ADJUDICATION ORDER IN TERMS OF SECTION 54
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011

Ref: CSOS224/WC/19

IN THE MATTER BETWEEN

MALCOLM CEDRIC ROSEN **Applicant**

and

ROCKAWAYS BODY CORPORATE **First Respondent**

TRUSTEES OF THE BODY CORPORATE **Second Respondent**

ADJUDICATION ORDER

EXECUTIVE SUMMARY

1. This Application is about the alleged maladministration of the affairs of the Body Corporate of Rockaways sectional title scheme by the trustees, brought against them by the Applicant as a fellow trustee.

2. Several issues required separate consideration such as –

2.1. whether a trustee has standing to bring an application against fellow trustees;

2.2. the nature of the condonation power vested in the Ombud in terms of section 41(2) of the Community Schemes Ombud Service Act ("the CSOS Act");

2.3. whether such condonation power, in the absence of the exercising thereof, passes to the adjudicator to whom such an application has been referred by the Ombud;

2.4. the nature of the operation of statutory time limitation clauses, such as is contained in section 41(1) of the CSOS Act, in law; and

2.5. circumstances that cause issues to become moot and as such no longer capable of adjudication.

2.6. It was found that –

2.7. a trustee has standing to bring applications against fellow trustees;

2.8. an adjudicator does not become vested with the condonation power in the absence of the exercise thereof by the Ombud;

2.9. time limitation clauses operate absolutely in barring justiciability of issues; and

2.10. failure to adhere to time constraints limits full consideration of issues.

3. Accordingly, no relief was granted to the Applicant, nor to the respondents.

INTRODUCTION

1. The Applicant is Malcolm Cedric Rosen. He completed the application form as the only Applicant and marked the capacity in which he applied as that of trustee on the application form. No other trustee is indicated on the application form as a co-Applicant, yet two persons had signed the application form on 16 July 2020. This pattern is repeated because the statement of claim attached to the application form, although unsigned, bears the details of another trustee, this time identified as Joanne Raubenheimer. So, it seems that two other trustees had shown their intention to join the Applicant in bringing this Application. Two questions therefore require consideration at the start of this adjudication:

1.1. The first is whether trustees in their individual capacities have standing in bringing an Application, which in this case due to the number of instances listed by the Applicant cumulatively amount to the maladministration of the affairs of the Body Corporate of Rockaways ("the Body Corporate"), against their fellow trustees and the Body Corporate?

1.2. The second is whether unidentified applicants can be considered as co-applicants in circumstances where neither their details nor signatures appear on the application form?

1.2.1. First question:

1.2.1.1. The standing of applicants is determined in terms of section 38 of the Community Schemes Ombud Service Act ("CSOS Act"), which stipulates that "any person may make an application if such a person is a party to or affected materially by a dispute" The definition of dispute in the CSOS Act reads: *"dispute" means 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, occupier or owner, acting individually or jointly*;

1.2.1.2. The Applicant has declared a dispute with his fellow trustees as he has documented in submissions to CSOS. He has endeavoured to show in the voluminous documentation filed with the application form how, according to him, his fellow trustees have mismanagement the affairs of Rockaways and through such mismanagement how not only himself but other members have been materially affected by such mismanagement. A number of members of the Body Corporate have filed written statements recording their support for this Application. So, in terms of section 38 the Applicant ostensibly have complied with its requirements. The definition of dispute goes further and requires that the persons who are parties to the dispute must comply with the following requirements:

1.2.1.2.1. Such a person must have a material interest in the scheme; and

1.2.1.2.2. One of the parties must be the association, occupier, or owner[1].

1.2.1.3. The Applicant did not apply in terms of any of those capacities. He only chose the capacity of trustee, which is patently not identified in terms of the three capacities mentioned in the definition, except for association which is defined as "any structure that is responsible for the administration of a community scheme". In the Avenues Body Corporate case it was decided that "The trustees, collectively, as the persons responsible for administering the functions and powers of the Body Corporate, are an 'association' within the meaning of the Act". The definition of association does not include "collectively", which means that Binns-Ward J had added that description. The judge was clearly of the opinion in that case that the trustees when acting collectively ostensibly (meaning that only as a group, not individually) they are acting as the association tasked in terms of section 7(1)[2] of the Sectional Titles Schemes Management Act ("the STSMA") to perform the functions and powers of the STSMA. Such an interpretation leaves the question of individual trustees open-ended. If trustees feel obliged to act in their individual capacities as trustees, would they be precluded from lodging an Application against their fellow trustees by a superficial reading of the definition or by the interpretation thereof in the Avenues Body Corporate case? In that case, however, the meaning of association was not considered in the context of the standing of a trustee as an Applicant.

1.2.1.4. It is therefore important to consider this matter in the context of the relationship between the Body Corporate and the trustees. Once a Body Corporate is established in terms of section 2(1) of the STSMA, it becomes a Body Corporate for that scheme and its members. In terms of section 2(1) of the STSMA the Body Corporate is responsible for the enforcement of the

[1] The Trustees of the Avenues Body Corporate v A Shmaryahu 2018 (4) SA 566 (WCC). See par. 19 on p. 10, "Both requirements must be satisfied for standing as an applicant in terms of section 38 of the Community Schemes Ombud Service Act". Although the main ratio of this decision was overturned by Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another 2020 (1) SA 651 (GJ), this finding was not affected by the latter judgement. Although the Avenues case involved a sectional title property, Binns-Ward J considered the provisions of the CSOS Act, which apply to all community schemes.

