unit would have to be cut off.

[63] After receiving the above notice, Mr Ncala advised the managing agents and the trustees that he had procured legal representation.

The Body Corporate's removal of the alterations (6 December 2016)

[64] On 6 December 2016, and because Mr Ncala had not attended to the remedial work as required by the managing agent's previous notices, the Body Corporate had the security gate and the plastic roof sheeting removed from the washing line area. In papers before the adjudicator, Mr Ncala complained that this was done without his knowledge or consent, and whilst he was absent from home.

[65] According to Mr Gidlow, the security gate and plastic roof sheeting were then stored at no cost to Mr Ncala, contrary to Mr Ncala's accusations that the Body Corporate had thrown these items away and caused malicious damage to his property. In its previous letters to Mr Ncala, the Body Corporate had advised him that the washing machine would be regarded as rubble, and likewise removed. Mr Gidlow, however, testified that whilst in terms of the Conduct Rules the Body Corporate was entitled to treat the washing machine as rubble, the Body Corporate acknowledged that in fact it was not rubble and so did not remove the washing machine as well. It did not do so in the hope that Mr Ncala would himself have the washing machine removed to a place of safety. Mr Gidlow also testified that although the Body Corporate had previously advised Mr Ncala that it would remove the plumbing and taps, it did not do at this stage because it required intervention inside Mr Ncala's unit. Again, the Body Corporate was hopeful that Mr Ncala would attend to this remedial work himself.

Mr Ncala's letter (7 December 2016)

[66] On 7 December 2016, Mr Ncala's attorneys addressed a 5-page letter to the managing agents and Body Corporate. The letter accused the managing agents and Body Corporate of subjecting Mr Ncala to *"abhorrent inhumane and degrading treatment...(including prejudicial treatment of the disabled, invasion of privacy, infringement of human dignity, harassment, discrimination)."* Examples of this alleged treatment included (1) trustees and the caretaker barging into Mr Ncala's unit unannounced and launching *"an impromptu attack on our client about the gate and sheeting at the washing area"*, (2) the dumping at Mr Ncala's doorstep of hard copy versions of demands and notices knowing that Mr Ncala would not be able to read them despite repeated requests to relay electronic or braille documents, and (3) inconsistent application of the Conduct Rules.

[67] This letter also implicitly alleged racism on the part of the Body Corporate by accusing the Body Corporate of taking *"a rigid hardline approach to our client's disability and personal circumstances..., without our client being made to feel like an unwanted person not fitting your supremacist mould of a suitable resident, unworthy of coexisting or being reasonably accommodated"*, and again (this time not so

implicitly) when referring to "*your various dictatorial correspondences to our client that the only approach taken by yourselves with him to date is one of 'master and servant', without due consideration for the nature of the issues at hand.*"

[68] Mr Ncala's attorneys letter went on to accuse the Body Corporate of taking the law into its own hands by removing the gate and plastic roof sheeting, theft, and malicious damage to property. The Body Corporate was also accused of not having advised Mr Ncala of his rights to seek approval for the alterations from a general meeting of owners.

[69] Regarding the washing line area itself, Mr Ncala's attorneys asserted that it was in fact an exclusive use area for Mr Ncala and the upper floor unit, and that Mr Ncala's circumstances were such that the Conduct Rules ought to be applied differently to him and with a certain level of sensitivity. According to Mr Ncala's attorneys upon Mr Ncala having informed the managing agents of the reasons for the alterations, the Body Corporate ought to have regarded that, as well as subsequent correspondence from Mr Ncala, as amounting to an application for consent under the Conduct Rules. It was asserted that the gate and plastic roof sheeting did not impair the use of the washing line area or create any damage to it, no other owners would be prejudiced by those installations, and that the trustees should accommodate Mr Ncala by allowing the installations to take place. This was especially so since installations (i.e., security gates) had been carried out in other washing line areas in the development.

[70] Mr Ncala's attorneys demanded that Mr Ncala's property, being the security gate and plastic roof sheeting, be returned and reinstalled at the washing line area according to its original quality and specifications by no later than 9 December 2016. The letter concluded by threatening court action, a complaint to the Human Rights Commission and publication to the media. The letter also described the tone of the Body Corporate's notices and letters to Mr Ncala as "*bombastic*" whilst Mr Ncala's letters were described as neutral.

The Body Corporate's response

[71] The Body Corporate's response to this letter, through its attorneys, came a few days later. The letter advised that, whilst the Body Corporate was sympathetic to Mr Ncala's disability, Mr Ncala still had an obligation to adhere to the Conduct Rules and the relevant legislation. The letter pointed out that Mr Ncala's belief that the washing line area formed part of his section was irrelevant. It highlighted that *"community living requires a certain degree of awareness of one's surroundings, of one's neighbours, and most importantly, of one's rights and obligations in terms of the Scheme itself. Pleading ignorance of the Rules, or the existence thereof, has never been a plausible excuse."* In this regard it was emphasised that whether or not Mr Ncala had been provided with a copy of the Conduct Rules was neither here nor there as the alterations undertaken by him were unlawful.

[72] Regarding the alleged differential treatment contended for by Mr Ncala's attorneys, the Body Corporate's attorneys recorded a denial that Mr Ncala had been treated any differently from other owners whether because of his disability or for any other reason. The letter recorded that the Body Corporate regarded such accusations as slanderous. The threat of approaching the media was also viewed as unprofessional. It was emphasised that the trustees of the Body Corporate had *"a fiduciary duty and are mandated to ensure that the Rules of the Scheme and the Act are upheld and enforced with no exceptions."*

[73] The letter went on to demand that Mr Ncala remove the piping and tap and washing machine from the washing line area. In regard to the plastic sheeting, the Body Corporate's attorneys advised, in paragraph 11, that Mr Ncala could request written permission to have it reinstalled and that such an application may be considered favourably *"if the sheeting were positioned in such as a way as to be out of sight from outside the said area, in other words, positioned below the edge of the walls instead of on top of the walls."* This statement referred essentially to the aesthetic standards of the complex and was also made in response to Mr Ncala's attorneys having contended that the plastic roof sheeting was aesthetically pleasing. On this score, the Body Corporate's attorneys advised that it was the trustees or Body Corporate which decided what may or may not be aesthetically pleasing

regarding the exterior of the complex, and what alterations to the exterior may or may not be undertaken.

[74] The letter concluded with the following:

> Kindly provide us with your client's proposals to remove the tap and washing machine and possible replacement of the sheeting as per 11 above.

[75] Mr Ncala's response was to submit a letter in March 2017 to the SAHRC, setting out in detail Mr Ncala's position and alleging *"gross discrimination due to disability and infringement of human dignity and privacy."*

Mr Ncala's application for consent (2 August 2017)

[76] On 2 August 2017, Mr Ncala applied to the Body Corporate for consent to use the washing line area in accordance with his alterations. In his application Mr Ncala pointed out his visual disability and that his disability had *"a major effect on my day-to-day living, more particularly in terms of mobility and security."* He reminded the Body Corporate that it had removed the security gate and plastic roof sheeting without a court order. In respect of the washing line area itself, Mr Ncala noted that although it forms part of the common property, it is only utilised by him and the neighbour above for washing and laundry purposes, and that his neighbour had never indicated any interest in accessing this area.

[77] Mr Ncala's application recorded the outcome of a mediation under the auspices of the SAHRC in terms of which the Body Corporate apologised (which apology was accepted) for failing to accommodate his disability and for any pain that may have been caused to him. The mediated agreement, according to Mr Ncala's application, also recorded the fact that the Body Corporate would reinstate the security gate upon Mr Ncala's application to it, and that regarding the plastic roof, if Mr Ncala persisted with that request, the roof must be aesthetically pleasing. In respect of the washing machine, it was agreed that Mr Ncala could request the trustees to pass a special resolution for members to vote on this issue.

[78] Mr Ncala's formal 2 August 2017 request to the trustees was to hold a special meeting for purposes of (1) reinstating the security gate, (2) allowing him to have a roof in the washing line area to protect his belongings and himself from the elements and criminal activity, and (3) allowing him to use his washing machine in that area. In the event of the Body Corporate not granting him these permissions, Mr Ncala required the Body Corporate to provide him with written substantive reasons for the refusal, the number of persons who voted for and against, the ethnicity of all the trustees, and statistics as to how many of the trustees suffer from a physical disability, and to detail any historical refusal of the Body Corporate for requests in the complex of the same or similar nature.

[79] Mr Ncala pointed out that accommodating his disability would not prejudice the Body Corporate or anyone else's rights, changes have been made to other units, seemingly without any resistance, and that in his view his reasons for the requests were relevant and sound.

The Body Corporate's response to the application (2 August 2017)

[80] Upon receipt of Mr Ncala's application, Mr Gidlow, a trustee of the Body Corporate addressed an email to Mr Ncala later that day.

