

SECTIONAL TITLE TRUSTEES' RESOLUTIONS THAT IMPACT THE RIGHTS OF OUTSIDERS: ON WHAT BASIS MAY A COURT INTERVENE?

Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and Another (304/2020) [2021] ZASCA 157 (5 November 2021)

Trustees, as body corporate nominees, have no easy job. This judgment highlights how trustees, in an effort to curb the nuisance caused by holiday sub-letting in their scheme, prohibited the owner from continuing to allow its tenant to do such letting, a power which the rules of the scheme gave to the trustees. They went further, however, and banned the owner's estate agent, who was mandated to find a tenant, from operating in the scheme. They wrongly assumed that the agent had vetted the sub-tenants. The agency sought to have the latter trustee resolution set aside and the Supreme Court of Appeal finally had the last word. Importantly, recognizing that trustee decisions are reviewable at common law (not under PAJA), the Court stated that the trustees' actions in the present matter were unfair, especially since the agency was never granted an opportunity to make representations.

This is an important reminder to trustees: Their decisions are reviewable by a court if they are irrational, unjust, in breach of the principles of natural justice or otherwise procedurally unfair. These principles can be complex. Contact your sectional title experts at STBB for assistance.

The Judgment can be viewed [here](#).

FACTS

Bae Estates and Escapes (Pty) Ltd (Bae Estates) is an estate agency that sells and rents properties on behalf of property owners. In May 2018 it was engaged by a property owner in the Legacy sectional title scheme to procure a tenant for his property on a long-term rental. Bae Estates delivered on its mandate and a lease agreement was concluded between the tenant and the owner in July 2018.

In terms of the lease agreement, the tenant was permitted to sub-let the property on short-term holiday lease, which the tenant himself did, without reference to Bae Estates. Subsequently, there were complaints by some property owners about the conduct of certain of the sub-tenants, including excessive noise and other unruly behaviour.

The trustees believed that the sub-tenants were sourced by Bae Estates and they accused the latter of having failed to properly vet the sub-tenants. For its part, Bae Estates denied that it had procured the sub-tenants on behalf of the owner.

In May 2019, the trustees informed the owner that they had resolved in terms of rule 37.3 of the body corporate conduct rules, that he was no longer allowed to carry on with short-term letting of his property. Rule 37.3 reads as follows: "An owner may let or part with occupation of his section provided ... that ... short term holiday letting shall be permitted provided that such ... 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 ...".

They passed a further resolution prohibiting Bae Estates from operating within the scheme. Bae Estates immediately objected to the decision and reiterated that it had nothing to do with the short-term letting of the property. Furthermore, Bae Estates stated, this had been the responsibility of the tenants, who had been permitted to do so by the owner. It accordingly requested the trustees to reverse their decision, which the trustees declined to do.

Consequently, Bae Estates launched an application in High Court on an urgent basis against the trustees and the

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managing agent of the scheme.

Bae Estates asserted that the trustees' resolution was: (a) unlawful and passed in error as conduct rule 37.3 had no application to it since it was not engaged in any short-term holiday letting; (b) procedurally unfair as it was passed without any prior investigation into its role and without any prior notice to it; and (c) arbitrary and taken with an ulterior motive, namely, to simply prevent it from carrying on business within the scheme. Bae Estates further contended that the decision amounted to administrative action, and thus was susceptible to be reviewed in terms of PAJA, alternatively, the common law read with section 33 of the Constitution.

The trustees raised, among others, a preliminary point that because Bae Estates had asserted that the decision of the trustees did not bind it, it did not have standing before court to bring the application. In respect of the merits of the application, the trustees contended that in taking the decision, they were not exercising a public power nor performed a public function. Thus, it was submitted, the decision did not constitute administrative action (and thus was not reviewable under PAJA). Also, it did not adversely affect any of Bae Estates' rights. In addition, the trustees contended that the decision was reasonable and lawful in the circumstances of the case.

The High Court concluded that the trustees' decision constituted administrative action envisaged in the Promotion of Access to Justice Act ('PAJA') and thus was reviewable. The High Court also reviewed the trustees' decision at common law 'against the standards of lawfulness, reasonableness and procedural fairness'. It reasoned that it was entitled to do so on the basis of its inherent power to develop the common law. The High Court, accordingly, reviewed and set aside the trustees' decision, and ordered the trustees to pay Bae Estates' costs.

In this Court, the trustees challenge the correctness of the High Court's decision.

HELD

- In order for PAJA to apply, the trustees' decision must amount to 'an administrative action'. Administrative action is defined in section 1 of PAJA as:
"any decision taken, or any failure to take a decision, by—
(a) an organ of state ...
or
(b) a natural or juristic person ... when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external effect."
- Our courts have held that "administrative action" is constituted where there is: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.
- When regard is had to the structure of the definition of an administrative action, the requirement that the decision be of an administrative nature is a gate-way to determining whether a particular decision constitutes administrative action. This the High Court did not do. Rather, with regard to whether the trustees exercised a public power or performed a public function, the High Court noted that the body corporate derives its power to formulate conduct rules and to apply them, from a statutory source, namely, the Sectional Titles Schemes Management Act. The exercise of those powers, it said, can affect a substantial number of people in important matters concerning the conditions under which they occupy the property concerned. To that extent, 'a body

corporate can be seen as exercising a public power or performing a public function'. Having regard to these considerations, the High Court concluded that the trustees' decision constituted administrative action as defined in PAJA and was, therefore, reviewable at Bae Estate's instance.