[2] Section 7(1) of the STSMA: "The functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restrictions imposed, or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules."

rules and for the control, administration, and management of the common property for the benefit of all the owners. As such, certain functions (s3) are vested in it and powers (ss4&5) are conferred on it. In terms of section 7(1) of the STSMA, these functions and powers are delegated to the trustees who must perform such functions and powers subject to the provisions of the STSMA, the rules and any restriction or direction imposed by the owners at a general meeting. Trustees therefore do not become the Body Corporate when vested with these functions and powers, they remain functionaries thereof limited in their execution of these functions and powers by the legal framework of the STSMA. One of the restrictions imposed on trustees is to be found in section 8 of the STSMA which requires trustees to "stand in a fiduciary relationship to the Body Corporate". This restraint is not imposed collectively but individually. The provisions of section 8(2)(a) are especially pertinent: "(2) Without derogating from the generality of the expression 'fiduciary relationship', the provision of subsection (1) implies that a trustee – (a) must in relation to the Body Corporate act honestly and in good faith, and in particular – (i) exercise his or her powers in terms of this Act in the interest and for the benefit of the Body Corporate; and (ii) not act without or exceed those powers." Bearing in mind this obligation with which trustees is vested the definition of dispute and the provisions of section 38 (1) should again be considered. This provision requires that an Applicant be "materially affected" by a dispute before an Application can be made. The definition of a dispute determines that a dispute must be between persons who have a "material interest" in the scheme. On both counts, a trustee who decides to break ranks with his fellow trustees because, in his determination, they have not acted in "in the interest and for the benefit of the Body Corporate" has a material interest in that scheme. Secondly, there should then not be any question that in such circumstances he would be materially affected by such dispute not only because he is now in dispute with his erstwhile colleagues but he also knows, better than the ordinary member, how their alleged irregular actions will affect the interest of the members of the Body Corporate. The legislative intent could not have been that trustees who find themselves in circumstances such as those of the Applicant be precluded from making an Application in terms of the relevant provisions of the CSOS Act. The Applicant is therefore qualified to make an Application as a trustee in this

matter. Support for this position is also to be found in the provision made by CSOS in its application form for an applicant to identify himself as a trustee. Although the application form is not prescribed in terms of the CSOS Act, nor its regulations, trustees are such an integral part of the management of sectional title schemes that to deny them standing as applicants in a dispute with one another would not be in the best interests of the members of the Body Corporate.

1.2.2. Second question:

1.2.2.1. Section 38(2)(a) requires an Application to be made in the prescribed manner and as may be required by practice directives. Section 19 of the regulations promulgated under the CSOS Act prescribes that an application referred to in section 38 (1) of the Act must be made by submission of an application by physical delivery or electronically, in accordance with the practice directive issued by the chief ombud. This Application was delivered to and accepted by the Ombud, hence this adjudication. No directives regarding the further requirements concerning the application form could be found on the CSOS website. This application form, as completed by the applicant, however, lacks the following:

1.2.2.1.1. the personal details and capacity of the person who co-signed the application form with the Applicant are not disclosed on the application form;

1.2.2.1.2. the same person is also not referred to on the statement of claim;

1.2.2.1.3. the personal details and signature of the person who is presented as a trustee on the statement of claim are not disclosed on the application form.

1.2.2.2. The fact that the other trustees who support the Applicant have not been properly identified either by personal details or in signing both the application form and statement of claim precludes them from being formally acknowledged as parties to this dispute. It should however not detract from the main Application because the submissions were clearly not made by an

individual trustee and so all the submissions regarding the Application can be attributed to the Applicant.

1.2.2.3. A further question requires consideration. A separate statement of claim was filed by the Applicant because the details of his various applications were too comprehensive to fit into the space provided therefor on the application form. This statement of claim does identify the Applicant as the author thereof (and one other trustee) but it is not signed by the Applicant. Does such oversight preclude reliance on its contents in adjudicating this dispute? The Applicant included the statement of claim by reference in the space provided for the facts and circumstances giving rise to the dispute. No requirement has been prescribed that the section dealing with this aspect on the form be signed separately by the Applicant. So, the same consideration should apply to the statement of claim. It clearly was incorporated by reference and therefore forms part of the form, which was signed by the Applicant.

1.3. Although the Applicant did not present himself in the capacity of occupier, he also qualifies as such. He is not a registered owner of any section but according to a printout obtained from the Deeds Registry at Cape Town sections 72, 24 and 37 Rockaways are registered in the name of Avril Rosen, whose marital status is recorded as being married out of community of property. In response to a question by the adjudicator the Applicant confirmed that he is married to the registered owner of section 72. A letter was submitted by her authorising the Applicant to act on her behalf. Moreover, he resides with his wife in the property. He is therefore at least an occupier in terms of the definition of an occupier in the CSOS Act in that he legally occupies a private area. He also has a material interest in the administration of Rockaways because whatever maladministration would occur would affect him as an occupier and would also affect him through his wife as owner. In his capacity as occupier, the Applicant would be limited to the relief in terms of section 39 of the CSOS Act that is authorised when the Applicant applies in the capacity of an occupier. It is not necessary to canvass such relief extensively because as trustee the relief would be more comprehensive.

2. The First Respondent is the Body Corporate of Rockaways. It also has standing in this dispute because it qualifies as a community scheme as defined in section 1 of the Community Schemes Ombud Service Act, 9 of 2011, ("the CSOS Act") and as such is the party against whom the various relevant orders of legal relief in terms of s 39 of the CSOS Act is sought by the Applicant, hence it is materially affected by this Application.

3. The Second Respondent are the trustees for the time being of the First Respondent and has standing in this matter because it is vested with the obligation to perform and exercise the functions and powers of the Body Corporate in terms of section 7(1) of STSMA and because most of the interaction regarding this dispute took place between the Applicant and the Second Respondent.