[81] In his email Mr Gidlow pointed out that there had been no agreement concluded yet and that the trustees were considering various draughts to what was, at that stage, only proposed terms. Mr Ncala's application was accordingly viewed as premature.

[82] Mr Gidlow stated that he viewed Mr Ncala's application as *"quite aggressive"* in tone. He pointed out that in his view, through the SAHRC mediation process, he believed that the parties had come a long way in settling the issues harmoniously, and that he had been feeling positive about the outcomes. Mr Gidlow lamented, however, that the author of Mr Ncala's application did not appear to feel the same way.

[83] Mr Gidlow also took exception to Mr Ncala's request for details of the ethnicity and disability history of the trustees. He stated as follows:

> Furthermore I am not sure requesting the ethnicity or history of disability of the trustees is even constitutional and I think it reflects badly on the author as it speaks to pre conceived ideas and prejudices on how certain groups of people may act and therefore vote. I will seek review on this.

The special general meeting (18 October 2017)

[84] On 18 October 2017, a special general meeting of the Body Corporate was convened for purposes of considering a special resolution to approve Mr Ncala's alterations. The minutes of the meeting appear to summarise the purport of the special resolution as follows: *"The purpose of the meeting will be to approve a Special Resolution with the intention of allowing the owner of unit 49B to make alteration to a piece of common property, being the laundry area adjacent to his unit, by installing plastic roof sheeting over the said laundry area, as well as a tap and washing machine on a permanent basis."*

[85] The minutes of the special general meeting reflect the attendance of 25 owners (1 by proxy). According to Mr Ncala, his attorney was also present at this meeting. 24 owners voted against the resolution, one voted in favour. The resolution accordingly did not pass.

The Body Corporate's fourth demand to remove the alterations (27 November 2017)

[86] On 27 November 2017 the Body Corporate's attorneys wrote to Mr Ncala. In this letter the results of the voting on the special resolution were recorded and on the basis that the resolution had not been passed. Mr Ncala was requested to remove the alterations by 18 December 2017 failing which the Body Corporate would proceed in terms of CSOSA and request an adjudication.

Mr Ncala's response (30 November 2017)

[87] Mr Ncala's attorneys responded to the Body Corporate's letter on 30 November 2017.

[88] In this letter, Mr Ncala's attorneys referred to the proceedings before the SAHRC and cited a written statement from the SAHRC which suggested that the SAHRC believed that if the matter proceeded before the Service, Mr Ncala had a very good chance of winning, moreover because the SAHRC would provide an opinion to the Service that Mr Ncala's rights have been infringed.

[89] The letter also attacked the process by means of which the special resolution was put on 11 October 2017 as flawed. Mr Ncala's attorneys contended that at the meeting no mention was made of Mr Ncala's disability, and that the meeting was a *"calculated continued attempt to quash our client's rights."*

[90] The letter concluded that if the Body Corporate decided to refer the dispute to the Service, that it did so at its own peril.

[91] Since the removal of the plastic roof sheeting, Mr Ncala's washing machine has remained outside exposed to the elements.

[92] The matter appeared to have gone into a hiatus until April 2018. On 12 April 2018, the Body Corporate sent a letter to Mr Ncala. In this letter the Body Corporate proposed a solution to the impasse: (1) the Body Corporate would restore the security gate to the washing line area at its own expense, (2) a key to the security gate would be given to the upstairs neighbour and to one of the trustees so that repairs and maintenance could be carried out, (3) a contribution levy would be charged to Mr Ncala's account, and (4) Mr Ncala would be allowed to install an awning over the washing line area, with the design and specifications having to be approved by the trustees and in line with standard building regulations and building insurance approvals. Regarding the washing machine and the outside plumbing, the Body Corporate informed Mr Ncala that this would not be permitted but that it would be prepared to absorb the cost of removing the washing machine and the plumbing from the outside and putting the washing machine inside Mr Ncala's unit. The cost of the internal installation of the washing machine would be for Mr Ncala's account.

[93] Mr Ncala rejected the above proposal, and instead made a counter proposal which was rejected by the Body Corporate.

[94] The Body Corporate then submitted its application to the Service.

THE ADJUDICATOR'S ORDER

[95] The adjudicator approached the matter with reference to what orders she was competent to make in terms of section 39. In this regard the adjudicator viewed the orders sought by the Body Corporate as falling particularly within section 39(6)(b).

[96] The adjudicator found that the Body Corporate had put these Rules in place for purposes of governing the management, control, administration and use and enjoyment of private and common areas in the complex. The adjudicator found that the Conduct Rules were fair.

[97] Regarding the security gate and its removal by the Body Corporate, the adjudicator agreed with Mr Ncala that he should be allowed to have the security gate reinstalled, and that the Body Corporate would be required to do so at its cost. This was because the Conduct Rules had to be applied equally to all owners, and other owners had installed security gates as well (albeit only after receiving written permission from the Body Corporate). Along with this finding, the adjudicator also held that the Body Corporate must ensure that Mr Ncala's upstairs neighbour had access to the washing line area. I point out that the Body Corporate had in any event conceded this aspect as far back as 18 February 2016 when it sent its first demand to Mr Ncala.

[98] The adjudicator found Mr Ncala to be literate, of sound mind, articulate and thorough in his submissions, despite his visual impairment. She considered that Mr Ncala bore the responsibility of familiarising himself with the Conduct Rules, and that ignorance of the law was no excuse. She found that Mr Ncala had clearly breached the Conduct Rules.

[99] Regarding Mr Ncala relying on his disability as a basis for breaching the Conduct Rules and justifying an order entitling him to use his washing machine in the washing line area, the adjudicator had this to say:

> [Mr Ncala's] submissions that he installed the structure, plumbing and placing his washing machine on common property because of his blindness and that he is concerned that should the washing machine have a leak in the house he may slip and injure himself does not hold because there is a bath and shower inside the unit which poses the same threat.

[100] The adjudicator held that the failure of the special resolution was nothing more than a process undertaken pursuant to the STSMA. She held that in removing the alterations, the Body Corporate acted within its rights, powers, and obligations. On this basis too, Mr Ncala would be required to remove his washing machine and the plumbing from the washing line area.

THE NATURE OF THE APPEAL BEFORE US

[101] CSOSA is a relatively new piece of legislation. Although assented to in June 2011, its commencement date was much later in October 2016.[29] For a time after its commencement date, the appeal procedure set out in section 57 was uncertain, as was the nature of the appeal itself. This is because neither CSOSA nor the Uniform Rules of Court makes provision for such a procedure.

[102] The issue was finally put to bed by a full bench decision of this division, constituted in terms of section 14(1) of the Superior Courts Act,[30] in *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another*.[31] The full bench was specially constituted because, at that stage, there were divergent approaches adopted by different divisions of the High Court as to both the nature of the appeal and the procedure to be followed. The full bench was called upon to deal with these two aspects.

[103] As set out in *Stenersen,* the position taken by the Western Cape High Court[32] and the Kwa-Zulu Natal High Court[33] was to regard the appeal to the High Court as in the nature of a judicial review along the lines of the third category of appeals

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[29] See Proc. 55 / GG 40334 / 20161007
[30] 10 of 2013
[31] 2020 (1) SA 651 (GJ)
[32] See for example *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC)
[33] See for example *Durdoc Centre Body Corporate v Singh* 2019 (6) SA 45 (KZP)

envisaged in *Tikly and Others v Johannes NO and Others.*[34] The procedure adopted by these two divisions of the High Court was for the 'appeal' to be brought on notice of motion supported by affidavits (presumably because the 'appeal' was regarded as a type of judicial review).

[104] On the other hand, the approach that had been adopted by the Gauteng Division (as also stated in *Stenersen*) was that section 57 envisaged an appeal by way of a notice of appeal and utilisation of the provisions of the Uniform Rules of Court where appropriate.

[105] The conclusion reached in *Stenersen* is that the appeal envisaged by section 57 does not fall within *Tikly's* narrow third category. Rather it 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."*[35]

[106] As to the procedure, *Stenersen* lays down that the appeal must be brought by way of a notice of appeal, with the grounds of appeal being set out succinctly.

[107] Before us the Body Corporate submitted that Mr Ncala failed to make out reasonable prospects of success in the appeal and had no prospects of success in the appeal. I agree with Mr Ncala's counsel that, in the context of an appeal brought in terms of section 57, there is no room for applying a prospects of success test. First, section 57 makes no reference to a leave to appeal process. Second, prospects of success generally find application in the context of a leave to appeal. Third, a dissatisfied party is given a statutory right of appeal against an order of an adjudicator.

