REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEAL CASE NO: A3048/2021
REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
6/9/2022

In the matter between:

RASCHID, MOHAMED AZAD	First Appellant
VALAITHAM, ANAND NAIDOO	Second Appellant
And	
LENASIA TAMIL ASSOCIATION BODY CORPORATE	First Respondent
ANDREAS N.O, ANDREA	Second Respondent
COMMUNITY SCHEMES OMBUD SERVICES	Third Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Manoim J:

INTRODUCTION

1. This an appeal brought by the first and second appellants against a decision made by the second respondent acting as an adjudicator in terms of the Community Schemes Ombud Service Act 9 of 2011 ("the Act").

2. The first and second appellants are residents and registered owners of units in a sectional title development scheme known as L [….] P [….] situated in Lenasia Extension [....] in Johannesburg.

3. The development is what is defined in the Act as a 'community scheme'. The first respondent is the body corporate of the scheme, and is the 'association' as referred to in the Act. The first respondent has not opposed the appeal.

4. The second respondent is the adjudicator who was appointed by the third respondent to adjudicate the dispute between the appellants and the first respondent. This process was done in terms of the Act. The second and third respondents have served a notice to abide. Nonetheless the third respondent was represented in this court but for a specific purpose. It sought a declaratory order in respect of the process that is to be followed with appeals in terms of the Act. This is an issue which I discuss more fully later.

5. The appellants are dissatisfied with the outcome of the adjudication process and hence have appealed against that decision to this court.

6. The right of appeal to the High Court in terms of the Act is limited. Section 57(1) of the Act provides that:

> *"An applicant, the association or any affected person who is dissatisfied with an adjudicator's order, may appeal to the High Court, but only on a question of law."*

7. The issue that this court has to decide is whether the appeal has raised a question of law that this court can properly decide. Before I do so it is necessary to consider the process by which the appeal has been brought.

8. In this case the appeal has been brought by notice of appeal, as required by the full court decision of this division in *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ). This notwithstanding, the third respondent has used the occasion of this appeal to make certain representations about whether that is the appropriate process to have been followed. I consider this argument first because it sets the context for the manner in which I thereafter analyse the facts in this appeal.

THE REPRESENTATIONS MADE BY THE THIRD RESPONDENT

9. The appellants, as already stated, brought this appeal by way of a notice of appeal. This complies with the procedure for section 57 appeals as set down by the full court in *Stenersen*. The full court held that appeals brought under section 57 of the CSOS were appeals in the strict sense, with the proviso that the right of appeal was limited to questions of law only. The full court held that that the procedure to be followed was that the appeal should be brought by notice of appeal (i.e. without affidavits) where the grounds of appeal are set out succinctly and in which both the adjudicator and the third respondent must be cited, as opposed to being brought by way of a notice of motion supported by affidavits.[1]

10. *Stenerson* was decided by a full court of this division after two courts in other divisions of the High Court had held that the procedure for section 57 appeals was that they are to be brought as reviews by notice of motion supported by affidavits.[2] The attraction of this latter process, according to the third respondent, citing, in addition to *Shmaryahu* and *Durdoc* above*, Kingshaven Homeowners Association v Botha 8 Others*[3] that: *"[t]he motion procedure has the added advantage that it*

[1] See para 38 and the order at 661
[2] *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC) and *Durdoc Centre Body Corporate v Singh* 2019 (6) SA 45 (KZP).

[3] [2020] ZAWCHC 92 (4 September 2020).

informs the respondent parties what they must do if they wish to oppose the appeal and by when they should do so".

11. The third respondent asks this court to reconsider the practice that *Stenerson* requires this division to follow. It argues that we may do so in terms of the court's inherent powers set out in section 173 of the Constitution or that we may under section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 refer of the issue to the Supreme Court of Appeal ("SCA") for determination.

12. But the full court in *Stenerson* was specifically constituted by the Judge President of this division for the purpose of determining the manner and procedure to be followed when noting an appeal in terms of the Act.[4] The full court made the decision with full awareness of the decisions in *Shmaryahu* and *Durdoc*.[5] Although perhaps not absolutely settled,[6] a court comprising two judges is bound by the decision of the full court consisting of three judges, as in *Stenerson*. In any event, even if we are not bound by *Stenerson*, it does not appear to us that *Stenerson* was clearly wrong so as to permit us to depart therefrom. And more so where *Stenerson* was specifically constituted to decide the issue.

13. But regardless of whether we are bound by *Stenerson* as a matter of judicial precedent, in this matter there is no *lis* between the appellants and the third respondent. The third respondent acknowledges this and has filed a notice to abide together with the adjudicator. Nor is there any dispute on the issue of the appropriate procedure to follow as between the appellants and the first respondent body corporate or the second respondent adjudicator, neither of which has opposed the appeal. Moreover, the appellants have complied with the *Stenerson* procedure and do not seek any relief in relation to the procedure on appeal, such as by a referral on the issue to the SCA. The applicant is content with the procedure laid down for this division in *Stenerson*. It is accordingly not open to the third respondent to make use

[4] Para 8
[5] Paras 4 to 6
[6] See the discussion in Hahlo & Kahn *The South Africa Legal System and Its Background* (Juta) 1968 at p 252.

of this appeal as an opportunity to decide an issue which neither the applicants nor the first and second respondent seek be decided.