3.1. However, it is important to consider whether relief can be granted against the trustees in terms of section 39 of the CSOS Act. Binns-Ward J, in the Avenues[3] case, has regarded the trustees, with the Body Corporate, as an association in terms of the CSOS Act. The question is then whether relief can lie against both the BC (legal personality – can sue and be sued) and the trustees (functionaries of the BC) indistinguishably. In terms of sections 3(1), 4(1) and 5(1) of the STSMA the Body Corporate is charged with performing the functions vested in it, exercising the powers conferred on it and further to exercise the additional powers in terms of section 5(1) of the STSMA. In terms of section 7(1) of the STSMA, the functions and powers of the Body Corporate must be performed and exercised by the trustees of the Body Corporate. In the Avenues case, Binns-Ward J states that "the trustees, collectively, as the persons responsible for administering the functions and powers of the body corporate are an association within the meaning of the Act." Does this statement imply that the trustees and the Body Corporate can be regarded as interchangeable when it comes to issuing orders in terms of section 39 of the CSOS Act? It seems to indicate that an order against the Body Corporate will be as competent as if it were made against the trustees. Section 7(1) of the STSMA constitutes a statutory delegation of the powers and functions vested in the Body Corporate in terms of sections 3, 4 & 5 of STSMA.

[3] See footnote 1.

3.2. Association is defined in the CSOS Act as "any structure that is responsible for the administration of a community scheme." In this matter, the community scheme is a sectional title scheme governed by the provisions of the STSMA. In terms of sections 3(1), 4(1) and 5(1) of the STSMA, the Body Corporate is clearly vested with performing the functions and powers concerned. In terms of section 7(1), the functions, and powers of the Body Corporate must, subject to the provisions of the Act , the rules and restrictions imposed by the members, be performed, and exercised by the trustees holding office in terms of the rules. It seems clear that the legislature intended to distinguish between the entity responsible for the administration and the tasks associated with such administration of a community scheme. The Body Corporate is vested with the functions and powers and consequently with the responsibility for the administration of the community scheme. Moreover, the legislature has by statutory delegation vested the trustees with the obligation to carry out such functions and exercise such powers within the parameters of the provisions of the STSMA, the rules and the restrictions imposed in terms of section 7(1) of the STSMA. Such statutory delegation simplifies and streamlines the administration in the hands of the trustees, who thereby become the functionaries of the Body Corporate. The trustees do not become the Body Corporate and therefore the association as contemplated in the CSOS Act, except where they are expressly referred to in the relevant provisions of section 39 of the CSOS Act. Moreover, in the context of the CSOS Act where the Body Corporate has to take responsibility for the administration of the scheme as far as the members are concerned, the Body Corporate is not released from this obligation by the statutory delegation effected in terms of section 7(1) of the STSMA. Support for this position can be found in the prescribed orders adjudicators can issue in terms of section 39 of the CSOS Act. Apart from those subsections in section 39 where other parties are expressly identified against whom orders can be issued, the remainder of the orders are against the association, being the Body Corporate, i.e., the entity in which the powers are vested in terms of which other parties can hold them accountable.

3.3. Section 39 of the CSOS Act also does not support that supposition. Section 39(4) (b) & (c) allow an order against both the association (Body Corporate) and

the trustees. All the other relevant orders target the Body Corporate specifically. If the section itself distinguishes the one from the other the legislative intent becomes clear. Put another way, the orders authorise actions against the Body Corporate because the Body Corporate is vested with the power to give effect to such an order. In terms of section 5 of the STSMA, the Body Corporate can act by passing special or unanimous resolutions. The passing of such resolutions has to comply with the prescriptions laid down in the regulations and prescribed rules, which indicate that orders seeking that these resolutions be declared void or invalid can only be issued against the Body Corporate.

3.4. The reason why this approach should be clarified is because once a Body Corporate has resolved that a certain matter will pertain, the trustees cannot act outside of such authorisation because the delegated power under which they act cannot be adjusted at their whim. Such action would be ultra vires.

4. This dispute was referred to conciliation by the Ombud in terms of s 47 of the CSOS Act but was not resolved and consequently this matter was referred to the adjudicator for adjudication of the dispute[4] pursuant to the notice issued by the Ombud Service of such referral and service thereof on the parties.

5. This is an Application for dispute resolution in terms of section 38 of the CSOS Act. The Application was made in the prescribed form and lodged with the Community Schemes Ombud Service (CSOS).

6. The Applicant has chosen to set out a number of alleged breaches committed by the Second Respondent in the statement of claim attached to his Application. In the Application itself the Applicant listed the formal legal relief he seeks with reference to the subsections of section 39 of the CSOS Act. He does not attempt to link the breaches with the specific formal legal relief he seeks pursuant to such breaches. The alleged breaches seem to best align with the following relevant orders in terms of section 39 of the CSOS Act:

6.1. "Unauthorised and unlawful variation of the 10 year maintenance plan"

[4] Section 48(1) and (4) of the CSOS Act.

6.1.1. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid.*

6.2. "Notification of unlawful special (contribution) levy March 2019"

6.2.1. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid.*

6.3. "No notice in terms of PMR 29 of the Act sent members re improvements"

6.3.1. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid*.

6.4. "Defective notice in terms of PMR 29 – Hatches"

6.4.1. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid*.

6.5. "Unlawful motion to vote not to give notice to members of PMR 29 notice"

6.4.2. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid*.

6.6. "Managing agent failure to inform members of the resignation of certain trustees and failure to take instructions from fellow co-trustees including but not limited to providing contract"

6.6.1. This alleged breach aligns best with section 39(4)(c) (i) or (i), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid.*

6.7. "Postponement of the 2020 AGM and refusal to call a SGM"

6.7.1. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid.*

6.8. "Trustee decisions and resolutions"

6.8.1. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid.*

6.9. "Lift and current condition"

6.9.1. This alleged breach aligns best with section 39(6)(c)(i) , which reads as follows: *In respect of works pertaining to private areas and common areas – (c) an order requiring the association (i) to carry out, within a specified time, specified works to or on the common areas for the use, convenience or safety of owners or occupiers.*

6.10. "Project management and expenditure"

6.10.1. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution*

purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid.