[108] The wording of section 57(1) that a dissatisfied party *"may appeal to the High Court"* supports this position in that the appeal is not made subject to an application for leave to appeal. As contended by Mr Ncala's counsel in their heads of argument, section 57(1) *"does not state that such person 'may seek the High Court's leave to appeal' or 'may apply to the High Court to appeal an Adjudication Order'. It simply*

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[34] 1963 (2) SA 588 (T) at 590 – 591
[35] At [42]

states that they may appeal, confirming that the appeal is a right to be exercised at will, and not on application." In any event the full bench in *Stenersen* addressed this very issue, holding that *"no leave to appeal is required to be given by the statutory body."*[36]

[109] I might add requiring the adjudicator to grant leave to appeal, would not be appropriate. In the first instance, the adjudicator is not a judge. In the second instance, this would effectively mean that a dissatisfied party might never be able to seek redress from a court if the adjudicator decides not to grant leave to appeal.

OVERVIEW OF THE PARTIES' POSITIONS

[110] I have above summarised Mr Ncala's notice of appeal.

[111] *Stenersen* provides that a dissatisfied party's notice of appeal must set out the grounds of appeal succinctly. Other than stating a broad proposition that the adjudicator failed to have regard to Mr Ncala's rights to dignity and equality as a disabled person, it does not appear to me that Mr Ncala's notice of appeal sets out the grounds of appeal sufficiently or even at all.

[112] I will, however, give Mr Ncala the benefit regarding this failure by virtue of the uncertainty attendant at the time in relation to the proper processes to be followed, and will regard his heads of argument before us as incorporating his grounds of appeal. The Body Corporate is not prejudiced by this approach as it presented heads of argument in response, and a full hearing was conducted before us in relation to the issues raised by Mr Ncala in his heads of argument.

[113] The theme cutting across the orders sought by Mr Ncala before us is informed by his submission that the right to equality and human dignity, and the supremacy of the Constitution and constitutional values, when applied to his case, entitle him to the orders sought. On the basis that these rights entitle him to the orders sought, Mr Ncala's following submission is that the adjudicator had the power in terms of section 39 of CSOSA to grant him the orders sought. Thus, on the merits there are three

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[36] At [31]

issues before us: (1) the application of the constitutional right to equality and dignity, (2) the competency of the orders under section 39, and (3) whether a case was made out for such orders.

[114] Mr Ncala's submission is that the Service, as a public body, and the adjudicator in turn, are bound to uphold the values of the Constitution and the rights entrenched in the Bill of Rights. According to Mr Ncala, the adjudicator misunderstood these obligations, and failed to have regard to these principles. He contends that the adjudicator merely dealt with the matter as if no Constitution or Bill of Rights existed and in doing so *"failed to acknowledge Mr Ncala's right to human dignity and equality as a person living with a disability."* It is submitted on his behalf that the adjudicator applied a formal equality standard as opposed to a substantive equality standard and ignored the principle of reasonable accommodation which stems from application of the latter standard. Mr Ncala also complains that the adjudicator failed to consider the proper interpretation of the relevant legislation in light of the Constitution.

[115] Counsel for Mr Ncala submit that the orders sought by Mr Ncala seek to affirm his *"humanness"*. They also submit that the issues in this matter are not only important to Mr Ncala but are important to all persons living with disabilities.

[116] Having regard to the above, Mr Ncala submits that the adjudicator's order is subject to substitution by this appeal tribunal on three points of law: (1) the adjudicator ought to have found that the Body Corporate infringed Mr Ncala's right to equality, (2) the adjudicator ought to have found that the Body Corporate infringed Mr Ncala's right to human dignity; and (3) the adjudicator failed to interpret the legislation in line with the Constitution.

[117] The Body Corporate submits that Mr Ncala does not have a need which is required to be reasonably accommodated. This is because this need relates to the unsuitability of his unit and is something which Mr Ncala can make accommodation for on his own. The Body Corporate argues that Mr Ncala's need is unreasonable.

[118] The Body Corporate also submits that the outcome of the special resolution did not unreasonably interfere with Mr Ncala's rights, and that the adjudicator did not make an error of law.

[119] It is necessary to address, up front, with Mr Ncala's condonation application. The condonation application gives rise to its own preliminary issue, which is not without complexity. Although I find in this judgment that Mr Ncala is not entitled to condonation, it nevertheless behoves me to address the merits of his appeal as the issues which the appeal raise is of some importance. I do so after dealing with condonation immediately below.

CONDONATION

[120] The condonation application gives rise to the question whether a High Court sitting as the court of appeal in terms of section 57 of CSOSA has the power to condone non-compliance with the statutory period for lodging an appeal, i.e., whether a High Court as the statutory appeal tribunal under section 57(1) has the power to condone an appeal which was lodged more than 30 days after delivery of an adjudication order.

[121] Mr Ncala's heads of argument did not address the issue identified above, viz whether the High Court sitting as an appeal tribunal from an adjudicator's order, has the power to condone non-compliance with section 57(2)'s time-period. The heads of argument were structured on the basis that the High Court seized with the appeal has the power to condone non-compliance. The Body Corporate's heads of argument, on the other hand, contended up front that a High Court has no jurisdiction to interfere with an adjudicator's order where the appeal is lodged after the prescribed 30-day period. It contends that this is so because CSOSA is premised on the quick and speedy resolution of disputes, and that delays in prosecution of these type of appeals are not in the interest of justice and the interests of the general community which CSOSA seeks to serve (i.e., body corporates, owners, and occupants of sectional title units). Although the Body Corporate alluded to the preliminary concern identified above, the issue was not analysed in any further depth.

[122] At the commencement of the hearing, this issue was raised with the parties' respective counsel. During this preliminary discussion we identified to the parties' counsel several reported judgments which appear to address this issue. In chronological order these are *Phillips v Direkteur van Sensus*,[37] *Toyota SA Motors (Pty) Ltd v CSARS*,[38] *Samancor Group Pension Fund v Samancor Chrome*,[39] and *Vlok NO and Others v Sun International South Africa Ltd and Others*.[40] The hearing was then stood down. Upon its resumption counsel for both parties provided us with heads of argument on the issue, and in argument before us addressed the issue.

[123] There are numerous statutes which impose time limits for instituting proceedings in the High Court. These include the following:

- Section 86A(12) of the Income Tax Act:[41] "*a notice of appeal shall be lodged within [21 business days after receiving notice...] or within such longer period as may be allowed under the Rules of the appeal Court*". *Toyota* was concerned with this section.

- Section 30P(1) of the Pension Funds Act:[42] "*Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, ...*". *Samancor* was concerned with this section.

- Section 124(2) of the Companies Act:[43] "*Within 30 business days after receiving a notice in terms of subsection (1) (a), a person may apply to a court for an order...*". *Vlok NO* was concerned with this section.

- Section 33(2) of the Arbitration Act:[44] "*An application pursuant to this section shall be made within six weeks after the publication of the award to the parties...*"

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[37] 1959 (3) SA 370 (A)
[38] 2002 (4) SA 281 (SCA)
[39] 2010 (4) SA 540 (SCA)
[40] 2014 (1) SA 487 (GSJ)
[41] 58 of 1962
[42] 24 of 1956
[43] 71 of 2008

[124] The issue was formulated as follows by Mr Ncala's counsel: does the High Court have a discretionary power to condone non-compliance with the 30-day period, or is a failure to lodge the appeal within the 30 days automatically destructive of the appeal?

[125] Much of the argument centred around the judgment in *Vlok NO,* and its analysis of *Toyota* as well as the Constitutional Court's judgment in *Mohlomi v Minister of Defence.*[45] In *Vlok NO,* the primary issue addressed by Snyckers AJ (for our purposes) was whether, courts in all instances, have the power to condone non-compliance with statutory time periods.

[126] Counsel for Mr Ncala's submissions may be summarised as follows: (1) In terms of section 173 of the Constitution, taking into account the interests of justice, the High Court, in all instances, has inherent power to protect and regulate its own process and develop the common law; (2) The High Court's inherent power to protect and regulate its own processes includes a power to condone non-compliance with statutory time limits for bringing proceedings to the High Court.

[127] Counsel for the Body Corporate, on the other hand, submitted as follows: (1) The adjudication process established in terms of CSOSA is for purposes of determining and resolving community scheme disputes; (2) This process is intended to be prompt, speedy and determined with little or no legal formality; (3) The adjudicator's power is afforded by statute; (4) The appeal of an adjudicator's order is equally conferred by statute; (5) The High Court has no inherent appeal jurisdiction over an adjudicator's order - its jurisdiction derives expressly from statute; (6) Because the High Court has no inherent appeal jurisdiction, there is no process that can be regulated, and thus there is no implied inherent power; (7) The High Court has no inherent power to condone non-compliance.

