

Judicial Review of the Enforcement of Sectional Title Rules: Administrative Action or Common-Law Review? *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd*

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Online ISSN
1727-3781

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Date Submitted

9 February 2023

Date Revised

22 April 2023

Date Accepted

8 May 2023

Date Published

23 November 2023

Guest Editors

Prof JM Pienaar
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Journal Editor

Prof C Rautenbach

How to cite this contribution

Pienaar GJ "Judicial Review of the Enforcement of Sectional Title Rules: Administrative Action or Common-Law Review? *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd*" *PER / PELJ* 2023(26) – DOI <http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15594>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15594>

Abstract

In *Bae Estates and Escapes (Pty) Ltd v Trustees for the time being of the Legacy Body Corporate* 2020 4 SA 514 (WCC) the Supreme Court of Appeal (SCA) considered a resolution by the trustees of a sectional title scheme that an estate agent Bae Estates and Escapes was not allowed to enter or exercise any economic activities in the scheme. The resolution was based on a conduct rule which enabled the trustees to disallow specific estate agents to sub-let units in the scheme on a short-term basis. The Western Cape Division of the High Court found that the resolution was unlawful, wrong, procedurally unfair and arbitrary and therefore reviewable. The High Court considered two requirements of the definition of "administrative action" in the *Promotion of Administrative Justice Act* 3 of 2000 (*PAJA*) and held that the resolution of the trustees constituted administrative action in terms of *PAJA* and was as such reviewable under *PAJA*.

On appeal the Supreme Court of Appeal considered whether the trustees' conduct should be considered an administrative act reviewable under *PAJA* or alternatively be reviewed under the common law in terms of section 33 of the *Constitution*. After analysing the three requirements of administrative action to determine whether the conduct of the trustees had to be determined under *PAJA*, the SCA held that the conduct of the trustees did not fulfil any of these requirements and reviewed their conduct under the common law.

In this case note the three requirements for administrative action are discussed in view of the special nature of the body corporate and the rules of a sectional title scheme. The body corporate is a statutory juristic person that is automatically established on the opening of a sectional title register and therefore not consensual in nature, like common law clubs, companies or retirement schemes. Furthermore, its rules are regarded as the product of the quasi-legislative function of a statutory body, which rules must be approved by the Ombud Service for Community Schemes before the opening of the sectional title register. Although the outcome of the judgment would have been the same, the juridical basis would have been more accurate if the SCA had taken into consideration the special nature of a sectional title scheme, which brings the conduct of the trustees within the ambit of administrative action under *PAJA*.

Keywords

Administrative action; sectional title scheme; body corporate; trustees; conduct rules; nature of rules; common-law judicial review.

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1 Introduction and facts

Disputes regarding the enforcement of the rules of a sectional title scheme often end up in court or are referred to the Ombud Service for Community Schemes for mediation or adjudication. This case is exceptional, as it does not concern a dispute between individual members of the scheme or the trustees and a member or members, but between the trustees and a third party who is not in any relationship, contractual or otherwise, with the trustees and is regarded as an outside party. The question in this judgment is how and to what extent the rules of the scheme are enforceable against outside parties, and how any dispute regarding such enforcement should be adjudicated.

Bae Estates and Escapes (Pty) Ltd, the applicant for an interdict in the Western Cape High Court (Cape Town)¹ and the respondent in the appeal before the Supreme Court of Appeal (SCA),² was operating as an estate agent in Cape Town. In May 2018, Bae Estates was engaged by an owner of a unit in Legacy sectional title scheme to procure a tenant for his unit, which lease was concluded in July 2018. In terms of the lease agreement the tenant was permitted by the owner to sub-let the unit on short-term holiday lease, which the tenant himself did without involving Bae Estates. Subsequently, the conduct of several of the sub-tenants was of such a nature that it gave rise to complaints by other unit owners of excessive noise and other unruly behaviour by the sub-tenants. The trustees of the scheme accused Bae Estates of recruiting these sub-tenants without properly vetting them. Bae Estates denied being involved in procuring any sub-tenants on a short-term basis on behalf of the owner of the unit but stated that their only involvement with the scheme was letting the unit to a tenant in July 2018 and previous selling and letting activities in the scheme.³

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¹ *Bae Estates and Escapes (Pty) Ltd v Trustees for the time being of the Legacy Body Corporate* 2020 4 SA 514 (WCC) (hereafter *Bae Estates and Escapes*).