6.11. "Fees charged for preparation of financial statements"

6.11.1. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid.*

6.12. "Written contract concluded with contractor – Granite Renovaters"

6.12.1. This alleged breach aligns best with section 39(4)(c) (i) or (ii), which reads as follows: *In respect of meetings – (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association – (i) was void; or (ii) is invalid.*

7. This matter is adjudicated in terms of the CSOS Act and Practice Directive on Dispute Resolution, 2019, as amended by Practice Directive dated 23 June 2020, which provides under paragraph 8.2:- “Adjudications will be conducted virtually or on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator." No adjudication was conducted virtually herein and the parties made further written submissions as requested by the Adjudicator in terms of section 51 of the CSOS Act.

SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

8. The Applicant is a trustee and occupier of sections 72, 24 and 37 Rockaways ("the property") in the community scheme known as Rockaways, scheme number SS58/1980 ("the Body Corporate") and therefore has standing in this dispute. The Applicant submits that the majority of trustees ("the trustees") have committed the breaches set out in paragraph 6 over the periods concerned. He

and two other trustees ("fellow trustees") have repeatedly tried to hold the trustees accountable, but to no avail. In the end, he submits, he, supported by his fellow discontented trustees, were compelled to approach CSOS for the relief set out in paragraph 6. The Applicant has submitted voluminous copies of minutes of general meetings of the Body Corporate and of the trustees, emails pertaining to some of the breaches complained off and other documents that have a bearing on his complaints.

CONDONATION

9. The Applicant, as part of his Application, lodged an application for condonation in terms of section 41(2) of the CSOS Act, which reads as follows: *An ombud may, on good cause shown, condone the late submission of an application contemplated in subsection (1).* Section 41(1) stipulates that an order sought to declare any decision of an association or an executive committee to be void may not be made later than 60 days after such decision has been taken. The following instances of the relief sought by the Applicant as set out in paragraph 6 all require adjudication to the extent of being considered void or invalid decisions and as such fall into the ambit of section 41(1) of the CSOS Act, namely:

9.1. Unauthorised and unlawful variation of the 10 year maintenance plan;

9.2. Notification of unlawful special (contribution) levy – March 2019;

9.3. No notice in terms of PMR 29 of the Act sent members re improvements;

9.4. Defective notice in terms of PMR 29 – Hatches;

9.5. Unlawful motion to vote not to give notice to members of PMR 29 notice;

9.6. Managing agent failure to inform members of the resignation of certain trustees and failure to take instructions from fellow co-trustees including but not limited to providing contract;

9.7. Postponement of the 2020 AGM and refusal to call special general meeting;

9.8. Trustee decisions and resolutions;

9.9. Project management and expenditure;

9.10. Fees charged for preparation of financial statements;

9.11. Written contract concluded with contractor – Granite Renovaters.

10. Although the relief set out in paragraph 6 refer to such resolutions as may be found to be "void or invalid", the power of condonation vesting in the Ombud refers only to void resolutions. The relief the Applicant seeks regarding such resolutions found to be invalid should then presumably survive rejection by the Ombud. In this matter there is no direct evidence that the Ombud exercised her power of condonation, let alone whether she had made such distinction. By inference, it seems, the fact that the Ombud had referred all the applications (there are 12 in total, 11 of which refer to resolutions that may be void or invalid) to conciliation in terms of section 47 and when that had failed to adjudication in terms of section 48, it may be deduced that –

10.1. referring to adjudication all 12 applications unamended implies that the Ombud had condoned the late filing and that the adjudicator should therefore consider in terms of section 50 of the CSOS Act whether such orders should be made or not; or

10.2. the Ombud had failed to exercise her power of condonation at all because of an oversight.

11. The evidence for the latter proposition in paragraph 10.2 may be deduced to be the following:

11.1. In terms of the provisions of the CSOS Act, the following procedure has to be followed by the Ombud before she considers the applications for condonation in terms of section 41(2) of the CSOS Act:

11.1.1. Unless an Application is rejected by the Ombud for the reasons set out in section 42, the Ombud must notify all the parties thereof. The content of the notice is also prescribed. In terms of section 42(2)(a) it must include "the relief sought in terms of the application" and in terms of section 42(2)(d) "invite written submissions with regard to the application". It is clear that at this stage of the proceedings the Ombud had not considered the condonation application because the Second Respondent in its response to this notice dealt extensively with the condonation application. Clearly, they should inform the Ombud of the grounds that, in their opinion, should be considered in exercising her power against allowing the late applications. It would have been premature for her to exercise her power earlier for the obvious reason that she might have condoned the late submissions of impeachable applications without affording the respondents the opportunity to raise grounds for it to be rejected;

11.1.2. The Ombud was then required in terms of section 44, to notify the Applicant of any submissions received and elicit his response thereto. When the Applicant furnishes his response, he must also inform the Ombud whether he wants to continue with his Application. If he does not, she can reject his Application as a whole.

11.2. The point in the procedure of preparing applications for conciliations or adjudications where the Ombud has to determine whether she can grant condonation or not is before she refers the matter to conciliation. The conciliator needs to be informed which of the 12 applications are still to be considered for conciliation. Even more so, before the matter is referred to adjudication should conciliation fail. And finally, the parties to the dispute should be notified at this stage which of the applications have survived pursuant to the granting or refusing of the late submission of such applications. The outcome of the Ombud's deliberations in deciding the issue would have to give reasons for her decision. There is no evidence in the file submitted to this adjudicator of such actions by the Ombud. Consequently, it is concluded that no consideration was given by the Ombud to the condonation applications.

