



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable
Case No: 304/2020

In the matter between:

**THE TRUSTEES FOR THE TIME BEING OF THE LEGACY
BODY CORPORATE**

APPELLANT

and

**BAE ESTATES AND ESCAPES (PTY) LIMITED
PAM GOLDING PROPERTY MANAGEMENT
SERVICES (PTY) LIMITED**

FIRST RESPONDENT

SECOND RESPONDENT

Neutral citation: *The Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and Another* (Case no 304/2020) [2021] ZASCA 157 (5 November 2021)

Coram: PETSE AP, MBHA and MAKGOKA JJA and POTTERILL and PHATSHOANE AJJA

Heard: 26 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 5th day of November 2021.

Summary: Sectional Title Scheme – whether a body corporate's decision to prohibit an estate agency from operating within its scheme amounted to administrative action for purposes of PAJA – if PAJA not applicable, whether decision subject to judicial review in terms of the common law.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Bozalek J sitting as court of first instance): judgment reported *sub nom BAE Estates and Escapes (Pty) Ltd v Trustees for the Time Being of the Legacy Body Corporate and Another* 2020 (4) SA 514 (WCC).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Makgoka JA (Petse AP, Mbha JA and Potterill and Phatshoane concurring):

[1] In May 2019 the appellant, the Trustees for the Body Corporate for The Time Being of the Legacy Body Corporate (the trustees), decided to prohibit the first respondent, Bae Estates and Escapes (Pty) Ltd (Bae Estates), from operating within a sectional title scheme (the scheme) administered by the trustees in Green Point, Cape Town. On 4 February 2020 the Western Cape Division of the High Court (the high court), at the instance of Bae Estates, set aside the trustees' decision. It concluded that the decision was an administrative action envisaged in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and that, in any event, the decision was reviewable at common law. The appeal is with the leave of the high court.

[2] The body corporate was established in terms of s 2 of the Sectional Title Schemes Management Act 8 of 2011 (the 'Schemes Management Act' or 'the Act'). In terms of s 10 of the Schemes Management Act, a sectional title scheme must as from the date of the establishment of the body corporate, be regulated and managed by means of rules which must provide for the regulation, management, administration and use and enjoyment of sections and common property. In terms of s 10(2), the rules must comprise (a) management rules and (b) conduct rules.

[3] The facts which gave rise to the dispute between the parties are uncontroversial. Bae Estates is an estate agency that sells and rents properties on behalf of property owners in Cape Town and the surrounding areas. In May 2018 it was engaged by a property owner in the 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, among other provisions, the tenant was permitted to sub-let the property on short-term holiday lease, which the tenant himself later did without reference to Bae Estates. Subsequently, there were complaints by some property owners about the conduct of some of the sub-tenants, including excessive noise and other unruly behaviour. According to the trustees, these sub-tenants were sourced by Bae Estates, which they accused 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.

[4] On 14 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 for his property. Rule 37.3 reads as follows:

‘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. . . .’

[5] From 15-21 May 2019 the trustees wrestled with the question asked by one of them whether, ‘[i]n light of all the events . . . there was any potential scope to prohibit [Bae Estates] from operating within the Legacy. . . .’ By 21 May 2019, the trustees had, by way of an email round-robin, voted to prohibit Bae Estates from operating within the scheme. The same day, the resolution was communicated by email almost simultaneously to both the owner and Bae Estates. The email to Bae Estates read as follows:

‘In terms of rule 37.3 of the body corporate rules, short term holiday is permitted provided that it is managed through a letting agency which is considered to be reputable in the sole discretion of the Trustees.’

After setting out the provisions of rule 37.3, the trustees concluded:

‘Due to recent incidents at Unit 107 the Trustees have resolved to restrict Bae Estates from operating within The Legacy with immediate effect’.

[6] 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.

