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SUMMARY OF THE HIGH COURT CASE: CLUB KERKIRA (PTY) LIMITED VS TRUSTEES OF CLUB KERKIRA BODY CORPORATE

Court Information

- **Court:** High Court of South Africa, KwaZulu-Natal Local Division: Durban
- **Case No:** D11451/2021
- **Date of Hearing:** 9th February 2024
- **Date of Judgement:** 4th June 2024

Parties Involved

- **Applicant:** Club Kerkira (Pty) Limited
- **First Respondent:** Trustees of Club Kerkira Body Corporate
- **Second Respondent:** Thandeka Qwabe N.O., Community Schemes Ombud Services Adjudicator
- **Third Respondent:** Community Schemes Ombud Services

Order Granted

- **Condonation of Late Lodgement:**
 - The application for condonation of the late lodgement of the appeal is granted, with the costs to be borne by the appellant.
- **Appeal Decision:**
 - The appeal is upheld.
 - The adjudication order dated January 26, 2021, along with the auditor's report of August 28, 2021, is set aside.
 - The adjudication proceedings are remitted to the Community Schemes Ombud Service for further consideration and decision as per the Community Schemes Ombud Service Act, 2011.
 - Each party is ordered to pay its own costs of the appeal

Background

- **Parties' Relationship:**
 - The appellant, Club Kerkira (Pty) Limited, is the developer of a sectional title scheme known as Club Kerkira. The trustees of the body corporate represent the first respondent.
 - The case arises from a dispute regarding the appellant's liability for contributions to the costs incurred in maintaining the common property of the scheme.
- **Development History:**
 - Club Kerkira registered a sectional title plan in 1992 for a property located at Palm Beach, KwaZulu-Natal, which included 101 units. Over the years, only 16 units have been built and transferred to owners.
 - The body corporate can currently raise levies from only 17 owners, making additional contributions from the rights holders crucial.

Dispute Overview

- The body corporate claimed contributions from the appellant for costs associated with maintaining the estate, which the appellant consistently repudiated, citing limitations under a certificate from the Sectional Titles Act.
- In August 2019, the first respondent applied under the Ombud Service Act to resolve the dispute regarding the appellant's liability for contributions, seeking a determination on applicable legislation and a monetary award.

Adjudication Process

- The adjudicator, Thandeka Qwabe, found the appellant's conduct obstructive and ruled on the claims made by the first respondent, which included a requirement for the appellant to contribute to the maintenance of common property.
- The adjudicator's order led to an assessment by an auditor, Mr. CC Elsworth, who concluded that the appellant owed the first respondent substantial contributions.

Appeal and Judgement

- The appellant's notice of appeal was filed late, leading to a request for condonation.
- The court recognised the importance of the case and granted the application for condonation despite the late filing, emphasizing that the appellant faced significant potential financial detriment.
- Ultimately, the court found that the adjudicator had erred in delegating decision-making power to the auditor, Mr. Elsworth, and thus set aside the adjudication order. The matter was remitted for further consideration by the Community Schemes Ombud Service.

Legal Implications

- This case highlights the balance between the rights of developers and the responsibilities of body corporates under the Community Schemes Ombud Service Act.
- The judgment underscores the importance of proper adjudication processes and the role of the courts in ensuring fair outcomes in community scheme disputes.



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