

Understand and appreciate the extent and impact of your powers – A lesson and reminder for trustees

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In Marvel's Spider-Man comic series Uncle Ben teaches Peter Parker that with great power comes great responsibility. This saying has become a cliché in many quarters. But the lesson also rings true for the power that trustees of bodies corporate wield in sectional titles schemes.

In *BAE Estates and Escapes (Pty) Ltd v The Trustees for the time being of the Legacy Body Corporate and Pam Golding Property Management Services (Pty) Ltd*¹ (the *Legacy* case), Judge Bozalek delivered a judgment which reviewed and set aside a trustee resolution.² It is not the first time, nor will it be the last time, that a trustee resolution is overturned and dismissed by a court.

The trustee resolution in the *Legacy* case, was reviewed and set aside on the basis that it was administrative action, and was unlawful, unreasonable, and not rationally connected to the purpose for which it was taken or to the information before the body corporate.³ The judge further held that irrelevant considerations were taken into account or relevant considerations were not taken into account.⁴ Moreover, the trustee resolution was taken in a procedurally unfair manner in that the affected parties were neither heard nor consulted prior to the decision being taken.⁵

The facts of the matter were that an estate agency (BAE Estates and Escapes – the applicant) was barred from conducting certain business within the sectional title scheme as per a trustee resolution which was purportedly passed under powers afforded to the trustees in a conduct rule. The estate agency was appointed to search for tenants for a unit on behalf of a unit owner within the scheme. A tenant was found by them, and the tenant then started sub-letting the unit on AirBnB for short periods. As guests started streaming in for short periods, so the complaints followed from neighbours due to various nuisances (from loud parties to cigarette butts being thrown on neighbouring properties).

The conduct rule in question provided the trustees with the power to restrict short-term holiday letting to only those which were, in the sole discretion of the trustees, managed by a “reputable” letting agency.⁶ The trustees, on the authority of the conduct rule and in reaction to the complaints received from other owners about the nuisances stemming from this unit, passed a resolution restricting the operation of short-term letting to “reputable” letting agencies only and caused an email to be sent to BAE Estates and Escapes, to the effect that they were not permitted from operating within the scheme at all and with immediate effect.⁷ The email to BAE Estates and Escapes implied that the estate agency was not reputable and was vehemently opposed by the estate agency.⁸ So much so, that when the trustees refused to retract their decision upon demand from the estate agency, the estate agency filed an application to review the decision of the trustees in the Western Cape High Court.⁹

The estate agency argued that the trustee resolution was administrative action in terms of the Promotion of Administrative Justice Act¹⁰ (PAJA), but that if it was not deemed to be administrative action in terms of PAJA, that it was still reviewable under the common law, read with section 33 of the Constitution (the right to just administrative action), on general principles of lawfulness, reasonableness and procedural fairness.¹¹

¹ 2020 (4) SA 514 (WCC) - <http://www.saflii.org/za/cases/ZAWCHC/2020/82.html>.

² *Legacy*, paras 47 and 48.

³ *Legacy*, para 41.

⁴ *Legacy*, para 41.

⁵ *Legacy*, para 41.

⁶ *Legacy*, para 8.

⁷ *Legacy*, para 10.

⁸ *Legacy*, paras 10 and 11.

⁹ *Legacy*, para 12.

¹⁰ Act 3 of 2000.

¹¹ *Legacy*, para 14.

The trustees contended that the trustee resolution was not administrative action because the trustees did not exercise a public power or perform a public function.¹² It was further argued that the decision did not adversely affect the rights of BAE Estates and Escapes and the decision did not have a direct, external legal effect.¹³ For the trustee resolution to amount to administrative action under PAJA it had to bear these features, among other considerations.

Therefore, the Court had to decide if the trustee resolution was reviewable, either as an administrative action under PAJA or under the common law. And then, if it was reviewable, whether it fell to be set aside on the merits or for procedural fairness reasons, or at all.

The learned judge referred to another court case in which the above was considered prior to the enactment of PAJA, but with no argument or opposition to fully ventilate the arguments in court for that matter.¹⁴ That case was *Body Corporate of Laguna Ridge v Dorse*¹⁵ where the judge was of the view that a decision of a body corporate affecting a member was reviewable at common law. There was no external third party here. The facts in *Laguna Ridge* were that the rules of the body corporate allowed pets only with the trustees' written consent. This is a common rule found in community schemes even today.