14. I may also add that as this court is not being asked to grant leave to appeal, section 17 of the Superior Courts Act would not apply.

15. Whilst sympathetic to the difficulties faced by the third respondent as a national public entity having to comply with divergent practices between the various divisions of the High Court, it will have to find another occasion to bring this issue before the SCA.

16. This appeal will accordingly be decided on the basis of the notice of appeal in accordance with the presently prevailing procedure laid down in *Stenerson*.

BACKGROUND FACTS

17. The matter commenced when the appellants applied to the third respondent for dispute resolution. They each filled in a prescribed form. The detail of the complaint is scant. In the part of the form where they must set out the alleged breach, the appellants make three complaints. The first is that the first respondent body corporate has no trustees and has never called a general meeting; the second is that they had not been given the required occupancy certificates; the third is that the City of Johannesburg wrongly classified the units as business premises, when in fact they are residential, and which resulted in them having to pay higher assessment rates than they should be paying.

18. The complaint first went to a conciliation process under the auspices of the third respondent. A conciliation was held in October 2020 but was unsuccessful.[7] The dispute was then referred to an adjudicator. It is important to mention here what we have of the record that served before the adjudicator. There is no transcript of the proceedings nor anything in the form of pleadings. The record commences with a

[7] There is a form entitled a 'Certificate of non-resolution' in the record, but it gives no detail beyond stating that the conciliation was unsuccessful.

complaint form. This is a standard pre-printed form which the complainant then completes in designated blocks. In the present case this is what the appellants have done. They made three complaints, which were filled in in manuscript, each one sentence long.

19. In addition, at some later stage, presumably after the failed conciliation process, the appellants had an attorney file a more comprehensive submission in the form of correspondence. There is also a letter from an attorney representing the body corporate, which appears to be a response to the complaint.

20. The final document we have is the 'adjudication order' made by adjudicator. In the award, which takes the form of an order accompanied by reasons, the adjudicator describes the relief the appellants sought in the following terms:

> *"(a) The Respondent be compelled to hold the first meeting in accordance with section 2(1) of the Act, within 2 (two) weeks of the granting of the order in this matter;*
>
> *(b) The Respondent is compelled to furnish the update occupancy certificates for unit 10 and 17;*
>
> *(c) The Respondent is compelled to ensure that the Applicants are getting billed on the correct tariff and the complex is correctly categorized. The Respondent must ensure attend to correcting the categorization of the property within 90 days of the order being handed down."*[8]

21. The appellants accept that the adjudicator adequately summarised the relief they sought.

22. The adjudicator awarded them their relief in respect of the occupancy certificates. This then leaves as the issues to be decided on the appeal the calling of

[8] There was also an issue of costs but that is not relevant to the present appeal.

the first meeting of the trustees of the body corporate and the correct tariff categorisation.

23. At the end of the reasons the adjudicator dismissed the relief in respect of the first meeting and the correct tariff. As a shorthand I will refer to these as the 'meeting' relief and the 'tariff' relief from now on. Whilst reasons were given for dismissing the tariff relief, scant reasons were given for the dismissal of the meeting relief. The body corporate must have made submissions on both these issues. I come to this conclusion because in paragraph 24 of his reasons, the adjudicator states: *"The Respondent* [the body corporate] *submitted that the development was attended to legally with all formal procedures that had to be complied with."* It is possible without more having been said that the reason the meeting relief was not granted was because based on these representations from the body corporate the adjudicator was satisfied that the meeting had been held.

24. On the subject of the tariff relief the adjudicator refers to a report from a town planner Beth Heydenrych. He mentions that the report was submitted by the appellants although it is more likely it was referred to him by body corporate as it is addressed to the body corporate's then attorney of record. But regardless of whoever was responsible for placing the report before the adjudicator, he relied upon it to come to his decision. The town planner explains in the report that the erf on which the appellants units are situated is a mixed-use area as it has ground floor shops with business premises above. For that reason, the town planner says, the City has correctly zoned the area as 'Business 1'. However, she seems to accept that the residents have been billed incorrectly as businesses. But she apportions the blame for this not on the zoning but on the City's rates department, which in her words: "*find such mixed zonings complicated and difficult to deal with as these officials look at zoning simplistically and do not pay any attention to the nuances of what uses are actually allowed and approved."*

25. Although his reasons are not particularly clear on this point it appears that the adjudicator accepted that the fault for the rates problem lay with the City and not the body corporate, and hence he refused the relief sought.

DOES THE APPEAL RAISE QUESTIONS OF LAW

26. Once a party proceeds with an appeal in terms of the Act, its appeal must, in the language of section 57(1), be confined to a " *question of law*".

27. The appellants need to persuade this court on the record that the appeal in respect of the two issues raises questions of law, within the meaning of that phrase in section 57(1).

