



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 22 November 2022

CASE NUMBER: 39321/2021

In the matter between:

CANDICE NAIDOO

Applicant

and

MOHAMED ALLI CHICKTAY NO

First Respondent

COMMUNITY SCHEMES OMBUD SERVICE

Second Respondent

EMBASSY GARDENS BODY CORPORATE

Third Respondent

JUDGMENT

WILSON AJ:

1 The applicant, Ms. Naidoo, owns a unit in the sectional title scheme administered by the third respondent, Embassy Gardens. On 11 August 2020, Ms. Naidoo sought permission from Embassy Gardens to erect a pergola in

the garden area outside her unit. She provided a picture of a structure which was “something like” what she wanted to erect, and asked how she might go about getting Embassy Gardens’ permission to do so.

- 2 Embassy Gardens responded to Ms. Naidoo’s request on 14 August 2020. Its managing agent, Trafalgar Properties, refused the request. The email in which it did so was written by Trafalgar Properties’ Portfolio Manager, Brendan Beech. It stated that “[t]he trustees would like to ensure that there is uniformity in such structures and have therefore disapproved of your below request.” The email added that the trustees “have referred to the structures which other units have erected and stated that it should be in line therewith”.
- 3 Ms. Naidoo took this message to mean that she could erect a pergola, so long as it was sufficiently similar to other pergolas erected at Embassy Gardens. Without seeking further approval from Embassy Gardens, she erected a pergola just outside her unit. Although the photographs provided to me were not the clearest, the pergola erected seems to be very different to the structure Ms. Naidoo originally proposed.
- 4 Embassy Gardens objected to Ms. Naidoo’s pergola, both on the basis that it had been erected without Embassy Gardens’ permission, and on the basis that the structure was not in keeping with other pergolas in the Scheme. Embassy Gardens demanded that the structure be taken down. Ms. Naidoo demurred. She instead referred a dispute to the second respondent, the Community Schemes Ombud Service (“CSOS”), in which she asked for an order allowing her to keep the pergola.

5 The dispute was determined by the first respondent, the Adjudicator, who dismissed Ms. Naidoo's application.

6 Ms. Naidoo now asks me to review and set aside the Adjudicator's decision.

The CSOS adjudication order

7 There is no dispute between the parties that the Adjudicator's order constitutes "administrative action" within the meaning of section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), and that it is susceptible to judicial review. That accords with the prevailing authority in this Division, which holds that the narrow appeal against adjudication orders permitted under section 57 of Community Schemes Ombud Service Act 9 of 2011 ("the CSOS Act") does not exclude PAJA's application (*Turley Manor Body Corporate v Pillay* 2020 JDR 0430 (GJ) paragraphs 8 to 30).

8 The thrust of Ms. Naidoo's review is that the Adjudicator did not have appropriate regard to the evidence she placed before him. In my view, this is but a symptom of a much more fundamental problem with the Adjudicator's approach to her application.

9 Section 50 of the CSOS Act provides that an adjudicator "must investigate an application to decide whether it would be appropriate to make an order". In this case, the Adjudicator did not discharge that obligation, and his decision to dismiss Ms. Naidoo's application falls to be reviewed and set aside for that reason alone.

10 There are, in my view, two clear indications on the record that the Adjudicator failed to discharge his investigatory function. The first indication is that the

Adjudicator failed to establish whether the dispute concerned a “common area”, with in the meaning of section 39 (6) (d) of the CSOS Act. The second indication is the Adjudicator’s failure to consider and resolve the central question before him: whether or not Ms. Naidoo’s erection of the pergola actually breached Embassy Gardens’ Conduct Rules.

Failure to establish whether the dispute was about a “common area”

- 11 Disputes before the CSOS must be capable of resolution by making one or more of the orders set out in section 39 of the CSOS Act. If the dispute is incapable of being resolved by making an order of the nature set out in section 39, then it is not a dispute over which the CSOS has jurisdiction.
- 12 The Adjudicator in this case considered that the dispute before him concerned a prayer for relief under section 39 (6) (d) of the CSOS Act. Section 39 (6) (d) authorises orders declaring that a body corporate’s “decision to reject a proposal to make improvements on or alterations to common areas is unreasonable”, and directing the body corporate to agree or ratify such a proposal.
- 13 In her application, Ms. Naidoo stated that she had erected a structure in her “private garden”. The rule Embassy Gardens says has been breached by the erection of the pergola forbids “[a]lterations, additions, extensions or repairs to the exterior sections, exclusive use areas or any portion of the common property . . . without the prior written approval of the Trustees.”
- 14 It is accordingly clear that the rule applies to pergolas erected in private gardens. But that does not mean that section 39 (6) (d) of the CSOS Act

applies. Section 39 (6) (d) applies only to “common areas”. It does not apply to “exclusive use areas”. Nor does it apply to “exterior sections”, unless those sections are also “common property”.

15 Ms. Naidoo’s reference to her “private garden” ought to have triggered an investigation into whether that garden was a “common area” or an “exclusive use” area. But the matter proceeded on the assumption that Ms. Naidoo’s garden was a “common area” and that section 39 (6) (d) applies. On the material before me, that assumption cannot be made. There was no evidence presented to that effect. Embassy Gardens’ Conduct Rules, which were annexed to their answering affidavit, do not address the issue.