The trustees had denied consent to an owner to keep her dog because the building was a high-rise (18 stories) and was in their opinion, unsuitable for keeping pets. The trustees had a "general policy" in which they would deny applications as they believed that they had created a precedent (several denials had presumably preceded the denial in question). The court in *Laguna* found that the trustees had considered irrelevant considerations (i.e. setting a precedent) and ignored relevant considerations such as that the dog was not a nuisance. The court interfered with the decision of the trustees and set it aside on the basis that it was unreasonable and the trustees had not applied their mind to the matter. They therefore permitted the owner to keep her dog, notwithstanding the rule, under certain conditions.

As Civin and Pereira stated in their article aptly titled "*Paws' before signing on the dotted line*":¹⁶

"If each decision by the trustees to grant or refuse such permissions was to be considered on its own merits that decision would not constitute a precedent because it would be a decision based on the facts and circumstances relevant to the particular case under consideration. A refusal to grant permission in a particular case simply because it would create a precedent would be tantamount to a failure to consider and decide the application on its own merits and would result in a refusal to depart from the general policy of not granting permission. As such the court held the decision of a trustee is reviewable under the common law."

In the case of *North Global Properties (Pty) Ltd v Body Corporate of Sunrise Beach*¹⁷, which was also quoted by the court in *Legacy*,¹⁸ the Durban High Court ruled that trustees' decisions must be objectively reasonable, and if they are not, then they are reviewable under the common law, read with the Sectional Titles Act¹⁹, PAJA and section 33 of the Constitution.²⁰ The judge in the *Sunrise Beach* case went further and stated that the body corporate is a statutory body performing not only commercial and regulatory functions but also administrative functions.²¹ Therefore, so the judge ruled, the trustees must adhere to the general constitutional principles of just administrative action, and that the body corporate is also an administrator as defined in PAJA.²²

The court in *Legacy* also quoted the earlier matter of *Khyber Rock Estate East HOA v Unit 9 of Erf 823 Woodmead Ext 13*²³ where the decision of a Home Owners Association (HOA) was found to have fallen outside of the the ambit of PAJA. Despite this outcome, the *Khyber Rock* case concluded that the decisions of the HOA are reviewable under the common law since those are decisions of a voluntary association. It ruled that a court could be called upon to interfere with the

¹² *Legacy*, para 15.

¹³ *Legacy*, para 15.

¹⁴ *Legacy*, para 17.

¹⁵ 1992 (2) SA 512 (D).

¹⁶ "Paws' before signing on the dotted line" *De Rebus* 1 February 2015 <https://www.derebus.org.za/paws-before-signing-on-the-dotted-line/> (accessed 15 August 2021)

¹⁷ (12465/2011) [2012] ZAKZDHC 47 (17 August 2012) - <http://www.saflii.org/za/cases/ZAKZDHC/2012/47.html>.

¹⁸ *Legacy* case, para 18.

¹⁹ Act 95 of 1986.

²⁰ *Sunrise Beach*, para 9.

²¹ *Sunrise Beach*, para 9.

²² *Sunrise Beach*, para 9.

²³ (7689/2006) [2007] ZAGPHC 137 (14 August 2007) - <http://www.saflii.org/za/cases/ZAGPHC/2007/137.html>. *Legacy*, para 19.



decisions of trustees of an HOA where that entity has failed to comply with the principles of natural justice, procedural fairness and reasonableness.²⁴

To determine the reasonableness of a decision, it was clear after the *Khyber Rock* case, that it was imperative that there be a rational connection between the facts that are presented to the decision makers and the considerations that are brought to bear in the process of decision-making to reach a conclusion.²⁵ What was not clear, was if PAJA would apply to such a decision under consideration.

In essence, for there to be administrative action, the action must not only have a public character, which means that it must be a power and function exercised in terms of an empowering provision (a statute), but it must also have a direct, external legal effect.²⁶ There is a plethora of cases, going even as far as the Constitutional Court, under administrative law, which grappled with these principles and definitions in administrative law.²⁷

A private body has the ability to exercise public powers or perform public functions and this is to be determined on a case by case basis.²⁸ It was explained that the source of the body corporate's powers, acting through its trustees, is the Sectional Titles Schemes Management Act²⁹, which provides that the body corporate is responsible for enforcement of rules and for the management of the common property, but also for financial and administrative management.³⁰ The body corporate is managed by the board of trustees who do so for the benefit of all owners and their powers stem from legislation.³¹ The trustees also stand in a fiduciary relationship to the body corporate.³² The judge noted that sectional titles schemes constitute a growing component of the housing market and was of the opinion that the application of management and conduct rules affect a significant section of the public.³³ The judge went even further and stated that many of the rules enforced by bodies corporate are characterised by their coercive and disciplinary natures.³⁴