² *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd* 2022 1 SA 424 (SCA) (hereafter *Trustees of the Legacy Body Corporate*).

³ *Trustees of the Legacy Body Corporate* para 3.

In May 2019 the trustees notified the owner of the leased unit that in terms of conduct rule 37.3 of the scheme he was no longer allowed to continue with the short-term letting of the unit. This rule determines:

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 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

In addition, the trustees considered the possibility of prohibiting Bae Estates from any operations within Legacy.⁴

On 21 May 2019 the trustees resolved and notified the owner of the unit and Bae Estates by email that Bae Estates was prohibited from all operations within the scheme with immediate effect. Bae Estates objected to the resolution and stated that it had nothing to do with the short-term letting of the unit, which was the responsibility of the tenant who had been permitted to do so by the owner. They requested the trustees to reverse the resolution, which request was declined by the trustees. Thereafter Bae Estates launched an application for an urgent interdict against the trustees of Legacy from implementing the resolution, pending an application to review and set aside the resolution. In the application Bae Estates asserted that the resolution was: (a) unlawful and passed in error, because conduct rule 37.3 could not be applied against Bae Estates in circumstances where they were not engaged in short-term holiday letting; (b) procedurally unfair as it was passed without any prior investigation into its role and without prior notice; and (c) arbitrary and taken with an ulterior motive, namely to prevent Bae Estates from carrying on any business within the scheme. Bae Estates contended that the resolution amounted to administrative action and should be reviewed in terms of the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)*, alternatively judicial review under the common law read with section 33 of the *Constitution of the Republic of South Africa, 1996 (the Constitution)*.⁵ Despite an application for an urgent interdict, the Western Cape High Court treated it as an application for the review of the trustees' resolution.

⁴ *Trustees of the Legacy Body Corporate* para 4.

⁵ *Trustees of the Legacy Body Corporate* para 8.

In their response the trustees denied that Bae Estates had *locus standi* because there was no contractual nexus between the body corporate and the short-term letting activities of Bae Estates (which point is not further discussed as part of this case note). Regarding the merits of the application, the trustees contended that in taking the resolution they were not exercising a public power nor performing a public function, and that the resolution did not constitute an administrative action because it did not adversely affect any of Bae Estates' rights or have a direct external effect. The trustees also set out the long list of complaints which culminated in taking the resolution and contended that the resolution was reasonable and lawful in the circumstances. They furthermore stated that the resolution was taken in terms of conduct rule 37.3 concerning short-term holiday letting, and not any blanket prohibition regarding long-term letting or sales.⁶

The Western Cape High Court considered two requirements of the definition of "administrative action" in *PAJA*, namely "public character" and "direct and external effect", which will be discussed comprehensively at 3.1 below. The Court held that the trustees' resolution constituted administrative action in terms of *PAJA* and is as such reviewable under *PAJA*. Furthermore, the court reviewed the resolution at common law against the standards of lawfulness, reasonableness and procedural fairness in view of its inherent power to develop the common law in terms of section 33 of the *Constitution*. Consequently, the high court set aside the trustees' resolution and ordered the trustees to pay Bay Estates' costs.⁷ The trustees appealed against this judgment to the SCA.

2 Sectional title legislation

Before analysing the SCA's judgment the legal nature of the body corporate and the enforcement of the rules of a sectional title scheme are discussed to distinguish these aspects from other statutory and common-law juristic persons such as companies, homeowners' associations and voluntary associations like jockey clubs, sports and cultural associations. This is necessary because in its judgment the SCA relied heavily on the legal position of these statutory and common law associations when dealing with the effect of the rules of the

⁶ *Trustees of the Legacy Body Corporate* paras 9 and 10.

