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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 813/2023

In the matter between:

MELUSI EMMANUEL NCALA **APPELLANT**

and

PARK AVENUE BODY CORPORATE **FIRST RESPONDENT**

COMMUNITY SCHEME OMBUD SERVICES **SECOND RESPONDENT**

DOMBOLO MAGKOMO MASILELA N O **THIRD RESPONDENT**

Neutral citation: *Ncala v Park Avenue Body Corporate and Others* (813/2023) [2026] ZASCA 16 (12 February 2026)

Coram: MAKGOKA, MBATHA and KEIGHTLEY JJA and TOLMAY and VALLY AJJA

Heard: 19 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for the handing down of the judgment are deemed to be 12 February 2026 at 11h00.

Summary: Community Schemes Ombud Service Act 9 of 2011 – s 57(2) – whether it empowers the high court to condone the late filing of a statutory appeal in terms thereof.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mdalana-Mayisela J and Ossin AJ sitting as court of appeal in terms of s 57(2) of the Community Schemes Ombud Service Act 9 of 2011):

1. The appeal is upheld.
2. The order of the high court is set aside and replaced with the following order:

'(a) The late filing of the appeal is condoned.

(b) The appeal is upheld.

(c) The award of the adjudicator is set aside and replaced with the following:

"(i) It is declared that Mr Ncala reasonably requires exclusive use rights of that portion of the common wall necessary for the installation of the washing machine and plastic sheeting cover referred to in paragraph (ii), which rights the Body Corporate unreasonably refused.

(ii) The Body Corporate is required to permit Mr Ncala to install, at his own cost, a washing machine in the common area adjacent to his flat, together with such covering necessary to protect the washing machine, which covering is acceptable to the Body Corporate.

(iii) Mr Ncala shall be obliged to maintain the installation of the washing machine and the plastic sheeting in good repair and so as to avoid damage to the common wall.

(iv) Mr Ncala shall pay the contribution levy which is levied to all other owners who have exclusive access to the washing area.

(vi) Mr Ncala shall be obliged to remove the installation of the washing machine as well as the covering, and to make good all changes effected to the exterior wall when he ceases to occupy the unit and/or ceases to be a member of the Body Corporate.

JUDGMENT

Vally AJA

Introduction

[1] This is an appeal against an order of the Gauteng Division of the High Court, Johannesburg (the high court). That Court dismissed the appellant's condonation application for the late filing of his appeal in terms of s 57(2) of the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act). The appeal is with the leave of this Court. The appeal raises two issues: does the court have the power to condone a failure to comply with a statutorily imposed time limit in a case where the statute fails to provide for condonation; and, if so, should the court condone the failure of the appellant, Mr Melusi Ncala, to comply with the time period set out in the relevant statute. A determination on the second issue, should it arise, would involve an examination of the merits of Mr Ncala's case.

[2] Mr Ncala is visually impaired. He lives in a residential unit located on the ground floor in a complex. The first respondent, Park Avenue Body Corporate (the Body Corporate) is entrusted with taking care of the general affairs of all the owners of the properties in the complex. Prior to purchasing the home, he was informed by the estate agent that he was allowed to make alterations to a washing area located directly outside his unit, as it was part of the property. This information was

incorrect. The truth was that the area is part of the common property. After taking occupation, he made alterations to this area in order to accommodate his disability, to avoid injury and to secure his belongings. The alterations are: placing his washing machine in the washing area; installing and attaching the necessary piping and tap to the washing machine; installing plastic roof sheeting to protect the washing machine from the elements; and, a security gate to the washing area.

[3] The Body Corporate disapproved of his actions as they contravened the 'Body Corporate Rules of Conduct' (the conduct rules), which prohibit any owner from making alterations to the common washing area, which in his case is outside his kitchen. Mr Ncala was asked to undo the alterations and return the washing area to its original state. During a lengthy stand-off, Mr Ncala complained that he and his teenage sister who lives with him received disrespectful and threatening treatment from a person employed as a caretaker of the complex. At the same time his disability was not being taken seriously enough by the Body Corporate.

[4] Mr Ncala asked for an exemption from the conduct rules on account of his visual impairment. This was refused. Mr Ncala referred the matter to the South African Human Rights Commission (SAHRC). The SAHRC shepherded a mediation process, which was abandoned once the parties failed to find common ground.

[5] Eventually the Body Corporate removed the gate and the plastic roof sheeting and lodged a complaint with the Community Schemes Ombud Service (the Ombud), a body established in terms of the CSOS Act. Its complaint was that Mr Ncala had contravened its rules by effecting the alterations. In terms of the CSOS Act the

Ombud is empowered to adjudicate disputes of this nature between a body corporate and homeowner-members of the body corporate.

[6] A conciliation process was initiated but failed to yield any positive results. In response to the Body Corporate's complaint, Mr Ncala lodged a counter-complaint. He contended that because of his visual impairment he should be allowed to place a washing machine in the washing area, install roof sheeting and a security gate. These adjustments were necessary to cater for his safety concerns. As a visually impaired person he is in danger of slipping if the washing machine were to be located in his kitchen (if it leaked he would not be able to see the water because of his disability and would slip and injure himself). He required a security gate to protect his clothes and washing machine against theft, and the roof sheeting to protect the washing machine from the elements. The failure of the Body Corporate to accommodate his requests was, he asserted, a violation of his right to equality and an assault on his dignity. Thus, his case invoked two constitutionally protected rights – the right to dignity and the right to equality, both enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution).

[7] The matter was then adjudicated under the auspices of the Ombud and an order was issued on 29 November 2018 (the adjudication order). The Adjudicator found that the conduct rules were fair; that the Body Corporate was required to apply them fairly to all residents; and that it did not treat Mr Ncala differently from other residents, save for the fact that it removed the security gate he installed and not those installed by other residents. She found that his claim to be at risk of personal injury if the washing machine was in his kitchen 'does not hold because there is a bath and shower inside the unit which poses the same threat'. Accordingly, she dismissed his call for an order compelling the Body Corporate to restore the roof sheeting and the

piping to his washing machine. Instead, she ordered the Body Corporate to restore the gate to the washing area, provide both Mr Ncala and his neighbour with a key to the gate and charge Mr Ncala R15 per month for having installed the gate, as allowed for in the case of other residents. She further ordered Mr Ncala to relocate his washing machine to the inside of his home, remove the piping and restore the rest of the washing area to the same state it was in prior to the installation of his washing machine.

[8] Mr Ncala was aggrieved by the order. In terms of s 57(1) of the CSOS Act any party aggrieved by the adjudication order is entitled to lodge an appeal with the high court. This, in terms of s 57(2) of the CSOS Act, must be done within 30 days of the date of the adjudication order. The adjudication order did not favour Mr Ncala. He exercised his right of appeal but failed to bring his application within the 30-day period set out in s 57(2). His appeal was 67 days late. A year after lodging his appeal, he applied to the high court to condone the late filing of his appeal. The Body Corporate opposed his application on the basis that the high court lacked the jurisdiction to entertain his application for condonation, and that the application lacked merit.

[9] The high court concluded that it does not have the jurisdiction to condone Mr Ncala's delay. And, even if it had jurisdiction, condoning his delay would not have been justified as he failed to explain why his application for condonation was a year late, and his case lacked merit. It accordingly dismissed his application for condonation with no order as to costs and dismissed the main application with costs.

The high court's power to condone non-compliance of statutorily imposed time limits

[10] Section 57(2) of the CSOS Act provides:

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

The restriction is not novel. There are many statutes that impose a similar restriction. Consequently, several authorities address the issue as to whether the court can condone non-compliance with a statutorily imposed time limit.

[11] The Constitutional Court in *Mohlomi v Minister of Defence* (*Mohlomi*)[1] addressed the issue of the constitutionality of a statutorily imposed time limit set out in s 113(1) of the Defence Act 44 of 1957 (the Defence Act). In terms of the section a plaintiff is required to file a claim within six months of the cause of action arising, and after giving the Minister one month's notice of the action. In that case the plaintiff argued that the very restrictive time-period unjustifiably and unlawfully invaded his right of access to courts. The power of the court to condone his lateness was not raised. The Constitutional Court agreed with him and declared s 113(1) to be unconstitutional and unlawful as it limited the time to six months for a plaintiff to bring an action against the Minister of Defence. The Court compared s 113(1) to a corresponding provision in another legislation, the South African Police Services Act 68 of 1995 (SAPS Act). In the SAPS Act, the Legislature provided for the court to dispense with the time limitation, 'where the interests of justice so require'.[2] The difference in treatment of a plaintiff prompted the Court to remark:

'The wording of that looks odd. It appears to have presupposed a power inherent in the courts to condone defaults of the kind covered which needed to be preserved. But courts have no such

[1] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559.
[2] Section 57(5) of the South African Police Services Act 68 of 1995. Section 57 was repealed by s 2(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

inherent power, and none derived from any source unless and until it is conferred on them. That the subsection grants them the power in the circumstances mentioned must necessarily be implicit in its terms, however, since they make no sense otherwise.'[3]

[12] This observation records that courts do not have the inherent power to condone non-compliance with a statutorily imposed time limit unless the statute expressly or impliedly empowers them to do so. It is to be noted that there is a judgment in the Western Cape High Court which held that the dictum actually carries the status of precedent as it was part of the reason for the decision (ratio decidendi).[4] On my part I am satisfied to tentatively accept that the dictum was made in passing. For our present purposes there is no need to make a definitive finding in that regard. The issue has, however, been directly confronted in several cases. In some of them the court considered whether the inherent power of the high court to control and regulate its own process allowed it to condone non-compliance.

