

SECTIONAL TITLE AIRBnB SUB-LETTING: REVIEW OF TRUSTEE RESOLUTION NEGATIVELY IMPACTING ESTATE AGENCY

Bae Estates and Escapes (Pty) Ltd v Trustees, The Legacy Body Corporate and Another 2020 (4) SA 514 (WCC) 2020 (4) SA 514

In this matter the trustees of a body corporate resolved to disallow all owners from using a certain estate agency, due to problems that arose with AirBnB tenants in one owner's unit. The agency assisted the owner to find tenants who, in turn, sublet the unit to AirBnB guests in terms of their agreement with the owner. The agency's application to court sought an order reviewing and setting aside the resolution as it had a direct and significant impact upon the agency, a third party. And, in the circumstances where the resolution was not preceded by even a basic investigation by the trustees and managing agent of the underlying facts, not granting the owner or the agency any prior opportunity to make representations, the resolution was not rationally connected to the purpose for which it had been taken, was unreasonable and unlawful.

FACTS

The dispute centred around the occupation of unit 107 in The Legacy sectional title scheme. The unit owner had instructed Bae Estates and Escapes (Pty) Ltd ('The Agency') to find a tenant for his unit. The Agency did so and the owner entered into a lease agreement with two co-tenants. In terms of the lease the tenants would be permitted to sublet the unit through Airbnb. They duly did so from the commencement of the lease on 1 August 2018. From late September 2018 onwards, however, a steady stream of complaints reached the scheme's managing agent concerning the conduct of these Airbnb occupants.

Complaints were directed to the scheme's managing agent and in turn, reached The Agency, apparently in their capacity as the owner's agent. The Agency responded by contacting the tenants, as well as the owner, but the problems grew and began to affect a growing number of owners or tenants at the scheme.

Early in May 2019 the owner wrote to the managing agent advising that he had 'issued instructions' for his tenants to vacate the unit by the following day and that no further Airbnb bookings would be allowed. On 15 May 2019 the estate agency's director emailed the managing agent confirming that the tenants' lease had been cancelled, but stating that they would now vacate only on 20 May 2019. The nuisance problems were ascribed to 'short-term Airbnb rentals' and The Agency stated that these problems were not of the owner's doing.

On 20 May 2019 the owner was advised by the managing agent, acting on behalf of the trustees, that he was no longer permitted to carry out short-term letting of his unit and further that the trustees had resolved to restrict the estate agency from operating within the scheme. The email quoted the relevant portion of the scheme's conduct rule 37, which read as follows:

'Letting and occupancy of sections

37. An owner may let or part with occupation of his section provided:

...

37.3 *that in order to retain the nature of the Scheme, short term holiday letting shall be permitted provided that such short term holiday letting is managed through a letting agency which is considered to be reputable for such purpose in the sole discretion of the Trustees. The Trustees shall in their sole discretion have the right to restrict any short term letting;'*

The email concluded that in light of this rule, the trustees resolved '*... to no longer allow you to carry out short term letting at Unit 107, we urge you to find a reputable letting agency to manage long term rentals of your unit.*'

At the same time the estate agency received an email from the managing agent advising it that the trustees had resolved to restrict them from operating within the scheme. It read in part: '*In terms of Rule 37.3 of the Body Corporate rules short term holiday letting is permitted provided that it is managed . . . through a letting agency which is considered to be reputable in the sole discretion of the Trustees. . . . Due to recent incidents at Unit 107, the Trustees have resolved to restrict (the applicant) from operating within The Legacy with immediate effect.*'

The Agency immediately objected and advised the managing agent that it had nothing to do with the short-term letting of unit 107, this being the responsibility of the tenant/s who had been permitted to do so by the owner.

Despite various attempts, no solution to the dispute could be brokered between the parties and The Agency instituted legal proceedings. It argued that the trustees' resolution restricting it from conducting business in the scheme:

- was unlawful and passed in error in that conduct rule 37.3 had no application since the estate agency was not engaged in any short-term holiday letting;
- was procedurally unfair in that it was passed without any prior investigation into the estate agency's role and without any prior notice to them;
- was taken arbitrarily and without the trustees applying their minds;
- was taken with an ulterior motive, namely, to simply prevent the estate agency from carrying on business within the scheme;
- that the resolution amounted to administrative action in terms of PAJA (the Promotion of Administrative Justice Act 3 of 2000); and if PAJA was not applicable, it was in any event entitled to review the resolution in terms of the common law (read with section 3 of the Constitution).