⁷ *Trustees of the Legacy Body Corporate* para 11.

sectional title scheme, which differ in several respects from other statutory associations and voluntary common law associations.⁸

The *Sectional Title Schemes Management Act 8 of 2011*⁹ (*STSMA*) has cleared up many misconceptions regarding the legal nature of the body corporate and the rules of a sectional title scheme. The body corporate is the management body of a sectional title scheme and is established automatically after the registration of a sectional plan and the opening of a sectional titles register in a deeds registry, when the first sectional title unit is transferred by the developer of the scheme to a sectional owner.¹⁰ It does not come into being by an act of incorporation by its members, like other statutory juristic persons, or by the acceptance of a constitution by the members of a voluntary association, and is therefore not based on contract.¹¹ It is a statutory juristic person which differs in several respects from other statutory and common-law juristic persons.¹²

A sectional title scheme is governed by its trustees in terms of rules approved by the Ombud Service for Community Schemes and registered when a sectional title register is opened in a deeds registry.¹³ The rules must provide for the control, management, administration, use and enjoyment of the sections and the common property of the scheme. Two kinds of rules are distinguished, namely the *management rules* contained in Annexure 1 of the *STSMA* regulations,¹⁴ and the *conduct rules* contained in Annexure 2 of the *STSMA* regulations. Some *management* rules may be substituted, added to, amended or repealed by the developer on opening the sectional title register or by a unanimous resolution of the body corporate after the opening of the register.¹⁵ However, in terms of *STSMA* regulation 6(3) some of the standard or model *management* rules may not be amended, substituted or repealed by the developer. All the standard or model *conduct* rules may be amended, repealed and replaced by the developer on the opening of the sectional title register or afterwards by a special resolution of the body corporate. The only requirements

⁸ Van der Sijde *Property Regulation* 187-189.

⁹ In operation since 7 October 2016.

¹⁰ *Sectional Title Schemes Management Act 8 of 2011* (hereafter *STSMA*) ss 2(1), 10(2)(a) and (b).

¹¹ Van der Merwe *Sectional Titles* paras 2-20–2-21.

¹² For a comprehensive discussion of management rules which may or may not be altered, see Pienaar and Horn *Sectional Titles* 92-98.

¹³ *STSMA* ss 10(1) and (2).

¹⁴ GN R1231 in GG 40335 of 7 October 2016 (hereafter *Regulations to the STSMA*).

¹⁵ *STSMA* ss 10(2)(a) and (b), 10(5).

are that the rules must be reasonable and equally applicable to all owners and occupiers of units and conduct rules may not be irreconcilable with any prescribed management rule.¹⁶

Before the opening of the sectional title register or after the adding, amending or repeal of existing management and conduct rules, such rules must be submitted to the Ombud Service for Community Schemes for approval.¹⁷ The Ombud Service acts as a national public entity in terms of the *Community Schemes Ombud Service Act 9 of 2011 (CSOSA)*, with its executive authority vested in the Minister of Human Settlements. It is therefore a state-funded public entity.¹⁸ Two of its functions are of particular importance to sectional title schemes, namely the responsibility and authority to examine the management and conduct rules of the scheme and to either approve or amend the rules without consultation with the developer or body corporate;¹⁹ and to file the rules as public documents as part of the scheme governance documentation.²⁰ A certificate of approval by the Ombud Service stating that the standard or amended management or conduct rules comply with the requirements of the *STSMA* and its regulations is required before opening the sectional title register in a deeds registry or the application and enforcement of the rules by the body corporate or the trustees.²¹

In case law it was often held that the body corporate, and consequently its rules, are based on contract.²² This notion is based on the consensual nature of voluntary associations (the Jockey Club cases) or homeowners' associations, both of which are normally based on contract.²³ However, a sectional title body corporate is a statutory juristic person which is automatically established after the opening of a sectional title register and the transfer of the first unit into the name of a sectional owner. The rules are not based on contract or consensus, as they are prescribed by regulation and must be approved by

¹⁶ *STSMA* s 10(3).

¹⁷ *STSMA* ss 10(5)(a), 10(2)(a) and (b); Pienaar and Horn *Sectional Titles* 205-206.

¹⁸ Pienaar and Horn *Sectional Titles* 237-238.

¹⁹ *STSMA* s 10(5)(a).

²⁰ *STSMA* s 10(5)(b); *Community Schemes Ombud Service Act 9 of 2011* (hereafter *CSOSA*) ss 4(1)(b), (c) and (d).

