



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no:171/2024

In the matter between:

PARCH PROPERTIES 72 (PTY) LTD

APPELLANT

and

SUMMERVALE LIFESTYLE ESTATE

OWNERS' ASSOCIATION

FIRST RESPONDENT

THE CITY OF CAPE TOWN

SECOND RESPONDENT

THEODORE BROPHY

119TH RESPONDENT

WILLEM HENDRIK DU PREEZ

192ND RESPONDENT

AND 287 OTHER RESPONDENTS

Neutral citation: *Parch Properties 72 (Pty) Ltd v Summervale Lifestyle Estate Owner's Association and Others* (171/2024) [2025] ZASCA 155 (17 October 2025)

Coram: MOKGOHLOA, BAARTMAN and COPPIN JJA, and STEYN and TOLMAY AJJA

Heard: 14 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 17 October 2025.

Summary: Community Schemes Ombud Act 9 of 2011 – jurisdiction of the high court not ousted – whether refusal to amend the constitution of a Community Scheme was reasonable – test for reasonableness objective and fact based – refusal was reasonable.

ORDER

On appeal from: Western Cape Division of the High Court, (Adhikari AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Mokgohloa and Baartman JJA (Coppin JA, and Steyn and Tolmay AJJA concurring):

Introduction

[1] The appellant, Parch Properties 72 (Pty) Ltd (Parch), unsuccessfully applied to the Western Cape Division of the High Court (the high court), for declaratory relief,¹ declaring, among other things, that its development on Erf 6343 (the garden cottages) be included in the definition of ‘Area’ in the constitution of Summervale Lifestyle Estate Owners’ Association (the HOA). The latter is a property owners’ association within the definition of ‘community

¹ ‘1. That a Rule Nisi be issued calling upon all interested parties to show cause, ...why an order in the following terms should not be granted:

- 1.1 That it is declared that the Constitution of the First Respondent ...be interpreted in the following terms: That the “Area”, as defined at clause 2.1.2 of the Constitution, is to include Erf 6343, Strand, in addition to Erf 5070 Strand.
- 1.2 That it is declared that the owner of the properties situated on Erf 6343, Strand is a member of the First Respondent, by virtue of its ownership, as contemplated by clause 5 of the Constitution, and that it has been a member since 1 December 2014, alternatively from such date as the court may determine....
- 1.3 In the alternative, that it is declared that paragraphs 1.1 and 1.2 supra are implied by operation of law and/or had been agreed to by all the relevant parties tacitly....’

scheme' in s 1 of the Community Scheme Ombud Services Act 9 of 2011 (the CSOS Act). The appeal and conditional cross-appeal is with leave of the high court. At the hearing the cross-appeal was abandoned.

[2] In 2002, the City of Cape Town (the City) approved an application² by the developer, White Waves Trading (Pty) Ltd (White Waves), to subdivide and rezone Erf 5070 to be developed as a retirement village within a gated community. The development would include cluster homes, sectional title units, a club house, a frail care centre and an administrative block. The City imposed several conditions on the approval, including that a Home Owners' Association (HOA) be established with an approved constitution. Those conditions were met and that constitution forms the subject of this litigation. The development is known as the Summervale Lifestyle Estate (Summervale).

[3] The development on Erf 5070 was completed in two phases: – phase 1 consisted of 162 free-standing cluster homes and phase 2 consisting of 78 sectional title flats and a care centre. In 2010-2011, White Waves applied for and was granted permission³ for the rezoning, departure and phasing of Erf 6343. The latter is adjacent to Erf 5070, the property of the HOA. The City granted the permission subject to certain conditions. One of which is the following: ' (v) that the subject property resort under the Summervale Lifestyle Estate Home Owner's Association and that their constitution be amended accordingly.'

[4] Erf 6343 was developed into 55 garden cottages, with garages, storage rooms, private roads and private open spaces (the garden cottages). The garden cottages, with a design style similar to the dwellings on Summervale, are rented out. The HOA has since 2010 recognised the owner of Erf 6343 as a member of

² In terms of the Land Use Planning Ordinance 15 of 1985 (LUPO).

³ Section 42 of LUPO.