[128] *Vlok NO* distilled two ways of approaching the issue. The first approach is that as, as a matter of principle, and in all instances, there exists a "*freefloating general power to condone noncompliance with a statutory time period*." This approach is independent of an interpretation of the provision in question. Thus, unless the

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[44] 42 of 1965
[45] 1997 (1) SA 124 (CC)

provision in question expressly excludes this power, the principle wins the day (so to speak). The second approach is that there is no general power to condone non-compliance, and that the existence of a power to condone would, in each instance, have to be investigated through a process of statutory interpretation. Whilst, in terms of this approach, there may be some residual bias for finding a power to condone, this bias would generally yield itself up to the interpretation process itself.[46]

[129] In grappling with the proper approach to be adopted, *Vlok NO* referred to a tension between a "*clear (obiter) dictum from the unanimous Constitutional Court in Mohlomi..., and a 'separate' (ie additional and independent), perhaps also obiter, finding of a unanimous Supreme Court of Appeal in Toyota...*", the latter also being supported by *Samancor.*

[130] The dictum in *Toyota* appears to support the first approach, viz that courts, in all instances, have a general power to condone non-compliance with statutory time-periods. The dictum reads as follows:

> the High Court has inherent jurisdiction to govern its own procedures and, more particularly, the matter of access to it by litigants who seek no more than to exercise their rights. It has been held that this jurisdiction pertains not only to condonation of non-compliance with the time limit set by a Rule but also to a statutory time limit.[47]

[131] The *obiter* dictum in *Mohlomi* (per Didcott J and concurred in by all the judges) illustrates the second approach, viz that there is no general power to condone non-compliance and any such power must necessarily be investigated through interpretation of the provision in question. The dictum is as follows:

> The wording of that looks odd. It appears to have presupposed a power inherent in the courts to condone defaults of the kind covered which needed to be preserved. But courts have no such inherent power, and none derived from any source unless and until it is conferred on them. That the subsection grants them the power in the circumstances mentioned must

[46] At [35]
[47] At [10]

> necessarily be implicit in its terms, however, since they make no sense otherwise.[48]

[132] Ultimately, the court in *Vlok NO* held that there was no free-floating general power to condone. Thus, the inquiry was whether, through a process of interpretation, the provision, properly construed, incorporated a power to condone.

[133] Mr Ncala's counsel submitted that *Vlok NO* was wrongly decided. This is because the dictum in *Toyota* clearly advocated for a general power of condonation in all instances, and this was supported by *Samancor.* Moreover, whereas the dictum in *Mohlomi* was *obiter,* the dictum in *Toyota* was part of the *ratio* of the judgment. Another reason why *Vlok NO* was wrong was because *Mohlomi* was decided under the interim Constitution, which did not have an equivalent section 173, whilst *Toyota* was decided under the Constitution which incorporated section 173. According to Mr Ncala's counsel, section 173 affords to the courts a much broader inherent jurisdiction than those powers afforded to the courts under the common law.

[134] It does not appear to me that the dictum in *Toyota* is clearly *ratio.* This was in fact alluded to by Snyckers AJ in *Vlok NO,* when he categorised the dictum as being possibly *obiter.* The primary finding in *Toyota* is based on the second approach to the issue. In this regard *Toyota* undertook a process of interpretating the provision in question. It found that, on a proper interpretation of the provision, and in that specific instance, the court had a statutory power to condone. This finding was based on the actual wording of the provision which read as follows:

> a notice of appeal shall be lodged within [21 business days after receiving notice...] or within such longer period as may be allowed under the Rules of the appeal Court.

[135] Regarding this provision, at paragraph [9] the court in *Toyota* stated as follows:

> The first question for decision is whether it was, as contended in the respondent's heads of argument, not open to the Court below to grant

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[48] At [17], 133C

> condonation. Rightly, counsel for the respondent before us readily acknowledged the existence of features pointing to an answer the other way. We are dealing here with noncompliance with a statutory provision laying down the time within which an appeal from the decision of the Special Court must be noted. It is of no practical assistance to seek to classify the provision as peremptory or directory. The enquiry is simply: what did the Legislature intend? (*Weenen Transitional Local Council v S J van Dyk*, Supreme Court of Appeal case No 399/2000 in which judgment was delivered on 14 March 2002, at pp 10 11.) That the Legislature did not intend noncompliance within the 21 business days referred to in s 86A(12) inevitably to have fatal consequences for an intended appeal is, in my view, clearly apparent. The noting period could be even longer if, as the lawgiver envisaged was possible, the Rules of the relevant appeal Court (either this Court or the High Court) so provided. And, of course, a rule prescribed period may itself be extended (or non observance of it condoned) if good cause is shown on due application. The expression 'may be allowed' covers not only the period provided for in a Rule but also any extension the Courts may grant. In the circumstances, therefore, the Legislature must have intended the appellate Courts to have the final say as to whether intending appellants could proceed with their appeals or not. The fact that the provision of time to note an appeal from the Special Court to a High Court has been overlooked by the drafters of the Uniform Rules cannot detract from this conclusion. It would be illogical and unfair if noncompliance with the 21 business days time limit barred an appeal simply because of the Rule makers' oversight when the Legislature clearly envisaged that an appellant who could resort to a rule prescribed time limit, and the grant of condonation or extension for good cause shown, would be able to proceed.

[136] The *Toyota* dictum relied upon by Mr Ncala in these proceedings comes after the above extract, at paragraph [10]. In *Toyota* the actual wording of the provision in question was critical to the outcome. The provision expressly pointed to a power to extend the time limits albeit that the parameters of that extension had not yet been regulated. In contrast to the provision in *Toyota,* section 57(2) does not contain an express power to extend or condone time-limits.

[137] Another reason why I disagree with Mr Ncala's criticism of *Vlok NO* relates to section 173. It is correct that *Toyota* was decided after section 173 came into effect

and that *Mohlomi* was not. However, when addressing the general power to condone non-compliance, *Toyota* did not express any reliance on section 173 for this proposition but rather relied on the judgment in *Phillips v Direkteur vir Sensus,*[49] a decision of the Appellate Division which was clearly decided absent section 173 and in terms of the common law.

[138] In *Vlok NO,* Snyckers AJ was also referred to the judgment of the Constitutional Court in *Phillips and Others v National Director of Public Prosecutions*[50] as support for the proposition that there exists no general power to condone non-compliance.[51] The relevant extract from *Phillips*, which Snyckers AJ regarded as apt, reads as follows:

> Whatever the true meaning and ambit of s 173, I do not think that an Act of Parliament can simply be ignored and reliance placed directly on a provision in the Constitution, nor is it permissible to sidestep an Act of Parliament by resorting to the common-law.
>
> I doubt that the inherent jurisdiction of the Court under s 173 is such that it empowers a Judge of the High Court to make orders which negate the unambiguous expression of the legislative will. Moreover, the power that a Court has to use its inherent power is a special and extraordinary power which should be exercised sparingly and only in clear cases. This is not such a case.[52]

[139] The detailed analysis undertaken by Snyckers AJ in *Vlok NO* regarding this issue, and his ultimate findings are in my view persuasive and are endorsed. I juxtapose this with the short paragraph in *Toyota* upon which Mr Ncala relies. In my view the fact that the Supreme Court of Appeal did not undertake a detailed discussion as to whether there exists, in all instances, a statutory power to condone non-compliance with statutory time periods, strengthens the argument that the dictum in *Toyota* is to be regarded as *obiter.*

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[49] 1959 (3) SA 370 (A)
[50] 2006 (1) SA 505 (CC)
[51] *Vlok NO* supra at [50]
[52] At [51] and [52]

[140] This then leaves us with the question as to whether within section 57(2), an implied power to condone non-compliance with the statutory time limit within which an appeal must be lodged can be found through a process of interpretation.

[141] The only case which I have been able to find which refers specifically to condonation in the context of CSOSA is the unreported judgment in *Waterfall Hills Residents Association NPC v Jordaan and Another*.[53] In that case, however, it appears that the court's competence to grant condonation was not raised, and the matter merely proceeded on the basis that condonation was available as a matter of principle.

[142] In my view the section, properly construed and having regard to CSOSA as a whole, does not envisage a residual power to condone non-compliance with an appeal lodged out of time.

[143] CSOSA aims to resolve disputes between parties living in fairly close quarters and with mutual responsibilities to each other in a relatively inexpensive and speedy manner. The following extract from *Stenersen* is apposite:

> A preliminary point to take note of is that no leave to appeal is required to be given by the statutory body. An appeal against an order may not be made after 30 days have elapsed. A specific question of law must be identified. It is that question that must be considered by the High Court, and it will not be open to the court later hearing the appeal to consider additional issues. Speed, economy and finality are the reasons the legislature limited the appeal process.[54]

[144] From the above extract in *Stenersen,* I discern that the reason why leave to appeal is not required is that having to do so would prolong the finalisation of the matter. Limiting the appeal to a question of law only also accords with the legislature's intention. In my view, since "*Speed, economy and finality are the reasons the legislature limited the appeal process*", importing into section 57(2) a

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[53] (A3140/2018) [2018] ZAGPJHC 669 (12 November 2018)
[54] *Stenersen* supra at [31]

residual power to condone non-compliance with the 30-day period would run counter to the legislature's intention.

[145] 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.