²¹ *STSMA* s 10(5)(c).

²² *Wiljay Investments (Pty) Ltd v Body Corporate, Bryanston Crescent* 1984 2 SA 722 (T); *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh* 2019 4 SA 471 (SCA) para 20.

²³ Pienaar and Horn *Sectional Titles* 516-517.

the Ombud Service before the opening of the sectional title register. Furthermore, regulation 6(1) of the *STSMA* determines that the rules "must be considered to be and interpreted as the laws made by and for the body corporate of the scheme." The rules form part of the public documentation of the sectional title scheme filed and are open for inspection at the Ombud Service.²⁴ Therefore, the rules must be regarded as the product of the quasi-legislative function of an autonomous statutory association, which differs in many respects from ordinary common-law voluntary associations or statutory associations created for other purposes, such as sports, social or cultural associations.²⁵

The conduct rules are enforceable against owners and occupiers of the scheme, their visitors and other tradesmen and labourers visiting the scheme with their consent, as well as outsiders with no contractual or other relationship with the owners and occupiers. Conduct rule 37.3, as approved by the Ombud Service, is an example of rules enforceable against outsiders. There are many other examples of conduct rules enforceable against outsiders, for instance in respect of access, security, parking arrangements and the use of facilities on the common property of the scheme. The only requirement for the enforcement of such rules against outsiders is that they must be enforced in respect of the use of (a) section(s) or the common property of the scheme.²⁶

3 Administrative action or common law judicial review?

3.1 Requirements for administrative action

The SCA referred to the definition of "an administrative action" in section 1 of *PAJA*, which determines:

[A]ny decision taken, or any failure to take a decision, by –

- (a) an organ of state, when –
 - (i) exercising a power in terms of the Constitution or provincial constitution: or

²⁴ Van der Merwe *Sectional Titles* paras 13.10 and 13.11; Pienaar and Horn *Sectional Titles* 209-212.

²⁵ Horn *Legal Effect of Rights* 87-91; Van der Merwe *Sectional Titles* para 13.11; *Body Corporate Pinewood Park v Dellis (Pty) Ltd* 2013 1 SA 296 (SCA) 303G-H.

²⁶ Van der Merwe *Sectional Titles* para 13-5 on 13.22(1).

- (ii) exercising a public power or performing a public function in terms of any legislation: or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of its empowering provision, which adversely affects the rights of any person and which has a direct, external effect

With reference to *Minister of Defence and Military Veterans v Motau*²⁷ the SCA stated that the Constitutional Court added a crucial requirement to the definition in section 1, namely that there must be a decision of an administrative nature.²⁸ The SCA also referred to *Sokhela v MEC Agriculture and Environmental Affairs*,²⁹ which stated that the requirement demands a detailed analysis of the nature of the public power or function to determine its true character.³⁰ According to the SCA the Western Cape High Court failed to determine whether the conduct of the trustees was of an administrative nature. The fact that bodies corporate derive their powers from statute is not in all circumstances an indication that they have exercised a public power or performed a public function.³¹ In their quest to determine which of the requirements of administrative action is in dispute, the SCA analysed three aspects of the trustees' conduct:

3.1.1 Was the resolution of the trustees of an administrative nature

The SCA stated with reference to *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*³² that conduct of an administrative nature is generally understood to be bureaucratic "... in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law ...".³³ The court found that there was nothing bureaucratic about the trustees' resolution, nor did it involve the application of policy. The resolution

²⁷ *Minister of Defence and Military Veterans v Motau* 2014 5 SA 69 (CC) para 33.

²⁸ *Trustees of the Legacy Body Corporate* para 13. For a comprehensive discussion of the definition of "administrative action", see Burns and Henrico *Administrative Law* 29-30. In terms of s 1(b) administrative action is not limited to organs of state, but broadened to include the conduct of natural and juristic persons "when exercising a public power or performing a public function in terms of its empowering provision, which adversely affects the rights of any person and which has a direct, external effect ...".

²⁹ *Sokhela v MEC for Agriculture and Environmental Affairs* 2010 5 SA 572 (KZN) para 61.