Summervale, in that it was represented at annual general meetings as the owner of phase 3 and exercised a pro rata vote according to the units it owned in phases 1, 2 and 3. The HOA therefore charged levies in respect of the garden cottages, which were paid without demur. Since 2014, the garden cottages have become fully integrated with Summervale, in that its tenants use the same shared access points and private roads and the same security measures apply to both developments. In 2015-2016, White Waves, as a developer of the erf, sold Erf 6343 and all its rights therein to Parch. Since 2015, the latter's director has been one of the HOA's trustees.

[5] In 2021, a group of Summervale residents (the Venter group) questioned whether the garden cottages, phase 3, formed part of Summervale. They argued that clause 5.1 of Summervale's constitution provided that: '[m]embership of the Association shall be evidenced by registered ownership in the Deeds Registry in Cape Town of one or more erven in the Area'. The Venter group further contended that 'Area' is defined in Clause 2.1.2 as 'the [r]emainder of Erf 5070 The Strand, including any subdivision thereof'. It is common cause that the garden cottages are on Erf 6343, which is not included in the definition of 'Area' in the constitution.

[6] On 11 April 2022, Summervale's Trustees Committee unsuccessfully sought to amend the constitution in terms of clause 14.2⁴ by round robin ballot. Only 68% of the voters favoured the amendment, instead of the required 75%. The following amendment was sought:

'Motion to Amend [HOA] Constitution dated 2 August 2013:

The current description of "**2. DEFINITIONS**

2.12 "Area" shall mean the remainder of Erf 5070 The Strand, including any subdivision thereof;"

⁴ Clause 14.2 of the Summervale Constitution 'Amendments to the Constitution: ...The Constitution may also be amended at any other stage, provided that 75% of all members grant their written consent to the amendment.'

To be amended to read as follows, with the inclusion of the underlined words:

2.1.2 “Area” shall mean the remainder of Erf 5070 and **Erf 6343** The Strand, including any subdivision thereof”

2. The amendment to be effective retroactive to 1 December 2014 when [the appellant] effected the first levy payments to Summervale Lifestyle Estate Owners Association’.

[7] On 6 June 2022, the Committee, in terms of clause 14.1,⁵ made another unsuccessful attempt to amend the constitution. The motion was opposed by a large majority. At the time, 43 of the garden cottages had already been built and the rest were in progress. Litigation followed in which Parch sought a declarator that the garden cottages were included in the word ‘Area’ in the HOA constitution. Two members of the Venter group, the 119th and 192nd respondents, opposed the matter. However, 97 other members of the Venter group, 74 single residential homeowners and 23 sectional title owners, have expressed support for the opposition in a petition. They have not formally opposed as the possibility of adverse costs orders appears to have been daunting in their twilight years. Therefore, reference to the Venter group from this point is reference to the 119th, 192nd respondents, as well as those petitioners. So as not to incur costs, the HOA abided by the outcome, and in correspondence dated 28 November 2022; its trustees said that they ‘support the relief moved for by the applicant’.

[8] In addition to the relief sought, referred to above, Parch also sought the following:

‘1.4 In the further alternative, that in terms of section 39(4)(d) of the Community Scheme Ombud Services Act 9 of 2011 [CSOS Act], it is declared that the motion(s) which refused the amendment to the Constitution in terms of prayer 1.1 *supra* are declared to be unreasonable and that they be set aside and substituted with a motion that reads as follows...:

⁵ Clause 14.1 ‘The Constitution may be amended at the Annual General Meeting of the Association. Each amendment shall be approved by 50% plus 1 of the total number of members, personally or represented by proxy.’

“That clause 2.1.2 of the Constitution of the Summervale Lifestyle Estate Owners’ Association is amended by changing the definition of “Area” to include Erf 6343, Strand, in addition to Erf 5070.”

[9] The high court was persuaded that the matter ‘hinges on complex and novel issues of law’ which constituted special circumstances that justified Parch launching the application in the high court instead of approaching the Ombud in terms of the CSOS Act. The abandoned cross appeal related to that finding.

[10] Parch is no longer pursuing the relief sought in prayers 1.1 to 1.3⁶. Instead, it has limited its appeal in this Court to the alternative relief sought in terms of the CSOS Act. Therefore, the issues in this appeal are:

- (a) Whether the high court correctly assumed jurisdiction to entertain the matter as a court of first instance.
- (b) Whether the high court erred in holding that the opposition to the motion to amend the constitution was reasonable.