[13] In *Toyota South Africa Motors (Pty) Ltd v Commissioner, SARS* (*Toyota*),[5] this Court was faced with a failure to comply with a statutorily imposed time limit for the lodging of an appeal. Section 86A(12) of the Income Tax Act 58 of 1962 provided for an appeal from the Transvaal Income Tax Special Court to the high court. The appellant had to lodge its notice of appeal 'within the period of [21 business days after notice] or within such longer period as may be allowed under the [uniform] rules of the high court'.[6] The uniform rules did not specify any timeframe for the lodgement of such notice. As a result, it had to be lodged within 21 business

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[3] *Mohlomi* fn 1 above para 17.
[4] *Sand Grove Opportunities Master Fund Ltd and Others v Distell Group Holding Ltd and Others* 2022 (5) SA 277 (WCC); [2022] 2 All SA 855 (WCC).
[5] *Toyota South Africa Motors (Pty) Ltd v Commissioner for the South African Revenue Service* 2002 (4) SA 281 (SCA); 64 SATC 421.
[6] Ibid para 3.

days. Toyota lodged its appeal well outside this prescribed timeframe. It applied for condonation for its delay. The high court did not address whether it was empowered to condone the lateness of the appeal. It dismissed the application on another ground. The matter came before this Court.

[14] This Court commenced by noting that the question had to be answered by deciding what the intention of the Legislature was, and not by whether compliance with the prescribed time period is peremptory or directory. It then found that the Legislature could not have intended compliance with the 21 business days as an absolute requirement, because it also allowed for a different time-period to apply – one that is provided for in the Uniform Rules of Court. Hence, it would be 'illogical and unfair' to bar an appellant for not complying with the 21 business days period when it would be possible for it to comply with the time-period set in the Uniform Rules of Court, save for the fact that the drafters of those rules failed to attend to this. Thus, there was a lacuna in the process. The Court then found that it was 'clearly apparent' that 'the legislature must have intended the appellate Courts to have the final say as to whether intending appellants could proceed with their appeals or not'.[7] It remarked further that the finding was bolstered by the fact that the high court:

'… has inherent jurisdiction to govern its own procedures and, more particularly, the matter of access to it by litigants who seek no more than to exercise their rights. It has been held that this jurisdiction pertains not only to condonation of non-compliance with the time limit set by a Rule but also a statutory time limit: *Phillips v Directeur van Sensus* 1959 (3) SA 370 (A) AT 374G - *in fine*.

The Court below therefore had the power to condone the applicant's non-compliance with the provision of s 86A(12) of the Income Tax Act.'[8]

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[7] Ibid para 9.
[8] *Toyota* fn 5 above paras 10-11.

[15] The finding that the high court had powers to condone non-compliance with the time-period was clearly based on the intention of the Legislature and not on the inherent powers of the high court to manage its own affairs on issues of procedure. The reference to the latter was in passing.

[16] In *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* (*Moch*)[9] this Court was faced with an appeal regarding the refusal of an acting-judge in the high court to recuse himself from a matter involving the provisional sequestration of the respondent before that high court. The high court issued the provisional sequestration order. The respondent petitioned this Court for leave to appeal. In terms of s 150 of the Insolvency Act 24 of 1936 an appeal against a provisional sequestration order is prohibited. This Court therefore lacked the jurisdiction to entertain the appeal. To overcome the statutory denial of jurisdiction, the appellant asked this Court to entertain the appeal by invoking its inherent powers to regulate its own affairs. This, the Court refused on the basis that the inherent reservoir of power to regulate its own affairs does not extend to the assumption of jurisdiction. Taking note of a number of previous authorities, this Court said:

'…In order to clear the way for a consideration of the real issue, viz whether such an order is appealable under the provisions of the Supreme Court Act, I will first dispose of an alternative submission made on the petitioner's behalf. It is to the effect that an appeal against an order which is not otherwise appealable may be heard in the exercise of this Court's so-called inherent jurisdiction. The short answer is that the Court's "inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice". . . does not extend to the assumption of jurisdiction not conferred upon it by statute.'[10]

The principle has been revivified in several subsequent authorities.[11]

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[9] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A).
[10] Ibid at 7D-E.
[11] *Oosthuizen v Road Accident Fund* [2011] ZASCA 118; 2011 (6) SA 31 (SCA); [2011] 4 All SA 71 (SCA) para 17; *DRDGOLD Limited and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA) para 13; *Hanekom*

[17] In *Pizani v Minister of Defence* (*Pizani*),[12] this Court, in dealing with a time-limitation period set out in s 113(1) of the Defence Act 44 of 1957 (the Defence Act), compared the time-limitation provided for therein (six months from date when the cause of action arose) to that set out in s 12 of the Prescription Act 68 of 1969 (the Prescription Act), which is three years from the date when the cause of action arose. It agreed with a previous finding of this Court in *Hartman v Minister van Polisie*[13] and another case in the then Transvaal Provincial Division, *Brosens v Minister van Verdediging*[14] that the time limit set in the Defence Act applied rather than the one in the Prescription Act.[15] It found that unlike in the Prescription Act, the expiry period 'has a guillotine-like effect'.[16] According to these authorities once the statutory period afforded to a litigant to bring an application is expired and absent the litigant claiming that it was impossible to comply – as the law does not compel the impossible[17] – the matter ends there. The court cannot come to the assistance of the litigant, as it does not have the jurisdiction to entertain the matter.

[18] An authority that came to the opposite conclusion was *Samancor Group Pension Fund v Samancor Chrome Ltd* (*Samancor*).[18] There, this Court endorsed the holding in *Toyota* that a court has the power to condone non-compliance with a statutorily imposed time limit for the lodging of an appeal. The case involved an appeal lodged in the high court in terms of s 30P(1) of the Pension Funds Act 24 of

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N O and Others v Nuwekloof Private Game Reserve Farm Owners Association [2024] ZASCA 154; 2025 (2) SA 128 (SCA) paras 18 and 35.
[12] *Pizani v Minister of Defence* 1987 (4) SA 592 (A) (*Pizani*).
[13] *Hartman v Minister van Polisie* 1983 (2) SA 489 (A).
[14] *Brosens v Minister van Verdediging* 1983 (3) 803 (T).
[15] *Pizani* fn 12 above at 602C.
[16] Ibid at 602G-H.
[17] This is a maxim derived from Roman law and expressed in Latin as *lex non cogit as impossibilia*.
[18] *Samancor Group Pension Fund v Samancor Chrome and Others* [2010] ZASCA 77; 2010 (4) SA 540 (SCA); [2010] 4 All SA 297 (SCA).

1956 (the Pensions Act) which allowed for an appeal against a decision of the Adjudicator. It reads:

'Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, …'

[19] The Adjudicator ruled against the first respondent (Samancor), which had failed to lodge its appeal to the high court within the stipulated six-week period. It lodged the appeal almost three and a half years late. This Court held that the inherent jurisdiction of the high court to 'govern its own procedures' entitled the high court to grant condonation to the appellant for his non-compliance. It did so without undertaking an analysis of the intention of the Legislature to allow the high court to condone a lodging of the appeal after the six-week period. It simply said:

'The High Court, because of its inherent jurisdiction, has powers to govern its own procedures. The said jurisdiction pertains not only non-compliance with the Rules of Court, but also to statutory time limits – see *Toyota*. . . In this matter the High Court was entitled to deal with Samancor's application for condonation.'[19]

[20] While in both *Toyota* and *Samancor* the Court did not have regard to the very definitive dicta in *Moch* and *Pizani*, which is contrary to what they held, it must be recognised that the Court in each of those cases was dealing with legislative provisions that allowed for the Court to adopt the view that the prescribed time periods were not absolute, or to put it differently, did not constitute an 'expiry period'. In *Toyota* the provision catered for two different time periods[20] for the lodging of the appeal, and in *Samancor* the Legislature used the word 'may' thereby

[19] Ibid para 20.

[20] '[W]ithin the period of [21 business days after notice] or within such longer period as may be allowed under the [uniform] rules of the high court'.

allowing for an interpretation of the provision as clothing the court with a discretionary power to condone non-compliance with the prescribed time-period. However, the Court in each of those cases relied on the inherent power of the court to govern its own procedures in order to condone non-compliance with the time periods set out in the respective legislations.[21] I hold that the correct legal position is set out in *Moch*, *Pizani* and the subsequent decisions of this Court which unequivocally hold that a court's inherent powers to control its own procedures can only be invoked if the court already has jurisdiction to consider the matter. The observation by the Constitutional Court in *Mohlomi* is consistent with this holding.

[21] The high court in *Vlok NO v Sun International South Africa Ltd* (*Vlok*),[22] in a thoughtful and carefully reasoned judgment, correctly came to the same conclusion as that of this Court in *Moch* and *Pizani*. The statute must, expressly or impliedly, give the high court the power to condone non-compliance with a time-period it imposes for the lodging of a claim. If it does not do so the high court lacks the jurisdiction to entertain the claim should it be brought outside the prescribed time-period. The power to condone must be located in the legislation, and this is done by identifying the intention of the Legislature, which is derived by having regard to language used in the statute, the context and scope of the section as well as the purpose of the statute.