11.3. The question of failure to exercise a power by the Ombud was raised by Binns-Ward J in The Trustees of the Avenues Body Corporate v A Shmaryahu[5]. That case turned on whether the applicant qualified as an applicant in terms of the definition of dispute in the CSOS Act. That applicant was a former owner of a section when he brought the application and consequently had no material interest in the scheme. The Ombud did not reject the application on the basis that CSOS had no jurisdiction to adjudicate disputes in such instances. Binns-Ward J then stated: "It may be inferred that the ombud must have considered that the matter constituted a 'dispute' as defined in s1 of the Act, for had she not done so she should have rejected the application for want of jurisdiction, in terms of section 42 of the Act." He goes on to say that the adjudicator was empowered to dismiss the application, or to make an order "granting or refusing each part of the relief sought by the applicant." The ratio for conferring jurisdiction on the adjudicator appears in a footnote: "Despite the fact that the ombud is meant to confirm that the Service has jurisdiction before a matter is referred to an adjudicator, it cannot have been the legislative intention that an adjudicator to whom an application was referred would be required to proceed to make an order in favour of an applicant in the face of a challenge by the Respondent to the adjudicator's jurisdiction that the adjudicator considered well-founded."[6] In that case the adjudicator had found in favour of the applicant despite the fact that he had lacked standing.

11.4. In this case the Applicant seeks an order to declare certain decisions by the respondents[7] void. However, he was in contravention of a time-bar requiring the lodgement of such applications within 60 days of such decisions being taken. The Ombud had the express power to condone such late submissions on good cause shown. Without condonation of such late submissions those decisions could not be adjudicated. In the Avenues case, whether the Ombud erroneously accepted that applicant's lack of standing or did not address it at all, would not have cured his lack of standing. He was not an owner of a unit and therefore had no material interest in the community scheme. In this case the Ombud had been granted a discretionary power to cure the late submission of void decisions

[5] See footnote 1.
[6] See footnote 19 in the Avenues case on page 8.
[7] The reference to "respondents" includes both First & Second Respondents purely as a general reference and not to distinguish between them as discussed in paragraph 3.

through the condonation power conferred on her and thereby allowing those decisions to be adjudicated as to their voidness. Her failure to do so means that those void decisions remain outside the dispute resolution process in terms of the CSOS Act because only the exercise of her discretionary power allowed them entry. The difference with the Avenues case is that of an express exercise of a discretionary power that grants judicial life to those allegedly void decisions, whereas in the Avenues case no exercise of any power could cure the standing of the applicant.

11.5. The question of the jurisdiction of the adjudicator to grant condonation to the Applicant in the absence of the Ombud's exercise of that power, concerns whether the adjudicator was authorised to do so in terms of a delegation of such power expressly or by necessary implication. In our common law there is a presumption against delegation which is embodied in the maxim *delegatus delegare non potest*. In Attorney-General, O.F.S. v Cyril Anderson Investments (Pty) Ltd Botha JA put it as follows: "The powers of administrative bodies, such as the Board in this case, are conferred on them, or delegated to them by the legislature, and they cannot delegate the powers so conferred to some other person or body except insofar as they have expressly or by necessary implication been empowered to do so. The maxim delegatus delegare non potest is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."[8]

11.6. In Shidiack v Union Government (Minister of Interior)[9] the court stated: "Where the Legislature places upon any official the responsibility of exercising a discretion which the nature of the subject matter and the language of the section

[8] In Attorney-General, O.F.S. v Cyril Anderson Investments (Pty) Ltd 1965(4) SA 628 (A) at 639 C – D as referred to in Chairman of the Board on Tariffs and Trade and Others v <<Teltron>> (Pty) Ltd (168/95) [1996] ZASCA 142; 1997 (2) SA 25 (SCA).

[9] 1912 AD 642 at 648, as referred to in Chairman of the Board on Tariffs and Trade and Others v <<Teltron>> (Pty) Ltd (168/95) [1996] ZASCA 142; 1997 (2) SA 25 (SCA).

show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged. The persons concerned have a right to demand the judgment of the specially selected officer."

11.7. The power to consider the condonation application in this instance was clearly not delegated to the adjudicator under section 41(2) of the CSOS Act. There was also no clear evidence of an implied power for it to do so. In the Teltron[10] case, Eksteen JA stated that if an Act conferred certain limited powers of delegation on an authority that in '' itself is a strong indication that the legislature intended the Board to have only those limited powers and no more''. Thus, in the Teltron case the court approached the question of whether the particular delegation relied on was authorised by examining first those parts of the statute which did expressly refer to an authority to delegate. Inasmuch as such an authority to delegate existed in respect of other powers under the Act, the court treated the absence of any provision for delegation in respect of the particular power under consideration to be a compelling factor against any implied authority to delegate.[11]

11.8. In this matter, the provision that confers the authority to condone on the Ombud is section 41(2) of the CSOS Act.[12] It is clear from its wording that it does not contain any express delegation of her condonation power to the adjudicator. The CSOS Act contains three instances where express delegation of authority is granted, namely, in section 13, from the Board to a number of persons identified in its subsections; in section 20, where the Chief Ombud and the chief financial officer can delegate their authority to other persons, and, finally, in section 25, where the Minister may delegate authority to the Director General. The delegations referred to are specific and expressly described so that no uncertainty arises as to the transfer of such power. No such express authority is vested in the Ombud to expressly delegate her power in terms of the provisions of the CSOS Act.