Did the high court have jurisdiction to entertain the application as a court of first instance?

[11] In opposing the application, the Venter group denied that the high court had jurisdiction to entertain the matter. Since Parch sought relief in terms of s 39(4)(d) of the CSOS Act, so the submission went, the Ombud, and not the high court had jurisdiction over the dispute. Further, that the high court’s jurisdiction was limited to appeals and reviews from the Ombud. The high court, relying on *Heathrow Property Holdings No 33 CC and Others v Manhattan Place Body Cooperate and Others*⁷ (*Heathrow*) held that ‘if the Ombud has the jurisdiction to grant such orders, I must decline to determine the matter, unless there are

⁶ See footnote 1 above.

⁷ *Heathrow Property Holdings No 33 CC and Others v Manhattan Place Body Corporate and Others* [2021] ZAWCH 109; [2021] 3 All SA 527 (WCC); 2022 (1) SA 211 (WCC) para 61.

exceptional circumstances warranting the court determining the matter as a forum of first instance'. The high court found that there were exceptional circumstances present that clothed it with jurisdiction.

[12] In considering the issue of jurisdiction, we find it necessary to outline the purpose, and the relevant provisions of the CSOS Act. Its purpose is to provide for: (a) the establishment of the Community Schemes Ombud Service (the service); (b) its mandate and functions; (c) a dispute resolution mechanism in community schemes; and (d) to provide for matters connected therewith. Importantly, the CSOS Act was established, *inter alia*, for the purpose of providing an expeditious and informal cost-effective mechanism for the resolution of disputes.

[13] Section 38(1) of the CSOS Act provides that any person who is a party to or affected by a dispute, may make an application to the Ombud. A dispute for the purpose of the CSOS Act is defined as 'a dispute in regard to the administration of a community scheme between persons who have a material interest in the scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly'. Section 39 provides for the relief that can be claimed in the application. It states:

'An application made in terms of s 38 must include one or more of the following orders:

- (1) ...
- (2) ...
- (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) ...

(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) ...

(ii) ...

(iii) to amend the provisions; or

(iv) to substitute a new provision.

(4) In respect of meetings –

(a) ...

(b) ...

(c) ...

(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) ...’

[14] As indicated above, a dispute is defined as one regarding the administration of a community scheme between persons with an interest in the scheme, and one of the parties being the association. The section provides that ‘a person may make an application’. Once the choice is exercised, the application ‘must’ be made in the prescribed manner. That is a clear indication of a choice of forum. In addition, ‘association’ is defined as ‘any structure that is responsible for the administration of a community scheme’. The HOA is not an opposing party in this dispute, it being common cause that it supports Parch’s application. Parch is also not a member of the Summervale community, and it failed twice to obtain the required votes to amend Summervale’s constitution to include it as a member.

[15] In addition, ‘community scheme’ is defined as:

‘...any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to sectional titles development scheme, a share block...’

In *Coral Island Body Corporate v Hoge (Coral Island)*,⁸ the court dealt with a dispute in which the body corporate of a residential property sectional title scheme sought declaratory and interdictory relief against one of its members. The dispute involved mundane issues of unauthorised alterations with inferior piping to a geyser overflow. Despite the mundane nature of the dispute, the court held that:

‘Compelling constitutional and social policy considerations informed the introduction of the legislation that is manifest in the Ombud Act. The promotion of access to justice by those not easily able to afford to litigate in the civil courts was but one of those considerations. Another was the social utility to be achieved by the provision of a relatively cheap and informal dispute resolution mechanism for the disposal of community-scheme-related issues. It requires little insight to appreciate that those commendable policy considerations would be liable to be undermined if the courts were indiscriminately to entertain and dispose of matters that should rather have been brought under the Ombud Act. *Whilst judges and magistrates may not have the power to refuse to hear such cases, they should, in my view, nonetheless use their judicial discretion in respect of costs to discourage the inappropriate resort to the courts in respect of matters that could, and more appropriately should, have been taken to the Community Schemes Ombud Service*’. (Own emphasis.)