[22] Another case of relevance is *Phillips v Direkteur vir Sensus* (*Phillips*)[23] where this Court held that a statutorily imposed, non-expiry time period can be extended. Furthermore, *Phillips* is explicit that the interpretation of the provision must be one

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[21] *Toyota* fn 5 above paras 10 – 11; *Samancor* fn 18 above para 10.
[22] *Vlok NO and Others v Sun International South Africa Ltd and Others* [2013] ZAGPJHC 269; 2014 (1) SA 487 (GSJ).
[23] *Phillips v Direkteur vir Sensus* 1959 (3) SA 370 (A).

that accords with the intention of the Legislature. The dictum to this effect is not controversial. The provision imposing the time limit in *Phillips* was couched in the directory language of 'may'. This, the Court interpreted to mean that the time limitation should not be understood as an 'expiry period'. This Court did not rely on the inherent power of the high court to regulate its own processes as the basis for holding that the high court is endowed with jurisdiction to condone non-compliance with the statutorily imposed time limit.

The CSOS Act

[23] Section 57 is titled 'Right of appeal'. Section 57(1) allows for an affected party who is dissatisfied with an order of the Adjudicator to appeal that order to the high court on a question of law only. Section 57(2)[24] prescribes that an appeal 'must' be lodged within 30 days of the order being issued. The word 'must' used in relation to a requirement in legislation is generally, though not always, peremptory:

'The general principle is, of course, that language of predominantly imperative nature such as 'must' is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction (see eg *Sutter v Scheepers* 1932 AD 165 at 173 - 4).'[25]

[24] One of the key rules of statutory interpretation, which is applicable here, is cogently articulated in the following dictum in *Nkisimane and Others v Santam Insurance Co Ltd*:

'[S]tatutory requirements are often categorized as "peremptory" or "directory". They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them. . . now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels

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[24] Quoted in para 10 above.

[25] *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA) para 32.

what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope and purpose of the enactment as a whole. . .'.[26]

[25] Understandably, there are circumstances when by interpreting 'must' to mean that a peremptory requirement has been imposed by the Legislature would result in an absurdity or would be inconsistent with the purpose of the legislation. In that event, it should read as a directory requirement, as the Legislature could never have contemplated that an absurd result would arise by the enactment of the statute.[27] This is how the Labour Court dealt with the issue in *Standard Bank of SA Ltd v Fobb*.[28]

[26] Section 41 of the CSOS Act also deals with the issue of time limits. It provides:

'Time limit on certain applications

(1) An application for an order declaring 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.

(2) An ombud may, on good cause shown, condone the late submission of an application contemplated in subsection (1).'

[27] Immediately, two major differences between this section and s 57(2) are conspicuous: first, the word 'may' is used in s 41(1) while the word 'must' is used in s 57(2); second, condonation of non-compliance with the imposed time limit is allowed for in s 41(1) but not so in s 57(2). The Legislature's failure to empower the high court to condone non-compliance with the time limit in s 57(2) allows for a

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[26] *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H – 434A.
[27] *Venter v R* 1907 TS 910 at 915.
[28] *Standard Bank of SA Ltd v Fobb and Others* 2003 (2) SA 692 (LC) paras 7 – 8.

single inference only, that it did not wish to empower the high court with the jurisdiction over the matter once the 30-day period ends.

[28] The Western Cape Division of the High Court (WCC) in *Baxter v Ocean View Body Corporate and Others* (*Baxter*)[29] came to the opposite conclusion. It relied on the dictum in *Phillips*[30] which held that the time limitation in that case was not intended by the Legislature to reflect an 'expiry period'. In my view *Phillips* is not supportive of the proposition that the time period in s 57(2) does not constitute an 'expiry period'. There this Court was dealing with a different statute where the time limit was couched in directory language and where this Court found that the Legislature intended for the high court to be empowered to grant condonation. The inherent power of the high court to regulate its own procedure played no part in its reasoning. In our case, the time limit is couched in peremptory terms.

[29] In *Baxter* the court further found that as the CSOS Act 'does not contain any procedural directions concerning the lodging and prosecution of the appeals permitted' it could be implied 'that the legislature intended to leave the procedural aspects of s 57 to the courts to regulate'.[31] The logic, with respect, is flawed. Statutes that provide for an appeal from any administrative body to the high court hardly ever dictate the procedure to be used for prosecuting the appeal. That is left to the Uniform Rules of Court. As it is an appeal and not a review of the administrative body's decision, rule 53 would be inapplicable. Rule 6, on the other hand, is flexible enough to be utilised for instituting the appeal in the high court. In fact, rule 6 – notice of motion with accompanying affidavit– has been utilised by parties that have

[29] *Baxter v Ocean View Body Corporate and Others* [2022] ZAWCHC 234; 2023 (2) SA 205 (WCC).
[30] *Phillips* fn 23 above.
[31] *Baxter* fn 29 above para 7.

brought their appeals within the 30-day time limit. The court encouraged this approach in *Trustees, Avenues Body Corporate v Shmaryahu*.[32] Thus, the logic underlying the finding that because s 57(2) does not provide any 'procedural directions concerning the lodging and prosecution of the appeal', it should be implied that the Legislature intended to empower the high court to condone non-compliance therewith is, in my judgment, a misdirection. The fact that a statute, which imposes a strict time limit for the institution of an appeal or any other legal proceeding in the high court, but which fails to prescribe the procedure to be used to institute the appeal or other legal proceeding does not allow for an interpretation that alters the substance of the statutory provision. In my view, the time limit for the institution of an appeal prescribed in s 57(2) is set out in strict terms – 'must be lodged within 30 days'. No room is allowed for condonation for non-compliance with the time limit. Furthermore, to imply such a power would not only contradict the clear wording of the CSOS Act, but also its purpose, which is to provide for an inexpensive, inquisitorial, informal, expeditious finalisation of disputes between a body corporate and its members.[33]

The second judgment

[30] I have read the carefully crafted judgment of my Sister, Mbatha JA (the second judgment). It is with regret that I cannot concur in it. I do not believe that it is open to the court to imply a power to condone non-compliance with a statutorily imposed time limit by having recourse to s 39(2) of the Constitution. The words used in the section are clear and free of any ambivalence or ambiguity. In my judgment the section does not trample upon the rights of any litigant to approach a court of law for a remedy. It gives them a right but limits the time period by which the right is to

[32] *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC) para 26.
[33] Ibid para 22.

be exercised. Absent a challenge to the constitutionality of this limitation, it should be adhered to by the litigant and applied by a court. It is not open to the court to ignore the clear wording of a statute by having regard to the 'spirit, purport and objects of the Bill of Rights', especially when the context of the clear wording and the purpose of the statute do not allow for an interpretation that detracts from its plain meaning. In this regard, the Constitutional Court has reminded us that it is not within the power of a court to ignore the language used by the Legislature 'in favour of a general resort to "values"' underlying the Constitution.[34] Hence, my disagreement with the second judgment.

Conclusion

[31] The Legislature limited the right of appeal from an Adjudicator's decision in two respects: by imposing a very strict time limit to lodge the appeal and by restricting the appeal to a question of law. Both are indicative of an intention to ensure '[s]peed, economy and finality'[35] in the determination of disputes between parties to whom the statute applies.

[32] It is worth recalling at this stage that many statutes, pre and post the enactment of the Constitution, impose a time limit for the institution of an action. These limits are not inherently repugnant, as underscored by the Constitutional Court:

'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. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories

[34] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (1) SACR 568; 1995 (4) BCLR 401 paras 17 – 18; *Hubbard v Cool Ideas* [2013] ZASCA 71; 2013 (5) SA 112 (SCA) para 52.
[35] *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ) para 31.

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.'[36]

[33] In my judgment the use of 'must' in s 57(2), appreciated in the context of the CSOS Act as a whole and the purpose for which it was enacted, indicates that the Legislature intended to impose a peremptory requirement. Exact compliance is called for. The same conclusion is arrived at if the 30-day limitation is regarded as an expiry period. Accordingly, I hold that non-compliance with the 30-day time limit in s 57(2) is visited with a termination of the right of appeal. The high court has no jurisdiction to entertain the appeal. That, in this case, is the end of the matter. The high court correctly found that it did not have the jurisdiction to entertain Mr Ncala's appeal.

[34] It must be said though that Mr Ncala has not been deprived of a remedy by the legislation, the remedy offered to him was always there but he had a limited time to exercise it. He is not a wronged person denied a remedy. It is he who failed to exercise the remedy available to him. True, the remedy only lasted for 30-days, but it was there. Accordingly, the appeal should, in my judgment, be dismissed.