16 Moreover, the CSOS Act defines a “common area” as “any part of land or building in a community scheme which is intended for common use by occupiers”. That may place Ms. Naidoo’s “private garden” beyond the scope of section 39 (6) (d), but I need not finally decide the issue. Garden areas in sectional titles schemes are clearly capable of being defined either as common or exclusive use areas, depending on the arrangements adopted in a particular Scheme. Ms. Naidoo’s description of the garden as her “private garden” is not dispositive of the question.

17 The point is that the Adjudicator ought to have investigated the issue, and to have made a finding. If he concluded that Ms. Naidoo’s garden was not a “common area”, then he would have called upon to consider whether section 39 offers another basis on which he could assume jurisdiction. If section 39 does not offer such a basis, then he would have been bound to refuse an order on the basis that he lacked jurisdiction. None of these issues was explored.

Failure to investigate whether the pergola breached Embassy Gardens' rules

- 18 Assuming that the Adjudicator had jurisdiction, it would then have been necessary to decide whether the pergola was in fact in breach of the Conduct Rules. Here the Adjudicator made no such finding, because he did not establish the facts necessary to reach one.
- 19 The question before the Adjudicator was whether the structure Ms. Naidoo erected was sufficiently similar to other such structures erected at Embassy Gardens. At paragraph 30 of his decision, however, the Adjudicator avoids this issue by observing that Ms. Naidoo “has not made an argument to show that her structure conforms with the complex”. That was true enough. Ms. Naidoo had in fact argued that there was no uniformity in the pergolas already erected at Embassy Gardens, and so the uniformity requirement was meaningless.
- 20 The Adjudicator did not investigate whether (a) there was in fact an existing uniformity to which Ms. Naidoo could reasonably have been expected to adhere and (b) whether, if there was, her structure actually adhered to it. He instead found that “the changes made by [Ms. Naidoo] *may have been* very different from what other units had done” (my emphasis). But whether the structure Ms. Naidoo erected was in fact sufficiently different from those erected by other unit owners was precisely the question that the Adjudicator was required to investigate and resolve. In failing to do so, the Adjudicator abrogated his statutory function.

The failure to secure permission before the pergola was erected

- 21 Ms. van der Laarse, who appeared for Embassy Gardens, defended the Adjudicator's decision on the basis that he was entitled to refuse relief merely because Ms. Naidoo had not secured Embassy Gardens' trustees' "prior written approval" before erecting the pergola. This, as I have already pointed out, is a requirement of Embassy Gardens' Conduct Rules.
- 22 It is true that the Adjudicator criticised Ms. Naidoo for failing to address the question of whether prior written approval had been obtained, but I do not think that he made a positive finding that permission had not been obtained. Nor can it be deduced from his decision that he refused relief for that reason.
- 23 Moreover, assuming that the Adjudicator did have jurisdiction under section 39 (6) (d) of the CSOS Act, I have some doubts about whether he would have been correct in law to reach that conclusion. Section 39 (6) (d) (ii) of the Act empowers an Adjudicator to "ratify a proposal on specified terms". That, it seems to me, encompasses the condonation of an improvement or alteration which was unauthorised at the time it was made. I need not finally decide the issue, as it is clear that, had he reached that question, the Adjudicator would have been duty bound to investigate it and draw the appropriate conclusion on the facts he established. The Adjudicator neither reached the issue nor undertook the necessary investigation.
- 24 It follows that Ms. van der Laarse's submission must be rejected. The Adjudicator did not dismiss Ms. Naidoo's application on the basis that she failed to secure prior written approval to erect the pergola. Absent the investigation that the Adjudicator was required, but failed, to carry out, it is

impossible to say whether he would have been entitled to dismiss Ms. Naidoo's application on that basis.

Review under PAJA

25 For all these reasons, it seems to me that the Adjudicator's failure to investigate Ms. Naidoo's application and establish the facts relevant to his decision vitiates the order he made. There was, at the very least, a failure to comply with "a mandatory and material procedure or condition prescribed by an empowering provision" (section 6 (2) (b) of PAJA).

26 But the Adjudicator's decision was also "materially influenced by an error of law" (section 6 (2) (d) of PAJA). This was because the Adjudicator proceeded as if he was entitled to limit his own decision-making function to engaging only with the arguments presented to him. That posture will rarely be sound adjudicative policy, but in the case of a matter brought before the CSOS, it is wholly inappropriate. CSOS adjudicators frequently deal with lay litigants who are unable to argue with the knowledge and precision expected of an experienced lawyer.

27 The CSOS Act enjoins adjudicators to tease out and mature facts relevant to the disputes presented to them and to avoid excessive legal formalism while doing so (see, in particular, sections 50 and 51). The Adjudicator's approach in this case was at odds with these critical provisions of the Act.

Order

28 For all these reasons, I make the following order –

- 28.1 The first respondent's decision to dismiss the applicant's application is reviewed and set aside.
- 28.2 The application is remitted to the second respondent for further proceedings consistent with this judgment.
- 28.3 The third respondent is directed to pay the applicant's costs.



S D J WILSON
Acting Judge of the High Court

HEARD ON:	9 November 2022
DECIDED ON:	22 November 2022
For the Applicant:	R More Instructed by Tjale Jubilee Attorneys
For the Third Respondent:	Y van der Laarse Instructed by Juke Malekjee and Associates