[146] A further reason why I find that there is no residual power to condone in terms of section 57(2) is that a similar provision is found in section 33(2) of the Arbitration Act. The Arbitration Act provides that a party who believes that there is a basis to review the arbitrator's award, has 6 weeks within which to apply to have the award set aside. However, in a separate section (section 38), the Arbitration Act expressly gives a court the power to condone non-compliance with any of its provisions on good cause shown. No such provision exists in CSOSA.

[147] The fact that this matter raises issues of a potentially constitutional nature, more particularly the Bill of Rights, is for purposes of the inquiry into the existence of a residual power to condone, irrelevant. As a matter of principle, the approach cannot be informed by the nature of the issues on the merits. The question is simply whether the court has the power to condone or not.

[148] Even if my views on this issue are wrong, I would not have been minded to grant Mr Ncala condonation.

[149] Mr Ncala was aware that his appeal had been lodged out of time. Yet he did not at that stage seek condonation and waited for almost a year before doing so. In the meantime, the dispute continued to simmer with no end in sight. Mr Ncala did not address the reasons why he had waited for almost a year before seeking condonation.

[150] Regarding the merits of the condonation itself, the reason put forward by Mr Ncala for not having lodged the appeal timeously was because of the uncertainty regarding the appeal process, the necessity for his legal representatives to become

fully acquainted with the matter and the decision taken by him to not only appeal the adjudicator's order but also to launch proceedings for hearing before the Equality Court. I do not find these reasons persuasive.

[151] Regarding the uncertainty of the appeal process, as set out in *Stenersen,* the approach of the Gauteng Division was to require a notice of appeal. There is no discernible excuse as to why this could not have been done.

[152] In so far as requiring his legal representatives to get up to speed with the matter, since in all matters that come before an adjudicator in terms of CSOSA, parties may not (in general) be legally represented, the supposed challenges faced by Mr Ncala's legal representatives would have been no more than the usual challenges arising from the 30-day period. In any event, since all that may be appealed is a question of law, this limited ground for appeal would not in my view require a detailed understanding of all the facts and issues. Distilling the question of law would, in my view, be a relatively straight forward task at least in so far as formulating a notice of appeal is concerned.

[153] In any event, it is apparent from the appeal record that Mr Ncala was, in the run up to the adjudication, represented by attorneys, and it is also apparent that these attorneys had to some extent already raised some of the legal questions which serve before us. Indeed, it is discernible from Mr Ncala's submissions before the Service that he had utilised legal representation in the drafting of his documents. I note further in this regard, that the legal representatives utilised by Mr Ncala from the time the dispute arose and subsequent to the adjudicator's order, are the same legal representatives who lodged the notice of appeal on his behalf.

[154] Regarding the decision to institute Equality Court proceedings simultaneously with the CSOSA appeal, in my view this decision is irrelevant. The decision to launch simultaneous proceedings in another forum does not in my view justify a finding of good cause. CSOSA is concerned with appeals in terms of CSOSA. If the issues on appeal happen to overlap with issues which might more properly have to be adjudicated by another forum, then so be it. In the meantime, the appeal of the adjudicator's order must be lodged.

INFRINGEMENT OF MR NCALA'S RIGHT TO EQUALITY AND DIGNITY

[155] The order sought by Mr Ncala in relation to his right to equality and dignity is framed as follows:

> The conduct of [the Body Corporate] is declared to be an infringement of [Mr Ncala's] right to dignity and equality

[156] As he did before the adjudicator, Mr Ncala contends that the Body Corporate has violated his constitutional right to equality (section 9 of the Constitution) and dignity (section 10 of the Constitution). According to him, the Body Corporate did not consider his visual impairment when it removed the security gate and plastic roof from the washing line area and failed to grant him permission for the alterations. This conduct amounts to an infringement of Mr Ncala's right to equality and dignity. Mr Ncala submits that section 9(4) of the Constitution prohibits all persons (including the Body Corporate) from unfairly discriminating against disabled persons. In other words, the Body Corporate may not unfairly discriminate against Mr Ncala on the grounds of his disability.

[157] In so far as the adjudicator is concerned, Mr Ncala submits that the adjudicator was duty bound to adjudicate the dispute within the framework of the Constitution, but she failed to do so. Mr Ncala contends that the adjudicator failed to acknowledge his constitutional rights to equality and dignity, and that even if she did, she applied incorrect tests and standards because she failed to consider Mr Ncala's visual disability. For this reason, the adjudicator's order is wrong and ought to be overturned.

[158] Section 9 of the Constitution provides as follows:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and

other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[159] Section 10 of the Constitution provides as follows:

> Everyone has inherent dignity and the right to have their dignity respected and protected.

[160] As to the application of the Constitution to the manner in which the adjudicator ought to have approached the dispute, Mr Ncala submits that the Service is an organ of state established by statute.[55] By virtue of section 8(1) and (2) of the Constitution, the Bill of Rights binds all organs of state and *"juristic person[s] if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."* In terms of section 7(2) of the Constitution, the Service, as a functionary of the state, must *"respect, protect, promote and fulfil the rights in the Bill of Rights."* Section 39(1) of the Constitution provides that in interpreting any right in the Bill of Rights, a tribunal *"must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".* In terms of section 39(2), when interpreting legislation *"every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."*

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[55]Section 239 of the Constitution defines an organ of state as a functionary or institution exercising public power in terms of legislation.

[161] According to Mr Ncala, the adjudicator, in making her order, relied on section 10 of the STSMA. The relevant portions of section 10 read as follows:

> (1) A scheme must as from the date of the establishment of the body corporate be regulated and managed, subject to the provisions of this Act, by means of rules.
>
> (3) The management or conduct rules contemplated in subsection (2) must be reasonable and apply equally to all owners of units.

[162] Mr Ncala's counsel submit that the STSMA's requirements in section 10 that management and conduct rules be applied equally to all owners must be viewed through the lens of what is termed substantive equality. According to Mr Ncala the adjudicator approached the issue by applying a different concept of equality, formal equality. This the adjudicator did, according to Mr Ncala, when she decided that the Body Corporate must treat Mr Ncala the same as it does all other owners in the complex. This approach resulted in an equal application of the Conduct Rules within the parameters of formal equality. This, according to the submission, is an approach which falls short of what the Constitution requires and renders the adjudication order invalid.

[163] According to Mr Ncala one of the components of substantive equality is the concept of reasonable accommodation. Mr Ncala submits that the adjudicator failed to apply the concept of reasonable accommodation. Reasonable accommodation, according to Mr Ncala, finds expression in section 9 of the Constitution as well as section 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act ['PEPUDA'].[56] Section 9 of PEPUDA reads as follows:

> Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including—
>
> (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

[56] Act 4 of 2000

(b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

(c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

[164] Mr Ncala also relies on the Convention of the Rights of People with Disabilities, more specifically the definition of discrimination based on disability, and article 2 which defines reasonable accommodation:

> 'Discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.[57]
>
> 'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

[165] Reasonable accommodation, according to Mr Ncala's counsel, is also recognised in the Employment Equity Act.[58] There reasonable accommodation is defined as *"any modification or adjustment to a job or to the working environment"*, and enjoins employers to make reasonable accommodation for, among others, people with disabilities.[59]

[166] As I understand the submission, had the adjudicator applied and adopted substantive equality and reasonable accommodation, she would and ought to have found that the Conduct Rules were not being applied equally and reasonably.

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[57] South Africa ratified the Convention on the Rights of People with Disabilities on 30 November 2007
[58] Act 55 of 1998
[59] Section 15(2)(c)

According to Mr Ncala the self-same conduct infringed his constitutional right to dignity.

[167] In *President of the Republic of South Africa v Hugo,*[60] the Constitutional Court stated as follows:[61]

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. In Egan v Canada, Heureux-Dube´ J analysed the purpose of (the Canadian right to equality) as follows:
>
> > Equality, as that concept is enshrined as a fundamental right . . . means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.

[168] Apart from section 10, the Constitution refers to human dignity numerous times.[62] In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,*[63] the Constitutional Court held that *"dignity requires us to acknowledge the value and worth of all individuals as members of our society".*[64] The Constitutional Court, in the same judgment, also stated that the violation of human dignity

> is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal

[60] 1997 (4) SA 1 (CC)
[61] At [41]
[62] See for example sections 1(a), 7(1), 39(1), 165(4), 181(3) and 196(3) of the Constitution
[63] 1999 (1) SA 6 (CC)
[64] At [28]

> characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity.[65]

[169] In *Ferreira v Levin*,[66] the Constitutional Court held that:

> Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.[67]

[170] Counsel for Mr Ncala submitted that the issues in this case affect Mr Ncala as a member of a community that has experienced historic, and continues to experience ongoing, discrimination. I understood this submission to refer to discrimination against visually impaired persons.