Costs

[35] The only fair and just order in this regard would be for each party to pay their own costs. The high court on the other hand dismissed the appeal with costs. It found that Mr Ncala, while seeking to protect his constitutional right to equality and dignity, failed to show that the Adjudicator was empowered to grant him the relief

[36] *Mohlomi* fn 1 above para 11.

he sought. In this regard there is a dispute as to whether Mr Ncala followed the correct procedure – he lodged his complaint by way of a counter-complaint rather than bringing it in his own right. In terms of the processes set out in the CSOS Act there is a significant difference between the two processes. However, even though he used an incorrect procedure, both the Adjudicator and the high court dealt with the substance of his complaint. Thus, his failure to use the correct procedure is ultimately of no moment. He certainly should not be mulcted with costs simply on that score. I would reverse the order of costs made against him by the high court. Did Mr Ncala litigate frivolously or vexatiously? On the contrary, he was summoned before the Adjudicator by the Body Corporate. To issue a costs order against him would only deter persons in the same category as himself from seeking recourse from the institutions created by law to protect them and to allow access to resolve their grievances.

Order

[36] For all the reasons set out above, I would have made the following orders:

1. Save for what is said in point 2 below, the appeal is dismissed with each party to pay its own costs.
2. Paragraph 3 of the high court's order is set aside and replaced with the following:
   '(1) The appeal is dismissed.
   (2) Each party is to pay its own costs.'

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B VALLY

ACTING JUDGE OF APPEAL

Mbatha JA (Makgoka and Keightley JJA and Tolmay AJA concurring):

[37] I have read the judgment of my Brother, Vally AJA (the first judgment), which concludes that s 57(2) of the CSOS Act does not provide for condonation for the late filing of the appeal to the high court. It holds that the Legislature has limited the period for lodging an appeal to strictly 30 days, which is indicative of the intention to ensure speed, economy and finality in these matters. Consequently, according to the first judgment non-compliance with the period set out in s 57(2) is visited with the termination of a right of appeal. Because of the conclusion it arrives at, the first judgment does not consider the merits of the appeal. I disagree with this conclusion and the reasons underpinning it. I conclude that while s 57(2) does not expressly provide for the high court to grant condonation for the late noting of an appeal, the high court is entitled to grant such condonation.

Condonation

[38] Section 57 provides that an appeal *must* be brought within 30 days of the order of the adjudicator. The provision is silent as to: (a) what happens if the appeal is brought after the 30-day period; (b) whether the high court may condone an appeal brought outside the stipulated period. The issue in the appeal is, therefore, whether the high court seized with the appeal is empowered to condone the late filing of the appeal in terms of s 57(2) of the CSOS Act.

[39] This requires a proper interpretation of the section, the principles of which are now settled, and were summarised by the Constitutional Court in *Minister of Police v Fidelity Security Services (Pty) Limited*[37] as follows:

'The interpretation of the Act must be guided by the following principles:

[37] *Minister of Police and Others v Fidelity Security Services (Pty) Limited and Others* [2022] ZACC 16; 2022 (2) SACR 519 (CC); 2023 (3) BCLR 270 (CC) para 34.

(a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.

(b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.

(c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification "reasonably possible" is a reminder that judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

(d) If reasonably possible, a statute should be interpreted so as to avoid a *lacuna* (gap) in the legislative scheme.' [38]

[40] There is also the constitutional injunction to interpret legislation in accordance with s 39(2) of the Constitution. Section 39(2) provides that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. How s 39(2) finds expression in the interpretative exercise was explained by the Constitutional Court in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* (*Hyundai*).[39] There the Court stated that '[t]he

[38] In respect of points (a) to (c), the Constitutional Court referred to *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) (*Waymark*) paras 30 – 32 and *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28. It referred further to *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SA) para 18, which is frequently cited with approval in the Constitutional Court. Examples of such approving citations can be found in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (5) SA 1 (CC); 2019 (2) BCLR 165 (CC) para 29 and *Diener N.O. v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (4) SA 374 (CC); 2019 (2) BCLR 214 (CC).

[39] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve'.[40] Simply stated, it found that s 39(2) does not only demand judicial attention where a constitutional issue is to be considered, but whenever a court interprets legislation.

[41] The high court ought to have found that it had the implied power to grant condonation, as the refusal thereof impacted on Mr Ncala's right of access to courts in terms of s 34 of the Constitution. I point out that interpretation is not premised on a simple determination of the intention of the Legislature as advocated in the first judgment. It involves a consideration of the language, context and purpose of the statute and, most importantly, it has to be alive to the objectives of s 39(2) of the Constitution.

[42] With these principles in mind, I have regard to the purpose of the CSOS Act. The CSOS Act aims to regulate and provide for dispute resolution for community schemes and other shared living arrangements. It also provides a mechanism for resolving disputes within community schemes. In the event that one of the parties is unhappy with the outcome of the adjudication process, an appeal lies to the high court on a question of law only.

[43] Key to the question whether the high court has the power to condone a breach of the time limit laid down in s 57(2) is the nature of this limitation. On a proper interpretation, is it a provision that extinguishes the right of appeal on a question of law if that appeal is not lodged within 30 days? Alternatively, is it to be properly understood as aimed at doing no more than regulating one aspect of the process to be followed in such appeal, namely, when the appeal should be filed? If it falls into

[40] Ibid para 22.

the former category, the exclusion of an express power to condone in the CSOS Act may arguably be understood to mean that the high court was intended to have no power of condonation. This Court in *National Credit Regulator v Lewis Stores (Pty) Ltd*,[41] found that in appeals of this nature the high court sits as the court of first instance. On that score nothing precluded the high court from condoning non-compliance with the time limit as our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body for whose benefit the powers were enacted.[42]

[44] A plain reading of s 57(2) of the CSOS Act affirms that on questions of law the Adjudicator is not the final *arbiter* of the dispute. That function is reserved for the high court. The purpose of s 57(1) is to establish the only jurisdictional factor that must be satisfied in order to exercise the substantive right of appeal. The appeal has to be on a question of law. This purpose is not met if s 57(2) is interpreted to mean that the failure to timeously lodge an appeal would result in the decision of the Adjudicator becoming final on questions of law. This conclusion is envisaged in the first judgment and the judgment of the high court which held that it had no residual power to condone the non-compliance with the time limit set out in s 57(2). On the contrary, the more reasonable interpretation, and one that better serves the right of access to courts, is that the time limit in s 57(2) simply regulates the procedure that is to be followed: it is not a jurisdictional requirement determinative of the right of appeal. In other words, it falls into the second of the two categories discussed above, and in terms of which the high court in any event would have its inherent powers of

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[41] *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190; 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA).
[42] *Millennium Waste Management (Pty) Ltd. v Chairperson, Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA); [2008] 2 All SA 145 (SCA); 2008 (5) BCLR 508 (SCA) para 17.

condonation at its disposal. This constitutes a default position which would have positive results for the litigants.

[45] This approach was adopted in *Baxter* where the high court considered an appeal brought outside the 30-day period, as prescribed in s 57(2).[43] The court held that:

'[t]here does not, however, need to be an express provision in the statute conferring a power of condonation. Depending on the context, the existence or conferral of such a power might in a given case be implied upon a proper construction of the relevant provisions of a statute.'[44]

It referred to *Phillips*[45] where this Court undertook such an interpretative exercise in analogous circumstances.

[46] I endorse the finding by the court in *Baxter*. It found that the prescribed period does not have the characteristics of an expiry period provision; that the exclusion of a power of condonation could readily conduce to incorrect decisions that could, and should be rectified, being irremediably visited upon members of community schemes. And that it was unlikely that the Legislature could have intended such an effect, as it would be irreconcilable with the object of the CSOS Act. The court in *Baxter* further held that the whole object of the CSOS Act is to facilitate the cost effective and relatively informal resolution of community scheme related dispute; that its provisions should not be read in a way that unreasonably limits the proper ventilation of such disputes, including appeals from the decisions of the Ombud; and that the CSOS Act does not contain any procedural directions concerning the lodging

[43] *Baxter* fn 29 above.
[44] Ibid para 5.
[45] *Phillips* fn 23 above.

and prosecution of the appeals permitted in terms of s 57. *Baxter* concluded by finding that the courts have to determine certain procedures to be followed and that the necessary implication is that the Legislature intended to leave procedural aspects of s 57 to the courts to regulate.[46]

[47] The provisions of s 57(2) should be read purposively and contextually. The central, if not the sole purpose of s 57(2) is to allow a person dissatisfied with the decision of the Adjudicator to appeal that decision and assert their legal rights. This is provided for should the jurisdictional requirement in s 57(1) be met and the appeal raises a question of law. It is important to consider the purpose of the provision. The clear legislative intent is not to extinguish the right of appeal, where it is intended, if it is filed late. In this case, it is to allow appeals on questions of law so as to prevent potentially prejudicial outcomes from the Adjudicator on legal issues. The purpose of the provision is to prevent wrong decisions on questions of law from influencing subsequent adjudications. For this reason, the right to an appeal should not be unduly fettered.

[48] The authorities that the first judgment relies upon in *Moch, Pizani,* and *Vlok*, advocate that the power to condone must be located in the legislation. That may be so, but such power can be implied. To hold otherwise would fly in the face of the judgments in *Toyota* and *Samancor*. The authorities relied on in the first judgment turned on different provisions. They demonstrate no more than that the high court's inherent jurisdiction to condone will depend on the provisions concerned and their interpretation by the court. In this matter, we are not dealing with an express

[46] *Baxter* fn 29 above para 7.

prohibition. The enquiry is, accordingly, whether on a proper construction of s 57(2) of the CSOS Act condonation of the late filing of an appeal is prohibited.