In reply, the trustees contended that:

- The disputed resolution did not constitute administrative action in that it had not exercised a public power or performed a public function and furthermore that, properly interpreted, the decision did not adversely affect the estate agents' rights or have a direct, external legal effect.

The issues before the Court were therefore:

1. Was the trustee resolution reviewable either as being administrative action in terms of PAJA or a decision or action which is reviewable at common law?
2. And, if the above is answered in the affirmative, does the decision incorporated in the resolution fall to be reviewed and set aside on its merits or for procedural reasons?

HELD

Was the resolution reviewable as being administrative action in terms of PAJA or otherwise reviewable at common law

- In order for a decision by a person *other than a state organ* to qualify as administrative action for the purposes

of PAJA, it must constitute the exercise of a *public power* or the performance of a *public function* in terms of an empowering provision.

- When regard is had to existing case law it is not entirely clear whether, in the ordinary course of events, decisions taken by a body corporate amount to administrative action in terms of PAJA.
- In the present matter two elements of the definition of 'administrative action' in PAJA call for closer attention. Firstly, there is the requirement that the action has a *public character*, i.e. 'when exercising a public power or performing a public function in terms of an empowering provision', and secondly, that it has '*a direct, external legal effect*'.

A public character

- The question of whether a non-state organ is exercising a public power or performing a public function is best determined on a case-by-case basis. In considering this issue in the present instance, relevant factors include the fact that this body corporate is established pursuant to and derive their powers from statute, namely, the Sectional Title Schemes Management Act (STSMA), which provides that body corporates are responsible for the enforcement of the rules and for the control, administration and management of the common property for the benefit of all the owners in a given scheme. Overall, the STSMA provides for the establishment of body corporates to manage and regulate sections and common property in sectional title schemes and, for that purpose, to apply rules applicable to such schemes. These management or conduct rules bind the body corporate, the owners of the sections and any persons occupying a section.
- Sectional title schemes encompass a substantial and ever-growing component of the housing market and thus affect a significant section of the public. Many of the rules, such as the rule utilised in the present matter, are coercive or have a disciplinary character.
- Although the subjection of owners and occupiers in a sectional title scheme to conduct or management rules, as well as the decisions flowing from their application, can be seen as contractual in nature, these arrangements flow from the statutory authority granted to these bodies by the relevant legislation. The vast majority of owners and occupiers of sections in such schemes have no choice but to accept this regime if they wish to reside in a sectional title scheme (i.e. unless they were initial owners when the scheme was opened and had a say with regards to the rules that were adopted.)
- An argument that the resolution only affects or binds owners and occupiers in the scheme is however belied in the present instance: the effect is to proclaim that the estate agency is not a reputable letting agency for the purpose/s of short-term holiday letting and which, at the least, restrict owners from using it for such purpose/s. It takes little imagination to appreciate the harmful effect on the estate agency of the resolution and its publication to owners in the scheme.
- Thus, in the present instance, the impugned resolution was not limited in its effect to owners or occupiers of the scheme. It had a direct and significant impact upon the estate agency, a party external to any contractually based arrangements administered by the body corporate acting through the trustees and had, as such, a public character.

Direct external legal effect

- To constitute administrative action in terms of PAJA a decision taken must also adversely affect the rights of a person and have a direct external legal effect. In the present instance, whereas previously The Agency could engage in short-term holiday letting on behalf of its client, the owner, and potentially also on behalf of all the

owners in the scheme, such right was removed by the body corporate's resolution. Furthermore, The Agency's reputation was harmed, it lost the owner as a client and its potential client base was reduced.

- In summary, not only does the body corporate derive its power to formulate conduct rules and to apply them from a statutory source, namely the STSMA, the exercise of those powers can affect a substantial number of people in important matters concerning the conditions under which they occupy the property concerned. In the exercise of those powers a body corporate can be seen as exercising a public power or performing a public function, namely regulating and administering the conditions under which persons who share common property in a sectional title scheme must live. In the present case, furthermore, the exercise of its power or performance of its function impacted upon a party not directly subject to the conduct rules.
- The trustees' impugned decision impacted adversely upon a third party (The Agency) which had an existing commercial relationship with one of the unit owners. Having regard to these and other relevant factors as a whole, the impugned decision, at least vis-à-vis the estate agency in this matter, does constitute administrative action as defined in PAJA and was therefore reviewable at its instance.

Reviewable at common law?