[7] Consequently, Bae Estates launched an application in the high court on an urgent basis, against the trustees and the second respondent, Pam Golding Property Management Services (Pty) Ltd (Pam Golding) which is the managing agent of the scheme. Bae Estates sought an interim interdict against the trustees from implementing the decision, pending an application to review and set it aside. Despite the relief in the notice of motion being for an interim relief pending the outcome of a review application, the high court treated the application as one for the review of the trustees’ decision. Nothing turns on this aspect. No substantive order was sought against Pam Golding which, accordingly, did not oppose the application, and consequently did not participate in this appeal.

[8] 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 susceptible to be reviewed in terms of PAJA, alternatively, the common law read with s 33 of the Constitution.

[9] In response, the trustees raised, among others, two preliminary points. First, that there was a non-joinder of the director of Bae Estates, its estate agent and the owner of the property. Secondly, that because Bae Estates had asserted that the decision of the trustees did not bind it, Bae Estates 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, as also, it did not adversely affect any of Bae Estates' rights nor did it have a direct, external legal effect. In addition, the trustees contended that the decision was reasonable and lawful in the circumstances of the case. The trustees then set out at length, the complaints which culminated in them taking the impugned decision.

[10] The trustees pointed out that the decision was taken in terms of rule 37.3 of the scheme's Conduct Rules, which, as already stated, concerns short-term holiday letting. Thus, emphasised the trustees, the decision related only to 'short-term holiday letting' and not any long-term letting or sales. In other words, Bae Estates was only prohibited from operating in the scheme insofar as short-term letting was concerned, and that the decision did not amount to a blanket prohibition.

[11] The high court concluded that the trustees' decision satisfied two requirements of the definition of 'administrative action' in PAJA, namely that of 'public character' and 'a direct external legal effect'. It, accordingly, concluded that the trustees' decision constituted administrative action envisaged in PAJA and thus 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.

[12] In order for PAJA to apply, the trustees' decision must amount to 'an administrative action'. Administrative action is defined in s 1 of PAJA as:

'any 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 a provincial constitution; or
 - (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 an empowering provision, which adversely affects the rights of any person and which has a direct, external effect. . . .’ Sub-sections (aa) – (ii) contain a list of powers, functions and decisions which are excluded from PAJA’s purview.

[13] In *Minister of Defence and Military Veterans v Motau and Others*¹ the Constitutional Court identified seven requirements of the definition of an administrative action: ‘there must be: (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’.

[14] 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. As Wallis J explained in *Sokhela and Others v MEC for Agriculture and Environmental Affairs*,² this requirement demands that a detailed analysis be undertaken of the nature of the public power or public function in question, ‘to determine its true character’. Thus, the determination of what constitutes administrative action does not occur by default, and ‘[t]he court is required to make a positive decision in each case whether a particular exercise of public power or performance of a public function is of an administrative character. . . .’³

[15] The high court did not consider whether the requirement that conduct be of an administrative nature, was met, and as such, did not engage in the analysis exercise suggested in *Sokhela*. To my mind, this is a structural deficiency in the judgment, amounting to a misdirection, for, if conduct is not of an administrative nature, a fortiori,

¹ *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) 69 (CC) para 33.

² *Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and Others* 2010 (5) SA 574 (KZP) para 61. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374; 1998 (12) BCLR 1458 para 26.

³ *Sokhela* para 61.

it cannot constitute an administrative action envisaged in PAJA. 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 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 constitutes administrative action as defined in PAJA and was, therefore, reviewable at Bae Estate's instance.

