CSOS APPEALS IN TERMS OF SECTION 57 OF THE CSOS ACT

A COMPREHENSIVE COMMENTARY

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"If you're not confused, you don't know what's going on."

Jack Welch, former Chairman and CEO of General Electric made this timeless statement. And the same statement can be said for the legal landscape for appeals against adjudication orders in terms of s 57 of the Community Schemes Ombud Service Act[1] ("CSOS Act"). It is far from simple, and it is costly.

The reported and unreported case law which has come out of the High Courts of the various provincial divisions, since May 2018, is riddled with contradictions and opposing views from legal counsel and judicial officers across the provincial borders. This confusion was not remedied by CSOS Practice Directives directing members of the public on what court process to follow.

These are the primary reasons why this article is a bit lengthier than usual. So, pour yourself a cup of coffee (or three) before reading further: it's almost a certainty that you will need them. If you only have an *espresso* available, see the chronology and summary of the case law studied in Part 3 of this article, and the table in the conclusionary paragraphs. If you wish to read or refer to only certain Parts, use the table of contents on the cover page and navigate to the specific Part.

The commentary below provides an overview of how to bring an appeal in the different High Court jurisdictions, and assist in distilling questions of law from questions of fact. The summary of the reported and unreported case law studied for this commentary will also highlight the contradictions and differing views mentioned above.

In the process of studying this case law, the number of High Court judges who presided over the hearing of the specific case and delivered their judgment is highlighted, so that the weight of the judgment can be appreciated. It was also important to highlight the specific High Court jurisdiction out of which that judgment originates. This will assist legal practitioners and other stakeholders in the community scheme industry to choose the correct path to appeal (or review), the correct process to do so, and the potentially valid arguments to be ventilated in the specific High Court jurisdiction based on the circumstances of the case at hand, until we have one process to follow across all High Court jurisdictions.

1. SECTION 57 OF THE CSOS ACT

The CSOS Act provides for the right to appeal to the High Court, against an adjudication order if an applicant, the association (community scheme) or any affected party is dissatisfied with the adjudicator's order.[2] The right to appeal is restricted to questions of law only.[3] The appeal must be lodged within 30 days after the date of delivery of the order of the adjudicator.[4] Anyone who does lodge an appeal against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.[5]

In this commentary, we will first deal with the process of lodging an appeal in the different High Court jurisdictions as the case law evolved and was published. We will deal with the case law in chronological order to show how the process has changed. Then, we will deal with the difference between a question of law and a question of fact. The distinction is critical to considering prospects of success in an appeal since the appeal is constrained to questions of law only. From there, we will explore whether an appellant can or cannot be granted condonation by the High Court for the late filing of the appeal if it is filed more than 30 days after the adjudication order is delivered.

The commentary then touches on applications to stay the enforcement of an adjudication order to secure the effectiveness of the appeal, and the question whether this is stay of enforcement is automatic or if a separate High Court application is required to be lodged. Finally, we will also delve into the possibility of the dissatisfied person bringing a judicial review application, instead of an appeal, against the adjudication order or process of adjudication.

[1] Act 9 of 2011.
[2] s 57(1) of the CSOS Act.
[3] s 57(1) of the CSOS Act.
[4] s 57(2) of the CSOS Act.
[5] s 57(3) of the CSOS Act.

2. A BRIEF HISTORY OF THE APPEAL PROCESS: NOTICE OF MOTION OR NOTICE OF APPEAL?

The Early 2018 and 2019 Judgments

The appeal procedure was first debated and discussed in *The Trustees for the time being of the Avenues v Shmaryahu and Another*[6] ("*The Avenues*") when the Cape Town High Court held that it prefers that the appeal is lodged by way of notice of motion with supporting affidavits, and not by way of notice of appeal in terms of the Uniform Rules of Court.[7] The Cape Town High Court also held that the CSOS, the adjudicator, and the registrar of the High Court (if the adjudication order was registered as a court order already) must be cited, in addition to the respondents.[8] This was because no procedure was set out in the CSOS Act by which to bring an appeal to the High Court.[9] Interestingly, the appellant in *The Avenues* delivered a notice of appeal, because at the time, there was no set procedure by which to lodge appeals in terms of s 57 of the CSOS Act. This appears to have been the first opportunity which a High Court had to rule on the question of procedure. Notwithstanding the High Court's view on the process which should be adopted to lodge an appeal of this nature, the court still entertained the appeal because there was no objection to the chosen procedure and there had been an effective notice of appeal.

With reference to *The Avenues*, the Cape Town High Court interpreted an appeal on a question of law to fit more appropriately within a specific category of appeals in terms of *Tikly v Johannes*[10] ("*Tikly"*) and this then persuaded the High Court to adopt the procedure of filing a notice of motion with supporting affidavits when lodging an appeal in terms of s 57 of the CSOS Act.[11]

After *The Avenues*, and before any other judgments were handed down from the High Courts, CSOS published a Practice Directive on Dispute Resolution, in which it provided that a person who is not satisfied with an adjudication order may lodge an appeal in the High Court on a question of law or must follow the review process in terms of the provisions of Rule 53 of the Uniform Rules of Court.[12]

Next came the reported judgment in *Evergreen Property Investments (Pty) Ltd v Messershmidt*[13] ("*Evergreen*"), where the full bench of the Pretoria High Court (two judges presiding) dealt with an appeal on notice of appeal, and not on notice of motion with supporting affidavits. There was no issue taken with the procedure (by either the court or the parties) and therefore there was no ruling in the judgment on the preferred procedure to lodge an appeal in terms of s 57 of the CSOS Act. There was also no mention of *The Avenues* judgment. Likewise, in the unreported judgment of *Waterfall Hills Residents Association NPC v Jordaan and Another*[14] ("*Waterfall Hills*"), the full bench of the Johannesburg High Court (two judges presiding), dealt with an appeal and a cross appeal against a CSOS adjudication order which was delivered by way of notice of appeal and not on notice of motion with supporting affidavits. There was also no opposition to the process of using notice of appeal by either the court or the parties. A practice was developed to lodge these types of appeals by means of notice of appeal in Gauteng.

The Avenues was then followed with approval in the Pietermaritzburg High Court (in Kwazulu-Natal) in the reported judgment of *The Body Corporate of Durdoc Centre v Singh*[15] ("*Durdoc Centre*"), where a full bench (two judges presiding) ruled that the appeal should be lodged by way of notice of motion with supporting affidavits.[16] There was no opposition to the process of delivering the notice of appeal by

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[6] 2018 (4) SA 566 (WCC) (10 May 2018). Accessible at http://www.saflii.org/za/cases/ZAWCHC/2018/54.html.
[7] *The Avenues* para 26.
[8] *The Avenues* para 26.
[9] *The Avenues* para 25.
[10] 1963 (2) SA 588 (T).
[11] *The Avenues* para 25.
[12] Item 34 of Part 8 of Practice Directive No. 2 of 2018, dated 1 August 2018. Accessible at https://www.stsolutions.co.za/wp-content/uploads/2022/12/CSOS-Practice-Directive-No-2-of-2018-1.pdf.
[13] 2019 (3) SA 481 (GP) (10 October 2018). Accessible at http://www.saflii.org/za/cases/ZAGPPHC/2018/786.html.
[14] (A3140/2018) [2018] ZAGPJHC 669 (12 November 2018). Accessible at http://www.saflii.org/za/cases/ZAGPJHC/2018/669.html.
[15] 2019 (6) SA 45 (KZP) (13 May 2019) . Accessible at http://www.saflii.org/za/cases/ZAKZPHC/2019/29.html.
[16] *Durdoc Centre* para 15.

either the court or the parties though, and the appeal was still finalised by the High Court (there are more details on the outcome in the next section).[17]

The Cape Town High Court (one judge presiding) in the reported judgment of *Mineur v Baydunes Body Corporate and Others*[18] ("*Baydunes*") then finalised another appeal against a CSOS adjudication order on notice of motion supported by affidavits as is required in that jurisdiction. No mention was made of *The Avenues* and it is clear from the judgment that the parties followed the notice of motion procedure and exchanged affidavits.[19] A practice was established to lodge these types of appeals by means of notice of motion supported by affidavits in the Western Cape.

The Short-lived CSOS Practice Directive

On 1 August 2019, the CSOS published a Practice Directive, repealing the previous one mentioned above, and in which it purported to prescribe the process or procedure for delivering a CSOS appeal against an adjudication order.[20] The Practice Directive provided, with reference to *The Avenues* that the appeal should be brought by notice of motion supported by affidavits, which should be served on the respondent parties by the sheriff, "until such time as the Full Bench of the High Court has made a determination or order on the process to be followed for Appeals under section 57 of the CSOS Act".[21] The Practice Directive went further to support and repeat much of what was held in *The Avenues*.[22] At the time, the Practice Directive was questionable because it purported to direct how a court process was to be handled in other High Court jurisdictions, which CSOS has no power to do.