[49] The *Toyota* and *Samancor* decisions are clear on what needs to be considered by the court when dealing with an application for condonation. In *Toyota*, this Court, held that courts can condone breaches of statutory time limits, where justice demands. This reinforces the judicial discretion of the court to prevent unfairness and injustice. In *Samancor*, this Court enforced the strict compliance with statutory time limit required in terms of s 30P of the Pension Funds Act. It held that the court does not have a discretion to extend the period prescribed for noting an appeal, if doing so would defeat the purpose of the statute. It found that in respect of the Pension Funds Act disputes are to be effectively and efficiently finalised. Allowing late challenges would prejudice the beneficiaries and the Pension Fund. Both these judgments show that the main considerations are the purpose of the relevant provision of the statute and whether the granting of condonation would prejudice or be unfair to any of the parties. This affirms my view that the refusal of condonation in this matter defeated the purpose of s 57(2), which is to appeal decisions of the Adjudicator on the questions of law. At the same time, I am alive to the fact that this does not mean that there should be no disregard of the expressed time limit stated in the provision. Moreover, no prejudice would be suffered by the Body Corporate if condonation is granted to Mr Ncala.

[50] For this reason, too, the analogy given in *Mohlomi* regarding the interpretation of s 113(1) of the Defence Act, covered in the first judgment, does not apply to this case. Section 113(1) was interpreted there as being an exclusionary provision, relating to the infringement of a right of access to court in terms of s 34 of the Constitution. The period of 30 days prescribed in s 57(2) only regulates a procedural

aspect of the ability to pursue an appeal in court. In conclusion, the high court ought to have found that an implied power to condone better protects the right of access to court and thus is to be preferred to an interpretation that excludes the power. It ought also to have followed the binding authority in *Toyota* and *Samancor* which recognise that provisions of this nature do not exclude the inherent power of the high court to condone a failure to comply with a time limit. Thus, as stated by the Constitutional Court in *Steenkamp and Others v Edcon Limited*,[47] that where a court has an inherent discretion to grant condonation it may do so if the interests of justice demand it and where the reasons for non-compliance with the time limits are explained to the satisfaction of the court. The high court ought accordingly to have undertaken this exercise.

[51] Having determined that the high court had the power to consider condonation, I turn to consider whether it ought to have granted condonation. As mentioned, the high court would not have exercised its discretion in favour of Mr Ncala, even if it had the authority under the CSOS Act to condone the late filing of the appeal. It held that the delay was excessive, not adequately explained and unjustified. It found that no compelling explanation was given for the delay of more than a year to seek condonation. The high court was also not persuaded that the parallel proceedings in the Equality Court was a reasonable explanation for not timeously noting the appeal in the high court.

[52] The reasons for the delay, as set out by Mr Ncala's attorney were that, first, the legal team miscalculated the computation of the 30-day period. Instead of computing it as calendar days, they mistook it for 30 court days. Second, due to the

[47] *Steenkamp and Others v Edcon Limited* [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) para 26.

novelty and complexity of the issues, they had pursued a two-pronged approach. Counsel had advised that the most efficient approach was to have the high court and the Equality Court challenge heard together. Finally, they submitted that the effluxion of the 30-day period prescribed in s 57(2) coincided with the end of the year and the recess period for courts. Mr Ncala submitted that the delay of 68 days in noting an appeal was not excessive, and that the Body Corporate also did not find this period to be excessive.

[53] In *Turnbull-Jackson v Hibiscus Coast Municipality*,[48] the Constitutional Court restated the general principles when condonation is sought. Factors to be considered are:

'the length of the delay, the explanation for, or cause of, the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice.'[49]

The Constitutional Court also noted that 'although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation'.[50]

[54] In the present case, Mr Ncala's legal representatives gave a comprehensive and reasonable explanation for the delay, which was not excessive and caused no prejudice to the Body Corporate. What is more, there are three other important considerations. First, the appeal raises novel and important issues implicating the rights to equality and human dignity. Second, the appeal will impact on how the conduct rules intersect with these constitutional rights. Third, flowing from the second, the appeal would not only have a direct impact on Mr Ncala, but on similarly

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[48] *Turnbull-Jackson v Hibiscus Court Municipality and Others* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) para 23.
[49] Ibid.
[50] Ibid.

situated persons, particularly those with disabilities living in sectional title scheme units. In light of these factors, the high court ought to have granted the condonation application in the interests of justice. I am thus satisfied that there was sufficient cause to condone the late filing of the appeal.

[55] The dispute leading to this appeal arises from the modifications which Mr Ncala made to the common property adjacent to his ground floor unit. He shares the common property with another person who occupies the unit above his. In the external common area, Mr Ncala installed a washing machine with plumbing, erected a security gate and placed a plastic cover over the area to protect his washing machine from the elements.

[56] It is common cause that these modifications were made without prior approval of the Body Corporate and in violation of the conduct rules. Pursuant to that, the Body Corporate initiated a dispute resolution process through Ombud in May 2018. It sought the removal of the washing machine and plumbing from the common area, restoration of the area to its original condition and partial recovery of the costs. In November 2018, the Adjudicator, in large measure, found in favour of the Body Corporate. Mr Ncala was ordered to relocate the washing machine back to his kitchen and remove the plumbing from the common area. The Body Corporate was ordered to restore the security gate at its own cost. The most significant finding was that the Adjudicator rejected Mr Ncala's argument that his visual impairment justified the modifications and a deviation from the conduct rules to accommodate his reasonable needs. Instead, Mr Ncala was ordered to acquaint himself with and to abide by the conduct rules.

[57] Mr Ncala lodged an appeal in terms of s 57 of the CSOS Act with the high court in March 2019. His grounds of appeal were two-fold. First, that the enforcement of the conduct rules failed to reasonably accommodate his visual disability. Second, that the Adjudicator erred in applying formal equality, instead of substantive equality, which recognises different needs for different people. He asserted that this infringed his right to equality and dignity in terms of ss 9 and 10 of the Constitution,[51] respectively. He further relied on the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), which mandates the reasonable accommodation of persons living with disabilities. He also invoked international law, including the United Nations' Convention on the Rights of Persons Living with Disabilities of 2006,[52] which supports the principle that people living with disabilities need to be reasonably accommodated in communal areas.

[58] For these reasons, Mr Ncala sought a reversal of the Adjudicator's orders and for the high court to substitute them with declaratory relief to the effect that the Body Corporate violated his rights to dignity and equality; an order requiring that the Body Corporate to replace the removed gate, roof sheeting, and washing machine; and an

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[51] Section 9 provides as follows:
'(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'
Section 10 provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.'
[52] Adopted on 12 December 2006 by the sixty-first session of the General Assembly by resolution A/RES/61/106 available at https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities. Signed and ratified by South Africa on 30 March 2007 and 30 November 2007 respectively.

order requiring the Body Corporate to take steps to accommodate Mr Ncala's disability.

[59] Despite its finding that it had no legal authority under the CSOS Act to condone the late filing of the appeal and that the case for condonation lacked merit, the high court proceeded to consider the merits of the appeal. It dismissed the appeal and found that: (a) there had been no breach of Mr Ncala's rights to equality and dignity; (b) that the conduct rules were lawfully applied; (c) that he had been reasonably accommodated as the Adjudicator had ordered that his security gate be re-installed, was given permission to install the awning and would be assisted to re-install the washing machine indoors; and (d) that the Body Corporate acted within its mandate.

[60] In support of its orders, it found that substantive equality did not entitle Mr Ncala to breach the Body Corporate rules, that the reasonable accommodation principle did not give him an absolute exemption from the conduct rules, and that the modifications had been unauthorised. It held further that the conduct rules were to be applied consistently across the spectrum. Lastly, the high court found that the relief sought by Mr Ncala did not fall within the provisions of s 39 of the CSOS Act.

[61] Before this Court, the issues raised by Mr Ncala were as follows: First, the Adjudicator ought to have found that the Body Corporate infringed his rights to equality and dignity. Second, the Adjudicator erred by assessing the conduct of the Body Corporate against the formal rather than substantive equality standard. Third, the Adjudicator did not engage in a reasonable accommodation analysis insofar as Mr Ncala is concerned. Fourth, that the relief he sought in terms of s 39 read with s 38(3)*(a)* of the CSOS Act is competent and justified. Fifth, the Adjudicator was empowered to grant the declaratory order which falls within the scope of s 39(7)*(b)*

of the CSOS Act. Last, that the high court misdirected itself by making an adverse costs order against him.

[62] Conversely, the Body Corporate submitted that there was no discriminatory conduct on its part, that Mr Ncala failed to make out a case for reasonable accommodation, and that the relief sought by Mr Ncala was incompetent as it fell outside the perimeters of s 39 of the CSOS Act and was therefore *ultra vires*. In addition, the Body Corporate contended that s 39 does not contemplate the declaratory relief sought by Mr Ncala for the alleged infringement of his rights. This, it said, was because the Adjudicator is not a court of law as contemplated in s 166 of the Constitution. The Body Corporate submitted that the reasonable accommodation order sought by Mr Ncala should fail, as reliance on s 39(6)*(f)* of the CSOS Act was misplaced. The further reliance on various subsections of s 39 for the return or replacement of removed property, according to the Body Corporate, also had to fail. As regards costs, the Body Corporate contended that Mr Ncala had not set out grounds that entitle this Court to interfere with the exercise of the high court's discretion.