- If the above conclusion was incorrect, the question arises whether it is reviewable at common law. The estate agency in this matter relied, in the alternative, on its right to lawful, reasonable and procedurally fair administrative action in terms of section 33(1) of the Constitution as well as its freedom to trade in terms of section 22 of the Constitution.
- There is no reason why, if the PAJA argument failed, that in protecting The Agency's constitutional rights, the Court should not subject the trustees' resolution to review against the common law standards of lawfulness, reasonableness and procedural fairness. Doing so would fall squarely within the inherent and constitutionally sanctioned power of the Court to develop the common law in accordance with the values of the Constitution and the rights which it enshrines, taking into account the interests of justice.

The merits

- Turning to the substance of the trustees' resolution and the process which led to it being taken, three features stand out. In the first place the resolution appeared not to have been preceded by any basic investigation of the underlying facts by the trustees or managing agents and nor was The Agency or the owner afforded any prior opportunity to make representations regarding the proposed decision. A second feature was that, certainly as initially conveyed to all parties and applied, the decision went well beyond the provisions of conduct rule 37.3. Thirdly, when regard is had to the facts which are common cause, there appears to have been no basis upon which the problems arising from the presence of Airbnb occupants in the unit could be ascribed to the estate agency.

The estate agent's responsibilities and the need for a prior investigation

- As far as the estate agent's responsibility for the problems emanating from unit 107 is concerned, regard must be had in the first place to the terms of the lease between the owner and the tenants. Not only did it provide that the tenants were permitted to sublet the premises via Airbnb, it made no provision for any role by the agency in such arrangements. In fact, the lease stipulated that The Agency's sole responsibility to the owner/lessor was to procure a suitable lessee. Referring to the rights and obligations as between the lessor and the lessee, clause 10.4 further provided that 'It shall not be the function of BAE [the applicant] to monitor or enforce their respective rights and obligations under this Lease Agreement, between themselves.'

- Notwithstanding these provisions, it is clear that the estate agency did play a role in attempting to alleviate the problems which arose from the presence of short-term Airbnb occupants of the unit. It received and responded to emails from the managing agent regarding the increasing complaints and communicated in this regard with the owner and other interested parties. The Agency explained these actions as being done purely as an act of good faith and added that the unit was managed by one Mr Clayton who was employed by the owner.
- Admittedly the involvement of these parties was somewhat confusing and one can easily see how the trustees and managing agent might have mistakenly assumed that the estate agency played a direct role in placing Airbnb occupants in the unit.
- However, the fact remained that nothing was ever produced by the trustees to indicate that The Agency bore responsibility, direct or indirect, for placing Airbnb occupants in the unit or for not regulating the tenants' conduct in doing so. That responsibility lay at the door of the owner.
- In summary, the estate agency played no part in the short-term letting of unit 107 beyond attempting to assist, as an act of good faith, in resolving the issue of the many complaints arising from the occupation of the unit either by the then tenants or by Airbnb occupants. Thus the trustees' decision to restrict its activities in terms of conduct rule 37.3 was not rationally connected to the purpose for which it was taken; or the information before the body corporate was unreasonable, unlawful; or was taken because irrelevant considerations were taken into account or vice versa. The Agency's contention that the decision taken was procedurally unfair in that it was not heard prior to the decision being taken was likewise established.

The scope of the trustees' resolution

- As far as the scope of the restriction embodied in the resolution is concerned, there are clear indications that the trustees acted arbitrarily or exceeded their powers by purporting to ban the applicant from any dealings with the sale, leasing or management of property within the scheme. Conduct rule 37.3 limited the body corporate's powers to restricting a letting agency in the field of short-term holiday letting in circumstances where it considered such an agency was not 'reputable for such purpose'.
- In its initial emails to the owner and The Agency written on behalf of the trustees, the managing agent (although referring to rule 37.3) advised that its principal had resolved to restrict The Agency 'from operating within The Legacy'. In keeping with this broad proscription, the owner was urged in the same notification to 'find a reputable letting agency to manage' the long-term rental of his unit. When the chairman of the body corporate responded to the letter of demand from the estate agency's attorney, he referred to the estate agency being barred from operating at the scheme with no qualification that this restriction was limited to short-term holiday letting. Similarly, all the internal correspondence between the trustees prior to the resolution being taken refers to the restriction on The Agency as being unqualified in its scope.
- The conclusion was inescapable that the trustees acted beyond its powers or arbitrarily in purporting to ban The Agency entirely from all or any dealings with property or owners in the scheme. On this ground alone The Agency was entitled to launch proceedings to have the decision trimmed to one which was within its powers as stipulated in conduct rule 37.3.

CONCLUSION

In the circumstances The Agency succeeded in establishing that the decision which it challenged amounted to administrative action and, in establishing at least three of the review grounds upon which it relied, both substantive and procedural. These grounds are amongst those listed in PAJA. The application succeeded and the resolution was reviewed and set aside.