[171] Counsel for Mr Ncala attacked the adjudicator's position that *"[The Body Corporate] is required by law to put in place rules that govern the scheme and enforce them equally to all owners."*. They contend that this statement effectively adopted the formal equality standard, and submitted that the only finding made by the adjudicator on the issue of equality related to the installation of the security gate:

> The applicant submitted a copy of its conduct rules and I am persuaded that the conduct rules are fair. However, the respondent stipulated in his evidence that the applicant does not apply the conduct rules equally to all owners of units. The respondent stated that there are owners in the complex who have installed gates to their washing areas. I am persuaded therefore that the same permission granted to other owners must be granted to the applicant to install a gate to his washing area. Accordingly, the applicant must replace the gate that was removed from the applicant's washing area and bear the cost of the replacement.

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[65] At [124]
[66] 1996 (1) SA 984 (CC)
[67] At [49]

[172] Whilst it appears that Mr Ncala is satisfied with the adjudicator's order regarding the reinstallation of the security gate, the complaint is that the adjudicator ought to have gone further and permit Mr Ncala to take additional steps that are necessary due to his disability. These steps would be to allow Mr Ncala to use his washing machine in the washing line area, validate the plumbing, and reinstall the plastic roof to protect his washing machine from the elements. The complaint is that the adjudicator treated Mr Ncala as she would any other owner in the complex, assumed that Mr Ncala's placement in society is the same as the placement of his neighbours, and that Mr Ncala moves through the world as a fully sighted person would. In making this limited order, Mr Ncala's counsel submitted that the adjudicator adopted the notion of formal equality and viewed Mr Ncala's visual impairment as irrelevant to the inquiry.

[173] The concept of formal equality was explained as follows in counsels' heads of argument:

> Formal equality is means focussed, it demands equality in the means adopted: that people be treated the same. It entails the idea that all people should be given equal treatment, regardless of their actual circumstances. It is supported by the unrealistic notion of sameness: it assumes that all people are the same regardless of the socio-economic realities that cause differentiated conditions. Formal equality does not concern itself with whether the outcome of the means adopted achieves equality.

[174] Substantive equality is said to be outcome-focussed. Equality of outcome is sought as opposed to equality of treatment. To reach an equal outcome, methods must be applied which would have the effect of levelling the playing field so to speak. In *Minister of Finance v Van Heerden*,[68] the Constitutional Court characterised substantive equality as follows:[69]

> This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of

[68] 2004 (6) SA 121 (CC)
[69] At [27]

> new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation-sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society. The unfair discrimination enquiry requires several stages. These are set out by this Court in *Harksen v Lane NO and Others*.

[175] Counsel for Mr Ncala submit that formal equality has been rejected by the Constitutional Court in favour of substantive equality. In *Hugo*, the Constitutional Court said as follows:[70]

> We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

[176] In *MEC for Education: Kwa-Zulu Natal and Others v Pillay*,[71] the Constitutional Court explained the principle of "reasonable accommodation" in the context of people with disabilities:

> At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not

[70] At [41]
[71] 2008 (1) SA 474 (CC)

relegate people to the margins of society because they do not or cannot conform to certain social norms.[72]

The idea extends beyond religious belief. Its importance is particularly well illustrated by the application of reasonable accommodation to disability law. As I have already mentioned, the Equality Act specifically requires that reasonable accommodation be made for people with disabilities. Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society:

> 'Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.'[73]

[177] Before us, Mr Ncala's counsel placed much store on *Pillay*. Counsel submitted that *Pillay* held that reasonable accommodation could entail granting an exemption for a general rule or even requiring that buildings be altered.[74]

[178] Mr Ncala's counsel submit that if the adjudicator had had regard to Mr Ncala's visual impairment, she would have sought an egalitarian outcome, and taken this into account in determining whether the Body Corporate's treatment of Mr Ncala was equitable. She would have been mindful that the purpose of equality, when viewed from a substantive point of view, is to ensure that Mr Ncala had equal benefits as the other owners in the complex. The submission is that Mr Ncala had made clear to the

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[72] At [73]
[73] At [74]
[74] *Pillay* supra at [75]

Body Corporate of the potentially devastating consequences to locating the washing machine inside his unit, and that he could not have it inside his unit.

[179] In their heads of argument counsel submit the following regarding the outcome of the application of the substantive equality standard to the matter:

> None of the other owners or residents in the complex suffer from visual impairments. Therefore, none of them are susceptible to the same harm. If the Adjudicator had conducted the equality assessment from a substantive point of view, she would have noted that the outcome for Mr Ncala was the same as that of the other residents: the ability to live, and do one's laundry safely and without harm. Having borne that objective in mind, she would have also noted that none of the other residents need to place the washing machines in the washing area, as the same potential for physical harm does not exist for them as it does for Mr Ncala.

[180] Mr Ncala's counsel submit that the Body Corporate failed to provide reasonable accommodation. They argue that Mr Ncala bore the financial expense for the placement of the washing machine in the washing line area, and the other alterations, and that no positive action was expected from the Body Corporate or the other residents. The only measure required of the Body Corporate would be to grant Mr Ncala permission for all the alterations by way of exempting him from the Conduct Rules. However, 96% of the owners who voted on the special resolution voted against this exemption. They submit that there are no negative consequences for the complex if permission is granted, the Body Corporate's failure to reasonably accommodate Mr Ncala by granting the exemption is unreasonable, and that such failure constitutes unfair discrimination. Counsel submitted that this outcome is similar to what occurred in *Pillay,* where Langa CJ noted that the dispute would not have arisen if the school had made an exception for Ms Pillay.[75]

[181] According to Mr Ncala, his right to dignity is expressed by way of the following. Following his mother's death, Mr Ncala became the guardian of his younger sister. Mr Ncala knows better than anybody else what he needs as a person with a visual impairment to be able to live optimally. All this to say, Mr Ncala, has his

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[75] *Pillay* supra at [38]

own agency. He can decide how he wishes to live and determine what he values over what he does not value. He wishes to exercise that agency in the manner he runs his home and protects his well-being. At its simplest, Mr Ncala would like to wash his clothing without the risk of coming to physical harm. He achieves this by moving the washing machine to the washing area. He should be entitled to do so. He is a human being. As stated by the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*, *"human beings are required to be treated as human beings."*[76]

[182] I agree with the Body Corporate's counsel that Mr Ncala's reliance on the constitutional right to equality and dignity to found a basis for the orders sought by him is misplaced. I elaborate on this further below.

[183] Section 9 of PEPUDA adopts the concept of reasonable accommodation in the context of persons with disability. It provides that no person may unfairly discriminate against another person on the ground of disability. Unfair discrimination includes (1) denying or removing a supporting or enabling facility necessary for disabled person to function in society, (2) failing to eliminate obstacles that unfairly limit or restrict disabled persons from enjoying equal opportunities, and (3) failing to take steps to reasonably accommodate the needs of the disabled person.

[184] The unit purchased by Mr Ncala provided a designated place in the kitchen for a washing machine. It is apparent from Mr Ncala's evidence that he would not have been minded to purchase the unit had he known that he could not utilise the washing line area for the washing machine. In other words, the unit as presented to him was otherwise not subjectively suitable for his purposes. In my view, this unsuitability, does not, in and of itself, give rise to a positive obligation on the part of the Body Corporate to make the unit subjectively suitable for Mr Ncala's purposes. I do not accept that the concept of reasonable accommodation goes this far, and I do not believe that the effect of the Body Corporate's application of the Conduct Rules to Mr Ncala infringed any constitutional right to equality, there being in my view an absence of unfair discrimination or even discrimination.

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[76] 2001 (1) SA 46 (CC) at [83]

[185] There is no evidence on the appeal record of Mr Ncala attempting to seek a solution to his predicament within the confines of the Conduct Rules. The evidence suggests that Mr Ncala could have, for example, replaced some or all the tiles in the kitchen with non-slip versions. The evidence from the oral hearing also suggests that when laundry was being done Mr Ncala had, in any event, someone to help him.

[186] In so far as a roof cover is concerned, Mr Ncala also complained that if he had to do his laundry in the kitchen, he would then need to take the wet clothes to the washing line. If he did not have a roof cover, he might, if it was raining, slip in the washing line area because his hands would be full of clothes. On this score the Body Corporate in fact offered a solution in the form of an awning if Mr Ncala was so inclined to still require a roof. Mr Ncala rejected this offer and continued to insist on being allowed to reinstall his plastic roof.

