EXCLUSIVE USE DISPUTE AT CSOS: CHALLENGING THE OUTCOME WITH APPEAL OR REVIEW?

Turley Manor Body Corporate v Pillay and Others (10662/18) [2020] ZAFSHC 54 (6 March 2020)

The establishment of the Community Schemes Ombud service in 2016 introduced a simpler mechanism for resolution of (certain) disputes in sectional title schemes. It is not without challenges, one being the rights of appeal against a finding of an adjudicator. The judgment highlights that whilst appeal is allowed on questions of law (excluding an appeal on a finding of merits), the adjudicator's finding may be reviewed in terms of PAJA which can result in overturning a finding. It is important for an attorney to guide participants in the differences between bringing an appeal and a review against a finding of the Ombud.

The Judgment can be viewed here.

FACTS

Mr Pillay, an owner in the Turley Manor sectional title scheme and accordingly a member of its body corporate, lodged a complaint against the latter with the Community Schemes Ombud Service (as established by virtue of the Community Schemes Ombud Service Act 9 of 2011 ("CSOSA"). He 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 those who enjoy exclusive use should carry the cost of the EUAs through an adjustment to the levies upon conversion of the private gardens areas to 'proper' exclusive use areas provided for in section 27 of the Sectional Titles Act 95 of 1986 ("STA").

The complaint was referred to conciliation in terms of section 48 of CSOSA and a settlement agreement was reached in terms of which the body corporate would call a meeting of the members to decide whether to convert the garden areas to EUAs or to leave them as common property. A meeting was held in May 2017 and, by 18 votes to 8, the members voted against conversion.

The Turley body corporate thereafter received a letter from the Ombud Services referring the dispute between it and Mr Pillay for adjudication. That dispute, as the letter made plain, concerned an order in terms of section 39(1)(c) of the CSOSA to declare that a contribution levied on owners or occupiers was incorrectly determined or unreasonable, and that an order was sought for the adjustment of the contribution to a correct or reasonable amount. The parties attended an adjudication hearing and, in December 2017, the adjudicator made an order requiring the Turley body corporate to register the garden areas as EUAs in accordance with section 27 of the STA and re-evaluate its levy calculations for each unit accordingly.

The Turley body corporate thereafter approached the High Court claiming that the order of the Adjudicator is reviewable and must be set aside. Mr Pillay, in whose favour the order was made, opposed the review on the basis that: (i) Turley body corporate was required to seek relief by exercising its right of appeal in terms of section 57 of the CSOSA. It had not done so and was out of time to do so. (ii) In consequence, so it was contended, the Turley body corporate could not initiate review proceedings to set aside the Adjudicator's order as a review is not competent because the exercise of the adjudicator's powers does not constitute administrative action.

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HELD

Appeal (in terms of CSOSA) and review

(A note aside: An "appeal" is a request to replace a previous order, based on merits. In the case of a "review", the court is concerned about the procedure followed. The unlawfulness of the procedure may be due to misconduct, gross irregularity, bias and procedural irregularities. Making a decision capriciously, or that is uninformed or impossible to carry out, are examples of procedural irregularity.)

- Section 57 of the CSOSA provides that a party that is dissatisfied with 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.

- It has been determined by our courts that the appeal contemplated by section 57 is an appeal in the ordinary strict sense, with the proviso that the right of appeal is limited to questions of law only. In other words, it is an appeal where there is a re-hearing on the merits, but limited to the information or evidence on which the decision under the appeal was given, and in which the only determination to be made by the court of appeal is whether the decision was right or wrong in respect of a question of law.

- Mr Pillay's contention - that the Turley body corporate enjoyed a right of appeal and that no court review was available to it - is based on the proposition that section 57 of the CSOSA exhausts the recourse available to a person dissatisfied with an adjudicator's order.

- It is so that the narrow scope of the right of appeal under section 57 of CSOSA does not extend to the exercise by the courts of their *review* jurisdiction. A review traverses different issues than an appeal, such as 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. 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.

Does it follow that Turley body corporate is confined to its right of appeal under section 57 or may the adjudicator's order be brought under review?

- No. The Court found that an interpretation of section 57 of the CSOSA that excludes the court's review jurisdiction would exclude the fundamental right to administrative action that is lawful, reasonable and procedurally fair as required by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Accordingly, the Court found that section 57 in no way curtails the right of persons to exercise their rights under PAJA to bring orders of an adjudicator under judicial review. Furthermore, the Court found that, because the order of an adjudicator in terms of the Act is a decision taken by a functionary of a juristic person (the Ombud Service) exercising a public function, such orders fall clearly within the meaning of administrative action as defined in section 1 of PAJA.

The merits of the review

- It was common ground between the parties that their dispute was referred to conciliation in terms of section 47 of the CSOSA. As a result of the conciliation, the parties entered into a settlement agreement. Section 48 obliges the Ombud to refer an application to an adjudicator if the conciliation fails. As the conciliation did not

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fail in the present matter, the referral to adjudication was irregular and the Adjudicator could not exercise his powers in respect of Mr Pillay's application. The adjudicator's order therefore had to be reviewed and set aside.

- The order also fell outside the powers of the adjudicator. 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. The types of orders that an applicant may seek and that an adjudicator may grant are set out in section 39 read with section 54(1) of the CSOSA. 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.

- Section 39(6)(f) of the STA 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. The members had decided that they will not agree to the gardens becoming EUAs.

CONCLUSION

The order made by the Adjudicator thus had to be set aside.

[The Court, in addition, raised with the body corporate that if it invoked the settlement agreement as a ground of review, it could 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 voted against conversion. If then the gardens remain common property, they must be available to be used as such. The Turley body corporate must then ensure that all members and occupiers have access to these garden areas, in respect of which the Court suggested an undertaking from the body corporate, which was furnished.]

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