³⁰ *Trustees of the Legacy Body Corporate* para 14.

³¹ *Trustees of the Legacy Body Corporate* para 15.

³² *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 24.

³³ *Trustees of the Legacy Body Corporate* para 18.

was made in the course of the running and managing the scheme and the nature of the power was thus managerial or commerce-related, like a meeting of shareholders of a company.³⁴ However, the SCA did not contextualise the abovementioned quote from the *Grey's Marine* case, which concerned the bureaucratic conduct of the Minister of Public Works, a state official in terms of section 1(a) (organ of state) in the definition of "administrative action" in *PAJA*, and whose conduct should be clearly distinguished from the conduct of a natural or juristic person. The conduct of the trustees should have been analysed in terms of section 1(b) (natural or juristic person) of *PAJA* and suitable case law in respect of persons or juristic persons which are not acting as organs of state.³⁵ Furthermore, the court failed to take into consideration the nature of the body corporate of a sectional title scheme, which is a statutory juristic person with rules considered to be the laws of the scheme approved by and registered at the Ombud Service for Community Schemes, a public entity with public functions (see 2 above).

It is an open question whether the SCA's reasoning would have been the same if they had considered the conduct of the trustees in the light of the special nature of the body corporate and the rules of a sectional title scheme, which differs in several respects from other statutory entities and common-law associations based on contract.³⁶ Furthermore, the resolution by the trustees concerning the right of access of Bae Estates, a so-called third party who was not in any contractual relationship with the body corporate, any trustees or any owners or occupants of the scheme in respect of the short-term letting was not managerial or commercial in nature, but rather a public function regarding the administration and governance of the scheme that affected the rights of and had a direct external effect on third parties (or outsiders).³⁷ Sectional title rules as the governing tools of the trustees are adopted in terms of the quasi-legislative function of a private-law institution as part of its internal objective law, and are enforceable only after acceptance by the Ombud Service as an administrative act sanctioned by legislation. It is an example of private law-

³⁴ *Trustees of the Legacy Body Corporate* para 18.

³⁵ For the discourse on the diminishing distinction between public and private law property remedies, and the broadening of the effect of the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter *PAJA*) to include administrative remedies in the case of private persons and juristic persons, see Boggenpoel *Property Remedies* 226-227; Van der Sijde *Property Regulation* 292-293; Burns and Henrico *Administrative Law* 34-38.

³⁶ Van der Merwe *Sectional Titles* paras 2-20 and 2-21; Pienaar and Horn *Sectional Titles* 92-98.

³⁷ Van der Sijde *Property Regulation* 187-189; Burns and Henrico *Administrative Law* 72.

making applicable to owners and residents of the scheme as well as outsiders without any contractual relation with the owners or residents.

3.1.2 *Did the trustees exercise a public power or exercise a public function*

With reference to *Chirwa v Transnet Limited*³⁸ the court analysed the requirements to determine whether the conduct in question was the exercise of a public power or the performance of a public function. In *Chirwa* the conduct of a semi-state enterprise, Transnet, was under consideration, and the court held that the nature of the conduct could be determined only with regard to the following 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 was a need for the decision to be exercised in the public interest.³⁹ It is clear that the SCA relied on case law in connection with state public enterprises or organs of state (section 1(a) of *PAJA*), and did not consider the special nature of the rules and the body corporate of a sectional title scheme (section 1(b) of *PAJA*).⁴⁰ The SCA applied the requirements of governmental control and the powers of the government decided in cases involving organs of state (section 1(a) of *PAJA*) as a determining factor in the case of the trustees of a statutory juristic person (section 1(b) of *PAJA*).

The SCA acknowledged the government's involvement through the Minister of Human Settlements in the *STSMA*, the regulations promulgated in terms thereof and the rules of conduct of the scheme, but confined it to the following matters: the management of the reserve and administrative funds of the scheme;⁴¹ the powers, functions and composition of the advisory council;⁴² and the power to make regulations. The SCA held that none of these concerned or governed the relationship between the body corporate and estate agents.⁴³ Therefore, the resolution to prohibit an estate agent did not establish a function that was "woven into a system of governmental control" or "integrated into a system of statutory regulation".⁴⁴ It was not an aspect for which "the public has assumed responsibility" and was not "linked to the functions and powers of

³⁸ *Chirwa v Transnet Ltd* 2008 3 BCLR 251 (CC) para 181.

