REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 10662/18

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

6.11.2020
DATE

SIGNATURE

In the matter between:

TURLEY MANOR BODY CORPORATE	APPLICANT
And	
JESEELAN PILLAY	FIRST RESPONDENT
EBRAHIM PATELIA	SECOND RESPONDENT
COMMUNITY SCHEME OMBUDSMAN SERVICE	THIRD RESPONDENT

JUDGMENT

UNTERHALTER J

INTRODUCTION

1. Turley Manor Body Corporate ("Turley") seeks to review and set aside an adjudication order made by the Adjudicator, Mr Patelia, the Second Respondent, appointed by the Board of the Community Schemes Ombud Service (" the Service"), the Third Respondent, under the Community Schemes Ombud Service Act 9 of 2011 (" the Act") .

2. On 14 December 2017, the Adjudicator made an adjudication order. The order arose from a complaint made by the First Respondent, Mr Pillay, a member of the Turley sectional title scheme, against Turnley and referred to the Service.

3. In essence, Mr Pillay complained that certain garden areas were enclosed, permitting these areas to be used exclusively by certain members. These areas were however registered as common property and not exclusive use areas ("EUAs "). As a result, all members were being charged for the maintenance of these private gardens, but the benefit of these gardens was enjoyed by only those members enjoying *de facto* exclusive use. Mr Pillay contended that the private gardens are UEAs in terms of s 27 and s 27A of the Sectional Titles Act 95 of 1986 ("STA") and that those who enjoy exclusive use should carry the cost of the UEAs through an adjustment to the levies.

4. The complaint was referred to conciliation in terms of s 48 of the Act. As a result, the parties concluded a settlement agreement in terms of which it was agreed that a meeting would be called by the members of the body corporate to decide whether to convert the garden areas to EUAs or to leave them as common property, A meeting was held on 3 May 2017 and the matter put to the vote by the members. By 18 votes to 8 the members voted against conversion.

5. Turley then received a letter from the ombud referring the dispute between Mr Pillay and Turley for adjudication. That dispute, as the letter makes plain, concerned an order in terms of s39(1)(c) of the Act to declare that a contribution levied on owners or occupiers was incorrectly determined or unreasonable, and an order was sought for the adjustment of the contribution to a correct or reasonable amount. The parties attended an adjudication hearing with the Adjudicator. After which, on 14 December 2017, the Adjudicator made an order requiring Turley to register the garden areas as EUAs in accordance with s27 of STA and re-evaluate its levy calculations for each unit to take into consideration the expanded EUAs.

6. Turley contends that the order of the Adjudicator is reviewable and must be set aside. The Adjudicator and the Service abide the decision of the court. Mr Pillay, in whose favour the order was made, opposes the review. Mr Pillay does so, in the first place, on the basis that Turley was required to seek relief by exercising its right of appeal in terms of s57 of the Act. Turley has not done so and is out of time to do so. In consequence, so it is contended, Turley may not initiate review proceedings to set aside the Adjudicator's order. Mr Pillay also contends that a review is not competent because the exercise of the Adjudicator's powers do not constitute administrative action.

7. I must therefore, before considering the merits of the review, decide whether a review of the Adjudicator's order can be entertained by this court.

APPEAL AND REVIEW

8. Section 57 of the Act provides that an association dissatisfied by an adjudicator's order may appeal to the High Court, but only on a question of law. An appeal must be lodged within 30 days after the date of delivery of the order.

9. Mr Pillay contends that Turley enjoyed a right of appeal and should have exercised it. Turley failed to do so, and in consequence no review lies to this court.

10. This contention rests upon the proposition that s 57 of the Act exhausts the recourse available to a person dissatisfied with an adjudicator's order.

11. Generally, an appeal from an administrative order permits of a reconsideration of the merits of that order. Following *Tikly*[1], that reconsideration may be a rehearing and fresh determination of the merits, with or without additional evidence. Or it may be a rehearing on the merits that is limited to the original evidence on the basis of which the decision was given. The first species of appeal is often termed a wide appeal, and the second, an ordinary appeal.

12. Rather less frequently, an appeal from an administrative order permits of a review in that the appeal is not concerned with whether the original order was correct, but rather, whether it was taken in a lawful manner.