[63] In substantiation of its argument, the Body Corporate highlighted that Mr Ncala breached rule 18(1) of the conduct rules, which requires that modifications be approved either by a special or unanimous resolution at a general meeting of owners. It submitted that the breach of the conduct rules is actionable and such actions vindicate the right to dignity and freedom. For this contention, it placed reliance on *Body Corporate of the Pinewood Park Scheme No 202 v Dellis (Pty) Ltd*,[53] where this Court held that rules are akin to a 'domestic statute'. The Body Corporate relied,

[53] *Body Corporate of the Pinewood Park Scheme No 202 v Dellis (Pty) Ltd* (SCA) [2012] ZASCA 105; 2013 (1) SA 296 (SCA); [2012] 4 All SA 377 (SCA) para 15.

too, on *Barkhuizen v Napier*,[54] where the Constitutional Court stated that '[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity'. The Body Corporate further relied on this Court's holding in *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others*,[55] that the rules in a sectional title scheme are binding in the same way as a contract. Therefore, it asserted that the disregard of its conduct rules by Mr Ncala constituted a breach of that contract.

[64] I turn to consider whether Mr Ncala's rights to equality and dignity were infringed. This inquiry is critical to the appeal in that what this Court ultimately must determine is whether the Adjudicator erred in finding that the Body Corporate's conduct was fair and, consequently, in dismissing his complaint. To this end, it is necessary to have regard to the constitutional requirements of the right to equality and non-discrimination.

[65] Section 9 of the Constitution guarantees the right to equality before the law and equal protection and benefit of the law. It prohibits unfair discrimination by the state or by individuals on various grounds, including disability. Section 10 provides that 'everyone has inherent dignity and the right to have their dignity respected and protected'. This emphasises the respect for the inherent worth of every person. Equally, it recognises that individuals should be shielded from actions or circumstances that could diminish their dignity. These rights ensure that persons living with disabilities are treated with respect, enjoy equal protection and benefit of the law and are not unfairly discriminated against due to their disability. In *National*

[54] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 57.
[55] *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others* [2019] ZASCA 30; 2019 (4) SA 471 (SCA) paras 19 – 25.

Coalition for Gay and Lesbian Equality v Minister of Justice,[56] the Constitutional Court held that 'dignity requires us to acknowledge the value and worth of all individuals as members of our society'.

[66] In addition, there are fundamental guiding principles of law that need to be taken cognizance of. Section 9 of PEPUDA requires that persons living with disabilities be reasonably accommodated. Internationally, Article 2 of the UN Convention on the Rights of Persons with Disabilities, ratified by South Africa, provides that failure to accommodate people living with disabilities is a form of discrimination. This is in line with s 39(1) of the Constitution which requires our courts to consider international law when interpreting the Bill of Rights. While disability is pertinently covered in these instruments, there is a notable paucity of caselaw in regard thereto. Some scholars observe that disability is one of the most under-litigated and under-explored grounds of differentiation.[57] Although foreign law[58] has some useful results,[59] they mainly involve a vertical relationship between states and individuals, and not the horizontal relationship we are presented with here.

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[56] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 28.

[57] See in this regard T Ngcukaitobi 'Equality' in J De Waal and I Currie *The Bill of Rights Handbook* 6th Edition 2023 at 234–235 as well as the contributions in a 2014 special edition of the *South African Journal on Human Rights*: C Ngwenya and C Albertyn 2014 *SAJHR* 214 et seq.

[58] The Canadian case of *The Brant County Board of Education and the Attorney General for Ontario v Eaton* [1997] 1 RCS. Langa CJ quoted from para 67 of this case in *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2007 ZACC 21; 2008 (1) SA 474 (CC); 2007 (3) BCLR 287 (CC) para 74: 'Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them'. *Eaton* has however been criticised for its approach in *Granovsky v. Canada* [2000] SCC 28.

[59] See for instance the cases of *HM v Sweden*, the first resolution of a communication brought under the Optional Protocol by the CRPD Committee and *Nyusti & Takács v Hungary*, the third communication to be resolved by the Committee on the Rights of Persons with Disabilities, where the authors, who were Hungarian nationals, had visual impairments. These can be accessed at https://juris.ohchr.org/.

[67] Section 9(4) of the Constitution clearly sets out that 'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)'. One of those grounds is disability. In *Harksen v Lane NO and Others*,[60] the Constitutional Court adopted a two-pronged analysis to establish the infringement of this constitutional right. First, the court will have to determine whether the differentiation amounts to discrimination. Second, if it does, the court must determine whether the discrimination amounts to unfair discrimination alongside the rationality test. Section 9(4) of the Constitution is embodied in s 9 of PEPUDA.

[68] PEPUDA was enacted to give effect to s 9 of the Constitution, which prohibits unfair discrimination. It applies alike to the state, private individuals and organisations like the Body Corporate. This is in line with s 8(2) of the Constitution which states that a provision in a Bill of Rights binds a natural or juristic person if, and to the extent, that it is applicable, considering the nature of the right and duty involved. This means that private individuals and juristic entities must also uphold these rights, and not only the state. This allows the courts to apply constitutional rights horizontally and not just vertically. It is a crucial piece of legislation enacted to build a more just and equitable society. PEPUDA has been in operation since June 2003 and should have been considered in the adjudication of this matter. So too, should Article 2 of the Convention on the Rights of People with Disabilities. The Article espouses the principle of reasonable accommodation as follows:

'[a] means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'

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[60] *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) para 44.

[69] The issue in this case is the lack of reasonable accommodation of Mr Ncala as a visually impaired person. PEPUDA provides for measures of equality and the eradication of unfair discrimination, with specific reference to disability. It provides that no person may unfairly discriminate against any person including: 'denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;'[61] and 'failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons'.[62]

[70] Discrimination on the grounds of visual impairment can occur in almost every sphere, including housing, as alleged in this appeal. In this case, the discrimination is alleged to impact on the safety of Mr Ncala within his own home. When he purchased his home, he was assured by the estate agent that he could move his washing machine outside, to avoid possible injury to himself. Of course, the estate agent could not bind the body corporate in any way, but this fact points to Mr Ncala's concern to determine that it would be permissible to install his washing machine outside his kitchen door. Although the conduct rules ultimately did not permit this without deviation, s 9*(c)* of PEPUDA prohibits the failure to take steps to reasonably accommodate persons with disabilities. This is the context within which the lawfulness of the conduct of the body corporate in refusing to deviate from its rules must be weighed.

[71] The high court recognised that there are two concepts of equality, that is, formal and substantive equality. Formal equality recognises the treatment of

[61] PEPUDA s 9.
[62] Ibid.

everyone identically in the application of rules and laws. It entails that the law should apply equally to people who are in the same situation, regardless of their background or status. Conversely, substantive equality recognises that different groups of people may require different approaches or forms of accommodation to enable them to enjoy the same level of benefit in their participation in society. It endeavours to eliminate barriers that prevent certain groups of persons from fully participating in various situations, by advancing the concept of reasonable accommodation to ensure that they obtain an equal opportunity to exercise their rights.[63] The aforementioned principles are relevant to Mr Ncala's case. Mr Ncala, a visually impaired person requires to be reasonably accommodated within his unit and its common area. He cannot fully enjoy the use of his unit due to having a washing machine placed in the kitchen area. A washing machine poses a danger to his safety as it enhances the risk of him slipping on water from the washing machine. This is a barrier not only to the enjoyment of his unit, but a hazard to his safety. The Body Corporate can easily accommodate him by allowing that the washing machine be placed outside in the common area which he shares with his upstairs neighbour.

[72] In *MEC for Education v Pillay* (*Pillay*),[64] the Constitutional Court ruled that the school's policy was unfairly discriminatory, as it violated the learner's right to practice her religion and culture. It emphasised that schools have a duty to reasonably accommodate the religious and cultural practices of their learners, unless

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[63] There is a rich body of scholarship and Constitutional Court jurisprudence on the notion of substantive equality. See in this regard the work of C Albertyn 'Substantive equality and transformation in South Africa' 2007 SAJHR 253, also 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' 2018 SAJHR 34(3), 441–468. In addition to substantive equality, s 9 is also seen to envisage 'remedial or restitutory equality' (See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* note 56 above paras 60-61) While the Constitutional Court has applied substantive equality to many protected groups based on different grounds listed in s 9, disabled people still await their turn.

[64] *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2007 ZACC 21; 2008 (1) SA 474 (CC); 2007 (3) BCLR 287 (CC). While this case was based on religion and not on disability, Langa CJ drew a comparison with the marginalisation of disabled people.

doing so would impose an undue burden on their core function of providing education. Similarly, in *Jansen v Legal Aid of South Africa*[65] the Labour Court affirmed that employers must explore reasonable accommodation before dismissing disabled employees. In *Baxter*[66] the court emphasised that Adjudicators must consider constitutional rights and reasonable accommodation in community schemes disputes.