³⁹ *Trustees of the Legacy Body Corporate* para 20.

⁴⁰ *Trustees of the Legacy Body Corporate* paras 21 and 22.

⁴¹ *STSMA* ss 3(1)(a) and (b).

⁴² *STSMA* ss 18(1)(a) and 19.

⁴³ *Trustees of the Legacy Body Corporate* para 23.

⁴⁴ *Trustees of the Legacy Body Corporate* para 24.

government".⁴⁵ However, these requirements as stated by the SCA are applicable to organs of state⁴⁶ and are typical principles applicable to organs of state.

The court furthermore referred to *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh*⁴⁷ to confirm that:

[T]he public does not include persons who are there with the permission of the owners of the 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.

It is common cause that Bae Estates had no contractual ties with the body corporate nor had visited the scheme with the permission of the trustees, owners or occupants. Furthermore, the appellant in the *Mount Edgecombe Country Club* case was a registered company and not a sectional title scheme (see 2 above). In considering this requirement the SCA did not distinguish the special nature of a sectional title scheme and its rules (being the laws of the scheme⁴⁸ and applicable not only to owners, occupants and trustees of the scheme, but also to outsiders with no proprietary or contractual interest in the scheme) and rules of common-law juristic persons or members of companies, both of which are based on contract and consensus.

The governing function of the trustees is much wider than the matters stated in terms of sections 3 and 18 of the *STSMA*⁴⁹ and is an indication of a public function exercised by the trustees. The rules of a sectional title scheme are examples of private rulemaking, which rules must be either accepted or rejected by the Ombud Service for Community Schemes, a state agency under the auspices of the Department of Human Settlements.⁵⁰ The acceptance by the Ombud Service of conduct rule 37.3 (the discretion allowed to the trustees to prohibit an estate agent from entering or doing business on the property of the sectional title scheme) falls within the ambit of administrative action on the

⁴⁵ *Trustees of the Legacy Body Corporate* para 24.

⁴⁶ *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* [2010] 4 All SA 561 (SCA) para 31.

⁴⁷ *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh* 2019 4 SA 471 (SCA) para 15. Also see Burns and Henrico *Administrative Law* 72, and *Bill v Waterfall Estate Home Owners Association (NPC)* 2020 6 SA 145 (GJ), where a contractor was locked out by the trustees.

⁴⁸ Regulations to the *STSMA* reg 6(1).

⁴⁹ As per the court in *Trustees of the Legacy Body Corporate* para 23.

⁵⁰ Pienaar and Horn 2020 *THRHR* 317; Van der Sijde *Property Regulation* 187-189.

side of the Ombud Service.⁵¹ The question is whether the resolution of the trustees based on conduct rule 37.3, as accepted by the Ombud Service, can also be considered an administrative action. The SCA rejected this notion, but the arguments of the court were based on the rules of organs of state, which differ in nature from the body corporate and trustees of a sectional title scheme.

The SCA held that the trustees' resolution was not an administrative decision envisaged in *PAJA* and was not reviewable in terms thereof.⁵² It is submitted that the court erred in this respect. However, as Van der Sijde⁵³ pointed out, the matter of administrative action in the case of private bodies is one of the grey areas of administrative law. Boggenpoel⁵⁴ refers to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,⁵⁵ where it was held that as far as *PAJA* was enacted to give effect to section 33 of the *Constitution*, courts should review the administrative action of organs of state and statutory bodies in terms of *PAJA* and not the common law.

3.1.3 *Did the trustees act in terms of legislation or an empowering provision*

The court stated that it was important to locate the trustees' resolution to prohibit Bae Estates from operating in the scheme within "an empowering provision".⁵⁶ The Western Cape High Court indicated that the empowering provision lay in the *STSMA*. The SCA limited the statutory powers of the trustees to the regulation of the relationship between the body corporate and the owners of the scheme. This notion cannot be correct. The trustees form the governing body of the sectional title scheme with much wider powers than those described by the SCA, including rules⁵⁷ prescribed by the *STSMA* and approved by the Ombud Service in terms of the *CSOSA*, which are also enforceable against outsiders and non-contractual parties like Bae Estates (see 2 above). In *Willow Waters Homeowners' Association (Pty) Ltd v Koka*⁵⁸ the SCA held that the embargo provision on the transfer of a sectional title unit

⁵¹ Van der Sijde *Property Regulation* 187-189.