This CSOS Practice Directive was short-lived (at least in Gauteng) because in October 2019, the full bench of the Johannesburg High Court (three judges presiding) delivered the reported judgment of *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another* ("*Stenersen*").[23] This full bench judgment held that the appellant should prosecute the appeal in terms of s 57 of the CSOS Act by delivering a notice of appeal in terms of the Uniform Rules of Court, succinctly specifying the grounds of appeal on a question of law only, and not on notice of motion supported by affidavits.[24] There were no questions of law to determine in the matter as the parties settled before the hearing, therefore only the procedure by which to bring appeals was discussed, determined and established by the Johannesburg High Court.[25]

Just before the Covid-19 pandemic, the unreported judgment of *Ward v Body Corporate of San Paulo and Others*[26] ("*San Paulo"*) was delivered by the Port Elizabeth High Court (in the Eastern Cape) (one judge presiding). The appeal in *San Paulo* was lodged on notice of motion with supporting affidavits, following the procedure in *The Avenues*. A practice was seemingly developed in the Eastern Cape to follow this procedure.

The Pandemic Appeals

Deep into the first year of the pandemic, the Cape Town High Court (one judge presiding) delivered the unreported judgment of *Kingshaven Homeowners' Association v Botha and Others*[27] ("*Kingshaven"*). Some of the conflicting decisions on the process to follow to appeal in terms of s 57 of the CSOS Act were discussed in the judgment. It was held that the notice of motion procedure is preferred, *Stenersen* was not followed, and *The Avenues* was reaffirmed in the Cape Town High Court.[28]

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[17] *Durdoc Centre* para 16.
[18] 2019 (5) SA 260 (WCC) (24 May 2019). Accessible at http://www.saflii.org/za/cases/ZAWCHC/2019/59.html.
[19] *Baydunes* paras 20, 28 and footnote 7.
[20] See Practice Directive No 1 of 2019 (also referred to as Version 2 of the Practice Directive on Dispute Resolution), dated 1 August 2019. Accessible at https://www.stsolutions.co.za/wp-content/uploads/2021/06/CSOS-Practice-Directive-No-1-of-2019-Dispute-Resolution-01-Aug-19.pdf.
[21] Item 34.2 of Part 8 of the Practice Directive.
[22] Items 34.2.1 to 34.2.7 of Part 8 of the Practice Directive.
[23] 2020 (1) SA 651 (GJ) (24 October 2019). Accessible here: http://www.saflii.org/za/cases/ZAGPJHC/2019/387.html.
[24] Paras 7, 38 and Order 1(a).
[25] *Stenersen* para 44.
[26] (2127/2018) [2020] ZAECPEHC 1 (28 January 2020). Accessible at http://www.saflii.org/za/cases/ZAECPEHC/2020/1.html.
[27] (6220/2019) [2020] ZAWCHC 92 (4 September 2020). Accessible at http://www.saflii.org/za/cases/ZAWCHC/2020/92.html.
[28] *Kingshaven* para 14.

A few days after *Kingshaven* came another unreported judgment in the case of *Rapallo Body Corporate v Dhlamini NO and Others*[29] ("*Rapallo*") which was also unsurprisingly brought on notice of motion with supporting affidavits.[30]

In the middle of 2021 when the public was probably still confused about which pandemic restrictions were applicable as they changed so often back then, we see that some confusion as to appeal process creeps in at Pietermaritzburg High Court in the matter of *Royal Palm Body Corporate v Vahlati Investments (Pty) Ltd and Another* ("*Royal Palm*").[31] In this reported judgment, the body corporate appealed under the notice of motion process with supporting affidavits (as laid out in *The* Avenues) and then also under the notice of appeal process (as laid out in *Stenersen*).[32] This was not an insurmountable obstacle for the body corporate and court still heard and finalised the appeal as is detailed below because the notice of appeal was simply converted on the same papers to a notice of motion with supporting affidavits.[33]

Later that same year, in July 2021, the Cape Town High Court appears to have heard an appeal against a CSOS adjudication order on notice of appeal and not on notice of motion with supporting affidavits as was prescribed by *The Avenues* and then later reaffirmed in *Kingshaven*. The reported judgment of *Prag N.O and Another v Trustees for the time being of the Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body Corporate and Others*[34] ("*Mitchell's Plain Industrial Enterprises*") was for a hearing before two judges presiding, which at first glance implied that the case was heard on notice of appeal rather than on notice of motion with supporting affidavits. However, the court clarifies that the appellant had lodged a notice of motion with supporting affidavits.[35]

Back to the Midlands, we see the notice of motion procedure being adopted in an initial appeal to the Pietermaritzburg High Court, and then that decision of the High Court appeal (one judge presiding) was taken on a further appeal to the full bench (three judges presiding) of the High Court. This occurred in the reported judgment of *Derby Downs Management Association v Assegaai River Properties (Pty) Ltd and Another*[36] ("*Derby Downs*").

A few weeks later, the Pietermaritzburg High Court handed down the unreported judgment in *Ellis v Trustees of Palm Grove Body Corporate and Others*[37] ("*Palm Grove*") wherein the full bench of that High Court was tasked with determining whether to adopt the procedure in *The Avenues* and *Kingshaven* requiring the appellant to file a notice of motion with supporting affidavits, or to adopt the procedure as laid down in *Stenersen* requiring the parties to file a notice of appeal succinctly setting out the grounds of appeal.[38] The full bench of the Pietermaritzburg High Court in *Palm Grove*, after considering all the relevant cases, held that while it was not concerned with the procedure to be followed in lodging an appeal in terms of s 57 of the CSOS Act, it found no difficulties in adopting the procedure as set out in *The Avenues*.[39]

As the Johannesburg High Court's full bench *Stenersen* judgment had not persuaded the Western Cape, the Eastern Cape, or Kwazulu-Natal High Courts, in the unreported judgment of *Doornhoek Equestrian Estate Home Owners Association v Community Schemes Ombud Service and Others*[40] ("*Doornhoek (1)*"), the Pretoria High Court was faced with some unsuccessful arguments that *Stenersen* was not binding in Pretoria.[41] The Pretoria High Court rejected these arguments and held that *Stenersen* was binding on it and that the notice of appeal process should be followed in the Pretoria High Court as in the Johannesburg High Court.[42] Having said that, the appellants launched the appeal by way of notice

[29] (12572/2019) [2020] ZAWCHC 97 (10 September 2020). Accessible at http://www.saflii.org/za/cases/ZAWCHC/2020/97.html.
[30] *Rapallo* paras 13, 24, 35, 44 and 45.
[31] 2021 (5) SA 632 (KZP) (1 June 2021) . Accesible at http://www.saflii.org/za/cases/ZAKZPHC/2021/28.html.
[32] *Royal Palm* paras 7 and 8.
[33] *Royal Palm* para 12.
[34] 2021 (5) SA 623 (WCC) (16 July 2021). Accessible at http://www.saflii.org/za/cases/ZAWCHC/2021/132.html.
[35] See footnote 17 read with paragraph 26.
[36] 2022 (2) SA 71 (KZP) (12 November 2021). Accessible at http://www.saflii.org/za/cases/ZAKZPHC/2021/91.html.
[37] (2293/2020P) [2021] ZAKZPHC 97 (7 December 2021). Accessible at http://www.saflii.org/za/cases/ZAKZPHC/2021/97.html.
[38] *Palm Grove* para 4.
[39] *Palm Grove* paras 10 and 11.
[40] (32190/21) [2022] ZAGPPHC 153 (8 March 2022). Accessible at http://www.saflii.org/za/cases/ZAGPPHC/2022/153.html.
[41] *Doornhoek (1)* para 9.
[42] *Doornhoek (1)* para 9.

of motion with supporting affidavits, and not by way of notice of appeal as required in *Stenersen*. The appellants first applied for and obtained an urgent order staying the effect of the adjudication order pending the appeal which was also launched on application (notice of motion), and then filed a notice of appeal and record long after the close of pleadings and the after being granted the urgent order (probably when the appellants realised that the notice of motion procedure was potentially incorrect in the Pretoria High Court, because of *Stenersen*).[43] The Pretoria High Court held that the delivery of the notice of appeal and record so late was prejudicial to the respondents and was set aside.[44] The appellant then launched a leave to appeal application against this order and in the unreported judgment of *Doornhoek Equestrian Estate Homeowners Association v The Community Schemes Ombud Service and Others*[45] ("*Doornhoek (2)*") a few months later, leave to appeal was granted to the full bench of the Pretoria High Court on the question whether striking out the notice of appeal was correct. We await the hearing and judgment of the full bench in that further appeal.