[73] The upshot of these cases is that the application of reasonable accommodation ensures equal enjoyment of rights by all, irrespective of their disability. Reasonable accommodation therefore requires that the conduct rules of a sectional scheme should not impose a disproportionate or undue burden on the person living with disability. The duty to reasonably accommodate people living with disability is proactive, therefore, failure to accommodate can be tantamount to unfair discrimination.[67]

[74] With these principles in mind, I consider Mr Ncala's case. First, Mr Ncala was originally ignorant of the conduct rules, as none were provided to him electronically. Absent prior knowledge of the conduct rules, he innocently relied on the

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[65] *Jansen v Legal Aid SA* (2018) 39 ILJ 2024 (LC) para 43. While this case was overturned on appeal by the Labour Appeal Court due to lack of evidence that the employee's acts of misconduct were caused by his depression and that he was dismissed for being depressed, the principle that employers must explore reasonable accommodation before dismissing a disabled employee was confirmed. The Labour Appeal Court, in *Legal Aid South Africa v Jansen* 2021 (1) SA 245 (LAC) para 50, stated that: 'As already discussed, but worthy of repeating, that is not to say that the depression of an employee is of insignificant relevance. Depression, sadly, is a prevalent illness in the current environment. Employers have a duty to deal with it sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal'.

[66] *Baxter* fn 29 above.

[67] On the concept of reasonable accommodation see for example A Lawson 'Accessibility obligations in the UN Convention on the Rights of Persons with Disabilities: *Nyusti & TakÜcs v Hungary*' 2014 *SAJHR* 380 – 392. See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC); *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2005 JDR 1405 (CC) para 159. South Africa's legislation has a reference to the concept of reasonable accommodation in PEPUDA, and it is also defined in s 1 of the Employment Equity Act 55 of 1998 as 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'.

representations of the estate agent who sold the unit to him, that he could modify the unit to the extent necessary. The modifications were only triggered by his safety concerns. He feared that if the washing machine remained in the kitchen area, and water spilt on the slippery kitchen tiles when he did his laundry, he could slip on the wet kitchen floor and injure himself.

[75] The absence of any written authority to Mr Ncala to modify his unit should not have been treated as a fatal flaw to his request to be reasonably accommodated. Mr Ncala is visually impaired and does not possess the capability to perceive danger as people with visual impairment do. Second, the concern that he expressed over the possibility of slipping on a wet floor in the kitchen is genuine. The Adjudicator's finding that he faced the same challenge in the bathroom was unreasonable: just because its use put him at risk does not justify him being put to the additional risk from a washing machine placed in his kitchen. After all, he could hardly be expected to bath or shower outside, whereas he could do his washing outside. She failed to appreciate that a bathroom is a confined space, with possibly modified bars for Mr Ncala to hold onto as he navigates the space.

[76] I also point out that in the kitchen, soapy water could unexpectedly spill on the floor without him realising it, and this could lead him to fall and injure himself. Water spills in the kitchen may not be confined to one spot. Water can also spill from a kitchen sink. The kitchen area is a dangerous zone for Mr Ncala when doing laundry. However, the washing machine posed an additional hazard in the kitchen area. It was unreasonable for the body corporate to refuse to permit him to eliminate this additional hazard by permitting him to move the washing machine outside. This would not only have caused undue hardship for Mr Ncala, but would have unfavourable consequences for him. On the other hand, there could have been no

inherent prejudice to the remaining residents and members of the scheme had the body corporate simply permitted the installation of the washing machine outside his kitchen door. It would have been a simple method to ensure reasonable accommodation for his disability.

[77] The modifications made by Mr Ncala would not have caused undue hardship to anyone. They were confined to the common area he shared with his upstairs neighbour. Furthermore, there is no suggestion that his neighbour objected to the modifications. The Adjudicator ruled that he should remove the washing machine, yet in the same breath, authorised Mr Ncala to install an awning where the washing machine was. This does not make sense, as the awning had been installed to protect the washing machine from the elements.

[78] The refusal to accommodate Mr Ncala was premised on the idea that the conduct rules applied equally to everyone alike, including Mr Ncala. This did not take into account that the modifications effected by Mr Ncala were necessary for a visually impaired person for safety reasons within his unit. The modifications were proportionate, tailored for his disability, and confined to what Mr Ncala considered to be essential to prevent potential harm to himself. They caused no undue inconvenience or hardship to other members of the scheme, nor any expense for the Body Corporate.

[79] In the circumstances, the rigid attitude adopted by the Body Corporate was not justified. At a special meeting of members to consider whether Mr Ncala should be permitted to keep modifications, the Body Corporate failed to disclose to the members that Mr Ncala was visually impaired. It is not surprising that the vote went against him. The repeated failure by the Body Corporate to provide him with the

conduct rules electronically and in braille made the refusal to accommodate him unjust. This is contrary to what the Constitutional Court found in *Dawood v Minister of Home Affairs,*[68] where it took the view that '[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner'.

[80] To achieve the objective of equality, I find that reasonable accommodation in a case like this may include allowing structural modifications, granting exclusive rights or exempting disabled residents from burdensome rules. As the duty to accommodate is proactive, the Body Corporate must espouse the principle of minimum hardship to its members. The refusal by the Body Corporate to accommodate Mr Ncala's modifications constitutes unfair discrimination. The removal of the modifications essential for Mr Ncala's safety infringed his rights to dignity and equality. The Body Corporate failed to reasonably accommodate Mr Ncala's disability, which is contrary to the Constitution and the jurisprudence of our courts and it failed to apply the principles of substantive equality.

[81] The Adjudicator and the high court failed to appreciate that substantive equality requires context-sensitive treatment of individuals. This was contrary to what the Constitutional Court espoused in *President of RSA v Hugo* (*Hugo*)[69] where it found that substantive equality requires differential treatment to redress disadvantage. In *Hugo* the court held further that 'although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that

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[68] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 para 47.
[69] *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC).

inequality'.[70] Equally in *Minister of Finance v Van Heerden* (*Van Heerden*)[71] it expressed itself as follows:

'The achievement of equality goes to the bedrock of our constitutional architecture [it] is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.

. . .

The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution. . . From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.

. . .

This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.'[72] (Citations omitted)

Mr Ncala's s rights are protected by the Constitution and the legislation. The Body Corporate fails to appreciate that that their failure to accommodate Mr Ncala's disability not only places him at a disadvantage, but their conduct is also discriminatory.

[82] Counsel for Mr Ncala correctly pointed out that formal equality is means focused, as it does not consider the outcome, and insists that people be treated equally. Whereas substantive equality recognises that it may be necessary to treat other people differently. In *Hugo,* the Constitutional Court recognised that we cannot

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[70] Ibid para 112.
[71] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC); (2004) 25 ILJ 1593 (CC).
[72] Ibid paras 22, 26 – 27.

insist upon identical treatment in all circumstances to achieve the goal of equality.[73] It held further that 'each case . . . will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not'.[74]

[83] *Van Heerden* espouses the importance of the contextual approach to achieve substantive equality. In *Van Heerden* the Constitutional Court recognised that there are levels and forms of social differentiation and underprivilege.[75] It took the view that the court would have to:

'scrutinise in each equality claim the situation of the complainant in society, their history and vulnerability, the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantaged in a real life context, in order to determine its fairness or otherwise in the light of the values of our constitution.'[76] (Citations omitted.)

[84] Had the Adjudicator applied this approach, she would have realised that the effect of the Body Corporate's refusal to approve Mr Ncala's request was discriminatory. The Adjudicator erred by assessing the Body Corporate's conduct in terms of formal equality. She ought to have assessed it against the standard of substantive equality, and not formal equality. In doing so, the adjudicator compounded the infringement of his rights by endorsing the Body Corporate's decision to refuse his request. She ought to have found that the Body Corporate's conduct was unfair and that his complaint was well-founded.

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[73] *Hugo* fn 69 above para 41: '. . . We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.'
[74] Ibid.
[75] *Van Heerden* fn 71 above para 27.
[76] Ibid.

[85] This brings me to the issue of competent relief. It is important to appreciate that while the kernel of Mr Ncala's complaint lay in the discriminatory effect of the Body Corporate's decision, his cause of action resides under the CSOS Act. It follows that the relief to which he is entitled must fall within the ambit of that Act. Mr Ncala duly sought relief in terms of s 39 of the CSOS Act.[77] That provision