- The conclusion was not correct because the fact that bodies corporate derive their powers from statute does not, without more, translate their decisions into the exercise of any public power or performance of a public function.
- The High Court thus failed to properly engage in an analysis of the relevant requirements of the definition of administrative action. In the present matter, it therefore had to be determined: (a) whether the trustees' decision was of an administrative nature; (b) whether the trustees exercised a public power or performed a public function; (c) whether the trustees acted in terms of any legislation or an empowering provision.

Was the trustees' decision is "administrative action"?

- In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* it was pointed out that conduct of an administrative nature is generally understood as the '... the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law ...'.
- In the present case, there was nothing bureaucratic about the trustees' decision, nor did it involve 'application of policy'. Instead, the decision seemed more commercial or managerial in nature, rather than administrative. The trustees' decision was made in the course of running and managing the scheme. The nature of the power is thus managerial or business-related, not administrative in nature.

Did the trustees exercise a public power or perform a public function?

- The question whether private entities are capable of exercising 'public' powers or performing 'public' functions is vexed. It has been held that in determining whether a power or function is 'public', regard had to be had to all the relevant factors including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. In doing so, our courts have consistently looked at the presence or absence of features of the conduct concerned that is "governmental" in nature, such as: the extent to which the functions concerned are "woven into a system of governmental control" or "integrated into a system of statutory regulation"; or it evidences "that the government regulates, supervises and inspects the performance of the function", or is "a task for which the public, in the shape of the state, have assumed responsibility"; or where it is "linked to the functions and powers of government", or it constitutes "a privatisation of the business of government itself", or is publicly funded, or there is "potentially a governmental interest in the decision-making power in question", or the body concerned is "taking the place of central government or local authorities".
- To determine in this case whether the above features are present, it suffices to refer to three sections of the Schemes Management Act, the regulations promulgated in terms thereof and the conduct rules of the scheme. Government's involvement, through the Minister of Human Settlement, is confined to the following matters: the management of the reserve fund levels (s 3); the powers, functions and composition of the Advisory Council (s 18) and the power to make regulations (s 18). None of these concerns or governs the relationship between bodies corporate and estate agents.
- Therefore, when deciding to prohibit an estate agent from operating in the scheme, the trustees did not perform a function that is 'woven into a system of governmental control' or 'integrated into a system of

statutory regulation'. Government does not 'regulate, supervise and inspect' the relationship between bodies corporates and estate agents like Bae Estates. It is not an aspect for which 'the public has assumed responsibility'; it is not 'linked to the functions and powers of government'; it is not 'a privatisation of the business of government itself'; there is no 'potentially a governmental interest in the decision-making power in question'; the body corporate is not 'taking the place of central government or local authorities', and, no public money is involved.

- What is more, the trustees' decision does not affect the public at large. The general public does not have access to the estate. In this context the word "public" does not include persons who are there with the permission of the owners of property within the estate. Thus the public must be the general public, not a special class of members of the public who have occasion for business or social purposes to go to the estate. In this case, there is no doubt that estates agents, such as those representing Bae Estates, are not general members of the public, but belong to the special class of members of the public who are there for business purposes.
- The trustees thus did not exercise a public power or perform a public function.

Did the trustees act in terms of any legislation or an empowering provision?

- It is important to locate the trustees' decision to prohibit Bae Estates from operating in the scheme, within 'an empowering provision'. In other words, under what empowering provision did the trustees act for that decision? The High Court said that they acted in terms of the Schemes Management Act. In coming to this conclusion, the High Court failed to appreciate that the statutory powers conferred on the trustees by the Schemes Management Act, where relevant, regulate the relationship between the body corporate and the home-owners. This case is not about that relationship. It is about a body corporate's relationship with a third party, an estate agent. There is no provision in the Act which empowers the trustees to prohibit an estate agent from operating in the scheme.
- The relevant sections here are sections 3 and 4. The first provides that a body corporate must perform the functions entrusted to it by the Act or the rules, and such functions include the establishment of an administrative fund; the repair, maintenance, management and administration of the common property; the establishment of a reserve fund. Section 4 provides for powers of the bodies corporate. Neither of these concerns the trustees' power to regulate the estate agents' right to operate in sectional titles schemes.
- As to the regulations promulgated in terms of the Act, they deal with the following issues: minimum amounts for reserve funds; other risks to be insured against; powers of a provisional curator-ad-litem and curator-ad-litem; notifications; rules and representative nature of the Advisory Council. Similarly, none of the regulations concern the relationship between the bodies corporate and estate agents. The scheme's conduct rules also qualify as 'an empowering provision', as the latter expression is defined in section 1 of PAJA. But here too, the scheme's conduct rules do not have any provision empowering the trustees to prohibit an estate agent from operating in the scheme.
- The upshot of the above is that there is no 'empowering provision' in terms of which the trustees were entitled to take a decision to prohibit Bae Estates from operating in the scheme. The trustees were therefore not enforcing or applying any statutory or regulatory provision. In summary: The trustees' decision is not an administrative decision envisaged in PAJA. It was thus not reviewable in terms thereof. The High Court erred in concluding to the contrary.