[10] See footnote 7.
[11] Teltron, par. 23.
[12] Section 41(2) of the CSOS Act: *An Ombud may, on good cause shown, condone the late submission of an application contemplated in subsection 1.*

11.9. Finally, the delegation, if it can by necessary inference be assumed, and such purported delegation is within the limits of the authority to delegate, the delegation must be properly executed. It has to comply with the standards of formality. In the Teltron[13] case the following was stated: "one would have expected any delegation of the Board's responsibilities to the I.I.C. to have been done with a measure of formality, such as a duly approved resolution of the Board. The Board is, after all, a creature of statute, and where the statute creating it gives it the right to delegate its duties, there is an onus on the Board to show that that delegation had been properly made. It may well be that the onus has not been discharged by the mere allegation that there had been a delegation. The terms of the delegation have not been disclosed. There is furthermore no proof that the formalities required for a resolution to that effect had been complied with, that the requisite quorum had been present, and that the resolution had been properly recorded. None of this has been done." In this matter, bearing in mind the three instances where the CSOS Act expressly allows delegation as referred to in paragraph 11.8, that where delegation may be claimed to have been impliedly delegated nothing short of the prescriptions contained in the relevant sections would be required for such delegation to comply with the standards of formality. For the reasons set out above, it is clear that no implied delegation to the adjudicator of the power to condone the late submissions of the applications contemplated in section 41(2) of the CSOS Act can be inferred. The adjudicator can therefore not adjudicate those applications for want of jurisdiction.

12. The statement of claim submitted by the Applicant contained a number of incorrect references to legislative provisions. The adjudicator pointed this out to the Applicant in the investigative phase and he then submitted an amended statement of claim. Such amendment is not subject to the discretion of the Ombud in terms of section 45 (1) of the CSOS Act because it occurred after the matter had been referred to the adjudicator for adjudication. The amendment was allowed by the adjudicator in terms of section 51(1)(a) of the CSOS Act during the investigative phase because the Applicant had furnished a sufficiency of facts on which to base the relief he sought in terms of section 39 of the CSOS Act. The wrong references to the Sectional Title Act instead of the Sectional

[13] Teltron, paragraph 10.

Titles Schemes Management Act ("STSMA") should not detract from the relief he sought because as a lay person it would be unreasonable to hold him to the same strict adherence a lawyer would be held to, especially if the respondents were given the opportunity to respond. In addition, the response of the Second Respondent was clearly drafted by an attorney which means that they had had the benefit of legal expertise not available to the Applicant. Had the Applicant had access to legal advice he would probably not have made the wrong references. Therefore, the amendment would be accepted into the adjudication process. It was clear from the responses by the respondents that they had not been confused by the incorrect references, by pointing out that the references were incorrect.

VOID RESOLUTIONS TO BE ADJUDICATED IF INVALID?

13. The effect of the failure to grant condonation in terms of section 41(2) of the CSOS Act regarding the late lodgement of applications requiring the declaration of resolutions as void raises the question whether the same resolutions can be adjudicated as to their invalidity? The power to condone in terms of section 41(2) only relates to the voidness of such resolutions, not its invalidity. The difficulty that now arises is whether determining the distinction between void resolutions and invalid resolutions (which cannot be done in isolation of the resolution complained of) would not amount to the adjudication thereof; the very consideration in terms of which adjudication is time-barred, if not condoned. However, it seems the purpose is different. Had the Ombud not been vested with the power to condone the late filing, an adjudicator would have been required to adjudicate the void decisions concerned in any event. That means determining whether the resolutions were void or invalid. The fact that void resolutions are no longer capable of adjudication because the late Applications have not been condoned, leaves the adjudicator in the same position, but for a different purpose. i.e., the resolutions may still be capable of adjudication as being invalid. However, determining the voidness or invalidity of the same resolution cannot be done in isolation the one from the other. Section 39(4)(c)(i) or (ii) of the CSOS Act also indicates the sequence in which to do so through the use of the past tense with regard to whether the resolution is void and the present tense when the resolution is considered to be invalid.

14. The effect of time limitation clauses in contracts were considered in Barkhuizen v Napier[14] where Ngcobo J stated the following: *time limitation clauses in contracts must be considered in light of the fact that time limitations are a common feature both in our statutory and contractual terrain. Their effect is the same whether they occur in a statute or a contract. They deny the right to seek the assistance of a court once the action gets barred because an action was not instituted within the time allowed. This is true of all of them, regardless of the amount of time they allow. These clauses therefore limit the right to seek judicial redress.* Ngcobo J goes on to say that the importance of (time limitation clauses) cannot be gainsaid. In *Mohlomi[15],* he continues, in the context of a statutory time limitation provision, the Constitutional Court recognised the importance of limiting time during which litigation may be launched: *Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.*

15. It seems clear from the quotations in paragraph 14 that such time limitation provisions, once activated, has an absolute effect on precluding the further consideration of the matter concerned. The order most appropriate to the relief denied to the Applicant is to be found in section 39(4)(c)(i) of the CSOS Act. The order is structured to require an investigation of a resolution to be declared void and then if such a finding is not competent, to determine whether a finding of invalidity can be made. However, because the first enquiry is time-barred and no consideration thereof can take place, the proposition that the same resolution would somehow survive the time-bar for the invalidity thereof to be interrogated seems too contrived to be considered seriously.

[14] 2007(5) SA 323 (CC), par. 46 on p.15.
[15] Mohlomi v Minister of Defence [1996] ZACC20: 1997(1) SA 124 CC.