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[77] Prayers for relief 39. An application made in terms of section 38 must include one or more of the following orders: (1) In respect of financial issues— (a) an order requiring the association to take out insurance or to increase the amount of insurance; (b) an order requiring the association to take action under an insurance policy to recover an amount; (c) an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way; (d) an order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order; (e) an order for the payment or re-payment of a contribution or any other amount; or (f) an order requiring a specified tenant in a community scheme to pay to the association and not to his or her landlord, all or part of the rentals payable under a lease agreement, from a specified date and until a specified amount due by the landlord to the association has been paid: Provided that in terms of such an order— (i) the tenant must make the payments specified and may not rely on any right of deduction, set-off or counterclaim that he or she has against the landlord to reduce the amount to be paid to the association; (ii) payments made by the tenant to the association discharge the tenant's liability to the landlord in terms of the lease; and (iii) the association must credit amounts received from the tenant to the account of the landlord. (2) In respect of behavioural issues— (a) an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way; (b) if satisfied that an animal kept in a private area or on common areas is causing a nuisance or a hazard or is unduly interfering with someone else's peaceful use and enjoyment of his or her private area or common area, an order requiring the owner or occupier in charge of the animal— (i) to take specified action to remedy the nuisance, hazard or interference; or (ii) to remove the animal; (c) an order declaring that an animal is being kept in a community scheme contrary to the scheme governance documentation, and requiring the owner or occupier in charge of the animal to remove it; or (d) an order for the removal of all articles placed on or attached illegally to parts of a common area or a private area. (3) In respect of scheme governance issues— (a) an order requiring the association to record a new scheme governance provision consistent with a provision approved by the association; (b) an order requiring the association to approve and record a new scheme governance provision; (c) an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision; or (d) an order declaring that a scheme governance provision, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable, and requiring the association to approve and record a new scheme governance provision— (i) to remove the provision; (ii) if appropriate, to restore an earlier provision; (iii) to amend the provision; or (iv) to substitute a new provision. (4) In respect of meetings— (a) an order requiring the association to call a general meeting of its members to deal with specified business; (b) an order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened; (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; (d) an order declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed; or (e) an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers. (5) In respect of management services— (a) an order requiring a managing agent to comply with the terms of a person's contract of appointment and any applicable code of conduct or authorisation; or (b) an order declaring that the association does or does not have the right to terminate the appointment of a managing agent, and that the appointment is or is not terminated. (6) In respect of works pertaining to private areas and common areas— (a) an order requiring the association to have repairs and

outlines the types of orders that an Adjudicator can make to resolve disputes within the community schemes. These orders cover various aspects, including financial matters, behavioural issues, scheme governance, meeting conduct, management services and works related to both private and common areas. Where there is a breach of the rules, the Adjudicator can enforce compliance with the scheme's conduct rules. In relation to common property, the Adjudicator can issue orders to prevent damage to or misuse of the common areas. At the same time, Adjudicators can review the decisions made by the Body Corporate. Relevant to this matter is s 39(2) of the CSOS Act, which regulates behavioural issues, and s 39(6), which pertains to works in respect of private areas and common areas.

[86] The Adjudicator found that it was not empowered to grant the orders sought by Mr Ncala, as they were beyond the ambit of s 39, a sentiment shared by the Body Corporate. Mr Ncala contended, to the contrary, that the orders he sought do fall within the purview of s 39. First, s 39(6)*(a)* empowers the Adjudicator to grant an order directing the Body Corporate to carry out repairs and maintenance. Second, s 39(6)*(c)*(i) empowers the Adjudicator to direct the Body Corporate to carry out specific works. Third, s 39(6)*(e)* provides for orders directing the association to

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maintenance carried out; (b) an order requiring the relevant person— (i) to carry out specified repairs, or have specified repairs made; or (ii) to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the applicant; (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; or (ii) not to carry out specified works; (d) an order declaring that the association's decision to reject a proposal to make improvements on or alterations to common areas is unreasonable, and requiring the association— (i) to agree to the proposal; or (ii) to ratify the proposal on specified terms; (e) an order requiring the association— (i) to acquire, within a specified time, specified property for the use, convenience or safety of owners or occupiers; (ii) not to acquire specified property; or (iii) to dispose of specified property, within a specified time; (f) an order declaring that an owner or occupier reasonably requires exclusive use rights over a certain part of a common area, that the association has unreasonably refused to grant such rights and requiring the association to give exclusive use rights to the owner or occupier, on terms that may require a payment or periodic payments to the association, over a specified part of a common area; or (g) an order obliging an owner or occupier to accept obligations in respect of a defined part of a common area. (7) In respect of general and other issues— (a) an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association to make such information or documents available within a specified time; or (b) any other order proposed by the chief ombud.

acquire, within a specified period, specified property for the use, convenience or safety of owners or occupiers.

[87] Mr Ncala did not point to any provision authorising the Adjudicator to declare that the Body Corporate had infringed his rights to dignity and equality. Bearing in mind that the Adjudicator's powers arise from, and are circumscribed by, the CSOS Act, there is merit in the Body Corporate's contention that the declarator, in the terms sought, falls outside the ambit of the Adjudicator's competence.

[88] However, in my view, this is not fatal to Mr Ncala's claim for relief. There are at least three provisions that permit relief appropriate to Mr Ncala's complaint. First, under s 39(6)(*f*), if an owner 'reasonably requires exclusive use rights over a certain part of a common area', the Adjudicator is empowered to issue a declarator to this effect. The Adjudicator may declare as unreasonable a refusal by the Body Corporate to grant such rights, and may direct that the relevant common area outside his unit be used, with the necessary modifications, to reasonably accommodate Mr Ncala's reasonable needs.

[89] Second, s 36(6)(*d*) empowers the Adjudicator to grant an award:

'declaring that the association's decision to reject a proposal to make improvements on or alterations to common areas is unreasonable, and requiring the association

(i) to agree to the proposal or

(ii) to ratify the proposal on specified terms.'

[90] Third, s 39(4)(*d*) provides for an order 'declaring a motion considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances'. In that case, the association may

be ordered to give effect to the motion as was originally proposed or a variation thereof.

[91] Although Mr Ncala did not express his relief in these precise terms, in substance, his complaint was that the refusal by the Body Corporate to permit him to install his washing machine outside was discriminatory and thus unfair and unreasonable. It therefore lay within the Adjudicator's powers under these provisions to grant appropriate relief directed at reversing the Body Corporate's refusal.

[92] The remaining relief-related issue is Mr Ncala's request that the Body Corporate be directed to replace the washing machine that was damaged after the removal of the plastic sheeting cover, as well as to restore the plastic sheeting cover at its cost. His counsel contended that the plastic sheeting was removed without a court order and without his consent in violation of his constitutional rights. Further that this has financial consequences for Mr Ncala, who has to replace and repair the removed items. It was submitted that he must therefore be restored to the position he was in before the violation of his rights.

[93] The Court's attention was drawn in this regard to s 39(7)*(b)* which provides for orders in respect of general and other issues, and includes 'any order proposed by the chief ombud'. Although the section caters for general issues which do not fall within the scope of the orders listed in other sub-sections of s 39, it is not without limitation. It does not expressly give the Adjudicator the power to make a form of restitution order such as that sought by Mr Ncala. Critically, it is not the Adjudicator who has the power to make 'any other order proposed'. That power resides in the

'chief ombud' who, by definition, is appointed under s 14.[78] Thus, it cannot be relied on as basis upon which the Adjudicator can make an award directing the Body Corporate to effect restitution in this case.

[94] Although one can sympathise with Mr Ncala's disability ultimately leading to the financial loss he suffered as a result of the removal of the plastic sheeting cover and degradation of his washing machine, his request for restitution in this respect resides more appropriately within the arena of PEPUDA and the equality court. The CSOS Act is not geared towards dealing with this form of complaint. It would be stretching the provisions of s 39 beyond their intended purpose to read into them a power on the part of an Adjudicator to order proprietary restitution, or damages in a case like this.

[95] It was also incorrect for the high court to conclude that the reasonable accommodation order sought by Mr Ncala was 'formulated in extremely vague and nebulous terms'. The high court, which sits as a court of first instance when determining the appeals, could easily have requested that Mr Ncala supplement his papers if the orders sought were vague. Besides that, I find that Mr Ncala's case was clearly made out in the papers.

[96] Having found that the Body Corporate acted unfairly and unreasonably, Mr Ncala was entitled to relief under the CSOS Act. The Adjudicator erred in dismissing his complaint, as did the High Court in dismissing his appeal. He is entitled to relief permitting his use of the common property in order to reasonably accommodate his disability.

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[78] CSOS Act s 1.

Costs

[97] In this case, I find that the high court erred in mulcting Mr Ncala in costs. Mr Ncala bona fide pursued the protection of his constitutional rights in terms of the law. His litigation was neither vexatious nor an abuse of the processes of court. The first judgment proposes that each party should pay its own costs. I agree with that proposition.

[98] In the result, the following order is made:

1. The appeal is upheld.
2. The order of the high court is set aside and replaced with the following order:

'(a) The late filing of the appeal is condoned.

(b) The appeal is upheld.

(c) The award of the adjudicator is set aside and replaced with the following:

"(i) It is declared that Mr Ncala reasonably requires exclusive use rights of that portion of the common wall necessary for the installation of the washing machine and plastic sheeting cover referred to in paragraph (ii), which rights the Body Corporate unreasonably refused.

(ii) The Body Corporate is required to permit Mr Ncala to install, at his own cost, a washing machine in the common area adjacent to his flat, together with such covering necessary to protect the washing machine, which covering is acceptable to the Body Corporate.

(iii) Mr Ncala shall be obliged to maintain the installation of the washing machine and the plastic sheeting in good repair and so as to avoid damage to the common wall.

(iv) Mr Ncala shall pay the contribution levy which is levied to all other owners who have exclusive access to the washing area.

(vi) Mr Ncala shall be obliged to remove the installation of the washing machine as well as the covering, and to make good all changes effected to the exterior wall when he ceases to occupy the unit and/or ceases to be a member of the Body Corporate.

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YT MBATHA

JUDGE OF APPEAL

Appearances:

For appellant:	E Webber and N Nyembe
Instructed by:	Norton Rose Fulbright South Africa Inc., Cape Town
	Lovius Block Attorneys, Bloemfontein
For first respondent:	M Desai and T Kgomo
Instructed by:	Andraos and Hatchett Inc., Johannesburg
	Van der Merwe & Sorour Attorneys, Bloemfontein.