[16] The *Coral Island* approach is consistent with the Constitution and the purpose of CSOS and related legislation. This Court in *Standard Bank of SA Ltd and Others v Thobejane and Others*⁹ (Thobejane) held the following about the abuse of a forum:

⁸*Coral Island Body Corporate v Hoge* [2019] ZAWCHC 58, 2019 (5) SA 158 (WCC 2019 (5) SA 158 (WCC) paras 8-10.

⁹ *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another* [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) paras 15 and 59.

‘In our country, the Constitution establishes judicial authority. Several Courts are created. Section 166(b) creates the High Court and s 166(d) creates the Magistrates’ Courts. The scope of the substantive decision-making power of these courts is addressed in ss 169 and 170.

...

...Thirdly, courts may make appropriate costs orders. In *Goldberg v Goldberg*, Scheiner J said that not only could a ‘successful applicant be awarded only magistrate’s court costs but he may even be deprived of his costs and be ordered to pay additional costs incurred by the respondent by reason of the case having been brought to the Supreme Court’. The application of all these rules involves a fact specific enquiry on a case-by-case basis...’

[17] Generally, the high court has authority to hear any matter that comes before it, unless the specific law or rule expressly limits that authority or grants it to another tribunal. The question is whether such limitation can be implied. This Court in *Thobejane* restated what Kriegler J held in *Metcash Trading Ltd v Commissioner South African Revenue Service and Another*¹⁰ that ‘there is a strong presumption against the ouster of the High Court’s jurisdiction, and the mere fact that a statute vest jurisdiction in one court is insufficient to create an implication that the jurisdiction of another court is thereby ousted’.

[18] The CSOS Act does not explicitly or implicitly exclude the high court’s inherent jurisdiction to hear community scheme disputes. The fact that the Ombud has wider powers does not imply the exclusion of the court’s jurisdiction. In our view, the Act was designed to co-exist with the court system providing the parties with a choice of a forum, not to replace it entirely.

[19] Counsel on behalf of Parch submitted, correctly in our view, that the high court had jurisdiction to entertain the application as a court of first instance. We are persuaded that the high court did not need exceptional circumstances to

¹⁰ *Metcash Trading Ltd v Commissioner South African Revenue Service and Another* 2001 (1) SA 1109 (CC) para 43.

entertain this application as a court of first instance. The dispute is deserving of the high court's attention and should not have attracted a *Coral Island* costs order, had Parch been successful.

Was it reasonable to refuse to amend the constitution?

[20] It is apparent that Phase 3 was envisaged as part of a retirement village. In opposing the amendment to the constitution, the Venter group complained that the garden cottages are rented out without any regard for the age of the tenants, thereby compromising the character of Summervale's retirement village. Parch has not disputed that allegation. That is a relevant consideration in determining the reasonableness of the opposition to the motion to amend the constitution.

[21] The test for reasonableness is objective and requires a balancing of all relevant factors. Both parties agreed with the following test as formulated in the Australian case *Albrecht v Ainsworth & Others*:¹¹

‘...the test was objective, requiring a balancing of factors in all the circumstances according to the ordinary meaning of the term reasonable. ...The question was not whether the decision was “correct” but whether it was objectively reasonable. A logical and understandable basis for a decision was a relevant but not determinative factor in deciding reasonableness which was ultimately a question of fact. The subjective intention of the individual lot owners who opposed the motion was not the test; the opposition must be considered objectively, taking into account all relevant circumstances...’

[22] As indicated above, Parch relies on the historic inclusion of the garden cottages in Summervale and alleges that a mutually beneficial relationship existed and further, that it was widely accepted that the garden cottages are ‘phase 3’ of Summervale. Conversely, the Venter group contends that Summervale's

¹¹ *Albrecht v Ainsworth & Ors* [2015] QCA 220 para 22. The reliance on the Australian authority is persuasive, since the Community Scheme Ombud Service Bill, the predecessor of the CSOS Act, was modelled on Chapter 6 of the Queensland Body Corporate and Community Management Act of 1997. See Lawsa Vol 24: ‘Sectional Titles’ at para 377.

constitution provides, in unambiguous terms, that ‘only the registered owners of erven and sectional title unit(s) on Erf 5070, including any subdivision thereof, are members of the first respondent [HOA]’. Therefore, the HOA is the legal entity and owner of the common property, worth approximately R60 million, in which members own individual properties. White Waves started to develop the adjacent property, Erf 6343, which it referred to as the ‘phase 3 of the Summervale Estate development,’ ten years after the establishment of Summervale. The Venter group takes issue with that reference and contends that the development on Erf 6343 is a separate development approved on its own terms.