16. Consideration of a different approach may yield clearer results. The process is the following:

16.1. Failure to submit applications regarding decisions by the Body Corporate or trustees timeously, triggers condonation by the Ombud;

16.2. Failure to grant condonation by the Ombud, whether based on refusal or oversight, has the following effect:

16.2.1. Refusal by the Ombud to condone the late submission of such applications has the same effect as if the Ombud failed to even consider the condonation application because of oversight on her part. In such an instance, the applications regarding void decisions should not be referred to the adjudicator in the first place. This is clear when the process leading to the referrals prescribed in sections 47 and 48 of the CSOS Act is considered:

16.2.1.1. Section 47 states: *On acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes the ombud must refer the matter to conciliation.*

16.2.1.1.1. If the Ombud had refused condonation, there certainly is no prospect of a negotiated settlement and therefore no referral to conciliation should even have been contemplated. The dispute cannot be referred to conciliation because the conditions for such referral have not been met, i.e., the applications could not have been accepted by the Ombud because the late submission excludes such acceptance until condoned, and, if the matters have not been condoned, such matters are not "live" and therefore not capable of conciliation. Even if the matter is erroneously referred to the conciliator, no power to conciliate has been triggered because the conditions to be seized with such a matter have not been fulfilled.

16.2.1.2. Section 48 (1) provides that: *If conciliation contemplated in section 47 fails, the ombud must refer the application together with any submissions and responses thereto to the adjudicator.*

16.2.1.2.1. Again, the conditions for referral of the matter to the adjudicator have not been met (the void decisions may have been referred in practice but such referral was unlawful) and so the adjudicator cannot be seized of the applications relating to the void decisions. The conciliation has not failed in the sense that the parties had lawfully engaged in such conciliation, it could not even have taken place lawfully, so any referral by the Ombud under such circumstances would be invalid. A lawful referral triggers the adjudicator's power to adjudicate, an unlawful referral does not. Consequently, because no adjudication can take place, no consideration of the invalidity aspect can take place.

16.2.2. The only Application that was not subject to condonation by the Ombud is the Application referred to in paragraph 6.9, which reads as follows: "Lift and current condition". Accordingly, this Application can therefore be considered.

Relief sought by the Applicant

17. The relief sought by the Applicant is more fully set out in paragraph 6.

Respondents' Submissions

18. The failure by the Ombud to condone the late submission of the applications for orders in terms of section 39(4)(c)(i) or (ii) of the CSOS Act has put those orders beyond consideration and therefore adjudication. For the reasons set out in paragraphs 9 through 11 it is not necessary to consider the responses of the Respondents to the relevant relief sought by the Applicant regarding the void decisions. The orders affected are all those contained in paragraph 6 except the order referred to in paragraph 6.9. Accordingly, only the Applicant's order sought in paragraph 6.9 will be considered under this heading.

18.1. The Second Respondent has filed a response to the Application pursuant to the section 43 notice served on the Second Respondent by the Ombud is set out in paragraph 18.1.1 below:

18.1.1. "As already mentioned above, the members duly approved the amended MRRP at the 2019 AGM to postpone the replacement of the lifts to 2021. An amount of R1,4 million has been earmarked for the replacement of the lifts and this project will commence in 2021 as planned".

Relief sought by the First and Second Respondent:

19. The First and Second Respondent seek –

19.1. that the Application be declared frivolous, vexatious, misconceived and without substance and therefore the relief sought by the Applicant must be dismissed in terms of section 53(1)(a) of the CSOS Act;

19.2. If the adjudicator makes an order rejecting the Application in terms of section 51(1)(a) of the CSOS Act, the respondent requests the adjudicator to order costs against the Applicant to compensate the respondent for loss resulting from the Application, including all legal fees incurred by the respondent, as permitted in terms of section 53(2) of the CSOS Act.

EVALUATION & FINDING

20. For reasons of coherence, the evaluation of certain of the issues were considered under the headings most appropriate to their resolution. So, for example, the question of whether the Applicant had standing as a trustee was considered when the Applicant was introduced in that capacity in paragraph 1.2.1. This arrangement was followed with other issues where it was cogent to consider them in the context in which they were raised. It is therefore not necessary to repeat the treatment of those issues under this heading. However, the surviving Application referred to in paragraph 6.9 still requires consideration and evaluation as well as the relief sought by the respondents in respect thereof.

21. The Applicant has raised the condition of the lift in two of the orders he sought initially. The first one was his compliant that the respondents had unlawfully amended the MRRP by postponing the replacement of the lift as originally intended and approved in 2017 to 2021. The legality of that amendment could not be considered because of the failure of the condonation of its late submission by the Ombud but the facts of the postponement of the lift replacement from 2019 to 2021 are broadly common cause between the parties. However, the Applicant raises it as a separate complaint stating the following aspects thereof:

21.1. The lift is 60 years old and when it breaks down, which is more often than not, the parts to be replaced are not obtainable anymore and requires it to be specifically designed and manufactured for this lift.

21.2. He claims it is often out of commission and when not, all the buttons don't work and that when the lift stops at each floor it does not aligned with the level of each such floor;

21.3. He also claims that the condition of the lift creates safety concerns that may be in contravention of the provisions of the Occupational Health and Safety Act, 85 of 1993;

21.4. He further claims that the Second Respondent has failed to execute the obligation vested in the First Respondent as set out in section 4(b) and (c) of the STSMA. It is clear that section 4(b) is not applicable but section 4(c) may be. It reads as follows: "[The Body Corporate have the power] to purchase, hire or otherwise acquire movable property for the use of owners for their enjoyment or protection or in connection with the enjoyment or protection of the common property."

21.5. The Second Respondent in its response to the Applicant's claim maintained its position that the members had approved the amendment at the 2019 AGM to postpone the replacement of the lift to 2021.

22. It is important, before the merits of this issue are considered, that the time line that has led to this adjudication be examined:

22.1. The Applicant signed the application form on 20 July 2020;

22.2. This matter was referred to this adjudicator in the first week of May 2021 as part of a batch of 9 matters which were adjudicated in the date order of when the applications were lodged with CSOS. That meant that this was the fourth matter on that list. So, the first draft of this order was only undertaken on 17 July 2021, more than a year after this Application was lodged with CSOS;

22.3. In the meantime, the MRRP had allocated funds for the replacement of the lift in 2021, which has already passed its half-way mark.