Notwithstanding that the rules, insofar as they regulate the relationship between owners, occupiers and the body corporate, have been held to be contractual in nature, the rules themselves, as well as the power to implement and enforce them stem from statutory authority.³⁵ Notably, other than the owners who participated in the original adoption of the management or conduct rules, the vast majority of the owners (including new owners or those that did not participate in the changes) are subjected to these rules and must live with them if they wish to live within the scheme.³⁶ This was how the court contrasted the case of *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others*³⁷ where it was held that the relationship between an owner and an HOA is contractual in nature. The trustees in the *Legacy* case attempted to argue this point to escape the review of its decision by the court but it was not accepted.

The court ultimately held that the resolution was harmful in its effect on the estate agency and directly impacted a party outside of the contractual relationship between owners and the body corporate, which brought other considerations to bear on the matter to which the court had to

²⁴ *Khyber Rock*, para 36.

²⁵ *Khyber Rock*, para 36. As quoted in *Legacy*, para 19.

²⁶ *Legacy*, para 22.

²⁷ An analysis of these cases extends beyond the scope of this article. To name a few of the cases: *Pharmaceutical Manufacturers Association of SA and Another: In re: ex parte President of the Republic of SA and Others* 2000 (2) SA 674 (CC) - <http://www.saflii.org/za/cases/ZACC/2000/1.html>; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) - <http://www.saflii.org/za/cases/ZACC/2004/15.html>; *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others* 2006 (8) BCLR 872 (CC) - <http://www.saflii.org/za/cases/ZACC/2005/25.html>; *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA) - <http://www.saflii.org/za/cases/ZASCA/2006/177.html>; *Sidumo and Another v Rustenburg Platinum Mines* 2008 (2) BCLR 158 (CC) - <http://www.saflii.org/za/cases/ZACC/2007/22.html>; *Head of Department: Mpumalanga Department of Education and Minister of Education v Hoërskool Ermelo and the School Governing Body of Hoërskool Ermelo and Others* 2010 (2) SA 415 (CC) - <http://www.saflii.org/za/cases/ZACC/2009/32.html>.

²⁸ *Legacy*, para 22.

²⁹ Act 8 of 2011 ("the STSMA").

³⁰ *Legacy*, para 22.

³¹ *Legacy*, para 22.

³² Section 8(1) of the STSMA.

³³ *Legacy*, para 23.

³⁴ *Legacy*, para 23.

³⁵ *Legacy*, para 24.

³⁶ *Legacy*, para 24.

³⁷ 2019 (4) SA 471 (SCA) - <http://www.saflii.org/za/cases/ZASCA/2019/30.html>.



apply its mind.³⁸ The direct, external legal effect that the resolution had on the estate agency was that it removed a pre-existing right that the estate agency had to engage short-term letting on behalf of owners within the scheme.³⁹ The reputation of the estate agency was also threatened because it lost the business of the owner in question and was not able to serve other potential clients within the scheme.⁴⁰

The court concluded that in the exercise of its powers, a body corporate is exercising a public power and performing a public function, namely regulating and administering the affairs and conditions under which owners and occupiers must live.⁴¹ In this case, the body corporate's powers and the performance of its functions impacted upon an external third party who was not directly subject to the rules of the body corporate.⁴² In this regard, it was held that the decision of the trustees, at least in so far as it related to the estate agency, constituted administrative action in terms of PAJA and was therefore reviewable by the estate agency.⁴³

Even if PAJA was not a successful argument for the estate agency, the court held that the trustee resolution could still be reviewable on the basis of lawfulness, reasonableness and procedural fairness.⁴⁴ Neither the trustees, the body corporate, nor the managing agent performed any basic investigation of the underlying facts and the estate agency was not given any opportunity to make any representations prior to the decision being made.⁴⁵ The decision also went beyond what the conduct rule had initially envisioned.⁴⁶ On the evidence, there was no factual basis upon which the trustees could rely which could lay the blame of the nuisances experienced in relation to the AirBnB occupants at the feet of the estate agency.⁴⁷

The court further ruled that the decision to restrict the activities of the estate agency in terms of the conduct rule and the trustee resolution which followed, was not rationally connected to the purpose for which it was intended, or to the information that was before the body corporate at the time that the decision was taken, and was therefore unlawful and unreasonable.⁴⁸ Relevant considerations were ignored and / or irrelevant considerations were taken into account (i.e. the estate agency had nothing to do with the short term letting of the unit in question).⁴⁹