[23] The HOA was not an applicant or party to the application for the land development rights and approvals on Erf 6343. Therefore, the municipal planning conditions imposed on Erf 6343 do not bind the HOA. Parch acquired the garden cottages from White Waves in 2015. Some of the HOA’s trustees are also members of Parch. The Venter group considers them conflicted and alleges that those members of the HOA’s board created the impression that Erf 6343 was an extension of Summervale. The Venter group is adamant that that is a false narrative. They further allege that those conflicted trustees attempted to coerce the members of the HOA to agree to amend the constitution with threats. One such threat appears from a circular that reads as follows:

‘If the vote is against including the garden cottages into the membership of Summervale (erf 6343) then the owners of the garden cottages (Parch Properties) has already indicated that it will enforce its rights through the courts and claim damages from those members that vote against this inclusion’.

[24] This prompted the 192nd respondent to lay criminal charges of extortion against the HOA’s trustees, some of whom are members of Parch and owners in Summervale. The criminal process was still pending when litigation started. The

Venter group further alleges that it was disingenuous of those conflicted trustees to welcome and treat Parch as part of the HOA. They regard the failure to achieve 50% plus one vote at the HOA's Annual General Meeting of 6 June 2022 as proof that there was no common intention among its members to amend its constitution to include Parch.

[25] The Venter group alleges that Parch should have prepared a proposal for its incorporation and that the HOA's trustees should have tabled the same for discussion and consideration at a general or special meeting. The Venter group perceives the conflict of some trustees to be the cause for not approaching the HOA's members in a conciliatory manner, which might have produced a different outcome. The Venter group is of the view that Parch cannot be allowed ownership of the HOA's R60 million common property without any compensation and further, that Parch is not entitled to ownership of the HOA's valuable common property merely because its tenants share Summervale's facilities and pay a levy for such use. The Venter group does not oppose the continuation of an arrangement where Parch uses the HOA's facilities and pays for such use.

[26] In addition, Parch is the owner of 43 garden cottages that it rents to persons irrespective of their age. The Venter group alleges that this policy compromises the environment for most HOA members who are retired persons. Parch's renting scheme has different objectives and characteristics, not shared by the majority of HOA members. According to this argument, the latter, in their twilight years, bought into Summervale to benefit from a tranquil environment, that is incompatible with Parch's indiscriminate rental environment. Nevertheless, the Venter group alleges that:

‘Whether Applicant becomes a member of the First Respondent or not, nothing prevents or prejudices the Applicant from continuing with its development of Erf 6343. *The same applies in respect of arriving at an agreement (including the registration of servitudes pertaining to the use of access and private roads (already forming part of the Second Respondent's*

conditions of approval) and the Applicant paying a fee or service levy for the use and enjoyment of these facilities) for the future use and enjoyment of the First Respondent's facilities and infrastructure. No-one, including the Applicant and the occupiers of Erf 6343 and the members of First Respondent, will be prejudiced with such an arrangement in place. Applicant has advanced no reasons in its founding papers why such an agreement or arrangement, coupled with the Body Corporate of Summervale Gardens (the 291st Respondent and once established) governing the affairs of the owners of units on Erf 6443 [Erf 6343], would benefit all the parties as adjacent land owners'. (Own emphasis.)

[27] The above is the view expressed by the Venter group. It is apparent that there is room for the parties to reach a mutually satisfactory and beneficial agreement. In *MEC for Education: KwaZulu-Natal v Pillay*¹² the Constitutional Court held that:

'It is obviously preferable for these matters to be dealt with by approaching the relevant authority before the issue arises. It indicates an important degree of respect and a desire to resolve the matter amicably rather than through confrontation'.

[28] The Venter group complains that it has been disrespected and bullied. In the prevailing circumstances, including the Venter group's well motivated distrust, we conclude that the opposition to amending the constitution was reasonable and based on the existing objective facts.

[29] In the circumstances, we make the following order:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

MOKGOHLOA
JUDGE OF APPEAL

¹² *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC); (2007) 28 ILJ 133 (CC) para 109.

BAARTMAN
JUDGE OF APPEAL

Appearances

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