23. There are now two extraneous factors that have become part of this dispute largely unrelated to the actions of the main protagonists, namely, the passage of time after lodgement of the Application and the effect of the passage of time on the lift replacement. The first aspect has possibly made the dispute moot, while the second aspect has brought initially disparate interests of the parties into some tacit agreement. These aspects will now be considered:

23.1. The analysis of the evidence and submissions would normally be done in order to establish the respective merits of the Application and the defence of the First Respondent in order to decide the issues raised by the parties to the disputes to determine whether an order can be made to resolve the dispute. For such an exercise to be undertaken, the dispute still has to be live and ready to be adjudicated. When a matter has become moot, no such analysis is further required until an analysis of whether the matter has become moot has been concluded and decided. Accordingly, the requirements regarding the mootness of this matter will now be considered:

23.2. In Afriforum NPC & Others v Eskom Holdings SOC Limited & Others[16] the court stated: *A case is moot and therefore ordinarily not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law. Eskom maintains that there are no exceptional circumstances in the Madibeng or Kamiesberg*

[16] [2017] 3 All SA 663 (GP) (24 May 2017).

applications which justify hearing the moot applications. There is accordingly no longer any basis for the interdictory or review relief. In its opinion, the court's resources should not be consumed by pronouncing on the abstract issues of declaratory relief, or the belated attack on the constitutionality of the ERA.

23.3. So, does "an existing or live controversy" still prevail in this matter? There are two aspects to consider:

23.3.1. The amendment of the MRRP cannot be adjudicated in terms of the provisions of the CSOS Act because of the operation of section 41(1), therefore the replacement of the lift in 2021 stands. That fact makes it moot in this controversy;

23.3.2. The order sought by the Applicant in terms of paragraph 6.9 was formulated just prior to lodgement of the Application on 20 July 2020 calling for "an immediate and necessary replacement of the lift"[17]. At this point in time effect can be given to such need by implementing the amended MRRP, to which the respondents are clearly committed.

23.4. So, on both counts, the controversy becoming moot and the agreement of the parties that the lift should be replaced, albeit for different reasons, it seems fair and reasonable to require that the lift now be replaced.

23.5. In this matter, it is clear that the controversary to which the court referred to is no longer live and should therefore not be justiciable. However, the court does refer to certain exceptions that may yet operate to require further consideration of this matter. In paragraphs 110 and 111 the court went on to say the following: *An application for an interdict or other relief with continuing force is not rendered moot solely by the voluntary cessation of allegedly unconstitutional, illegal, unreasonable, or unfair conduct, since the offending party may return to its old ways. An issue will normally not be deemed moot if it is capable of repetition yet evading review. The court should enquire into whether the claim has been mooted only because the respondent has voluntarily, but not necessarily permanently, acquiesced. So long as the person mounting the legal challenge*

[17] See par. 94 in amended statement of claim lodged by the Applicant.

confronts continuing harm, collateral harmful consequences that continue to endure, or a significant prospect of future harm, the case cannot be deemed moot. By similar token, in the event of a voluntary cessation of wrongful conduct, a case might well become moot if subsequent events make it sufficiently clear that the allegedly unlawful behaviour may not reasonably be expected to recur. But even where there has been permanent acquiescence or cessation, there may still remain a public interest in having the legality of the practice settled. Courts retain a discretion to hear matters where there is no live controversy when it is in the interests of justice to do so. The onus rests on the party seeking to have the matter heard to show that there are sufficiently exceptional circumstances for the exercise of this discretion.[18]

24. This forum of adjudication cannot be equated with a court vested with such discretion to deal with the presence of the circumstances described in the above case. Moreover, the Applicant has not furnished any further evidence of such circumstances. However, the response by the Second Respondent suggested that they would implement the replacement of the lift in terms of the MRRP, as they contended, in 2021, and thus by implication they should not contest the relief claimed by the Applicant in terms of paragraph 6.9.

25. However, no order can be issued because the matter has become moot as set out above.

26. The Second Respondent has submitted that in the light of its submissions in response to all the applicants lodged by the Applicant that those applications be treated as vexatious, frivolous, misconceived or without substance as contemplated in terms of section 53(1)(a) of the CSOS Act. It is not necessary to deal with each of the grounds referred to because the nature of the allegations submitted by the Applicant were substantive in that each of the applications were grounded on relevant legislative provisions supported by sufficient evidence to establish *prima facie* positions that would require responses from the respondents. Interrogating the merits of each Application was not possible for

[18] Id. Par. 79, p. 26.

reasons set out in this order. Accordingly, no order as sought by the respondents will be issued.

COSTS

27. No order as to costs is made.

ADJUDICATION ORDER

28. The relief sought by the Applicant in terms of paragraph 6 is refused for want of jurisdiction on the part of the adjudicator and the other reasons set out in this order.

RIGHT OF APPEAL

24. Section 57 of the CSOS Act, provides for the right of appeal-

(1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.

(2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.

(3) A person who appeals 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.

DATED AT CAPE TOWN ON 10 SEPTEMBER 2021.

ADJUDICATOR
W T DU TOIT

- Relief applied for in terms of the CSOS Act: Section 39(4)(c)(i)or(ii)- in respect of meetings.
- Date Adjudication conducted: 17 July 2021.
- Name of the Adjudicator: W T du Toit

29. Order: The relief sought by the Applicant in terms of paragraph 6 is refused for want of jurisdiction on the part of the adjudicator and the other reasons set out in this order.

- Circulate:
- Authority: Section 41(1) of STSMA.
- Legislative Provisions: n/a
- Quality Assured by & date: Ms P Moodley on 7 September 2021
- Date issued (signed) 10 September 2021.
- Issue or topic Condonation in terms of section 41(2) of CSOS Act.
- Date sent to parties:
- Enforcement Notice issued