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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. 13725/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

2023-05-11

SIGNATURE

In the matter between:

THE SILVERLAKES HOMEOWNERS ASSOCIATION

Applicant

(Registration No: 1[...])

and

THE COMMUNITY SCHEMES OMBUD SERVICE

First Respondent

THE ADJUDIATOR: A J ANDREAS

Second Respondent

CJ LEONARD

Third Respondent

JUDGMENT

The judgment and order are *published and distributed electronically*.

VAN NIEKERK PA. AJ

- [1] Applicant is a Homeowners Association which applies for the review of an adjudication order issued by the Second Respondent ("the Adjudicator"). Applicant is a "*community scheme*" as defined in Section 1 of the Community Schemes Ombud Service Act 9 of 2011 ("*the Act*") and the adjudicator is appointed in terms of Section 21(2)(b) of the Act.
- [2] First Respondent is a juristic person established in terms of Section 3(1) of the Act with the functions as set out in Section 4 of the Act. Second Respondent is an Adjudicator appointed in terms of section 21(2)(b) of the Act. First Respondent and Second Respondent did not oppose the application.
- [3] Third Respondent is the registered owner of immovable property within the Applicant's scheme and is thus a member of the Applicant and subject to the Memorandum of Incorporation of Applicant and its rules of governance. Third Respondent applied for relief at the First Respondent In terms of the provisions of Chapter 3 of the Act after the Applicant instituted and finalised disciplinary proceedings against the Third Respondent in terms of the applicable Memorandum of Incorporation and Rules of the Applicant. On 26 September 2022 Second Respondent issued an adjudication order in terms of Section 54 of the Act ("*the impugned order*") which dismissed part of the relief which Third Respondent claimed in the application, but upheld a claim that it be declared that the process followed by the Applicant was unfair, unreasonable, inconsistent and/or procedurally unfair. It is the Applicant's case that the impugned order is reviewable and falls to be set aside.

BACKGROUND TO THE APPLICATION:

- [4] The application contains extensive averments relating to instances where the Third Respondent was allegedly involved in the contravention of rules of the Applicant. I am of the view that it is not necessary for purposes of this application to deal with the nature and extent of these complaints, except to note that it is clear from a perusal of the papers that various incidences at the premises under the control of the Applicant has led to a substantially deteriorated relationship between the executive functionaries of the Applicant, employees of the Applicant and the Third Respondent on the other hand.
- [5] Certain of the aforesaid alleged incidents eventually led to the fact that the Applicant initiated disciplinary proceedings in terms of the relevant rules of the Applicant against the Third Respondent. In this respect I also deem it not necessary to repeat the specific rules involved, nor the nature of the charges against the Third Respondent. Suffice it to note that the rules of the Applicant provide for a process in terms whereof the transgressor of a rule is served with a written notice of the alleged offence, is informed of the intended sanction to be imposed by the Applicant, and provided an opportunity to make written submissions. Upon consideration of such submissions (if any) a Disciplinary Committee determines guilt and if applicable, appropriate sanction whereafter the rules of the Applicant provide for an internal process of appeal. The applicable rules further provide for time periods within which such submission can be made, the appeal process can be instituted, and timeframes within which disciplinary proceedings may be instituted.

THE ADJUDICATION PROCESS

- [6] Third Respondent was sanctioned by the Applicant in terms of the applicable disciplinary rules and procedures as contained in the Applicant's Memorandum of Incorporation and Rules. Third Respondent contended that the Applicant victimised him, that the procedure followed by the Applicant was inconsistent with the Applicant's Rules, that the procedure followed was unfair against the Third Respondent, and in the end result the Third Respondent lodged an application to the First Respondent on 20 January 2021. On 20 January 2021 the Third Respondent completed an *"Application for Dispute Resolution Form"* to which was various attached e-mail correspondence addressed by the Third Respondent's attorney of record to the Applicant, which recorded alleged procedural and administrative irregularities regarding the disciplinary proceedings initiated against the Third Respondent by the Applicant. Furthermore, additional correspondence exchanged between the Applicant and Third Respondent recording their different views on the background facts relating to the institution of the disciplinary proceedings were attached.
- [7] On 25 March 2021 First Respondent requested the Applicant to present written submissions regarding the application of the Third Respondent to First Respondent. The Applicant submitted its written submissions on 16 April 2021, which raised certain procedural points *in limine* relating essentially to the non-compliance of the Third Respondent with time periods relating to internal appeal processes applicable to the disciplinary proceedings of the Applicant and/or the declaration of disputes, and further contains submissions on the merits of the application.

[8] On 23 April 2021 Third Respondent replied to the aforesaid written submissions of the Applicant. Applicant avers in the Founding Affidavit that these submissions were not sent to the Applicant and only came to the knowledge of the Applicant subsequent to the adjudication order being granted by the Second Respondent.

[9] The impugned order was made by the Second Respondent in a document containing an "*Executive Summary*" dated 26 September 2022 wherein it was recorded that the Third Respondent sought certain relief which was set out in the "*Executive Summary*" as follows:

"The applicant seeks an order in the following terms:

- (a) Whether the process followed by the Respondent was fair, reasonable, consistent and/or procedurally fair;*
- (b) Whether the Respondent without prejudice correspondence, amounts to a formal finding against our client;*
- (c) Whether the Respondent is permitted to take action against our client in the absence of a formal finding;*
- (d) Whether the action against our client, a single aspect of which can be seen in his levy statement, is fair, reasonable and in line with the sanctions schedule as attached to the rules;*

(e) *Any other formal finding and/or commentary that you may have in this regard."*

[10] In the "*Executive Summary*" the Second Respondent records as follows:

"The relief sought by the Applicant against Respondent is upheld insofar as it relates to prayer (a).

Respondent is hereby directed to remove the penalty imposed on the Applicant's levy statement within 14 days upon receipt of this order.

The relief sought by the Applicant in respect of prayers (b), (c), (d) and

(e) falls outside the scope of the prayers of relief as set out in section 39 of the CSOS Act, and the adjudicator is not empowered in terms of the applicable legislative framework to grant such and order."

[11] From a perusal of the Third Respondent's application to First Respondent, the attached documents to the submissions made to the First Respondent by both the Applicant and Third Respondent, and the contents of the "*Executive Summary*" it is clear that the adjudicator upheld only that part of the Third Respondent's application which claimed relief to set aside the sanctions imposed by the Applicant against the Third Respondent on the basis of procedural irregularity committed during the process of disciplinary proceedings by Applicant against Third Respondent. It also follows that the points *in limine* raised and submissions made by Applicant in response

to the application by third Respondent to First Respondent were not upheld or confirmed by the adjudicator.

[12] It is common cause between the parties that the adjudicator:

[12.1] Failed to conduct a hearing, either "*face to face*" (in person), virtual or telephonically; and

[12.2] Failed to invite any further submissions from the Applicant subsequent to the "*replying*" submissions delivered to the First Respondent by Third Respondent; and

[12.3] Did not afford the parties an opportunity to submit final submissions, either orally or in written form.

IS THE ADJUDICATION ORDER REVIEWABLE?

[13] It was submitted on behalf of the Applicant that an adjudication order constitutes administrative action as defined in Chapter 1 of the Promotion of Administrative Justice Act (PAJA) and is therefore susceptible to review under PAJA.

[14] The issue of an adjudication order is regulated in terms of Chapter 5 of the Act. Section 53 of the Act empowers the Adjudicator to dismiss an application, including the power to make a costs order against an applicant. Section 54 of the Act empowers the Adjudicator to make orders of a wide range, including orders in the nature of an interdict¹, costs², and the orders which may be made relates *inter alia* to financial disputes³ and may result in orders for the payment of money. The adjudication order may also be

¹ Section 54(2) of the Act;

² Section 54(1)(b) of the Act;

³ Section 39 of the Act;

enforced as if it is an order of Court⁴.

[15] An adjudication order therefore has a direct, external legal effect and falls squarely within the definition of "*administrative action*" as defined in terms of Section 1 of PAJA⁵.

[16] In terms of Section 3 of PAJA administrative action may be reviewed on the grounds as set out in Section 6 of PAJA, and it therefore follows that the adjudication order is susceptible to review in terms of PAJA.

APPLICANT'S GROUNDS FOR REVIEW:

[17] Applicant raised the following grounds for review of the impugned order, namely:

[17.1] That the Adjudicator's failure to afford the parties a hearing was procedurally unfair;

[17.2] That the impugned order was materially influenced by an error of law in that the Adjudicator *inter alia* failed to uphold the Applicant's point *in limine* that the Third Respondent was enjoined in terms of the Rules of Applicant to institute an internal appeal process within a specified time period before being entitled to refer the dispute to First Respondent, which the Third Respondent (according to Applicant) failed to do.

[18] During argument Counsel for the Third Respondent in my view properly and correctly conceded that the procedure adopted by the

⁴ Section 56 of the Act;

⁵ Promotion of Administrative Justice Act 3 of 2000;

Adjudicator was procedurally unfair as per the first ground of review set out in par. [17.1] *supra*. It is therefore not necessary to deal with the second ground of review as set out in par. [17.2] *supra*.

[19] The empowering provisions in terms wherefore the Adjudicator issued the adjudication order are the Act and Regulations⁶ and Practice Directives⁷ issued by the First Respondent. In a Practice Directive on dispute resolution dated August 2019, Part 5 thereof, provision is made for a process of adjudication where parties to a dispute appear before the Adjudicator. Only in the event that both parties consent may the process of adjudication be disposed of in *absentia* of the parties, or when a party is in default to appear at the adjudication hearing which was duly set down.

[20] In a Practice Directive issued during 2019, which applied during the so-called "*Covid lockdown period*" when the impugned order was issued provision was made for no "*face-to-face*" adjudications but instead for virtual and/or telephonic hearings. Paragraph 8.3 of this Directive reads:

"8.3 The Adjudicator may at his or her discretion conduct the adjudication telephonically or virtually. Parties in a dispute are requested to have sufficient data, bandwidth, battery-life or connectivity for the duration of the Conciliation."

[21] There is no provision in the Act, the Regulations in terms of the Act, or the Practice Directives issued in terms of the Act which empowers an Adjudicator to exercise his/her own discretion to

⁶ Section 29 of the Act;

⁷ Section 36 of the Act;

issue an adjudication order without an adjudication hearing. It is clear that the provisions of the Act, the Regulations in terms of the Act and the Practice Directives envisage a Tribunal where the Adjudicator is enjoined to dispose of disputes between parties in a *quasi-judicial* manner which requires at its very basic tenant the application of the *audi alteram partem* principle.

[22] The Adjudicator's failure to afford the parties and in particular the Applicant the opportunity to present and argue its case renders the procedure followed by the Adjudicator reviewable under Section 3(1) of PAJA read with Section 3(2)(b)(ii), having regard to the objects of the empowering provision (the Act) which is to resolve disputes between parties who have competing interests in a dispute which falls within the jurisdiction of First Respondent. In the result, the impugned order falls to be set aside on review.

[23] Counsel acting on behalf of the parties made comprehensive submissions relating to costs. On behalf of both parties it was submitted that costs should be awarded against the other party on a punitive scale which in my view is simply indicative of the level of conflict which exist between the parties and has no merit. Counsel acting for Third Respondent submitted that, in the event that the impugned order is set aside, no order for costs should be made on the basis that the Applicant acted grossly unfair during the disciplinary proceedings and that the Third Respondent is not to blame for the fact that the Adjudicator followed an irrational process which renders the adjudication order reviewable. Although this argument may have a measure of attraction, considering the background to the dispute between the parties, the fact remains that it was only the Third Respondent who opposed the application and no reason therefore exist why the normal principle namely that costs should follow the event, should not apply.

[24] In the result, the following order is made:

[24.1] The adjudication order dated 26 September 2022 in the adjudication proceedings between Third Respondent (Applicant in the adjudication proceedings) and Applicant (Respondent in the adjudication proceedings) are reviewed and set aside and the application for adjudication in terms of Section 38 of Act 9 of 2011 instituted by Third Respondent against Applicant is remitted to First Respondent to be adjudicated in terms of Chapters 3, 4 and 5 of Act 9 of 2011 *de nova*;

[24.2] Third Respondent is ordered to pay the costs.

P A VAN NIEKERK
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

CASE NUMBER: 13725/2022

HEARD ON: 9 May 2023

FOR THE APPLICANT: ADV. R.J. GROENEWALD

INSTRUCTED BY: VZLR Incorporated

FOR THE THIRD RESPONDENT: ADV. L. VAN DER
WESTHUIZEN

INSTRUCTED BY: F van Wyk Attorneys

DATE OF JUDGMENT: 11 May 2023