13. What type of appeal is contemplated by the right of appeal in s 57? Happily, that question has been authoritatively answered in this division by the decision of a full bench in *Stenersen*[2]. There it was held that an appeal to the high court against a decision of the adjudicator in terms of s 57 is an ordinary appeal, following the *Tikly* typology, with the proviso that the right of appeal is limited to questions of law only.

14. This means that s 57 permits of an appeal as to whether the adjudicator's order was correct in law. A s 57 appeal may not be brought to correct a mistake of fact.

15. Nor is a s 57 appeal concerned with reviewable irregularities. This is so for the following reasons.

16. First, the holding in *Stenersen* makes it clear that the appeal in s 57 is an ordinary appeal. An ordinary appeal does not reference a review. Furthermore, the scope of a

[1] *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T)
[2] *Stenersen and Tulleken Administration CC v Linton Park Body Corporate 2020(1) SA 651 (GJ) at [42]*

s 57 appeal is strictly limited by its subject matter: it may only traverse the question whether an order is correct in law. The question as to whether an order is reviewable gives rise to issues of considerably broader scope, and then under a different standard of consideration: regularity rather than correctness.

17. Second, the restriction of an ordinary appeal to questions of law is intended to limit the scope of intervention by a court. The adjudicator may decide upon the facts, without a court intervening on appeal to say that the adjudicator's findings of fact were wrong. This narrow focus upon the correctness of the adjudicator's findings of law in making an order is incongruent with the interventions that a court may make when an order is shown to be reviewable.

18. Third, an appeal as to whether a finding of law made by the adjudicator was correct does not generally implicate the grounds upon which a decision may be reviewable. Review grounds, as is well known, traverse different issues. Whether the adjudicator enjoyed the power to act as he did, or whether he acted fairly or rationally or upon relevant considerations or was biased are all matters that cannot be determined on the basis that the adjudicator made an error of law. Reviewable irregularities almost always depend upon the proof of some facts. Furthermore, grounds of review usually depend upon facts that formed no part of the evidence before the adjudicator. The review may turn upon the interpretation of the empowering provisions under which the adjudicator acts, none of which may have enjoyed any consideration by the adjudicator. These well understood grounds of review cannot be determined on appeal on the basis that the adjudicator made an error of law.

19. For these reasons, I conclude that the narrow scope of the right of appeal under s 57 of the Act provides does not extend to the exercise by the courts of their review jurisdiction.

20. Does it follow, as Mr Pillay contends, that Turley is confined to its right of appeal under s 57, and if that right does not permit of a review of the adjudicator's order, as I have found, then the order may not be brought under review.

21. This line of reasoning cannot be supported.

22. First, the right to administrative action that is lawful, reasonable and procedurally fair is a constitutional right, The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") gives effect to this right. An interpretation of s 57 of the Act that excludes the court's review judrisdiction would exclude the fundamental right to an adjudicative order that is lawful, reasonable and procedurally fair. This would require language of the clearest kind – not least because such exclusion would be likely to render s 57 unconstitutional .No such language is to be found in s 57.

23. Second, s57 permits of an interpretation entirely harmonious with the right to administrative action that is lawful, reasonable and procedurally fair. Section 57 permits the adjudicator the freedom to make errors of fact but not of law. That freedom has no entailment that the adjudicator may give orders that are irregular or unfair by reason of their non -conformity with the norms of administrative justice set out in PAJA. Quite the reverse is so. An order may enjoy immunity from revision by a court on the grounds of error of fact, but that says nothing at all as to the obligation that an order must be made in compliance with PAJA. That lies at the very heart of the distinction between review and appeal. A limitation of a right of appeal entails no limitation of the right of review. Section 57 stands together with the right to review recognized in PAJA.

24. I find that s 57 in no way curtails the right of persons to exercise their rights under PAJA to bring orders of an adjudicator under judicial review. It follows that the failure by Turley to exercise a right of appeal in terms of s 57 does not prevent Turley from exercising its right to review the order made by the adjudicator. An appeal under s 57 is a right to challenge an order on the basis that the adjudicator made an error of law.

That right does not exclude Turley's right to challenge the order by way of review. These rights compliment each other. The failure to exercise one right does not exclude the exercise of the other right.