[187] Counsel for the Body Corporate also submitted that in the context of CSOSA and section 9 of PEPUDA, a balancing act between legitimate interests was required. On the one hand is Mr Ncala's alleged reasonable accommodation right to make alterations to a property that was not owned by him and on the other hand is the Body Corporate's right and obligation to manage the complex according to the social and legal contract between the parties who have an interest in the complex. This analysis also encapsulates aspects of the right to dignity. In this regard counsel for the Body Corporate relied on the following passage from the Constitutional Court decision in *Barkhuizen v Napier*:[77]

> The first question involves the weighing-up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should

[77] 2007 (5) SA 323 (CC)

> be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common law principles of contract.[78]

[188] Apart from the passage in *Pillay* cited above, and upon which Mr Ncala relies, there are also other passages in *Pillay* which are relevant to the balancing act:

> The difficult question then is not whether positive steps must be taken, but how far the community must be required to go to enable those outside the 'mainstream' to swim freely in its waters. This is an issue which has been debated both in this court and abroad and different positions have been taken. For instance, although the term 'undue hardship' is employed as the test for reasonable accommodation in both the United States and Canada, the United States Supreme Court has held that employers need only incur 'a *de minimis* cost' in order to accommodate an individual's religion, whilst the Canadian Supreme Court has specifically declined to adopt that standard and has stressed that 'more than mere negligible effort is required to satisfy the duty to accommodate'. The latter approach is more in line with the spirit of our constitutional project which affirms diversity. However, the utility of either of these phrases is limited as ultimately the question will always be a contextual one dependent not on its compatibility with a judicially created slogan but with the values and principles underlying the Constitution. Reasonable accommodation is in a sense an exercise in proportionality that will depend intimately on the facts.[79]

[189] In my view, *Pillay* is not on all fours with the issues in the present matter. *Pillay* raised issues involving discrimination on grounds of religious and cultural practices in the context of the school system, more specifically whether a learner should have been allowed to wear a gold nose-stud to school and been exempted from the school's code of conduct in this regard. Whilst *Pillay* did utilise examples of reasonable accommodation in the context of persons with disabilities, the reference point related to situations which had the effect of excluding such persons from participating in society. The instant matter is not such a situation.

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[78] At [57]
[79] At [76]

[190] I doubt that Mr Ncala has a legitimate interest as expressed above but even if I am wrong on this, I do not believe that the balancing act between his interest and that of the Body Corporate's comes down on Mr Ncala's side. The situation we are dealing with here does not, in my view, give rise to a legitimate complaint of being excluded from society.

[191] A more pertinent and relevant complaint would have been, for example, a request from a physically disabled person in a wheelchair for ramps to be constructed, or for steel bars to be installed in the swimming pool to aid access. On the other hand, it would be up to that person to have installed in his or her unit steel bars adjacent to or in the bath.

[192] I use the example of the ramp because counsel for Mr Ncala submitted that the present situation is no different from the ramp, and was an example postulated in *Pillay.* I do not agree with this comparison. The ramp would be placed in the general common areas to allow freedom of movement and access to the complex's facilities, so as to allow such persons to freely move around. On the other hand, each owner's unit already has a place for a washing machine, and not permitting Mr Ncala to utilise the common area for such purpose does not in my view curtail his freedoms.

[193] Whilst it is correct that private entities and persons may also not discriminate against persons with disabilities, balanced against that is any contract concluded between private persons which set out and define their rights and obligations to each other. This is the case with the Conduct Rules. The owners of the complex are entitled to control the aesthetic standards of the complex. It is in my view not correct that the owners and the Body Corporate would not be prejudiced by the installation of the washing machine and the type of roof which Mr Ncala had constructed. It is not inconceivable that these types of alterations may have some effect on the complex as a whole which would include but not be limited to property values. The owners of the complex understand that their ownership is subject to limitations, and they also understand that whilst they have rights, they also have responsibilities and obligations to other owners.

[194] Counsel for Mr Ncala also attack the adjudicator's finding that Mr Ncala bore the onus of familiarising himself with the Conduct Rules, and that ignorance of the law is no excuse. They contend that in doing so the adjudicator was not mindful of Mr Ncala's visual impairment.

[195] The Body Corporate is also criticised by Mr Ncala's counsel for having refused to provide Mr Ncala with a braille version or a computer readable electronic version of the Conduct Rules. The submission is that the reasonable accommodation principle would have been fulfilled through the provision of the Conduct Rules in this format. I have some difficulty with this submission. It is apparent from the appeal record that Mr Ncala did not, at least during the initial stages of the dispute, request a computer readable electronic version of the Conduct Rules. What he requested was an electronic version. This electronic version was in fact provided to Mr Ncala in February 2018 in response to his specific request. In my view, Mr Ncala ought to also understand that whilst he lives with visual impairment, his experience is not the experience of most of the population. Accordingly, in my view, until such time as Mr Ncala had educated the Body Corporate in relation to his needs, it would not be fair to criticise them for failing to take such needs into account.

[196] Mr Ncala contends that because of the Body Corporate's failure to provide him with a copy of the Conduct Rules, he was not aware that he was not permitted to move his washing machine to the washing line area or install a gate or plastic roof, and that he had, to the contrary, been informed by his estate agent that he could make alterations to the washing line area. I again have difficulties with this contention. As far as I can discern from the appeal record, the Body Corporate was not aware of Mr Ncala's visual impairment until after he had been called upon to remove the alterations. Thus, providing him with the Conduct Rules even at that stage would not have made any difference: Mr Ncala had already carried out the alterations.

[197] In my view the Body Corporate did not infringe Mr Ncala's right to dignity. I cannot find that the Body Corporate treated Mr Ncala in any other way other than a human being. As part of a community Mr Ncala is also subject to societies rules. Whilst certain conduct of the caretaker might be seen as unjustified, in so far as the

issues in question are concerned, I cannot find that the Body Corporate's treatment of Mr Ncala infringed his right to dignity. The Body Corporate did attempt to engage with Mr Ncala. It was amenable to reinstalling the security gate and allowing Mr Ncala to install an awning instead of the plastic roof. These offers were, however, rejected by Mr Ncala.

THE LEGISLATIVE BASIS FOR THE ORDERS SOUGHT

[198] Mr Ncala's case before us is that each of the orders sought by him from this appeal tribunal are orders which the Service, and hence the adjudicator, was empowered to make in terms of section 39 of CSOSA.

[199] In respect of the order declaring the Body Corporate to have infringed Mr Ncala's right to dignity and equality, Mr Ncala submits that section 39(7) empowers the Service to make such an order.

[200] In respect of the order directing the Body Corporate to replace the security gate and plastic roof at its own costs, Mr Ncala submits that section 39(6)(a) and (c) empowers the Service to make such an order.

[201] In respect of the order directing the Body Corporate to replace Mr Ncala's washing machine with a new one, Mr Ncala submits that section 39(6)(e)(i) empowers the Service to make such an order.

[202] In respect of the order directing the Body Corporate to take all reasonable steps to accommodate Mr Ncala's needs as a person living with a disability, Mr Ncala submits that section 39(6)(f) empowers the Service to make such an order.

[203] The nature of the orders which the Service is competent to make indicate to me that CSOSA is intended to be a practical piece of legislation for purposes of providing an inexpensive and time-sensitive mechanism for resolving disputes between, in the context of this matter, body corporates and owners. This intention is further supported by the requirement that the adjudicators who are in the employ of the Service must have competencies and experience in community scheme governance. The intent is to resolve disputes at a practical level. Whilst adjudicators

are obliged to take the Constitution into account, this does not translate to the adjudicators being required and empowered to issue declarations of constitutional infringements, or declarations which are vague, nebulous and of academic interest only.

ORDER DECLARING INFRINGMENT OF RIGHT TO EQUALITY AND DIGNITY

[204] There are two components to this declaratory order. The first is procedural in nature: is such an order competent in terms of section 39. The second is substantive: has the Body Corporate's conduct infringed Mr Ncala's right to equality and dignity.

[205] Mr Ncala submits that the orders set out in section 39 are not a closed list. Counsel submit that section 39 allows for such a declaratory order, and point to section 39(7) which gives the Service the power to make any order proposed by the Chief Ombud. On this basis counsel submit that one of the general issues that the Service is empowered to consider is whether there has been a breach of constitutional rights. On the other hand, counsel for the Body Corporate submits that the Service is not empowered to make the declaratory order sought.

[206] A further preliminary aspect is the nature of the declaratory order itself. It is well understood that courts will not grant declaratory orders which are of mere academic or abstract interest. Mr Ncala's counsel submits that the declaratory order is not of mere academic interest and is not abstract.

[207] Regarding the substantive portion of the declaratory order Mr Ncala's counsel submit that the Body Corporate had infringed Mr Ncala's rights to equality and dignity, and that Mr Ncala has a real and substantive right to the declaratory order. Counsel also submitted that this declaratory order would serve as a warning that conduct similar to that which the Body Corporate had already engaged in, is an infringement and should not be repeated, and that such a declaration will protect Mr Ncala from the Body Corporate's future unconstitutional behaviour.

[208] It appears to me that Mr Ncala's submission regarding the competency of the declaratory order relies to some extent on the opening words of section 39(7),

"general and other issues". In my view the orders explicitly referenced in section 39(7) do not, however, support an understanding that the Service is empowered to make any orders of a general nature which are not explicitly referenced in the rest of section 39. I view this subcategory as addressing miscellaneous as opposed to general issues. In this regard, the order catered for in section 39(7)(a) is not a general matter at all but rather gives explicit power to order delivery of documents and information. Section 39(7)(b) is also, strictly speaking, not a general order or power. It states that, apart from any other orders explicitly referenced in section 39, the Service may only make any other orders proposed by the Chief Ombud. In other words, in so far as the Chief Ombud is apparently empowered to propose a further order, this order would also have to be explicitly set out. There is no case made out that the declaratory order sought by Mr Ncala is one which the Chief Ombud has proposed as a further order.