The Pretoria High Court then handed down the judgment of *Ncala v Park Avenue Body Corporate*[46] ("*Park Avenue*") which is marked reportable but cannot yet be found anywhere online or in the law reports.[47] In this appeal (two judges presiding), the appellant delivered a notice of appeal, as is correct in this jurisdiction.[48] While the Pretoria High Court dismissed the application for condonation for the late filing of the appeal against CSOS which is discussed below in Part 4, there were some additional interesting remarks made by the judges regarding the power of CSOS to grant some of the orders sought by the appellant (these are also discussed below in Part 3).

Back to the Cape Town High Court, we see in *Trustees of Alessio Body Corporate v Cottle and Others*[49] ("*Alessio*") that despite the prevailing case law in that jurisdiction (*The Avenues* and *Kingshaven*) requiring a notice of motion with supporting affidavits, the appellants brought the appeal by way of notice of appeal.[50] As a result the appeal was struck from the roll.[51]

The Johannesburg High Court (two judges presiding) had another opportunity to discuss and debate some of the above case law, directly with CSOS, who joined these proceedings, when the High Court was faced with an appeal against a CSOS adjudication order in the unreported case of *Raschid and Another v Lenasia Tamil Association Body Corporate and Others*[52] ("*Lenasia Tamil Association*"). In *Lenasia Tamil Association*, we see CSOS unsuccessfully attempting to convince the High Court that *Stenersen* was wrong and to adopt the notice of motion procedure adopted by the other High Court jurisdictions.[53] While a bold step by CSOS, it remains to say that only the Supreme Court of Appeal ("the SCA") is going to be in a position to overturn *Stenersen* and adopt the procedure as laid down in *The Avenues* and *Kingshaven*, or *vice versa*, if the question in an appropriate case is put to the SCA.

There are vastly different procedures across the High Court divisions and this alone may be a way to petition the SCA to pave the way for litigants and legal practitioners to clearly understand what procedure to follow to appeal against a CSOS adjudication order, if a given case is destined for a further appeal.

Notably, in the recent unreported judgment of the Cape Town High Court (two judges presiding) in the matter of *Baxter v Ocean View Body Corporate and Others*[54] ("*Ocean View*") the reason for the late filing of the appeal against the adjudication order was stated to have been the conflicting decision in *Stenersen* in relation to the acceptable manner in which to bring an appeal against a CSOS adjudication

[43] *Doornhoek (1)* paras 8 and 9.
[44] *Doornhoek (1)* para 16.
[45] (32190/21) [2022] ZAGPPHC 455 (1 July 2022). Accessible at http://www.saflii.org/za/cases/ZAGPPHC/2022/455.html.
[46] Case Number A3029/2019 (9 May 2022). Accessible at https://www.stsolutions.co.za/wp-content/uploads/2022/12/Ncala-v-Park-Avenue-Body-Corporate-9-May-22-Johannesburg-High-Court.pdf. For another brief synopsis of this judgment, you can review *New Clarifications on Appeals against CSOS Adjudication Orders*.
[47] The judgment was obtained directly from the respondent's attorneys.
[48] Para 13.
[49] (A38/2022) [2022] ZAWCHC 233 (15 August 2022). Accessible at http://www.saflii.org/za/cases/ZAWCHC/2022/233.html.
[50] *Alessio* para 12.
[51] *Alessio* para 24.
[52] (A3048/2021) [2022] ZAGPJHC 649 (6 September 2022). Accessible at http://www.saflii.org/za/cases/ZAGPJHC/2022/649.html.
[53] *Lenasia Tamil Association* paras 9 to 16.
[54] (A170/2022) [2022] ZAWCHC 234 (16 November 2022). Accessible at http://www.saflii.org/za/cases/ZAWCHC/2022/234.html.

order in terms of s 57 of the CSOS Act.[55] The appeal in *Ocean View* was brought on notice of motion in accordance with *The Avenues*.[56] More on *Ocean View* in Part 4 below.

Lastly, in the recent case of *Rampul v Trustees of Mangrove Beach Centre Body Corporate and Others*[57] ("*Mangrove Beach Centre*"), the unsatisfied party used the notice of motion with supporting affidavits procedure, following previous cases in Pietermaritzburg High Court in line with *The Avenues*.[58] The same notice of motion with supporting affidavits procedure was used in the Free State High Court case of *Kobi v Trustees For The Time Being Of The De La Rey Body Corporate and Others* ("*The De La Rey*").[59]

In one appeal judgment, recently concluded, in which a CSOS adjudication order was challenged in the Johannesburg High Court (and heard before a full bench on 16 August 2022), *Gonen v Trustees for the time being of The Melville Body Corporate and Others*[60] ("*The Melville*"), the appellant proceeded by way of notice of appeal as required in *Stenersen*. Now, that the appeal judgment has been delivered, it is insightful reading when juxtaposed with the above judgments, and for the further reasons set out in Part 3 below due to the extensive grounds of appeal that were tested. Since the appellant was successful in the Johannesburg High Court, it is unlikely that the body corporate will appeal further to the SCA. If a further appeal to the SCA is made by the body corporate, the SCA would be presented with the much-needed opportunity to commit the High Courts across the country to the same procedure by which to appeal against CSOS adjudication orders, instead of having these conflicting judgments. We are all still desperate for some clarity.

When it comes to the question whether one or two judges should hear an appeal against a CSOS adjudication order, from the case law we see that where the procedure utilised is notice of motion with supporting affidavits, usually one judge presides. Where a notice of appeal process is used, two judges preside. In the unreported *De Nys Vervoer (NV) v De Kock NO and Others*[61] ("*De Nys*") this issue was discussed (albeit in relation to "circuit courts").[62] Section 14(3) of the Superior Courts Act[63] provides that for the hearing of any appeal the High Court must be constituted by two judges. Since *the Avenues* and *Kingshaven* argue that the appeal in terms of s 57 of the CSOS Act is not an ordinary civil appeal within the meaning provided in the Superior Courts Act, it was argued but not decided in *De Nys*, that there is no bar to a single judge hearing such an appeal.[64] In practice, reviews are also heard by two judges but the case law mentioned above and summarised in the table in Part 3, illustrates that this is not always the case and some of the cases (including judicial reviews as discussed in Part 6) are heard by a single judge.

Therefore, at this stage, it is also unclear whether a single judge or two judges ought to be presiding over appeals in terms of s 57 of the CSOS Act, and in respect of judicial reviews. In Gauteng, because the notice of appeal procedure is utilised, two judges usually preside.[65] In the Western Cape and other jurisdictions where notice of motion with supporting affidavits is used, one judge usually presides.[66]

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[55] *Ocean View* para 10.
[56] *Ocean View* para 3.
[57] (9823/2022P) [2022] ZAKZPHC 81 (15 December 2022). Accessible at http://www.saflii.org/za/cases/ZAKZPHC/2022/81.html.
[58] *Mangrove Beach Centre* paras 11 and 12.
[59] (A68/2022) [2023] ZAFSHC 128 (14 April 2023). Accessible at http://www.saflii.org/za/cases/ZAFSHC/2023/128.html.
[60] (A3025/2022) ZAGPJHC. Accessible at https://www.stsolutions.co.za/wp-content/uploads/2023/05/Gonen-v-Trustees-for-the-Time-Being-of-the-Melville-Body-Corporate-and-Others-26-Apr-23-Johannesburg-HC.pdf.
[61] (19662/18) [2018] ZAWCHC 178 (18 December 2018). Accessible at http://www.saflii.org/za/cases/ZAWCHC/2018/178.html.
[62] *De Nys* paras 14 to 18.
[63] Act 10 of 2013.
[64] *De Nys* paras 16 to 19.
[65] See *Evergreen, Waterfall Hills*, *Park Avenue*, *Lenasia Tamil Association*, and *The Melville*. The exception was *Stenersen* where a full bench of three judges presiding as directed by the Judge President.
[66] See *Baydunes*, *San Paulo*, *Kingshaven*, *Rapallo*, *Royal Palm*, and *Mangrove Beach Centre*. Some notable exceptions are: *The Avenues* (two judges presided but that seems to be because the appellant used the notice of appeal process, notwithstanding that the judgment concluded that notice of motion with supporting affidavits should be utilised); *Durdoc Centre* (two judges presided but this was also because the notice of appeal procedure was used; *Mitchell's Plain Industrial Enterprises* and *Ocean View* (two judges presided despite this matter being an appeal in terms of s 57 of the CSOS Act and brought to the Cape Town High Court on notice of motion supported by affidavits); and *The De La Rey* (two judges heard the appeal brought by notice of motion supported by affidavits).