25. Counsel for Mr Pillay also submitted that an adjudicative order made in terms of chapter 5 of the Act does not constitute administrative action, and hence no review may be brought under PAJA. The submission rests upon the proposition that the exercise of powers by the adjudicator is akin to the position of an arbitrator, and following *Patcor Quarries CC*[3], since the rendering of an arbitration award is not administrative action, neither is an order made by the adjudicator under the Act.

26. *Patcor* was affirmed in *Total Support Management*[4] by the Supreme Court of Appeal. The court characterized arbitration as a form of private adjudication and the function of an arbitrator, in consequence, is not administrative but judicial.

27. An adjudicator appointed under the Act is not engaged upon private adjudication. The Community Schemes Ombud Service is a juristic person constituted under the Act. The Service operates as a national public entity listed in terms of the Public Finance Management Act, which if of application to the Service.[5] The Service is funded by public moneys and reports ultimately to Parliament. The functions of the Service include dispute resolution. Dispute resolution under the auspices of the Service is clearly a public and not private form of dispute resolution. An application made under the Act and lodged with the ombud, if referred to adjudication, does not permit a person against whom an order is sought to opt out of the process. If the adjudicator makes an order it is binding and enforceable, as if a judgment of a court. Adjudication under the Act is thus not the result of bilateral consent. It is a compulsory form of public dispute resolution.

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[3] *Patcor Quarries CC v Issroff & Others* 1998 (4) SA 1069 (SE)
[4] Total Support Management (Pty) Ltd v Diversified Health Systems (South Africa) (Pty) Ltd 2002 (4) SA 661 (SCA) at [25]
[5] See s 3 of the Act.

28. Adjudication under the Act is thus clearly not a species of private adjudication. Nor is the exercise of powers by the adjudicator a judicial function since it is not one of the courts listed in s 166 of the Constitution. The orders of an adjudicator in terms of the Act is a decision taken by a functionary of a juristic person, the Service, exercising a public function. Such orders fall clearly within the meaning of administrative action as defined in s1 of PAJA.

29. It follows that Mr Pillay's contentions that Turley could not bring a review must fail.

30. Mr Pillay raised one further preliminary point. He submits that even if a review of the Adjudicator's order is competent under PAJA, Turley's review failed to reference PAJA and the sections of PAJA relied upon as the grounds of review. In *Bato Star*[6], the Constitutional Court emphasized that it is not necessary for a litigant who seeks to review administrative action to specify the provision of PAJA relied upon, but the litigant must identify the facts on which the cause of action is based and the legal basis of the cause of action. This Turley has done. Mr Pillay could identify no prejudice he had suffered in comprehending the case he was required to meet. His objection cannot prevail.

THE MERITS OF THE REVIEW

31. Turley contends that the order of the Adjudicator is reviewable for two principal reasons. First the dispute between Turley and Mr Pillay was settled at the conciliation stage of the proceedings under the Act. As a result the dispute could not be referred to the Adjudicator who could not assume jurisdiction over the dispute. Second, the order issued by the Adjudicator required Turley to register the garden areas as EUAs. The Adjudicator enjoyed no power to issue such an order.

32. Counsel for Mr Pillay conceded in oral argument that the order of the Adjudicator could not be defended and, on the merits, stood to be reviewed and set aside.

[6] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at 507

33. That concession was well made.

34. It is common ground between the parties that their dispute was referred to conciliation in terms of s 47 of the Act. As a result of the conciliation, the parties entered into a settlement agreement. In terms of the settlement, Turley agreed that a meeting would be called at which members would take a decision as to whether the garden areas would be converted to EUAs or remain common property. Mr Pillay agreed not to request a refund from Turley in respect of previous financial years. The only question that stood over was the question of Mr Pillay's costs which Turley undertook to request the Trustees to pay, failing which the question of costs could be referred to adjudication.

35. Section 48 of the Act is clear. The ombud must refer an application to an adjudicator if the conciliation fails. The conciliation did not fail. It succeeded in bringing about a settlement. There was no basis for the ombud to refer the application to the Adjudicator, nor, as a result, could the Adjudicator exercise his powers in respect of Mr Pillay's application. The Adjudicator nevertheless considered the application and made an order. He had no power to do so. And his order must be reviewed and set aside.