[209] Whilst my finding regarding the competency of the Service granting this declaratory order puts an end to this order, in any event I have already found that the Body Corporate's conduct did not infringe Mr Ncala's right to equality and dignity.

ORDER TO REPLACE THE PLASTIC ROOF AND SECURITY GATE

[210] Mr Ncala submits that section 39(6)(a) and (c) of CSOSA sanctions an order to replace the plastic roof and security gate. Mr Ncala submits that the Body Corporate was not legally entitled to remove these items as it did not have a court order. He contends that the removal of these items violated his constitutional rights. On this basis, the adjudicator ought to have exercised her powers in terms of section 39(6)(a) and (c) and directed the Body Corporate to replace the plastic roof.

[211] In my view, the Body Corporate was legally entitled to remove the plastic roof and security gate. It had on numerous occasions brought to Mr Ncala's attention that he was in breach of the Conduct Rules and had afforded him ample opportunity to remedy his breach by seeing to the removal of these items himself. Mr Ncala refused to do so. It was common cause that Mr Ncala had breached the Conduct Rules. Under these circumstances, the Conduct Rules give the Body Corporate the power to remove these items. In so far as replacing the security gate is concerned, as already

stated, the Body Corporate accepted that it was obliged to do so. In so far as replacing the plastic roof is concerned, the adjudicator correctly held that Mr Ncala was not entitled to such an order.

ORDER TO REPLACE THE WASHING MACHINE WITH A NEW ONE

[212] Mr Ncala contends that the Body Corporate is liable to provide him with a new washing machine, because consequent on the removal of the plastic roof the old one has been damaged by the elements. According to Mr Ncala the washing machine has mechanical faults, water damage and dents which would not have occurred had the plastic roof not been removed.

[213] Mr Ncala submits that section 39(6)(e)(i) of CSOSA empowers the Service to make this order.

[214] There are several reasons why I do not agree with Mr Ncala's view.

[215] Section 39(6)(e)(i) empowers the Service to order a body corporate to *"acquire, within a specified time, specified property for the use, convenience or safety of owners or occupiers."* In my view, this provision does not give the Service the power to order a body corporate to purchase property for a particular owner. The property identified in section 39(6)(e)(i) is property which is to be used for the convenience and safety of owners. A new washing machine to be owned by Mr Ncala is not the type of property envisaged by this provision.

[216] Mr Ncala bore the onus of proving the damages suffered by the washing machine, and the causes. He also bore the onus of proving that the damages were such that the washing machine required replacement as opposed to repair. Whilst Mr Ncala made general allegations regarding these aspects, his evidence did not address the details required of him. In my view he did not discharge his onus.

[217] In any event, even if the damages suffered to his washing machine were found to be as Mr Ncala alleged, and the damages were caused because of the removal of the plastic roof, in my view this would not have assisted Mr Ncala. After the plastic roof was removed Mr Ncala was aware of the potential damage to his

washing machine. Yet Mr Ncala took no steps to protect it from the elements, and this is notwithstanding that the Body Corporate called on him to remove the washing machine from the washing line area. In the same way that Mr Ncala was able to attend to the alterations, it was well within his power and capability to have the washing machine taken indoors. Mr Ncala cannot lay the blame for the damages at the Body Corporate's feet.

ORDER TO REASONABLY ACCOMMODATE MR NCALA

[218] The order sought by Mr Ncala reads as follows:

> [The Body Corporate] is directed to take all reasonable steps to accommodate [Mr Ncala's] needs as a person living with a disability.

[219] Mr Ncala justifies the competency of this order on the basis of section 39(6)(d)(ii) and (f).

[220] Section 39(6)(d)(ii) provides that the Service may make *"an order declaring that the association's decision to reject a proposal to make improvements on or alterations to common areas is unreasonable, and requiring the association . . . to ratify the proposal on specified terms."*

[221] Section 39(6)(f) empowers the Service to declare that the association has acted unreasonably. Counsel for Mr Ncala submits that this demonstrates that the Service is statutorily empowered to order the Body Corporate to treat Mr Ncala reasonably. Counsel submits that Mr Ncala has never sought the exclusive use of the washing area. What Mr Ncala seeks is an order directing the Body Corporate to take reasonable steps to accommodate his needs as a person with a disability. In other words, Mr Ncala seeks "reasonable accommodation", or that "reasonable measures" be made for him.

[222] In my view the adjudicator correctly rejected this order.

[223] In the first instance, the order sought is formulated in extremely vague and nebulous terms. It is quite incapable, in my view, of having any practical effect.

Moreover, to the extent that Mr Ncala views the rejection of his special resolution as unreasonable, the order sought by him does not contain a formulation of the proposal which he requires to be ratified.

[224] In the second instance, I do not believe that section 39(6)(f) is to be understood as giving rise to a corollary power on the part of the Service to order a body corporate to act reasonably. Section 39(6)(f) is pointedly aimed at declaring a particular action by a body corporate as being unreasonable.

[225] In the third instance, I have already rejected any infringement by the Body Corporate of Mr Ncala's right to equality and dignity.

CONCLUDING REMARKS

[226] Before, concluding this judgment there are some ancillary comments which I wish to make regarding the general conduct of the Body Corporate and Mr Ncala.

[227] Mr Ncala testified to certain conduct by the caretaker to which he did not take kindly. The Body Corporate did not address this conduct, instead advising that it would only be addressing matters directly relevant to the issue, i.e., the alterations. I agree with the Body Corporate that the evidence relating to the caretaker's alleged treatment of him regarding the caretaker suggesting that Mr Ncala cannot use the swimming pool and the issue with the guide dog may not be directly relevant to the issue. However, I do believe that the caretaker's conduct of screaming at Mr Ncala about the alterations is relevant to some extent.

[228] It was clearly so that Mr Ncala had breached the Conduct Rules. I accept that when the caretaker took this up with Mr Ncala for the first time, that she may well have not been aware of his visual impairment. This does not, however, excuse her conduct. The Conduct Rules provide a mechanism for resolving issues. Conduct of the kind displayed by the caretaker does not make for peaceful co-existence, and employees of body corporates must be minded to conduct themselves with civility and professionalism at all times.

[229] The evidence of the caretaker's alleged treatment of Mr Ncala concerning his use of the pool would also leave one with a sense of unease but that is as far as I can go since there may well be further context and explanation.

[230] The issue involving the guide dog is an example of able-bodied people not having been exposed to challenges faced by persons with disabilities. No blame can be attached. What is required is a process of education. This process may be led by management but, in the context of complex living, some responsibility also falls on the person who has the disability. As Mr Ncala has stated, he knows what his challenges are. Other people do not. Mr Ncala cannot expect that everyone with whom he comes into contact is aware of his visual impairment and is cognisant of what this means for him. To some extent Mr Ncala's behaviour to the Body Corporate appeared to involve some aggression on his part, and this did not assist matters.

[231] What also did not assist matters were the vitriolic attacks by Mr Ncala and his attorneys on the Body Corporate especially their accusations of racism. It is regrettable that aspects of this dispute were characterised by Mr Ncala and his attorneys as involving race. The very easy path to accusing someone of racism can be counter-productive at its basic level, and defamatory and even criminal at its higher level. Moreover, a knee jerk resort to accusations of racism might also have the effect of undermining the legitimacy of those cases where racism is clearly shown to exist.

ORDER AND COSTS

[232] For the reasons stated above, including the dismissal of the condonation application, I would therefore dismiss the appeal.

[233] In so far as costs is concerned, the Body Corporate has asked for costs to follow the result. Mr Ncala, on the other hand, submits that he should not have to pay the costs because he sought to protect his constitutional rights and his appeal was not frivolous.

[234] Whilst it may be that Mr Ncala believes he was seeking to protect his constitutional rights he was obliged to demonstrate that the orders which he sought fell within CSOS's powers as set out in section 39. Thus, even if he had been able to demonstrate infringement of his constitutional rights, he would and has not shown an entitlement to the orders themselves.

[235] The dismissal of the application for condonation is also relevant to the question of costs.

[236] I accordingly agree with counsel for the Body Corporate that costs ought to follow the result. Regarding Mr Ncala's application for condonation, however, I make no order as to costs.

[237] I accordingly make the following orders:

(1) Mr Ncala's condonation application dated 13 March 2020 is dismissed.

(2) There is no costs order made in respect of the condonation application.

(3) The appeal is dismissed with costs.

T Ossin AJ

Acting Judge of the High Court

Gauteng Division

I agree:

MMP Mdalana-Mayisela J

Judge of the High Court

Gauteng Division

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Instructed by:	Andraos and Hatchet Inc
Date of Hearing:	12 October 2021
Date of Judgment:	9 May 2022