Reviewability under the common law

Locus standi

- It was submitted that the common law does not allow for the judicial review of the trustees' decision because there is no contractual nexus between the body corporate and Bae Estates, as a result of which, Bae Estates did not have an enforceable right against the trustees to operate in the scheme. The result, they submitted, was that the trustees did not owe Bae Estates a duty to act fairly towards it before they terminated Bae Estates' ability to operate in the scheme. It was therefore submitted that Bae Estates lacked *locus standi* to set aside the trustees' decision.
- It brooks no debate that Bae Estates had a substantial and direct interest in the decision of the trustees, the subject-matter of this litigation, and that such interest was real and current. As such, they had the required *locus standi*: they were sufficiently and directly affected in their rights and legal interests by the trustees' decision. In any event, since the advent of the constitutional order, the issue of *locus standi* is regulated by section 38 of the Constitution, in terms of which the class of persons who may approach a court include 'anyone acting in their own interest.'
- Both at common law and in terms of the Constitution, Bae Estates had established the required *locus standi* to challenge the validity of the decision.

Reviewability

- Decisions of private bodies are not immune from judicial review. The principles in this regard have mostly evolved from the so-called 'Jockey Club' cases, where voluntary associations are required to afford their members a fair and impartial hearing before their domestic tribunals. The trustees sought to distinguish this matter from those, on two grounds: First, that the trustees did not act in their capacity as a domestic tribunal. Secondly, that as members of such associations, they were persons affected by the finding of a domestic tribunal which was invalid for want of observance of the rules of natural justice. As Bae Estates was not a member of the body corporate, so it was submitted, the trustees were not obliged to observe the rules of natural justice.
- There is no merit to these propositions. As to the first, it is mechanical and amounted to placing form over substance. The identity or form of the decision-maker (the trustees, in this matter) is immaterial. What was important is the effect of its decision and its implications on the subject to whom it was directed. It is therefore irrelevant whether the body entrusted with the decision is styled 'tribunal', 'committee', 'task team', 'board of trustees', etc. As to the second, it is common cause that Bae Estates was directly and materially affected by the trustees' decision. There is no rational and justifiable basis, why the rules of natural justice should not apply to the trustees' decision. This is particularly so in circumstances where Bae Estates had, to the knowledge of the trustees, been freely operating within the scheme for at least a year.

On what grounds can a decision of a private body be subjected to judicial review at common law?

- This would be the case where a decision-maker failed to comply with the elementary principles of justice, such as for example, where the tribunal misconceives the nature and ambit of its powers, or where it acts capriciously or mala fide, or where its findings in the circumstances are so unfair that they cannot be explained unless it is presumed that the tribunal acted capriciously or with mala fides.
- It is so that ordinarily, Bae Estates did not have a right to operate in the scheme. However, once it was permitted to do so by the trustees, about which there is no dispute, Bae Estates held a well-founded belief and expectation that its continued ability to operate in the scheme and service its clients there would not be arbitrarily terminated by the trustees. Therefore, the duty on the trustees to act fairly in accordance with the

tenets of natural justice came about consensually when Bae Estates was allowed to practice its occupation or profession in the scheme for over a year without hindrance. It is common cause that the decision under review was taken without affording Bae Estates a hearing in circumstances where Bae Estates was not responsible for short-term leases in the scheme.

- The trustees accepted that Bae Estates was not responsible for the short-term letting in the scheme. This notwithstanding, the trustees contended that they acted perfectly within their rights in prohibiting Bae Estates from operating in the scheme despite the fact that Bae Estates was not afforded an opportunity to be heard. The trustees sought to justify their conduct purely on the grounds that Bae Estates was neither an owner nor a member in the scheme, in which event they would have been obliged to afford Bae Estates a hearing.
- The contentions advanced by the trustees entirely overlook the fact that before their decision to bar Bae Estates from operating within the scheme, the latter had, in pursuit of its occupation or profession, enjoyed such right for over a year without hindrance. For the trustees to now contend that they were entitled, without rhyme or reason as it turned out, to deny Bae Estates the right to continue servicing its clients in the scheme, without affording Bae Estates a hearing was manifestly untenable.
- The trustees' decision was admittedly: (a) procedurally unfair and unreasonable; (b) without any justifiable basis and thus irrational; (c) in breach of the principles of natural justice; and (d) most importantly, unjust. The trustees' decision was so unfair that 'it cannot be explained unless it is presumed that they acted capriciously or with mala fides'.

CONCLUSION

The appeal was dismissed.