28. In relation to the first issue, the meeting relief, it is not apparent, particularly given the paucity of the reasons, that the rejection of this relief involves a question of law. The adjudicator does mention that the body corporate had stated that all the formalities had been followed. This appears to emanate from a letter from the body corporate's then attorney, which from the submissions in the record must have been placed before the adjudicator. The adjudicator's finding appears to be a factual finding that there was compliance. That no reasoning is evident in the award does not elevate this to a question of law. No facts are before this court to identify what the question of law is[9] other than the outcome of the relief sought and the absence of reasons for that outcome. This may be a good point on a review[10] but is not a question of law as envisaged in section 57(1) of the Act. We sit in this matter as an appeal court, particularly given the procedure prescribed by *Stenersen*, not a review court.

29. Mr Alli who appeared for the appellants argued that an 'error of law' may equate to a question of law, with reference to paragraph 92 of *Genesis Medical Schemes v Registrar of Medical Schemes and another* 2017 (9) BCLR 1164 (CC), which describes as an error of law *'if an administrative functionary misconstrues the enabling provision or misapplies it."* But that is not what has happened in the present case. There is no evidence that the adjudicator either misconstrued the enabling

[9] Which may demonstrate a shortcoming of the procedure on appeal being that it is brought on notice of appeal confined to the record and the adjudicator's order and reasons (*Stenersen* para 42), rather than on affidavit.

[10] In their treatise *Administrative Law in South Africa* (3rd ed) at p 626, Hoexter and Penfold note that the giving of reasons is: "*widely regarded as one of the more fundamental requirements of administrative justice and a component of procedural fairness".* They also note that there is not only a duty to give reasons but also adequate reasons

provisions of the Act or misapplied them, other than having provided no or inadequate reasons[11].

30. If I assume in favour of the appellants that there had been a failure to give adequate reasons and this failure might amount to a reviewable failure of administrative justice, it does not follow that an appeal in terms of section 57 was the correct remedy for the appellants to have followed.

31. As Unterhalter J held in *Turley Manor Body Corporate v Pillay and others* [2020] JOL 46770 (GJ) in relation to this issue, in paragraph 18:

> *"…, an appeal as to whether a finding of law made by the adjudicator was correct does not generally implicate the grounds upon which a decision may be reviewable. Review grounds, as is well known, traverse different issues. Whether the adjudicator enjoyed the power to act as he did, or whether he acted fairly or rationally or upon relevant considerations or was biased are all matters that cannot be determined on the basis that the adjudicator made an error of law. Reviewable irregularities almost always depend upon the proof of some facts. Furthermore, grounds of review usually depend upon facts that formed no part of the evidence before the adjudicator. The review may turn upon the interpretation of the empowering provisions under which the adjudicator acts, none of which may have enjoyed any consideration by the adjudicator. These well understood grounds of review cannot be determined on appeal on the basis that the adjudicator made an error of law."*

32. Unterhalter J in *Turley Manor* went on to find that the existence of a section 57 appeal in terms of the Act does not preclude parties from invoking their rights by way of a review in terms of the Promotion of Administrative Justice Act no 3 of 2000 ("PAJA"). As the court put it in paragraph 24:

> "*I find that section 57 in no way curtails the right of persons to exercise their rights under PAJA to bring orders of an adjudicator under judicial review. It*

[11] Section 54(1)(c) of the Act.

follows that the failure by Turley to exercise a right of appeal in terms of section 57 does not prevent Turley from exercising its right to review the order made by the adjudicator. An appeal under section 57 is a right to challenge an order on the basis that the adjudicator made an error of law. That right does not exclude Turley's right to challenge the order by way of review. These rights complement each other. The failure to exercise one right does not exclude the exercise of the other right."

33. The meeting issue in the appeal does not, on the record, raise a question of law and hence fails.

34. In relation to the second issue, that of the incorrect tariff being levied, the adjudicator has given reasons which follow the advice of the town planner that this is effectively a problem between the appellants and the City and not as between the appellants and the first respondent body corporate. The City is responsible for the billing and if the wrong tariff is being levied, this is a matter for the appellants to take up with the City. The rates account that is part of the record indicates that the appellants are billed directly for rates by the City, not by the body corporate. There does not appear to us to be any question of law that was incorrectly decided by the adjudicator.

35. In any event, the tariff issue was not a matter over which the adjudicator had jurisdiction in terms of the Act[12].

36. The appeal in relation to the tariff issue must too fail.

37. It is not necessary to make any order for costs. The first and second respondents did not oppose the appeal. And no costs order was sought against the third respondent.

ORDER

[12]The relief that can be granted by an adjudicator in terms of the Act is limited to that set out in section 39 of the Act.

38. The appeal is dismissed.

39. There is no order as to costs.

Manoim J

I agree.

Gilbert AJ

Date of hearing:	4 August 2022
Date of judgment:	6 September 2022
Counsel for the appellants:	Mr Y Alli
Instructed by:	Mortimer Govender Attorneys

No appearance for first and second respondents

Counsel for the third respondent:	Ms Cathryn Read
Instructed by:	Moja Sibiya Attorneys