[16] I cannot agree with the reasoning of the high court. 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. As explained in *Chirwa v Transnet Limited*,⁴ such an approach would render the requirement that the decision be taken 'in terms of any legislation' meaningless, as all decisions taken by a body created by statute would meet the requirement. For example, almost all of the excluded powers and functions in sub-sections (aa) – (ii) in the definition of administrative law in PAJA are exercised in terms of statute, but decisions taken in terms thereof are not administrative decisions. And, to the extent the learned Judge seems to suggest that bodies corporates exercise public power by virtue of their power to regulate the living arrangements of property owners in their schemes and to control the common property, this is at odds with this Court's decision in *Mount Edgecombe Country Club Estate Management Association v Singh*.⁵

[17] The sum effect of these is that the high court failed to properly engage in an analysis of the relevant requirements of the definition of administrative action. I turn to that aspect. It is prudent right from the onset, to delineate which of those requirements are in dispute. As I see it, three of those are: (a) whether the trustees' decision is of an administrative nature; (b) whether the trustees exercised a public power or

⁴ *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) para 183. PAJA

⁵ *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others* [2019] ZASCA 30; 2019 (4) SA 471 (SCA). The essence of the decision is that, as between home owners and a homeowners' association, conduct rules have a contractual basis, and therefore PAJA does not find application where home owners' association enforced rules against property owners.

performed a public function; (c) whether the trustees acted in terms of any legislation or an empowering provision.⁶

Whether the trustees' decision is of an administrative nature

[18] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*⁷ 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 is nothing bureaucratic about the trustees' decision, nor does it involve 'application of policy'. Instead, the decision seems 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. Their decision is no different to a decision of a meeting of shareholders of a company.⁸

[19] I therefore conclude that the trustees' decision was not of an administrative nature. Having failed at the first hurdle, this should be the end of the enquiry. However, given the interrelatedness of the requirements, and the far-reaching implications the judgment of the high court holds for bodies corporate generally, I will consider the other two requirements.

Whether the trustees exercised a public power or performed a public function

[20] The question whether private entities are capable of exercising public powers or performing public functions is vexed. In *Chirwa* it was held that determining whether a power or function is 'public' has to be determined with regard 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

⁶ The expression 'an empowering provision' is defined in s 1 of PAJA as 'a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken'.

⁷ *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA) para 24.

⁸ Compare for example, *Pennington v Friedgood* 2002 (1) SA 251 (C) where it was held that decisions taken at the annual meeting of a medical aid scheme were not exercises of public power.

in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context’.

[21] In *Calibre Clinical Consultants*⁹ this Court at para 31 cited with approval the following remarks by Lord Bingham in *YL v Birmingham City Council*:¹⁰

‘[T]he role and responsibility of the state in relation to the subject matter in question . . . the nature and extent of any statutory power or duty in relation to the function in question . . . the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question, and imposes criminal penalties on those who fall below publicly promulgated standards in performing it . . . whether the function in question is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay. . . .’

[22] This Court went on to observe (at para 38) that ‘courts have consistently looked at the presence or absence of features of the conduct concerned that is “governmental” in nature’. Relevant considerations in this regard include:

‘[a] the extent to which the functions concerned are “woven into a system of governmental control”, or [b] “integrated into a system of statutory regulation”, or [c] [that] the government “regulates, supervises and inspects the performance of the function”, or [d] it is “a task for which the public, in the shape of the state, have assumed responsibility”, or [e] it is “linked to the functions and powers of government”, or [f] constitutes “a privatisation of the business of government itself”, or [g] it is publicly funded, or [h] there is “potentially a governmental interest in the decision-making power in question”, or [i] the body concerned is “taking the place of central government or local authorities”. . . .’

[23] 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

⁹ *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94; 2010 (5) SA 457 (SCA); [2010] 4 All SA 561 (SCA) para 31.

¹⁰ *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and Others* [2007] 3 All ER 957 (HL). Although the remarks are in the minority judgment, on the point made by Lord Bingham the court was unanimous.

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.

[24] 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.

[25] What is more, the trustees' decision does not affect the public at large. The general public does not have access to the estate. In *Mount Edgecombe* at para 15 this Court held that '[i]n 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.

[26] I therefore conclude that the trustees did not exercise a public power or perform a public function.

Whether the trustees acted in terms of any legislation or an empowering provision

[27] 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.

[28] The relevant sections here are ss 3 and 4. Section 3 provides for the functions of bodies corporate. In terms thereof, a body corporate must perform the functions entrusted to it by or under 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 them concerns the trustees' power to regulate the estate agents' right to operate in sectional titles schemes.¹¹

[29] As to the regulations promulgated in terms of the Act,¹² 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 established in terms of s 18 of

¹¹ Section 4 reads as follows:

'Powers of bodies corporate

4. The body corporate may exercise the powers conferred upon it by or under this Act or the rules, and such powers include the power—

- (a) to appoint such agents and employees as the body corporate may consider fit;
- (b) when essential for the proper fulfilment of its duties and upon special resolution, to purchase or otherwise acquire, take transfer of, mortgage, sell, give transfer of or hire or let units;
- (c) to purchase, hire or otherwise acquire movable property for the use of owners for their enjoyment or protection or in connection with the enjoyment or protection of the common property;
- (d) where practicable, to establish and maintain on the common property suitable lawns, gardens and recreation facilities;
- (e) upon special resolution, to borrow moneys required by it in the performance of its functions or the exercise of its powers;
- (f) to secure the repayment of moneys borrowed by it and the payment of interest thereon, by notarial bond over unpaid contributions whether levied or not, or by mortgaging any property vested in it;
- (g) to invest any moneys of the fund referred to in section 3(1)(a);
- (h) to enter into an agreement with any owner or occupier of a section for the provision of amenities or services by the body corporate to such section or to the owner or occupier thereof, including, upon special resolution, the right to let a portion of the common property to any such owner or occupier by means of a lease other than a lease contemplated in section 5(1)(a);
- (i) to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property.

¹² The regulations were promulgated by the Minister on 7 October 2016, the Minister made regulations in terms of the Sectional Title Schemes Management Act 8 of 2011.

the Schemes Management Act. Similarly, none of the regulations concern the relationship between the bodies corporate and estate agents.

[30] The scheme's conduct rules also qualify as 'an empowering provision', as the latter expression is defined in s 1 of PAJA as 'a law, a rule of common-law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken'. But even here, the scheme's conduct rules do not have any provision empowering the trustees to prohibit an estate agent from operating in the scheme.

[31] 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.

[32] To sum up. 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. This brings me to a consideration as to whether the decision is reviewable at common law.

Reviewability under the common law

[33] Before us, the trustees had an about-face. They abandoned the defence adopted in the high court. To recap, that defence was that the prohibition against Bae Estates was only applicable to short-term holiday letting, and therefore, Bae Estates was entitled to operate in the scheme for other purposes such as long-term letting or sales. Counsel for the trustees was constrained to concede that the trustees' decision amounted to a total prohibition on Bae Estates to operate in the scheme, and that: (a) the decision was taken without affording Bae Estates any hearing; (b) Bae Estates was not responsible for the sub-letting which culminated in the complaints in respect of the property, and that Bae Estates became involved only after the problems arose.

[34] Despite the above, counsel 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, counsel 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.

[35] Significantly, this point was not even pleaded. In paras 8-10 above, I have set out fairly comprehensively, the points in the trustees' answering affidavit upon which they rested their defence to the application. This was not one of them. The point was raised for the first time in the application for leave to appeal. Ordinarily, a point of lack of locus standi should have been pertinently raised in the answering affidavit to enable Bae Estates to meet it, and for the high court to pronounce on it.

[36] It is so that the mere fact that a point of law is raised for the first time on appeal is not in itself a sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, a court may in the exercise of its discretion consider the point.¹³ It would be unfair to the other party if the point of law and all its ramifications were not canvassed and investigated at trial.¹⁴ In this case, the point was neither covered in the affidavits, nor was it canvassed and investigated in the high court. It is, therefore, patently unfair to Bae Estates to have to be confronted with the point for the first time on appeal. For this reason alone, the locus standi point must be dismissed. But, in any event, as I show below, there is no merit to the point.

[37] At common law, a person who approached a court for relief was required to have an interest in the sense of being personally adversely affected by the wrong alleged.¹⁵ In *Jacobs v Waks*¹⁶ this Court set out the following requirements to determine whether an applicant has the necessary locus standi to challenge an

¹³ *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) para 44; *Cole v Government of the Union of SA* 1910 AD 263 at 273; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 24-5; and *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290.

¹⁴ *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA); [2000] 3 All SA 181 (A) para 30; *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 39.

¹⁵ See for example, *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 389I.

¹⁶ *Jacobs and Another v Waks and Others* 1992 (1) SA 521 (A) at 534A-E.

impugned decision: (a) the applicant for relief must have an adequate interest in the subject-matter of the litigation, in other words, a direct interest in the relief sought; (b) such interest must (i) not be too far removed; (ii) be actual, not abstract or academic; (iii) be current, and not a hypothetical one. The Court further pointed out that issues of locus standi should be dealt with in a flexible and pragmatic manner, rather than a formalistic or technical one.

[38] It brooks no debate that Bae Estates has a substantial and direct interest in the decision of the trustees, the subject-matter of this litigation, and that such interest is real and current. Bae Estates, accordingly, fulfils all of the above requirements. It was sufficiently and directly affected in its rights and legal interests by the trustees' decision. Also, since the advent of the constitutional order, the issue of locus standi is regulated by s 38 of the Constitution,¹⁷ in terms of which the class of persons who may approach a court include 'anyone acting in their own interest.' Thus, at both common law and in terms of the Constitution, Bae Estates has thus established the required locus standi to challenge the validity of the decision. A contrary conclusion would be tantamount to the adoption of a 'formalistic or technical' approach cautioned against in *Jacobs* and, contrary to s 38 of the Constitution. It follows that the trustees' contention that Bae Estates lacks locus standi, does not withstand scrutiny. Bae Estates has established an enforceable right against the trustees, and thus, the necessary standing to review the trustees' decision at common law.

[39] Bae Estates' alleged lack of standing was the only defence proffered by the trustees on the reviewability of their decision under common law. Having found no merit in that point, it remains to decide whether the trustees' decision is in fact, reviewable at common law. Decisions of private bodies are not immune from judicial review. The principles in this regard have mostly evolved from the so-called 'Jockey

¹⁷ Section 38 of the Constitution states:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.'

Club' cases, where voluntary associations are required to afford their members a fair and impartial hearing before their domestic tribunals.¹⁸ Counsel for the trustees sought to distinguish these cases from the present case on two bases: 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.

[40] In my view, there is no merit to either of the two propositions. As to the first, it is mechanical, and amounts to placing form over substance. It is reminiscent of, and akin to, the former classification of administrative powers and functions as 'purely administrative' or 'quasi-judicial', that was discredited and discarded in our administrative law even pre-constitutional order. The identity or form of the decision-maker is immaterial. What is important is the effect of its decision and its implications on the subject to whom it is 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.

[41] I turn now to consider the grounds on which a decision of a private body can 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.¹⁹

¹⁸ See for example *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).

¹⁹ *South African Railways v Swanepoel* 1933 AD 370 at 378; *Theron and Others v Ring van Wellington van die NG Sendingkerk and Others* 1976 (2) SA 1 (A).

[42] In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,²⁰ Innes CJ observed that the grounds upon which a review may be brought under common law are 'somewhat wider' than those that would justify a review of judicial proceedings. It is well-established that common law review, inter alia, applies also to cases where the decision under review is taken without a hearing having taken place. And, where the duty or power is created not by statute but consensually as in relation to domestic tribunals.²¹

[43] It is so that ordinarily, Bae Estates does 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.

[44] As already stated, in this Court 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.

[45] 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

²⁰ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115.

²¹ *Hira and Another v Booysen NO and Another* 1992 (4) SA 69 (A) at 93A-94A.

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 is manifestly untenable.

[46] The trustees' decision is 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 is so unfair that 'it cannot be explained unless it is presumed that they acted capriciously or with mala fides'. This is buttressed by the conduct of one of the trustees, Mr Graham Cowburn, who is an estate agent with Dogon Group Properties. His company is thus a direct competitor of Bae Estates.

[47] On 22 May 2019, a day after the decision was taken to prohibit Bae Estates from operating in the scheme, Mr Cowburn addressed an email to the property owner, in which he suggested to the owner to give the mandate to find a tenant, to his company. This is a clear conflict of interest. Mr Cowburn, having been part of the decision to prohibit Bae Estates from operating in the scheme, immediately sought to benefit his company from the latter's 'banning'. Earlier, on 17 May 2019, he had enthusiastically agitated for Bae Estates' prohibition from the scheme with a curt 'Ban them!'.

[48] Should the trustees' stance prevail in these circumstances, it would mean that the court's hands are tied in the face of an injustice. As remarked in *Barkhuizen v Napier*,²² the hands of justice can never be tied under our constitutional order. That would give the trustees a license to act with impunity by arbitrarily and whimsically prohibiting estate agents from operating in the scheme. Courts must endeavour to do simple justice between parties. Maripe explains it well:

'The ends of justice should transcend the boundaries that so often restrain the courts, and it is the courts' responsibility, to rule against abuse of power and dispense justice in deserving cases, and to lay down particular rules whose effect is to promote the exercise of power or discretion in regular fashion. Doing so in relation to decisions of private bodies would not involve a "quantum leap", but would rather prevent injustices in demonstrably deserving cases.'²³ (Footnote omitted.)

²² *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 73 in a contractual context.

²³ B Maripe 'Judicial Review and the Public/Private Body Dichotomy: An Appraisal of Developing

[49] The facts of this case call to mind the English case of *Breen v Amalgamated Engineering Union*.²⁴ The case concerned an application to review the decision of a committee of a trade union, which admittedly was made in circumstances of utmost bad faith. But the remedy for judicial review was denied because the union was a private body and not the subject of judicial review. The majority acknowledged the injustice, but considered their hands bound. Edmund Davis LJ, writing for the majority, lamented the result in the introductory paragraph of his judgment at 194:

'I entertain substantial doubts that the judgment I am about to deliver will serve the ends of justice. That is, to say the least, a most regrettable situation for any judge, but I see no escape from it. Its effect is to throw away empty-handed from this court an appellant who, on any view, has been grossly abused. It is therefore a judgment which gives me no satisfaction to deliver.'

[50] Fortunately, the constraints which inhibited Edmund Davis LJ from doing justice between the parties, have no place in our law. 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 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.

[51] It remains to briefly dispose of a residual argument on behalf of the trustees. It was submitted that there were other remedies available to Bae Estates, such as an interdict, and a claim for damages based on unlawful interference with contractual obligations, or remedies under the anti-competition law. That may well be so. However, none of those remedies would adequately redress the effect of a permanent prohibition against Bae Estates to service clients in the scheme. A damages claim, for example, would be retrospective and limited to any clients that Bae Estates might have had at the time of the prohibition. In addition, such a damages claim might prove difficult to quantify. For future purposes, however, the permanent prohibition would still stand, and Bae Estates would be unable to service its clients in the scheme.

Trends' (2006) University Botswana Law Journal 23 at 42.

²⁴ *Breen v Amalgamated Engineering Union and others* [1971] 2 QB 175.

[52] In all the circumstances I am of the view that the trustees' decision ought to be reviewed and set aside. To hold otherwise would give an imprimatur to an injustice, totally inimical to our constitutional order and values. Accordingly, the appeal cannot succeed.

[53] I therefore make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

T M Makgoka
Judge of Appeal

APPEARANCES

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