SECTIONAL TITLE SOLUTIONS

Community scheme disputes: CSOS or the courts first?

"You cannot negotiate with people who say what's mine is mine and what is yours is negotiable."

These are the famous words coined by the former president of the United States of America, John F. Kennedy. As many South Africans live in close proximity to each other, disputes have become a daily reality of unit owners and residents within the community scheme environment and there is a constant need to negotiate, mediate and settle disputes among neighbours. In some cases, unit owners and residents within the community scheme environment often fail to settle the disputes in a neighbourly fashion and are forced to seek dispute resolution processes. The question, therefore, arises whether to approach the Community Schemes Ombud Service (CSOS) or go to the courts directly. The answer is not as clear-cut as some may have thought.

In a Cape Town High Court matter, *Heathrow Property Holdings No 33 CC and Others v Manhattan Place Body Corporate and Others*[1] ("the *Manhattan Place* case"), it was held that, whenever the CSOS has the power to adjudicate a dispute, you have to go that route first before approaching the court.[2] Specifically, Sher J was of the view that disputes pertaining to sectional titles schemes fall within the Community Schemes Ombud Service Act[3] ("the CSOS Act") and they are in the first instance to be referred to the Ombud for resolution in accordance with the conciliative and adjudicatory processes established by the CSOS Act. The High Court emphasised precedents stemming from the Supreme Court of Appeal and Constitutional Court stating that specialist bodies, established by statute for efficient, informal, and economical resolution of specific disputes requiring specialised knowledge, should initially handle such disputes.[4] These entities should be engaged first, even if a court possesses concurrent jurisdiction.[5]

In the *Manhattan Place* case, the High Court was approached with an urgent application for declaratory relief sought in relation to the application of conduct rules which were adopted by the body corporate. The applicants were owners who had approached the High Court for relief against the installation of a biometric access system on the property, as well as their displeasure with regard to a conduct rule prohibiting short-term leasing (less than six months) to third parties.[6] The High Court held that the urgent application was an

[1] (7235/2017) [2021] ZAWCHC 109; [2021] 3 All SA 527 (WCC); 2022 (1) SA 211 (WCC) (1 June 2021), accessible at http://www.saflii.org/za/cases/ZAWCHC/2021/109.html.
[2] *Manhattan Place* para 19.
[3] Act 9 of 2011.
[4] *Manhattan Place* para 57.
[5] *Manhattan Place* para 57.
[6] *Manhattan Place* paras 1 and 28.

"egregious abuse of the process of this Court" and that the relief sought in the application is within the express jurisdiction of the CSOS which is mandated by the CSOS Act to deal with such disputes.[7]

As per the arguments of the respondents, that it is within the jurisdiction of the CSOS in terms of ss 39 (3) (c) and (d) as well as ss 39 (4) (c) (d) and (e) of the CSOS Act, to adjudicate and make a ruling on the dispute, the Court held that the applicants were indeed abusing the court process as clearly the CSOS could adjudicate and rule on the disputes.[8]

However, it was also held in *Manhattan Place* that one could approach the court directly in exceptional circumstances without first approaching the CSOS.[9] The CSOS should be considered as an internal remedy to be utilised by parties unless exceptional circumstances entitled a litigant to approach the High Court directly, and convenience will not constitute an exceptional circumstance.[10] What these exceptional circumstances are will have to be determined on a case-by-case basis.[11]

This judgment served as a lesson to all stakeholders within the community schemes, that the CSOS dispute resolution process is important and should be the first point of departure before approaching the courts.

"Exceptional circumstances" was then explored in two later cases: *Body Corporate of the Sorronto Sectional Title Scheme, Parow v Koordom and Another*[12] ("the *Sorronto* case") coming out of the Cape Town High Court in the Western Cape and then in *Port O'Call Body Corporate v Verwoerdpark Liquors (Pty) Ltd*[13] ("the *Port O'Call* case") coming out of the Johannesburg High Court in Gauteng.

In the *Sorronto* case, the court held that "the courts concurrent jurisdiction with the Ombud is well-established, albeit the Ombud has wider jurisdiction on certain issues and less on others."[14] The Court found that the matter ought to have been referred to CSOS first and that there were no exceptional circumstances pertaining to that matter that justified it being referred to High Court as first instance.[15]

In the *Sorronto* case, the court also held that both litigants and their legal teams should acknowledge the Ombud's availability for matters that are straightforward, necessitate a more conciliatory approach, and seek a significantly more cost-effective and prompt resolution process.[16] The court was finally of the view that the application before it was frivolous or vexatious and manifestly inappropriately brought in the High Court.[17]

In contrast, in the *Port O'Call* case, the court held a different view on a different set of facts before it. This case concerned a matter dealing with permanent alterations and improvements completed by a unit owner