⁵² *Trustees of the Legacy Body Corporate* para 32.

⁵³ Van der Sijde *Property Regulation* 187-189.

⁵⁴ Boggenpoel *Property Remedies* 172 fn 438; also Boggenpoel 2014 *Stell LR* 92-94; Van der Walt *Property and Constitution* 41.

⁵⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 25.

⁵⁶ *Trustees of the Legacy Body Corporate* para 27.

⁵⁷ Called "laws" in terms of the Regulations to the *STSMA* reg 6.1.

⁵⁸ *Willow Waters Homeowners' Association (Pty) Ltd v Koka* 2015 5 SA 304 (SCA) para 24.

without a clearance certificate that all levies have been paid is akin to the embargo provision contained in section 18 of the *Local Government: Municipal Systems Act 32 of 2000*. The power to limit the access to a sectional title scheme and the ability to operate within it by non-owners and non-residents cannot be excluded from the functions and powers of the body corporate and trustees. The body corporate as the manager (and in some instances the owner) of the common property may exercise any of the powers and rights of a property owner by the enforcement of the rules of the scheme against outsiders, subject to the provisions of the *STSMA* and its regulations.⁵⁹

In this instance the conclusion by the SCA that the trustees' resolution was not an administrative decision envisaged in *PAJA* and was not reviewable in terms thereof but rather by way of common-law judicial review⁶⁰ can therefore not be supported.

3.2 Judicial review under the common law

The SCA then examined the trustees' conduct in considering and taking the resolution (to prohibit Bae Estates from operating in the scheme) to determine whether the resolution was reviewable under the common law.⁶¹ Bae Estates alleged that the resolution was: (a) unlawful and passed in error, because conduct rule 37.3 could not be applied in these circumstances, as Bae Estates was not engaged in short-term holiday letting; (b) procedurally unfair as it was passed without any prior investigation into its role and without prior notice; and (c) arbitrary and taken with an ulterior motive, namely to prevent Bae Estates from carrying on any business within the scheme.⁶²

The SCA correctly held that private bodies are not immune from judicial review, but that the principles of common-law review 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.⁶³ The principle of a fair and impartial hearing cannot be faulted, but in this particular case it should have been based on the rules of a statutory sectional title scheme in terms of its statutory regulations and rules, and not the principles of

⁵⁹ *STSMA* ss 5(2)(a) and (b).

⁶⁰ *Trustees of the Legacy Body Corporate* para 32.

⁶¹ *Trustees of the Legacy Body Corporate* paras 33-50.

⁶² *Trustees of the Legacy Body Corporate* para 8.

⁶³ *Trustees of the Legacy Body Corporate* para 39.

common-law associations based on contract and consensus (see 2 above). The court stated that Bae Estates had been directly and materially affected by the resolution of the trustees. This was in effect a recognition by the SCA that the trustees exercised a public function (see 3.1.2 above), as there was no contractual nexus between the body corporate and Bae Estates.⁶⁴

The SCA then analysed the grounds on which a private body can be subjected to judicial review at common law.⁶⁵ With reference to case law, examples of the principles of justice highlighted by the court are the failure by a tribune to conceive the nature and ambit of its powers; capricious or *mala fide* acts; unfair conduct; or decisions taken without a hearing or a procedure to enable the other party to state its case.⁶⁶ The SCA acknowledged the fact that, ordinarily, Bae Estates did not have a right to operate in the scheme. Furthermore, they were not involved in any short-term letting in the scheme, which was the crucial issue in the application of conduct rule 37.3. But Bae Estates held a well-founded belief and expectation that, due to its general activities as an estate agent, its ability to operate in the scheme should not be arbitrarily terminated by the trustees.⁶⁷ This conduct of the trustees was not in accordance with the principles of natural justice.