36. Mr Pillay sought to make something of the fact that the meeting of members of the Turley did not take place in 45 days but shortly thereafter at the annual general meeting. Nothing flows from this. The settlement agreement was not terminated as a result of the delay. It stood and had not failed. Therefore the referral to the Adjudicator remained unlawful.

37. The order made by the Adjudicator also falls outside of his powers. The order required the body corporate to register the garden areas as EUAs. However, whether by way of notarial registration or amendment to the management or conduct rules, a resolution of the members under the STA is required. Notarial registration under the

new STA requires unanimity, so too does the creation of EUAs by way of amendment of the management rules. An amendment of the conduct rules requires a special resolution.

38. The types of order that an applicant may seek and that an adjudicator may grant are set out in s 39 read with s54(1). An order cannot compel the body corporate to register EUAs. That is a decision to be made by the members in accordance with the requirements of the STA.

39. Section 39(6)(f) contemplates an order declaring that an owner or occupier reasonably requires exclusive use rights over a certain part of a common use area that the association has unreasonably refused to grant. But that is not the order that was referred to the Adjudicator. It is not the order that the Adjudicator made. Nor is it an order that would be appropriate to the case before the Adjudicator. Members have decided that they will not agree to the gardens becoming EUAs. Mr Pillay's case is not that owners require exclusive rights but rather that they have assumed exclusive use without being willing to pay for that use. Neither Mr Pillay's complaint, nor the order he obtained from the Adjudicator fall, within the scope of s 39(6)(f).

40. It follows that the order made by the Adjudicator cannot stand and must be reviewed and set aside.

CONCLUSION AND RELIEF

41. For these reasons, Turley has made out its case that the adjudication order must be reviewed and set aside.

42. I raised with counsel for Turley that if Turley invoked the settlement agreement as a ground of review, Turley cannot not shrink from its consequences. The parties to the settlement agreement were content to allow the members at a meeting to determine

whether the gardens should be converted to EUAs. The members have voted against conversion. If then the gardens remain common property, they must be available to be used as such.

43. I have sympathy for the position of Mr Pillay. If levies are raised on the basis that they are used to maintain the common areas, then the common areas must be accessible to those who pay for their upkeep. Owners cannot render garden areas *de facto* exclusive and yet look to the contributions of others to maintain these areas. That is simply free riding. The members have voted not to convert the gardens to EUA and to continue to treat these gardens as common property. Turley must then ensure that all members and occupiers have access to these garden areas.

44. I invited counsel for Turley to give an undertaking to this effect. Turley has undertaken that upon Mr Pillay writing to Turley indicating that he is being hindered from his use and enjoyment of the common property within Turley's sectional title scheme, then Turley shall take all appropriate steps to ensure the removal of any such hindrance so that Mr Pillay may be able to exercise his rights to the use and enjoyment of the common property. Turley made it clear that this undertaking was of application to the gardens that have been subject to *de facto* exclusive use by certain owners.

45. Given the decision of the meeting not to sanction the conversion of the gardens to EUAs, this undertaking at least permits Mr Pillay the benefit of the common areas to which he is contributing.

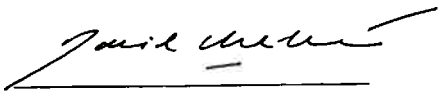
46. Turley also seeks a declaratory order that the settlement agreement concluded between Turley and Mr Pillay is of full force and effect. I see no reason to make such an order. The settlement agreement, as I have found, did not permit the dispute to be referred to adjudication. No orders need issue in respect of the settlement agreement, given the ambit of the case before me.

47. Mr Pillay opposed the review. He is liable for the costs of his opposition.

In the result, the following order is made:

i) The Adjudication Order of the Second Respondent, dated 14 December 2017, under reference number CSOS433/GP/16 is reviewed and set aside;

ii) The First Respondent is to pay the costs consequent upon his opposition to the application.



Unterhalter J

Judge of the High Court

Gauteng Local Division: Johannesburg

Date of Hearing: 02 and 03 March 2020

Date of Judgement: 06 March 2020

Appearances

Applicant: Advocate Christophorou instructed by Biccari Bollo Mariano Inc.

First Respondent: Advocate Ozoemena instructed by Oni And Company Inc.