The trustees in the *BAE Estates and Escapes* case had acted arbitrarily and irrationally.⁵⁰ They exceeded their powers by trying to ban the estate agency from conducting its business in the sectional title scheme.⁵¹ It was notable that the conduct rule itself limited the body corporate's powers to restrict an estate agency from short-term letting in circumstances where the trustees considered that such an agency was not a reputable one for that purpose.⁵²

In so far as the rights of members of a sectional title scheme are affected by the decisions of trustees, their decisions are reviewable as they constitute administrative action.⁵³ The same goes for decisions of trustees which affect external parties who are not members of the sectional title scheme. In terms of section 3(2) of PAJA, there are several requirements to take heed of:⁵⁴

- adequate notice of the nature and purpose of the proposed action must be given;
- the proposed action must be described with sufficient detail to be understood;
- a reasonable opportunity must be given to submit representations from those affected;
- adequate notice must be given of a right to an internal appeal or review mechanism, if one is available to those affected; and

³⁸ *Legacy*, para 25.

³⁹ *Legacy*, para 27.

⁴⁰ *Legacy*, para 27.

⁴¹ *Legacy*, para 31.

⁴² *Legacy*, para 31.

⁴³ *Legacy*, para 32.

⁴⁴ *Legacy*, para 34.

⁴⁵ *Legacy*, para 35.

⁴⁶ *Legacy*, para 35.

⁴⁷ *Legacy*, para 35.

⁴⁸ *Legacy*, para 41.

⁴⁹ *Legacy*, para 41.

⁵⁰ *Legacy*, para 42.

⁵¹ *Legacy*, para 42.

⁵² *Legacy*, para 42.

⁵³ CG van der Merwe *Sectional Title, Share Blocks and Time-Sharing* Vol 1 LexisNexis SA para 14.4.15.

⁵⁴ Van der Merwe *Sectional Title* Vol 1 para 14.4.15.



- adequate notice of a right to request written reasons for the decision must be provided.

Professor van der Merwe suggests that if the body corporate's rules dealing with such actions contain a fair administrative procedure, then those procedures may be followed to the exclusion of the provisions of PAJA.⁵⁵ However, the fairness of any procedures set out in the rules will be tested against the standards set out in PAJA if a dispute results from any actions taken.⁵⁶ For example, the procedure to enforce a fine or penalty against an owner for non-compliance with a rule is the most commonly disputed instance where, in some cases, the owner being fined, was not given the opportunity to make representations to the trustees prior to a decision being taken against the owner (a penalty being imposed). For instance, the Community Schemes Ombud Service (CSOS) refers to some rules as being "undesirable" such as if penalties are imposed "without following due process".⁵⁷

With the establishment of the CSOS in terms of the Community Schemes Ombud Service Act⁵⁸ (CSOS Act) it is arguable that CSOS is the more appropriate forum to review a decision-making process and / or a decision of an executive committee of a community scheme. Specific relief is afforded to applicants in a dispute resolution application to CSOS in terms of sections 39(4)(c) or (e) of the CSOS Act, for example. An order can be applied for on the basis that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association was void or invalid. An order can also be passed by CSOS declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of them.

Trustee resolutions come in many forms and shapes and they are concluded often, and for many different reasons. Decisions are required or considered necessary in the day-to-day management of the sectional titles scheme, as the trustees exercise the body corporate's powers and perform its functions. In some instances, trustees are obliged to make decisions in terms of the STSMA, the rules or directives imposed on them at a general meeting.

In any case, even if there is no external third party that may be adversely affected by a decision that a board of trustees is contemplating, the trustees must act fairly in accordance with the law, honour their fiduciary duty towards the body corporate and follow due process. If they do not do so, their decisions could be set aside once successfully reviewed by a court or the CSOS.

The *Legacy* case is on appeal at the Supreme Court of Appeal (SCA) and hearing of the appeal is set down for Thursday, 26 August 2021. It will be interesting to see if the SCA agrees with the Western Cape High Court on the matter. We should expect an appeal judgment in the next few months.

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⁵⁵ Van der Merwe *Sectional Title* Vol 1 para 14.4.15.

⁵⁶ Van der Merwe *Sectional Title* Vol 1 para 14.4.15.

⁵⁷ CSOS Circular on Amendment or Rules in terms of the STSMA (1 August 2019) – accessible from the CSOS website at <https://csos.org.za/wp-content/uploads/2019/10/Circular-On-Amendment-Of-Rules-In-Terms-Of-The-STSMA.pdf>.

⁵⁸ Act 9 of 2011.