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[7] *Manhattan Place* para 19.
[8] *Manhattan Place* paras 29 to 33.
[9] *Manhattan Place* paras 61 to 63.
[10] *Manhattan Place* para 63.
[11] *Manhattan Place* para 62.
[12] (5439/2021) [2022] ZAWCHC 99; 2022 (6) SA 499 (WCC) (26 May 2022), accessible at http://www.saflii.org/za/cases/ZAWCHC/2022/99.html.
[13] (5187/2021) [2022] ZAGPJHC 1052 (25 October 2022), accessible at http://www.saflii.org/za/cases/ZAGPJHC/2022/1052.html.
[14] *Sorronto* para 16.
[15] *Sorronto* para 19.
[16] *Sorronto* para 21.
[17] *Sorronto* para 21.

on his exclusive use area and onto common property without the required consent and approval from the body corporate.[18] Referring this matter to the Ombud first would have simply have led to more delays, and was a matter of great concern to the body corporate.[19] The unit owner had already conceded that his extensions had been done without approval and had undertaken to remove them if such approvals were not obtained in the letter from the unit owner's initial attorneys.[20] The court held that there would be little benefit in seeking a demolition order from the Ombud (on the assumption that it is within its competence) which in any event would need to be enforced through the courts.[21]

For an example of where the Ombud had no jurisdiction at all, and the dissatisfied party ought to have approached the High Court first, one could have a look at *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*[22] ("the *Mitchell's Plain* case"), coming out of the Cape Town High Court. This case concerned a statutory appeal in terms of s 57 of the CSOS Act brought against the decision of an adjudicator, whereby the adjudicator dismissed an application by the unit owner for an order that the body corporate should pay damages which were allegedly sustained by the unit owner pursuant to a fire which occurred in its unit.[23] After its unit was destroyed by the fire, the unit owner claimed from the scheme's insurers.[24] The insurers repudiated the claim on the basis that they had, following a previous fire, suspended the scheme's fire cover pending the filing of valid electrical and fire equipment certificates of compliance by all the owners of units in the scheme. The unit owner also argued that the body corporate failed to comply with its statutory duty of care and to ensure that the buildings in the scheme were properly insured.[25]

The adjudicator in the *Mitchell's Plain* case dismissed the application on a point *in limine* on the grounds that the relief which was sought fell outside of his statutory jurisdiction.[26] The court held that the adjudicator was correct in holding that he did not have jurisdiction to entertain the dispute and the appeal therefore failed.[27] The unit owner should have approached the High Court at first instance, but probably also would have failed given the merits.

As a side note, 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, but only on a question of law.[28] There is also the option of bringing an application for judicial review

[18] *Port O'Call* para 54.
[19] *Port O'Call* para 57.
[20] *Port O'Call* para 58.
[21] *Port O'Call* para 58.
[22] (A260/2020) [2021] ZAWCHC 132; 2021 (5) SA 623 (WCC) (16 July 2021) accessible at https://www.saflii.org/za/cases/ZAWCHC/2021/132.html.
[23] *Mitchell's Plain* para 1.
[24] *Mitchell's Plain* para 4.
[25] *Mitchell's Plain* para 26. See also, Ashersons Attorneys "Community Scheme Disputes and the Ombud's Powers to Resolve Them", accessible at https://www.ashersons.co.za/articles/community-scheme-disputes-and-the-ombuds-powers-to-resolve-them/'.
[26] *Mitchell's Plain* para 2.
[27] *Mitchell's Plain* para 30.
[28] Section 57(1) of the CSOS Act.

under the common law or in terms of the Promotion of Administrative Justice Act[29] (PAJA). Access our free comprehensive commentary on appeals and reviews against CSOS adjudication orders here.

The dispute resolution mechanisms and processes available in terms of the CSOS Act must not be overlooked, in particular when the issues fall within the powers of the Ombud.[30] Courts will often use their discretion to discourage litigants from approaching the courts unnecessarily in matters that should have been taken to the CSOS in the first place, which will result in wasted costs for the unsuccessful litigant and more wasted time and resources.

There need to be exceptional circumstances in order to approach the High Court directly in cases where the CSOS has the power to grant the relief sought. What these exceptional circumstances are will have to be determined on a case-by-case basis. In some cases, it may not be so clear-cut to determine whether a given set of facts will be viewed as exceptional or not, to warrant approaching the High Court first, and so this may have to be carefully investigated by the legal team of the unsatisfied litigant.

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*****END OF ARTICLE*****

[29] Act 3 of 2000.
[30] P Ncanywa "*The Community Schemes Ombuds Service"* (undated) of the law firm, Joubert Galpin Searle, accessible at https://www.jgs.co.za/index.php/commercial/the-community-schemes-ombuds-service.