Bae Estates was not afforded an opportunity to be heard by the trustees. Furthermore, after the resolution had been taken, one of the trustees proceeded to try to convince an owner of Legacy to give a mandate to the trustees to find him a tenant, which was clearly a conflict of interest.⁶⁸ The SCA held that the trustees' resolution was: (a) procedurally unfair and unreasonable; (b) without any justifiable basis and thus unreasonable; (c) in breach of the principles of natural justice; and (d) unjust.⁶⁹ The court stated that "the trustees' decision is so unfair that 'it cannot be explained unless it is presumed that they acted capriciously or with *mala fides*'".⁷⁰ The court furthermore stated:⁷¹

In our constitutional order, private entities are not enclaves of power, immune from the obligation to act fairly, lawfully and reasonably. In the present case, it is not necessary to develop the common law, as the high court purported to do. The

⁶⁴ *Trustees of the Legacy Body Corporate* para 40.

⁶⁵ *Trustees of the Legacy Body Corporate* paras 41-50.

⁶⁶ *Trustees of the Legacy Body Corporate* paras 41-42.

⁶⁷ *Trustees of the Legacy Body Corporate* para 43.

⁶⁸ *Trustees of the Legacy Body Corporate* paras 44-47.

⁶⁹ *Trustees of the Legacy Body Corporate* para 46.

⁷⁰ *Trustees of the Legacy Body Corporate* para 46.

⁷¹ *Trustees of the Legacy Body Corporate* para 50.

common law, which now yields to the Constitution and must be viewed through the prism thereof, is adequate to meet the ends of justice. It follows, in my view, that the trustees' decision is reviewable at common law.

The SCA subsequently held that the resolution by the trustees ought to be reviewed and set aside and dismissed the appeal by the trustees with costs.⁷²

4 Administrative action or common-law review?

The outcome of the appeal regarding the reviewability of the resolution of the trustees cannot be criticised because it appeared clearly from the affidavits of the parties that the standards of lawfulness, reasonableness and procedural fairness had not been adhered to by the trustees. The SCA's comment in paragraph [50] of the judgment that private entities are not enclaves of power and immune to the obligation to act fairly, lawfully and reasonably is commendable. The SCA, like the Ombud Service, had no problem with the content of rule 37.3, being a rule enforceable against third parties or outsiders also. Furthermore, the SCA rightly found that the enforcement of the resolution lacked lawfulness, reasonableness and procedural fairness.

However, the SCA's rejection of the possibility that the resolution should have been an administrative action to be reviewed under *PAJA*, and the choice of judicial review under the common law, are debatable. The body corporate of a sectional title scheme is not a common law juristic person but a statutory juristic person with a public function in certain instances. In this regard Van der Sijde⁷³ states:

The impact of (sectional title) rules can be widespread and ensuring effective oversight (as regulation of this type of regulation) is important to safeguard not only property rights but also other constitutional rights.

The resolutions of the trustees that concern owners, occupants and outsiders of the scheme can be classified as administrative actions and reviewable under *PAJA*. Under *PAJA* the outcome of the review would have been the same, but the juridical basis of the review would have been more satisfactory. It is clear that the SCA grasped this opportunity to clear up uncertainties regarding reviews of activities of common law juristic persons which fall outside the ambit of *PAJA*, but it is debatable whether the review of the enforcement of a

⁷² *Trustees of the Legacy Body Corporate* para 52.

⁷³ *Van der Sijde Property Regulation* 187-189.

sectional title rule by the trustees was in this instance the correct basis for the review. Judicial review under *PAJA* is an effective, authoritative and final method of resolving administrative disputes.⁷⁴ Section 6 of *PAJA* contains an extensive list of grounds of review, mainly concerning the lawfulness, reasonableness and procedural fairness of the action.

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⁷⁴ Hoexter and Penfold *Administrative Law* 169; Burns and Henrico *Administrative Law* 362-363.

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List of Abbreviations

CSOSA	Community Schemes Ombud Service Act 9 of 2011
PAJA	Promotion of Administrative Justice Act 3 of 2000
SCA	Supreme Court of Appeal
STSMA	Sectional Title Schemes Management Act 8 of 2011
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg