

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2023-059686

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
<u>02/03/2025</u> 	
DATE	SIGNATURE

In matter between

MJEJANE GAME RESERVE HOMEOWNERS'

Applicant

ASSOCIATION

and

COMMUNITY SCHEMES OMBUD SERVICES

FIRST RESPONDENT

ACTING CHIEF OMBUD

SECOND RESPONDENT

THEMBELIHLE MBHATHA N.O

COMMUNITY SCHEME OMBUD SERVICES,

THIRD RESPONDENT

KWA-ZULU NATAL REGIONAL OFFICE

MJEJANE RIVER LODGE PROPERTY (PTY) LTD

FOURTH RESPONDENT

PETRUS ZELIE N.O.

FIFTH RESPONDENT

JUDGMENT

LESUFI AJ

Introduction

[1] This is an application to review and set aside the two decisions made by the First to Third Respondent, the decisions are as follows:

1.1 The decision to accept the application for Dispute Resolution (CSOS application 1237/MP/2023, hereinafter “*the application*”) at the instance of the Fourth Respondent on the 18 May 2023

1.2 The decision on the 25th May 2023 to refer the application for dispute resolution directly to the Adjudicator.

[2] The Applicant seeks a declaratory order that the application has lapsed in terms of in terms of in terms of section 41 of the Community Schemes Ombud Services Act 9 of 2011(the CSOS Act)

[3] An order substituting the decision and/or direct reference of the First to the Third Respondents to an Adjudicator with the following:

3.1 The Fourth Respondent’s application for the direct Dispute Resolution in terms of the Act 9 of 2011 is rejected pursuant to section 42 of the Act.

[4] The Applicant further seeks that the Respondents be interdicted and prohibited to continue with the application for Dispute Resolution pending the adjudication of the relief sought in par 1-3 above.

[5] In the alternative to prayers 1-4 above, that the application for Dispute Resolution and/or direct reference to an Adjudicator by the First, Second and /or Third Respondent be stayed in terms of Arbitration Act 42 of 1965 pending referral and outcome of the dispute between the Applicant and the Fourth Respondent (alternatively that the stay be ordered in terms of section 40 (c) read with section 42 (d) of the Act on an urgent basis if necessary.

Parties

[6] The Applicant is Mjejane Game Reserve Homeowner’ Association NPC, a non-profit company with voting members, registered and incorporated in accordance with the company laws of the Republic of South Africa, with registration number 2009/016655/08 and registered address at 38 Mostert street, Cherieta Building , Suite 7, Mbombela, Mpumalanga Province.

[7] The First Respondent is the Community Schemes Ombud Services established in terms of the Community Schemes service Act, 9 of 2011(“CSOS Act”) with the purpose to regulate the conduct of the parties with community schemes and to ensure good governance, with its physical address at Berkley Office Park, 8 Bauhinia street , Highveld Technopark, Centurion , Gauteng Province.

[8] The Second Respondent is Acting Chief Ombud, Thembelihle Mbatha N. O, in her capacity as the Interim Chief Ombud of the First Respondent, with physical address at Berkley Office Park, 8 Bauhinia street, Highveld Technopark, Centurion, Gauteng Province.

[9] The Third Respondent is Community Schemes Ombud Services, Kzn Regional Office, the regional office of the First Respondent located in Kwazulu – Natal , with its physical address at Aquasky Towers , 275 Smith Street, Durban Central , Kwazulu-Natal Province.

[10] The Fourth Respondent Is Mjejane River Lodge Property (Pty) Ltd, a private company duly incorporated in terms of the laws of the Republic of South Africa, with registration number 2007/025318/07, and registered address at 381 Ontekkers Road, Florida Park, Roodepoort, Gauteng Province.

[11] The Fifth Respondent is Petrus Zeelie N.O, cited herein in his representative capacity as the court appointed interim administrator of the Mjejane Trust (“the trust”) with his current business situated address at 381 Ontekkers Road, Florida Park, Roodepoort, Gauteng Province.

[12] The First to the Second Respondent will be referred to as “The Respondents, throughout the judgment, save for where the court makes reference to the First or Second Respondent individually.

Background and Facts

[13] On the 21 April 2023, the Fourth Respondent made an application to the First Respondent for dispute resolution by completing a form “the dispute resolution form” (the form), setting out 17 disputes for conciliation or arbitration against the applicant. In the application to the First Respondent, the Fourth Respondent sought the following relief in terms of Section 39 of the CSOS Act:

- 8.1 the relief in terms of financial issues;
- 8.2 scheme governance issues;
- 8.3 meeting issues;
- 8.4 General and other issues;

[14] On the 18th of May 2023 the First Respondent, acting through the Second and/or Third Respondents accepted the application for the Dispute Resolution (under CSS Application 1237 MP/23) initiated by the Fourth Respondent.

[15] In order to assist the Fourth Respondent in the resolution of the dispute, the First Respondent requested the Applicant to furnish written submission in terms of section 43 of the CSOS Act, regarding the application by the 24th of May 2023. On the 25th of May 2023, the Applicant received an email from the First Respondent informing them that they failed to provide a response, accordingly the dispute was therefore referred directly to adjudication in terms of Section 48 of the CSOS Act.

[16] On the 25th of May 2023 the Applicant sent a letter to the First Respondent in response to Section 43 notice in terms of the CSOS Act, acknowledging receipt of the copy of the Fourth Respondent 's application for dispute resolution dated 21 April 2023. The Applicant further acknowledged request for submissions in response to the application made by the Fourth Respondent on or before 24 May 2023.

[16] The Applicant informed the First Respondent that they are of the view that, based on the relief sought, the application should not have been entertained by First Respondent and that the First Respondent was obligated to reject the application in terms of Section 42 of the CSOS Act and therefore should have been rejected.

[17] On the 27th of June 2023, the Applicant instituted the current review application before this court seeking *inter alia* that the Respondents' decisions to accept and refer the dispute for adjudication be reviewed and set aside.

Applicant' submissions

[18] The Applicant contends that the First Respondent had to reject the application in terms of section 42 of the CSOS Act because the relief sought was not in its jurisdiction in terms of Section 39. This is because the basis of the alleged dispute

sought by the Fourth Applicant concerned domestic disputes not membership disputes. Such dispute ought to be resolved in terms of an arbitration entered into between the parties in terms of the Memorandum of Incorporation(MOI). The Fourth Respondent omitted to mention in the form that there is an existing internal step to take as a dispute resolution mechanism before approaching the First Applicant.

[19] The Applicant further argues that the First Respondent 's mandate is to decide on personal and individual interest and rights according to the CSOS Act, not a dispute resolution such as this one where the Fourth Respondent instituted a dispute resolution on behalf of its members which it failed to identify such members and the basis upon which it is authorised to represent such members. The Applicant argues that the motive behind the institution of the dispute resolution before the First Respondent was to declare the MOI invalid, and to circumvent the role of the Applicant by brining a domestic dispute under the guise of a membership dispute.

[20] The Applicant also avers that the condonation granted by the Respondents should not have been allowed on the grounds that it is unjust and it erases the proper management of the Applicant and it was not based on proper grounds.

[21] With regard to the referral for adjudication, the Applicant submits that the referral of the dispute for adjudication by the First Respondent was contrary to the relief sought in the form, and it relied on the wrong authority that has been overturned by the Courts.

First to Second Respondents' submissions

[22] The Respondents are opposing the application to review and set aside their decision to accept the application for dispute resolution by the Fourth Respondent and to refer the application for adjudication. They argue although the Second Respondent acts in terms of the provisions of the CSOS Act, not all the decisions she makes constitute an administrative act in terms of the Promotion of Justice and Administrative Act 3 of 2000 (PAJA). The Second Respondent took a decision to accept the Fourth Respondent' s application after considering the relief sought and confirmed that it fell under the categories of the prayers in terms of section 39 of the CSOS Act. Further the Second Respondent took a decision to directly refer the matter for adjudication because no conciliation process was conducted in accordance with the CSOS Act and the CSOS Directives. The Applicant was provided with the Fourth Respondent's

application to make submissions in terms of section 43 of the CSOS Act in order for the Applicant's side to be heard, however the Applicant did not file the response. Instead the Applicant sent a letter through its attorney highlighting that the Respondents should not have accepted the Fourth Respondent's application. On this basis, the Second Respondent argue that the Applicant misconstrued the meaning of section 42(d) which requires "satisfaction" from the Second Respondent to refer a dispute to the court of law or tribunal with competent jurisdiction. According to the Second Respondent "satisfaction" is subjective.

[23] The filing of the application was condoned after considering the contents of the condonation application which stated that if the application is not condoned the Applicant will continue with its oppression, reckless trading, insolvency and unreasonable actions, which will as a result prejudice the Fourth Respondent and the shareholders, and probably have a long term effect on them.

[24] As far as the dispute mechanism is concerned, the Respondents contend that, the parties' MOI does not bind the Second Respondent as it is bound by the provisions of the CSOS Act and the CSOS directive. Even so, she had no knowledge of the MOI as this was not raised by the Applicant. As such, a preliminary issue should be determined by the Adjudicator in the adjudication process.

Issues

[25] The main issue for contention are as follows:

25.1 Whether the decisions of the First to the Third respondents to accept the application for dispute resolution and to directly refer it to the Adjudicator are reviewable in terms of PAJA.

25.2 Whether the Applicant exhausted internal remedies.

The Law

[26] In terms of section 3(1) of PAJA:

"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

[27] An administrative action is defined in terms of section 1 as follows:

"any decision taken, or any failure to take a decision, by—

- (a) ...
 - (i)...
 - (ii)...
- (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,

[28] Section 1 further defines a decision to mean:

“...any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—

- (a) making, suspending, revoking or refusing to make an order, award or determination;”

Application

1. Whether the decisions of the First to the Third respondents to accept the application for dispute resolution and to directly refer it to the Adjudicator are reviewable in terms of PAJA.

[29] At the onset, the Second Respondent argues that not all her actions are reviewable in terms of PAJA, although her actions are derived from the provisions of the CSOS Act. However, the First Respondent as an administrative body with primary powers to receive and resolve disputes related to community schemes,¹ has discretion whether to accept and to refer the matter for adjudication,² also ensuring that the parties involved are given an opportunity to be heard³ in accordance with the principles of procedural fairness in terms of section 3 of PAJA. In performing such duties, the First Respondent delegates its power in terms of the empowering provisions to the Second Respondent to perform such duties.⁴ Therefore the decision to accept the Fourth Respondent ‘s application and to refer it to the Adjudicator was an administrative decision taken by the First Respondent and its delegates. The Second Respondent was acting on behalf of the First Respondent; thus her decision constitutes an administrative act reviewable in terms of PAJA.

¹ Section 38 of the Community Schemes Ombud Services Act, 9 of 2011.

² Section 47 and 48 of the Community Schemes Ombud Services Act, 9 of 2011.

³ Section 43 of the Community Schemes Ombud Services Act, 9 of 2011.

⁴Section 6(2)(a)(i) and (ii) of the Promotion of Administrative Justice Act, 3 of 2000.

[30] The main issue for determination in this court is whether such decisions are reviewable? As section 3 provides above. The requirement here, is that procedural fairness must be adhered to when an administrative decision taken adversely affects the rights or legitimate expectation of any person.⁵ In *Law Society v Law Society, Northern Provinces (Incorporated As The Law Society of The Transvaal) v Maseka and Another*⁶ the court said as follows in determining the entitlement for the application of the principles of natural justice:

“... for a person to be entitled to the application of the principles of natural justice or to procedurally fair administrative action, the decision or conduct must at least materially and adversely affect that person's rights.”⁷

[31] The Applicant set out two decisions of an administrative nature in its papers, however as far the rights and legitimate expectations are concerned, the Applicant did not put it before the court and in its papers whether the decisions of the Respondents adversely affected its rights, other than *inter alia* the averments that the First Respondent had no jurisdiction to accept the application and to refer it for adjudication on the grounds that the disputes contained in the form are domestic disputes and that there is an arbitration agreement in terms of the MOI in place to deal with internal issues between the parties. In my view accepting and referring the application for adjudication had no material and adverse effect to the Applicant's rights. The issue raised by the Applicant must be determined by the Adjudicator. Whether the disputes are domestic or membership disputes have already been correctly determined by the Respondents when accepting the application. What was left was for the Applicant through its submissions to oppose such.

[32] In terms of section 42 of the CSOS Act the First Respondent is to reject a relief sought if it is not within its jurisdiction. It was contended that the relief sought fell squarely within the jurisdiction of the First Respondent as it related to financial issues behavioural issues, governance issues, meeting issues, private and common area issues and in respect of general and other issues as stipulated in section 39 of CSOS. Based on the disputes outlined in Annexure A, the application was accepted and thereafter condoned considering the grounds laid by the Fourth Respondent.

⁵ *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) at para 28.

⁶ 2005 (6) SA 372 (BH).

⁷ *Id* at para 382.

Thereafter, the Applicant was required in terms of section 43 notice to make submissions to the averments made in the application, in accordance with the principle of *audi alterum partem* rule, but the Applicant did not engage. The requirement of procedural fairness was fully observed by the Respondents.

[33] With regards to the decision to refer the application for adjudication, section 48(1) of the CSOS Act, is clear, the First Respondent must refer the application to an adjudicator if the conciliation fails. In this case there is no evidence that indicates that a conciliation was held. However, the First Respondent referred the matter directly to the adjudicator upon exercising its discretion in terms of section 47 and considering the factors under the CSOS Directive to refer a matter for adjudication. Of importance is to note clause 21.5.8 of the CSOS directives as it gives the First Respondent the powers to refer a matter to the adjudicator if the respondent (in this case the Applicant) fails to attend the conciliation. Thus, it was well within the powers of the First Respondent to refer the application to the Adjudicator.

Whether the Applicant exhausted internal remedies

[34] The Respondents argue that the Applicant did not exhaust internal remedies. The Applicant did not make submissions in terms of section 43 when he was requested to do so. It is further contended alternatively the Applicant could make section 43 submissions under the jurisdiction of the Adjudicator. This is an internal remedy available to the Applicant. Under the auspice of PAJA in terms of section 7(2) which provides as follows;

- “(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[35] The Constitutional Court in *Koyabe and Others v Minister for Home Affairs and Others*;⁸ held as follows with respect to exhausting internal remedies:

“Thus, unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.”⁹

[36] The constitutional court continued to add as follows regarding utilising the internal remedies:

“Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid...

The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in section 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless.³⁶ Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute...

What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.”¹⁰

[37] As the Constitutional Court emphasised, although the internal remedies are cost effective they should not be rigidly imposed. The courts must consider and

⁸ 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327.

⁹ Id para 34.

¹⁰ Id para 35-39.

determine exceptional circumstances that warrant direct access to courts, and allow the litigant to bypass internal remedies.

[37] In this circumstances, the First Respondent has internal remedies effective to determine the disputes between the Applicant and the Fourth Respondent. There is clear indication that the Applicant is allowed to make its submissions before the Adjudicator and raise the issues as averred to above to be determined through the adjudication process. In my view there are no exceptional circumstances that warrants the Applicant to bypass these internal remedies. Thus, non-exhaustion of the internal remedies cannot be condoned.

Order

[38] In the results I make the following order:

1. The application to review and set aside the First to the Third Respondent's decisions is dismissed
2. The decision to refer the application to the adjudicator in terms of Section 48 Community Schemes Ombud Services 9 of 2011 and Community Schemes Ombud Services directives is upheld. The disputes between the Applicant and the Fourth Respondent will be determined by the Adjudicator.
3. Applicant to pay costs on scale A



B LESUFI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the Applicant: Adv. J De Beer SC

Instructed by: AJ Van Rensburg INC

For Respondents:	K. Mnyandu
Instructed by:	Lusenga Attorneys INC
Date of hearing:	22 October 2024
Date of judgement:	3 February 2025