It must also be noted that CSOS has, at various levels and on various platforms, intimated its intention to proposed amendments to the prevailing legislation to incorporate a new internal appeal process within CSOS itself (to say, three adjudicators). This would be a welcome amendment, if the adjudication and appeal process was not unreasonably prolonged, and if the appeal adjudicators are competent and skilled in this arena so as to avoid poor decisions. Furthermore, when the amendment does come to fruition it must be specifically stated whether the internal appeal to the panel of three adjudicators must be done by an unsatisfied party before going to the High Court, or whether they can still proceed to the High Court without first obtaining an outcome in the potentially proposed internal appeal process.

Having briefly traversed the historical path of appeals brought in terms of section 57 of the CSOS Act across the High Court jurisdictions between 2018 and 2022, each of the cases and the relevant questions of law dealt with, as well as the outcomes of those cases, are tabulated below in Part 3.

3. LAW OR FACT? WHAT IS THE QUESTION?

In *Mangrove Beach Centre*, the High Court explained that "a question of fact usually calls for proof while a question of law usually calls for argument"[67]

One useful judgment to study regarding the distillation of questions of law from questions of fact is *Kingshaven*. If one thing is for certain, it is "difficult to distinguish the factual questions from the legal ones in a case."[68] In appeals on questions of law only (such as appeals in terms of section 57 of the CSOS Act) the appeal court will not revisit the adjudicator's findings of fact.[69] However, questions of law cannot be decided "in isolation from the facts".[70]

What may assist further is the table set out below which provides summaries of the abovementioned cases and the questions of law and fact dealt with in each of the cases, as well as the outcomes. Each question of law considered by these High Courts, could be categorised as either an interpretation exercise (in respect of a contract, rules, a policy or applicable statutory provision or regulation) or as a jurisdictional issue (the extent of the statutory powers bestowed on CSOS and its adjudicators). Where there was no question of law found or where the outcome of the CSOS Appeal was unsuccessful, the brief reasoning and outcome is also provided in summary below with a few comments.

Case, Date of Judgment and Category	Court, Number of Judges, and Procedure	Questions of Law	Outcome and Comments
1. *The Avenues*	Cape Town High Court	The person making the claim in the application was no longer a member of the body corporate and therefore they had no material interest in the scheme any longer.[71]	Appeal was upheld, and order of the adjudicator was set aside.[72]
10-May-18	Two judges presiding		
Jurisdictional issues	By notice of appeal, but held that notice of motion with supporting affidavits is preferred	CSOS had no jurisdiction and the adjudicator's order was held to be beyond his powers and legally incompetent (even if CSOS had jurisdiction) because CSOS cannot order an adjustment to a previous	

[67] *Mangrove Beach Centre* para 1. The honourable judge quoted C Morris 'Law and Fact' (1942) 5 Harvard Law Review 1303 at 1304.
[68] *Kingshaven* para 18.
[69] *Kingshaven* para 18.
[70] *Kingshaven* para 18.
[71] *The Avenues* para 29.
[72] *The Avenues* para 31.

		owner's liability in respect of contributions as this must be determined by the registered participation quota. Such a ruling would be in conflict with the registered participation quotas.	
2. ***Evergreen*** 10-Oct-18 Jurisdictional issues and interpretation exercises	Pretoria High Court Two judges presiding Notice of appeal	The adjudicator had no power to order a repayment of a rates rebate to a Life Right Owner in the scheme.[73] The issue was not a financial issue which fell within the scope of section 39(1) of the CSOS Act.[74]	Appeal upheld, and order of the adjudicator was set aside.[75]
3. ***Waterfall Hills*** 12-Nov-18 Interpretation exercises	Johannesburg High Court Two judges presiding Notice of appeal	The adjudicator's order was against the association but no relief was sought against the association.[76] The conclusions arrived at by the adjudicator involved interpretation of documents and therefore these were points of law.[77] "The interpretation of a document is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses."[78]	Appeal and cross appeal were upheld, and the order of the adjudicator was set aside and replaced with a new order, compelling a unit owner to remove a koi pond.[79]
4. ***Durdoc Centre*** 13-May-19 Interpretation exercises	Pietermaritzburg High Court Two judges presiding Notice of appeal, but held that notice of motion with supporting	The applicant was the manager of the unit owner (a company).[80] The applicant was not the company itself. The adjudicator did not make a finding on *locus standi* and ought to have.[81]	Appeal upheld, and order of the adjudicator was set aside.[83]

[73] *Evergreen* para 27.
[74] *Evergreen* para 30.
[75] *Evergreen* para 35.
[76] *Waterfall Hills* para 3.
[77] *Waterfall Hills* para 17 .
[78] *Waterfall Hills* para 22 . Quoting *KPMG v Securefin Ltd* 2009 (4) SA 399 SCA, at paras 39 and 40.
[79] *Waterfall Hills* para 29.
[80] *Durdoc Centre* para 3.
[81] *Durdoc Centre* para 12.
[83] *Durdoc Centre* para 18.

	affidavits is preferred as per *The Avenues*	The applicant was not a unit owner and did not have a material interest in the scheme.[82]	
5. ***Baydunes*** 24-May-19 Interpretation exercises	Cape Town High Court One judge presiding Notice of motion with supporting affidavits	The applicant sought a declarator that s 13(1)(g) of the Sectional Titles Schemes Management Act[84] ("the STSMA") applied to certain conversions of garages, that the adoption of a conduct rule at a meeting was invalid, and that some special resolutions purportedly adopted at that same meeting were invalid.[85] The meaning ascribed to the word "section" in s 13(1)g) and whether the correct procedure was followed to adopt special resolutions are questions of law which were at the heart of the dispute.[86]	Appeal upheld, and order of the adjudicator was partly set aside.[87]
6. ***San Paulo*** 28-Jan-20 No question of law	Port Elizabeth High Court One judge presiding	"A fact is the event that has led to litigation while law refers to actual rules that decide how the facts will be viewed by court. If facts of a case fall within the law or regulation, it is a question of fact. Interpretation and scope of law on the other hand is a question of law. Clearly, the matter which is raised on appeal by applicant is not on a point of law but based on factual findings."[88] There was a dispute of fact that could not be resolved on the papers.[89]	Application dismissed.[91]

[82] *Durdoc Centre* para 16.
[84] Act 8 of 2011.
[85] *Baydunes* para 6.
[86] *Baydunes* para 8.
[87] *Baydunes* para 54.
[88] *San Paulo* para 7(iii).
[89] *San Paulo* para 7(vii).
[91] *San Paulo* para 9.

		The applicant raised additional and new issues which were not placed before the adjudicator.[90]	
7. ***Kingshaven*** 4-Sep-20 Jurisdictional issues	Cape Town High Court One judge presiding Notice of motion with supporting affidavits	Adjudicator had no jurisdiction to interdict the homeowner from parking in the visitor's parking bays.[92]	Appeal dismissed, and interdict prohibiting the homeowner from parking in the visitor's parking was granted.[93]
8. ***Rapallo*** 10-Sep-20 Interpretation exercises	Cape Town High Court One judge presiding Notice of motion with supporting affidavits	There were multiple misdirections on the law and certain facts necessary to be determined were not determined by the adjudicator.[94] Question whether a trustee resolution was required for fines already imposed in terms of the rule.[95] Question whether a special resolution was required for the conditions for building works to be imposed if the discretion of the trustees was already confirmed.[96]	Appeal upheld and matter referred back to CSOS for determination afresh.[97]
9. ***Royal Palm*** 1-Jun-21 Interpretation exercises	Pietermaritzburg High Court One judge presiding Notice of motion with supporting affidavits, and also notice of appeal	Question was which rules applied and whether a former developer was now just an owner since there was no longer any land to develop.[98] Questioned the power of the adjudicator to invalidate an old rule which was inconsistent with the new rules.[99]	Appeal upheld, and order of the adjudicator was set aside.[100]
10. ***Mitchell's Plain***	Cape Town High Court Two judges presiding	Adjudicator did not have the jurisdiction to entertain	Appeal dismissed.[102]

[90] *San Paulo* para 7(viii).
[92] *Kingshaven* para 7.
[93] *Kingshaven* para 54.
[94] *Rapallo* paras 25 to 26, 31 to 34, and 41.
[95] *Rapallo* paras 20 and 36.
[96] *Rapallo* paras 22 to 24, 31 and 32.
[97] *Rapallo* paras 48.
[98] *Royal Palm* paras 16 to 22.
[99] *Royal Palm* paras 31 to 41.
[100] *Royal Palm* para 52.
[102] *Mitchell's Plain Industrial Enterprises* para 35.

Industrial Enterprises 16-Jul-21 Jurisdictional issues	Notice of motion with supporting affidavits	a dispute for delictual damages.[101]	
11. ***Derby Downs*** 12-Nov-21 Interpretation exercises	Pietermaritzburg High Court Three judges presiding Notice of motion with supporting affidavits to the High Court, and then on further appeal to the full bench	The question was whether the ratification of a prior decision of the directors of the homeowners association was valid in law, some 20 years after the decision was purportedly taken.[103]	Appeal against court *a quo*'s order was granted, and therefore appeal against adjudicator's order was dismissed.[104]
12. ***Palm Grove*** 7-Dec-21 Jurisdictional issues	Pietermaritzburg High Court Three judges presiding Originally brought by way of notice of appeal, but court held that it prefers notice of motion with supporting affidavits	Adjudicator did not have the jurisdiction to order damages.[105] The adjudicator's order was not one of the reliefs to be granted under the provisions of s 39 of the CSOS Act.[106]	Appeal upheld, and order of the adjudicator was set aside.[107]
13. ***Park Avenue*** 9-May-22 Jurisdictional issues	Pretoria High Court Two judges presiding Notice of appeal	Adjudicators do not have the power to make orders of a general nature which are not explicitly referenced in s 39 of the CSOS Act.[108] The declaratory order sought by the unit owner was also not a further order which the Chief Ombud had proposed.[109] The adjudicator is not empowered to make an order to replace the unit	Condonation application for the late filing of the appeal was dismissed.[112] Appeal also dismissed.[113]

[101] *Mitchell's Plain Industrial Enterprises* paras 27 to 29.
[103] *Derby Downs* paras 20 to 27.
[104] *Derby Downs* para 44.
[105] *Palm Grove* para 15.
[106] *Palm Grove* para 17.
[107] *Palm Grove* para 18.
[108] *Park Avenue* para 208.
[109] *Park Avenue* para 208.
[112] *Park Avenue* paras 122 to 154, and 232.
[113] *Park Avenue* para 232.

		owner's washing machine.[110] An adjudicator is not empowered to make an order in vague terms such that the body corporate must act reasonably.[111]	
14. ***Alessio*** 15-Aug-22 Could have been an interpretation issue, but the appeal was struck from the roll.	Cape Town High Court Two judges presiding Notice of appeal, instead of notice of motion with supporting affidavits as required in this High Court jurisdiction.	No questions of law were dealt with by the High Court.	Appeal struck from the roll as the appeal should have been on notice of motion and not on notice of appeal.[114]
15. ***Lenasia Tamil Association*** 6-Sep-22 No question of law, jurisdictional issue.	Johannesburg High Court Two judges presiding Notice of appeal	No evidence that the adjudicator either misconstrued the enabling provisions of the Act or misapplied them, other than having provided no or inadequate reasons.[115] If the body corporate is being billed on an incorrect tariff by the local municipality in respect of municipal rates or services, it is not something that the adjudicator has jurisdiction over.[116]	Appeal dismissed.[117]
16. ***Ocean View*** 16-Nov-22 Interpretation issue	Cape Town High Court Two judges presiding Notice of motion with supporting affidavits	On the merits, the adjudicator had erred in failing to recognise the distinction between levy contributions to maintain exclusive use areas and that the conduct rules must be amended to ensure that the holders of exclusive use rights maintain those areas.[118] If the latter is adopted, such as in this	Appeal upheld, and order of the adjudicator was set aside, and replaced.[120] It was held that it was not for the court to decide what the levy contribution should be which Is not contained in, or covered by, the unit owner's

[110] *Park Avenue* paras 212 to 217.
[111] *Park Avenue* paras 218 to 225.
[114] *Alessio* paras 22 and 24.
[115] *Lenasia Tamil Association* para 29.
[116] *Lenasia Tamil Association* paras 34 to 35.
[117] *Lenasia Tamil Association* para 38.
[118] *Ocean View* paras 18 and 19.
[120] *Ocean View* para 20.

		case, then the body corporate would not also be entitled to levy a contribution for the same purpose.[119]	responsibility in the applicable conduct rule.[121]
17. ***Mangrove Beach Centre*** 15-Dec-22 Interpretation exercises	Pietermaritzburg High Court One judge presiding Notice of motion with supporting affidavits	The High Court held that the adjudicator erred in concluding that the matter was *res judicata* because the specific issue had not already been determined by another court.[122] The unit owner argued that certain rules were unreasonable and invalid as they unfairly discriminated against residential unit owners in favour of commercial unit owners.[123] It was held that the rules giving commercial unit owners a greater weighted vote were not unreasonable or iniquitous, were not unconstitutional and were reasonable.[124] The developer was permitted to make such rules when opening the sectional title register in terms of the Sectional Titles Act 95 of 1986 (which applied then) and also in terms of the Sectional Titles Schemes Management Act 8 of 2011.[125]	Appeal was dismissed.[126]
18. ***The De La Rey*** 14-Apr-23 Jurisdictional issue challenged	Free State High Court Two judges presided Notice of motion with supporting affidavits	Adjudicator found that CSOS had no jurisdiction even though the applicant applied for relief in terms of s39(1)(c) of the CSOS Act in respect of financial issues.[127]	The court held that the CSOS clearly had jurisdiction and therefore the adjudication order was set aside.[129]

[119] *Ocean View* para 19.
[121] *Ocean View* para 19.
[122] *Mangrove Beach Centre* paras 6 to 8.
[123] *Mangrove Beach Centre* para 14.
[124] *Mangrove Beach Centre* paras 31, 32 and 40 to 48.
[125] *Mangrove Beach Centre* paras 23 to 26.
[126] *Mangrove Beach Centre* para 49.
[127] *The De La Rey* para 12.
[129] *The De La Rey* paras 12 and 13.

		Specifically, the dispute concerned financial issues of "an order declaring that a contribution levied on owners is incorrectly determined or unreasonable" as contemplated in s 39(1)(c) of the CSOS Act.[128]	The matter was remitted to the CSOS in order to refer the application, together with any submissions thereto, to a different adjudicator to convene and conduct an adjudication *de novo*.[130]
19. ***The Melville*** 26-Apr-23 Interpretation exercises and jurisdictional issues challenged	Johannesburg High Court Two judges presided Notice of appeal	Some of the noteworthy questions of law forming the grounds of appeal were as follows: The question of the validity of a trustee resolution which had the effect of altering, or being in conflict with, an existing conduct rule of the body corporate. Whether an ordinary resolution of the members in general meeting was enough to validate the trustee resolution which had the effect of altering, or being in conflict with, an existing conduct rule of the body corporate. The validity of some of the conduct rules were challenged on the basis that they had not been approved and certified by CSOS and because the rules allowed the trustees to make rules without following the required procedure to have them adopted by special resolution of the body corporate. Furthermore, the appellant sought an order directing that the conduct rules of the Body Corporate be submitted to CSOS and that CSOS respond with a certification or rejection of same in terms of CSOS's	The court ruled that the adjudicator's decision was incorrect and should be set aside. It held that the security protocol was indeed a conduct rule, and that the trustees had no power to unilaterally adopt, implement, and enforce it without the body corporate's approval in general meeting (by special resolution – to amend a conduct rule).[131] Moreover, the court declared the security protocol invalid and ordered the body corporate to approve and record a new scheme governance provision in order to remove it.[132]

[128] *The De La Rey* para 13.
[130] *The De La Rey* para 15.3.
[131] *The Melville* paras 57 and 58.
[132] *The Melville* paras 58 and 70.

		quality assurance processes as contained in its Circular of 2018.	

Having journeyed through the legal landscape of case law pertaining to appeals against CSOS adjudication orders as set out in the history and summaries above, we now turn to the prospects of success of making an application for condonation for the late filing of an appeal against a CSOS adjudication order in terms of s 57 of the CSOS Act.

4. PROSPECTS OF SUCCESS IN APPLICATION FOR CONDONATION FOR THE LATE FILING OF AN APPEAL

The CSOS Act does not provide a express statutory right to apply for condonation for the late filing of the appeal against a CSOS adjudication order.

The first time that we see condonation for the late filing of an appeal in terms of s 57 of the CSOS Act being dealt with by a court is in *Durdoc Centre*. The appellant noted the appeal more than 30 days after the adjudication order was delivered, applied for condonation, which was not opposed and condonation was therefore granted.[133] Nothing more was said about condonation in *Durdoc Centre*.

In the matter of *San Paulo* the applicant filed the appeal late and applied for condonation for the late filing of the appeal.[134] The applicant in the case argued that the High Court has inherent jurisdiction to condone the late filing of the appeal when taking into account the interests of justice.[135] The Port Elizabeth High Court in *San Paulo* appeared accepting of this argument that the High Court has an inherent jurisdiction to grant such condonation in the interests of justice, and before exercising this discretion, required a full explanation for the delay relevant to the condonation application.[136] And the other important factor that the court considered was prospects of success.[137] The applicant had not fully explained the entire period of the delay to the satisfaction of the High Court.[138] Prospects of success were low because there was no question of law to consider on appeal, and there was also no record to assess the merits of the appeal.[139] As a result, the application was dismissed.[140]

Subsequently, in the unreported judgment of *Body Corporate of the Chelston Hall Sectional Title Scheme v Mohamed and Others*[141] ("*Chelston Hall*"), the Johannesburg High Court was faced with a leave to appeal application against an order dismissing the appeal against an adjudicator's order.[142] The High Court held that the application appealing against the adjudication order was not lodged within the time period prescribed by s 57 of the CSOS Act, and the applicant had not established a basis for condonation for the late filing thereof.[143] The first respondent took issue with the late failing of the application and the applicant failed to amend its notice of motion or supplement its founding affidavit to request condonation and explain the basis for such a request, and also failed to launch a separate condonation application.[144] The High Court was therefore unable to grant condonation without an application for condonation setting out a full explanation for the late delivery of the appeal.[145] As a result, the application for leave to appeal was dismissed.[146]

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[133] *Durdoc Centre* para 2.
[134] *San Paulo* para 6 (iii).
[135] *San Paulo* para 6 (iii).
[136] *San Paulo* para 7(iv).
[137] *San Paulo* para 7(iv).
[138] *San Paulo* paras 7(v) and (vi).
[139] *San Paulo* paras 7(vii) and (ix).
[140] *San Paulo* paras 8 and 9.
[141] (18/29890) [2021] ZAGPJHC 843 (28 June 2021). Accessible at http://www.saflii.org/za/cases/ZAGPJHC/2021/843.html.
[142] *Chelston Hall* para 1.
[143] *Chelston Hall* para 2.
[144] *Chelston Hall* paras 12 and 13.
[145] *Chelston Hall* para 17.
[146] *Chelston Hall* para 25.

In *Doornhoek (1)* after the notice of appeal was lodged late, the respondents took issue with it and the High Court set aside the notice of appeal and record as an irregular step.[147] Leave to appeal against this ruling was then granted in *Doornhoek (2)*, as mentioned above, so we now await *Doornhoek (3)* which might give us more insight into the High Court's reasons pertaining to late appeals in terms of s 57 of the CSOS Act.

The *Park Avenue* judgment was the first full analysis by a High Court pertaining to the question of whether or not the High Court has inherent jurisdiction to condone the late filing of an appeal lodged outside of the prescribed time period of 30 days as contained in s 57 of the CSOS Act.[148] After an analysis of prevailing case law and statutes on the statutory imposition of time limits for instituting proceedings in the High Court, it was held by the Pretoria High Court (two judges presiding) that with regard to the CSOS Act as a whole (the purpose for which is to resolve disputes expeditiously, without unnecessary delays) that there is no "residual power to condone non-compliance with an appeal lodged out of time".[149] The High Court further held that:

> *"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."*[150]

On the other hand, in the recent unreported judgment of *Ocean View*, mentioned above, the Cape Town High Court held a different view. *Ocean View* was also followed in *The De La Rey*, out of the Free State High Court. The *Park Avenue* judgment was not mentioned in the *Ocean View* or *The De Lay Rey* judgments, and therefore it appears that the Cape Town and Free State High Courts were unaware of it. Had these courts been aware of the judgment, the High Court would have dealt with it. The Cape Town High Court and Free State High Courts in *Ocean View* and *The De La Rey* held that an express provision of the statutory instrument may imply that condonation is possible, depending on the construction and context of that provision.[151] It was also held that it was not within the objects of the CSOS Act to treat the appeal time limit as an expiry period because then bad decisions would be irremediable.[152] It was not mentioned, however, that in such cases of an unsatisfied party being late in lodging an appeal, an application for judicial review may be appropriate, and thus still provide opportunity to ensure that a potentially wrong decision does not remain in force.[153] Therefore, the Cape Town High Court, and the Free State High Court have concluded that the High Courts do have the power to condone non-compliance with the statutory time limit within which to file an appeal against a CSOS adjudication order, and that it was, in these cases, in the interests of justice to do so.[154]

The question whether the High Court has inherent jurisdiction or power to condone the late filing of an appeal in terms of s 57 of the CSOS Act, is a constitutional one. In terms of s 173 of the Constitution, taking into account the interests of justice, it has been argued that the High Court has, in all instances, an inherent power to protect and regulate its own process and develop the common law, which includes a power to condone non-compliance with statutory time limits for bringing proceedings to the High Court.[155]

Because there are conflicting decisions between the Pretoria High Court and the Cape Town and Free State High Courts on this question of condonation, it will probably end up in the Constitutional Court someday (unless the legislation is amended to clarify this position in the next round of amendments.[156]

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[147] *Doornhoek (1)* paras 6 and 17.
[148] *Park Avenue* paras 120 to 154.
[149] *Park Avenue* para 142.
[150] *Park Avenue* para 145.
[151] *Ocean View* para 5. *The De La Rey* paras 7 and 8.
[152] *Ocean View* para 7. *The De La Rey* paras 7.3.
[153] See more on judicial reviews of adjudication decisions in Part 6, below.
[154] *Ocean View* para 11. Notably, the delay in launching the appeal was due to the appellant's attorneys thinking that *Stenersen's* notice of appeal procedure was to be adopted and not *The Avenues*' notice of motion procedure, as is required in the Western Cape. See also, *The De La Rey* paras 7 and 8.
[155] *Park Avenue* para 126. The High Courts in *Ocean View* and *The De La Rey* did not consider the constitutional question.
[156] The Constitutional Court recently dealt with the inherent jurisdiction of High Courts in terms of s 173 of the Constitution, in respect of the High Court hearing cases that could have been instituted in the Magistrates' Courts. See the recent, as yet, unreported Constitutional Court case of *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others* (CCT 291/21) [2022] ZACC 43 (9 December 2022), accessible at http://www.saflii.org/za/cases/ZACC/2022/43.html.

If an unsatisfied person lodges an appeal against a CSOS adjudication order, it will need to follow the correct procedure as required in that specific High Court jurisdiction as mentioned above. Lodging the appeal late in Gauteng will probably be fatal given the decision in *Park Avenue*, unless overturned by the Supreme Court of Appeal or the Constitutional Court. If the appeal is lodged late in the Western Cape, condonation may still be successful depending on the circumstances of the case and all relevant factors to be considered by the court.

Once lodged, pending the appeal, a separate process is provided in terms of s 57(3) of the CSOS Act to apply for a stay of the enforcement of the adjudication order pending the appeal. This is also not so simple.

5. APPLICATIONS TO STAY THE ENFORCEMENT OF AN ADJUDICATION ORDER: IS IT AUTOMATIC OR NOT?

In the unreported judgment of *De Nys*, the Eastern Circuit Local Division of the High Court in George, in the Western Cape (one judge presiding), was faced with an application staying the execution of a CSOS adjudication order pending the outcome of an appeal which was lodged against a part of the adjudication order.[157] The application was opposed on the basis that the High Court (sitting as a circuit court) lacked the jurisdiction to grant the order and that the order is not one which that circuit court was competent to make in terms of the provisions of s 57(3) of the CSOS Act.[158] This resulted in a brief debate whether the right of appeal was not merely a right of review since it was limited to a question to law only, and also how many judges would normally hear appeals and reviews.[159] The High Court, however, held that since the pleadings and issues arising therefrom in the application were phrased in interdict terminology, the High Court was inherently empowered to stay proceedings in another matter, pending the determination of a material issue, before another forum.[160] It appears then that the decision was based on the inherent jurisdiction of the High Court to stay these proceedings and not on s 57(3) of the CSOS Act: a parallel solution as it were.

Therefore, in *De Nys* we learn that the applicant could have relied on either the statutory right to apply for a stay of the enforcement of an adjudication order in terms of s 57(3) of the CSOS Act, or could have relied on the power which the High Court has at common law to interdict.[161]

In the unreported judgment of *The Body Corporate of Central Square SS 661/2917 v Beck-Paxton N.O and Others*[162] ("*Central Square 1*"), the Johannesburg High Court (one judge presiding) was faced with an urgent application to stay the effect and enforcement of two adjudication orders. The first adjudication order seemed to oblige the body corporate to hold a meeting to consider some impugned management rules, but was held to be non-sensical as it required a meeting with no effect.[163] As a result, this first adjudication order was stayed pending the outcome of the appeal.[164] The second adjudication order appeared correct and on the face of it there was no *prima facie* right to the interim relief, therefore the application to stay the enforcement of this second adjudication order was dismissed.[165]

Another unreported judgment in *Cliffendale Villas Body Corporate v Mbowane*[166] ("*Cliffendale*") is noteworthy as this was also an application to stay the enforcement of the CSOS adjudication order.[167] The Pretoria High Court (one judge presiding) ruled that application to stay the enforcement of the adjudication order was itself stayed pending the condonation application for the reinstatement of the application for the appeal.[168] It is unclear if this reinstatement application will be favourably concluded because since *Cliffendale* the Pretoria High Court (two judges presiding) has ruled that the High Court

[157] *De Nys* para 1.
[158] *De Nys* paras 3, and 9 to 21.
[159] *De Nys* paras 14 to 17.
[160] *De Nys* para 21.
[161] *De Nys* para 24.
[162] (30916/2021) [2021] ZAGPJHC 783 (2 August 2021). Accessible at http://www.saflii.org/za/cases/ZAGPJHC/2021/783.html.
[163] *Central Square 1* paras 11, 20 and 42.
[164] *Central Square 1* para 45.
[165] *Central Square 1* paras 39 and 45.
[166] (28013/19) [2022] ZAGPPHC 144 (8 March 2022). Accessible at http://www.saflii.org/za/cases/ZAGPPHC/2022/144.html.
[167] *Cliffendale* para 1.
[168] *Cliffendale* paras 2 and 3.

has no power to condone the late filing of a CSOS appeal, as mentioned above.[169] Whether that is the same as an application for reinstatement of an appeal launched within time but not prosecuted remains to be seen. It is submitted that the High Court will have inherent powers to reinstate the appeal if it was not prosecuted timeously for good cause, but was still lodged within the 30 day statutory time period (at least in Gauteng, as the applicant may still be successful with a condonation application in other jurisdictions such as the Western Cape).

In yet another unreported judgment, in the matter of *Conrad v Key West Body Corporate*[170] ("*Key West*") the Pretoria High Court (one judge presiding) was faced with an urgent application to stay the operation of an adjudication order.[171] The question which arose was, whether, despite the provisions of section 57(3) of the CSOS Act, since there was already an appeal lodged against the adjudication order, the enforcement of the adjudication order was automatically suspended s 18(3) of the Superior Courts Act[172].[173] The application was dismissed.[174] But it was also mentioned that the adjudication order under appeal would be automatically suspended pending the outcome of the appeal since the appeal against CSOS adjudication orders is an appeal in the strict sense (at least in Gauteng it is, as per *Stenersen*) and therefore s 18(3) of the Superior Courts Act applied.[175]

Not only appeals against CSOS adjudication orders are possible. The decision of a CSOS adjudicator may also be the subject of an application for judicial review under the common law or under the Promotion of Administrative Justice Act[176] ("PAJA'').

6. JUDICIAL REVIEW INSTEAD OF APPEAL

The Cape Town High Court in *The Avenues* mentioned that the relief available to affected persons in terms of s 57 of the CSOS Act "is closely analogous to that which might be sought on judicial review".[177] This does not mean that the appeal and review are the same. They are not.

It was held in the unreported judgment of the Johannesburg High Court in *Turley Manor Body Corporate v Pillay and Others*[178] ("*Turley Manor"*) that an application for judicial review is not magically limited, or removed from the rights of applicants, just because of the presence of their additional and limited right of appeal in terms of s 57 of the CSOS Act.[179]

Turley Manor dealt with a dispute concerning an adjudication order in terms of s 39(1)(c) of the CSOS Act to declare that a contribution levied on owners or occupiers was incorrectly determined or unreasonable, and an order was sought for the adjustment of the contribution to a correct or reasonable amount.[180] The adjudicator made an order requiring the body corporate to register certain garden areas as exclusive use areas and also to re-evaluate levy calculations for each unit to take into consideration the expanded exclusive use areas.[181] The unsatisfied party in this review was too late to bring an appeal in terms of s 57 of the CSOS Act and opted for an application for judicial review.[182] In differentiating between an appeal and a review, and with reference to the decision in *Stenersen*, the High Court in *Turley Manor* explains that:

> *"The question as to whether an order is reviewable gives rise to issues of considerably broader scope, and then under a different standard of consideration: regularity rather than correctness."*[183]

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[169] See *Park Avenue*.
[170] (55262/2021) [2022] ZAGPPHC 508 (28 June 2022). Accessible at http://www.saflii.org/za/cases/ZAGPPHC/2022/508.html.
[171] *Key West* para 1.
[172] Act 10 of 2013.
[173] *Key West* paras 13 and 14.
[174] *Key West* para 58.1.
[175] *Key West* paras 13, 14 and 20.
[176] Act 3 of 2000.
[177] *The Avenues* para 25.
[178] (10662/18) [2020] ZAGPJHC 190 (6 March 2020). Accessible at https://www.saflii.org/za/cases/ZAGPJHC/2020/190.html.
[179] *Turley Manor* para 24.
[180] *Turley Manor* para 5.
[181] *Turley Manor* para 5.
[182] *Turley Manor* para 6.
[183] *Turley Manor* para 16.

It was also held that:

> *"Whether the adjudicator enjoyed the power to act as he did, or whether he acted fairly or rationally or upon relevant considerations or was biased are all matters that cannot be determined on the basis that the adjudicator made an error of law. Reviewable irregularities almost always depend upon the proof of some facts. Furthermore, grounds of review usually depend upon facts that formed no part of the evidence before the adjudicator. The review may turn upon the interpretation of the empowering provisions under which the adjudicator acts, none of which may have enjoyed any consideration by the adjudicator. These well understood grounds of review cannot be determined on appeal on the basis that the adjudicator made an error of law."*[184]

The right of appeal is limited to a question of law in terms of s 57 of the CSOS Act. This does not result in a limitation of the right of review because the right to lawful, fair and reasonable administrative action is a constitutional right.[185] The right of appeal in terms of s 57 of the CSOS Act is complementary to the right to review recognised in PAJA: the exercise of one does not exclude the other.[186]

As a result of the High Court's analysis in *Turley Manor* confirming the applicant's right to have the adjudicator's decision reviewed, as the adjudicator exercises a public function and the decision is administrative action, it was found that following the conciliation, the parties had, in fact, settled and the matter should never have been referred to adjudication in the first place.[187] The referral to the adjudicator was unlawful since the conciliation succeeded, and the order of the adjudicator was set aside.[188] Even if the referral was lawful, the High Court found that the adjudicator had no power to order the body corporate to register exclusive use areas as that is a decision that must be made by the members in accordance with the requirements of the sectional title laws.[189]

Therefore, affected persons who are unsatisfied with CSOS adjudication orders are not limited to bringing appeals in terms of s 57 of the CSOS Act. Depending on the circumstances of the case, an application for judicial review under PAJA or under the common law is also a viable option. In practice, given the complexities associated with bringing appeals in the various jurisdictions, in terms of s 57 of the CSOS Act on questions of law only, an application for judicial review of the adjudicator's decision may be more appropriate and less costly. Bringing both an appeal in terms of s 57 of the CSOS Act and an application for judicial review may also be necessary.

As highlighted in *Kingshaven*, a double-barrelled approach may be employed by some parties because of the difficulty encountered to determine whether there is a question of law.[190] In *Kingshaven*, the applicant had applied in the alternative for judicial review of the adjudicator's decision on the basis that the adjudicator did not have the jurisdiction to entertain the application under the CSOS Act.[191] From a practical point of view, this is why bringing an appeal in terms of s 57 of the CSOS on notice of motion with supporting affidavits as held in *The Avenues* and *Kingshaven*, can permit the party bringing the application to add prayers for relief under judicial review, if applicable.[192] Whereas, if the appeal is brought on notice of appeal only, such as required in *Stenersen*, a different procedure would need to be followed to bring an application for judicial review of the same decision as well. This would increase costs for litigants and be unnecessarily burdensome on judicial resources.

In the *Lenasia Tamil Association* case, the court was of the opinion that the appellant's grounds of appeal would have fitted more appropriately in a judicial review application and not in terms of s 57 of the CSOS Act.[193] This was because of the dearth of reasons provided by the adjudicator in the adjudication order.[194]

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[184] *Turley Manor* para 18.
[185] *Turley Manor* para 22.
[186] *Turley Manor* paras 23 and 24. This was also confirmed in the Cape Town High Court matter of *Kingshaven*: see para 35, footnote 10.
[187] *Turley Manor* para 34.
[188] *Turley Manor* paras 35, 36 and 40.
[189] *Turley Manor* para 38.
[190] *Kingshaven* para 25.
[191] *Kingshaven* paras 1 and 6.
[192] *Kingshaven* para 24.
[193] *Lenasia Tamil Association* paras 28 and 30.
[194] *Lenasia Tamil Association* para 28.

In the matter of *Naidoo v Chicktay N.O., CSOS and the Embassy Gardens Body Corporate*[195] ("*Embassy Gardens*"), the unit owner erected a pergola without the permission of the trustees of the body corporate and when she was requested to remove the pergola, she took the dispute to the CSOS for resolution so that she could keep the pergola.[196] The dispute was referred to adjudication and the adjudicator dismissed the unit owner's application.[197] The unit owner then took the matter to the Johannesburg High Court in an application for judicial review.[198] The unit owner argued that the adjudicator did not apply his mind to the evidence that she placed before him.[199] The High Court, however, found that there was a much more fundamental issue with the adjudicator's order in that he was obliged to investigate an application to decide whether it would be appropriate to make an order, in terms of s 50 of the CSOS Act.[200] The High Court was of the view that the adjudicator did not discharge that obligation and therefore his adjudication order stood to be set aside on this basis alone.[201]

It was held that the adjudicator in *Embassy Gardens* had failed to determine whether the dispute concerned a "common area" and whether the erection of the offending pergola breached the body corporate's conduct rules.[202] It was held that the adjudicator ought to have found that he had no jurisdiction because it was not determined that the pergola was on a common area.[203] The unit owner stated that it was erected on her "private garden".[204] It was also held that the adjudicator had "abrogated his statutory function" by not investigating whether there was any uniformity on the pergolas erected by other unit owners.[205]

In *Embassy Gardens*, the High Court concluded that the adjudicator's failure to investigate the unit owner's application and establish the facts relevant to his decision, was a failure to "comply with a mandatory procedure or condition prescribed by an empowering provision" as required in terms of s 6(2)(b) of PAJA.[206] The judge stated that:

> *"…the Adjudicator's decision was also "materially influenced by an error of law" (section 6 (2) (d) of PAJA). This was because the Adjudicator proceeded as if he was entitled to limit his own decision-making function to engaging only with the arguments presented to him. That posture will rarely be sound adjudicative policy, but in the case of a matter brought before the CSOS, it is wholly inappropriate. CSOS adjudicators frequently deal with lay litigants who are unable to argue with the knowledge and precision expected of an experienced lawyer."*[207]

As a result, the adjudicator's decision was reviewed and set aside, and the application was sent back to the CSOS for further proceedings.[208]

In the case of *Body Corporate of Central Square v Paxton N.O and Others*[209] ("*Central Square 2*"), two the application concerned the review of two adjudication awards. It was argued that management rules were altered after the purchaser of one of the units purchased that unit, and differed from the sale agreement for the unit, in that it changed the levy liabilities to a floor of 60% rather than a ceiling of 60%, of levy contributions payable by the residential section, and the change was unilaterally implemented by the developer.[210]

The unit owner filed a dispute with CSOS seeking relief that management rules amendments should not have occurred and prayed that the management rules based on the sale agreement between them and the developer be applied and effective retrospectively.[211] The adjudicator then ruled that the unit

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[195] (39321/2021) [2022] ZAGPJHC 929 (22 November 2022). Accessible at http://www.saflii.org/za/cases/ZAGPJHC/2022/929.html.
[196] *Embassy Gardens* paras 1 to 4.
[197] *Embassy Gardens* para 5.
[198] *Embassy Gardens* para 6.
[199] *Embassy Gardens* para 8.
[200] *Embassy Gardens* paras 8 and 9.
[201] *Embassy Gardens* para 9.
[202] *Embassy Gardens* para 10.
[203] *Embassy Gardens* paras 11 to 17.
[204] *Embassy Gardens* paras 11 to 17.
[205] *Embassy Gardens* paras 18 to 20.
[206] *Embassy Gardens* para 25.
[207] *Embassy Gardens* para 26.
[208] *Embassy Gardens* paras 28.1 and 28.2.
[209] (2021/30916) [2023] ZAGPJHC 24 (17 January 2023). Accessible at http://www.saflii.org/za/cases/ZAGPJHC/2023/24.html.
[210] *Central Square 2* para 12.
[211] *Central Square 2* para 14.

owner's consent was not obtained as was required in terms of s 11 of the STSMA, as the unit owner was adversely affected.[212] However, adjudicator dismissed the application to invalidate the management rule amendments due to exceeded time limits in s 41 of the CSOS Act.[213] To give some relief, the adjudicator ordered a general meeting be held within 30 days to address the amendment's impact on participation quota, voting rights, and the body corporate composition.[214] This is the first adjudication order under review in *Central Square 2*.

The developer then exercised its rights to develop the non-residential section in 2019, amending the management rules further to introduce additional levies for maintenance of various exclusive use areas.[215] The unit owner disputed these amendments with CSOS as well, alleging lack of consent, and sought to restore the original budget and levy apportionment as existed at the time that the sale agreement was concluded with the developer.[216] The adjudicator in this second dispute referred to the CSOS agreed with the unit owner, and ordered that the new 2019 amendments be set aside as well.[217] The adjudicator found that the amendment process violated the STSMA and adversely affected the unit owner without their consent.[218] The contribution levied on owners became unlawful, and this adjudication order is also under review in *Central Square 2*.[219]

By amending levy contributions and voting rights without first reserving these rights contractually with the purchasers of units in the scheme prior to the registration of the sectional title scheme, the developer violated the STSMA and Sectional Titles Act[220] ("the STA"), prejudicing the unit owner and other purchasers of residential sections.[221] These purchasers are protected by the STSMA and STA, which requires disclosure of quotas in deeds of alienation and prohibits changes without proper disclosure of the intentions of the developer.[222] The court found the first adjudicator's decision was correct, as the developer unilaterally amended the management rules without written consent form the purchaser of the unit which purchase had occurred prior to the registration of the sectional title scheme, leading to negative financial prejudice for this unit owner and other purchasers and unfair financial benefit for the developer.[223] The further amendment the management rules which was the subject of the second adjudication order, effectively increased the unit owner's levy contribution by 639%.[224] The court found the developer and body corporate's right to amend management rules was limited due to the absence of unanimous or special resolutions and written consent from affected owners.[225]

The court in *Central Square 2* therefore upheld both adjudication orders and dismissed the review application brought against them.[226]

We had hoped that the judgment in *The Melville* the following issue would have been handled, but unfortunately it did not, as the case was decided on another basis in favour of the unit owner. In the *Melville*, the unit owner reserved their right in the court papers to challenge the decision of the adjudicator under PAJA, since they were not offered a list of adjudicators to choose from before the matter was referred to adjudication, and so it was contended, the adjudicator failed to call for additional information that would have assisted in the determination of the dispute. It will be interesting to see if other litigants challenge this issue on review as in most cases the adjudicators are being pre-selected by the CSOS and the parties get no opportunity to choose from a list.

[212] *Central Square 2* para 14.
[213] *Central Square 2* para 15.
[214] *Central Square 2* para 15.
[215] *Central Square 2* para 16.
[216] *Central Square 2* para 17.
[217] *Central Square 2* para 18.
[218] *Central Square 2* para 18.
[219] *Central Square 2* para 18.
[220] Act 95 of 1986.
[221] *Central Square 2* paras 41 and 46.
[222] *Central Square 2* para 46. See ss 11(2)(b) and 11(2)(d) of the STSMA and s 32(2) of the STA.
[223] *Central Square 2* paras 50, 51 and 54.
[224] *Central Square 2* paras 55 and 56.
[225] *Central Square 2* paras 68 and 56. See s10(2)(a) read together with s 11(2)(a) and (b) of the STSMA.
[226] *Central Square 2* para 82.

It these review cases, it is being alleged that material considerations were either ignored or immaterial considerations were relied on when reaching the conclusion that the adjudicator reached, or that the adjudication decision was irrational and not supported by the facts established in the case.

7. CONCLUSIONARY REMARKS

We have previously referred to the legal landscape for appeals against CSOS adjudication orders as an “inter-judicial debate”, but it is safe to say that this is no longer just a debate between judicial officers across the provincial divisions of the High Court. It has become a debate about practicality and cost not just about the technical legal aspects of, and dogmatic differences between, an appeal and a review, and a question of law compared to one of fact.

The SCA needs to be approached in the appropriate case, to finally put these debates to rest and give the community scheme industry some final practical and cost-effective solutions, with the least impact on judicial resources. Ultimately, the CSOS Act was meant to reduce the cost of resolving disputes in the community scheme industry.

For now, see the table overleaf for the main differences in appeal procedure and prospects of success for applications for condonation for the late filing of appeals in terms of s 57 of the CSOS Act.

High Court Jurisdiction	**Procedure to be followed by party bringing the appeal**
Western Cape Kwa-Zulu Natal Eastern Cape Free State	Notice of motion accompanied by supporting affidavits. Litigants may be able to obtain condonation for the late filing of an appeal against a CSOS adjudication order, under certain circumstances.
Gauteng	Notice of appeal stating succinctly the grounds of appeal relied on. Litigants will not be able to obtain condonation for the late filing of an appeal against a CSOS adjudication order as the High Court does not have inherent jurisdiction to condone same in respect of these limited statutory appeals.

FAUSTO DI PALMA

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