Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 6220/2019

Before: The Hon. Mr Justice Binns-Ward

Hearing: 31 August 2020
Judgment: 4 September 2020

In the matter between:

THE KINGSHAVEN HOMEOWNERS' ASSOCIATION	Applicant
and	
PHILLIPUS BOTHA	First Respondent
THE COMMUNITY SCHEMES OMBUD SERVICE	Second Respondent
THABISILE CYLVIA DLAMINI N.O.	Third Respondent

JUDGMENT
(Delivered by email to the parties and release to SAFLII.)

BINNS-WARD J:

[1] The applicant is the Kingshaven Home Owners' Association. The Association is a 'community scheme', as defined in s 1 of the Community Schemes Ombud Service Act 9 of 2011 ('the CSOS Act'). It has brought proceedings on notice of motion under case no. 6220/2019, in which it seeks (i) to appeal the refusal by an adjudicator in an application lodged by the Association in terms of the CSOS Act to grant an order prohibiting the first

respondent from parking in the parking bays allocated for visitors to the housing scheme; (ii) alternatively, to have the said decision reviewed and set aside; and (iii) in either event, an interdict prohibiting the first respondent from parking his vehicles, caravans, boats or trailers anywhere within the Kingshaven estate other than in his garages, or in front of his garages and wholly within the boundary of his property.

[2] The first respondent is a homeowner in the Kingshaven estate, and as such he is automatically a member of the Association.

[3] The Community Schemes Ombud Service, which is a juristic person established in terms of s 3 of the CSOS Act, was cited as the second respondent. The core functions of the Service include the promotion of good governance of community schemes and the provisions of a dispute resolution service under the auspices of the Act.[1]

[4] The third respondent was the adjudicator to whom an application made by the applicant, in terms of s 38 of CSOS Act, for relief concerning its complaint about the first respondent's parking habits, in alleged breach of the homeowners' association's rules, had been referred by the local ombud, in terms of s 48 of the Act, for adjudication. I shall hereinafter refer to the third respondent as 'the adjudicator'.

[5] The Ombud Service and the adjudicator took no part in the proceedings in this court. I infer that they abide the judgment. The first respondent opposed the application on various grounds that I shall discuss presently.

[6] The statutory appeal, in terms of s 57 of the CSOS Act, was brought on the assumption that it had been within the adjudicator's power to consider and determine the relief sought by the applicant for an order under the CSOS Act that the first respondent 'be prohibited from parking on visitors' parking bays or in front of his garage where his vehicle protrudes onto the road'. Such an order could be obtained under the CSOS Act only if it fell within the categories of orders listed in s 39 of the Act. The relief sought in the alternative, by way of judicial review, was applied for on the contrary premise that it had not been within the adjudicator's jurisdiction to entertain the application under the CSOS Act for that relief.

[7] The adjudicator refused the applicant's application for an order prohibiting the first respondent from parking in the visitor's bays on the ground that the order sought was not one provided for in terms of s 39 of the CSOS Act, and therefore not one within the Ombud

[1] Section 4 of the Act.

Service's jurisdiction. The adjudicator nevertheless proceeded in her written decision to venture the opinion that the applicant association in any event did not 'have jurisdiction over the visitors' parking bays'. In the context of her primary finding that the Ombud Service did not have jurisdiction to determine the application, her statement concerning the Association's jurisdiction over the parking bays was obviously obiter.

[8] Section 57(1) of the CSOS Act provides that an aggrieved party may appeal against an adjudicator's decision, but only on 'a question of law'. There has been a difference of opinion in the reported cases about the characterisation of such appeals. The only significance of the divergence of opinion is that it appears to have contributed to conflicting decisions in the various divisions of the High Court on the appropriate procedure by which such appeals fall to be brought.

[9] In *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another* [2018] ZAWCHC 54 (10 May 2018); 2018 (4) SA 566 (WCC), [2] in the course of giving guidance as to the procedure by which such appeals should be brought, I acknowledged that it is well recognised that the word 'appeal' is often used indiscriminately to refer any one of a number of what are in fact quite distinguishable procedures, and that therefore, when treating of a statutory appeal, one has to look at the context of the provision in question to ascertain the juridical character of the remedy afforded thereby. I opined that the remedy available in terms of s 57 of the CSOS Act is closely analogous to that which might be sought on judicial review, and concluded that such an appeal was accordingly one that was 'most comfortably' niched within the third category of appeals identified in *Tikly v Johannes* 1963 (2) SA 588 (T), which was not the same as suggesting an exact fit.

[10] A subsequent judgment of the KwaZulu-Natal Division concurred in that categorisation; see *Durdoc Centre Body Corporate v Singh* [2019] ZAKZPHC 29 (13 May 2019); 2019 (6) SA 45 (KZP) in para 15 (per Steyn J, Madondo DJP concurring). The court in *Durdoc Centre* also endorsed the view expressed in *Shmaryahu* that such appeals should be brought on notice of motion.

[11] The third category of appeal in *Tikly* was defined by Trollip J in these terms: '*a review, that is a limited rehearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly*'. In my view, the

[2] The judgment was written by me, with Langa AJ concurring.

'*proper*' exercise of administrative powers includes whether they have been exercised within the ambit of the arbiters' authority or in accordance with the applicable law. Those were classical grounds for judicial review in administrative law in the pre-Constitutional era and they have now been codified in s 6 of the Promotion of Administrative Act 3 of 2000 ('PAJA'); see s 6(2)(a)(i) and (ii), (b), (c), (d), (e)(i), (f)(i), (f)(ii)(bb) and (i). Hence my niching of the appeal in the third category.

[12] My purpose in undertaking some sort of classification exercise in *Shmaryahu* was to reason my conclusion that such appeals should be brought on notice of motion in a manner analogous to applications for judicial review. The exercise was not undertaken with a view to determining on which side, if any, of the orthodox dividing line between appeal and review a s 57 appeal fell to be classified.[3] Many statutory appeals allowed to the High Court from administrative decisions do not lend themselves to that sort of classification because they frequently involve a remedy that contains a mixture, or overlap, of classical appeal and review elements. Therein, indeed, lies the very predicate for the third category of 'appeal' in the *Tikly* typology, viz. an 'appeal' that involves a 'review'.

[13] In *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another* [2019] ZAGPJHC 387 (24 October 2019); 2020 (1) SA 651 (GJ), a full court of the Gauteng Division adopted a different view. The court in *Stenersen* was concerned with exactly the same issue that I had been in the relevant part of the judgment in *Shmaryahu*, viz. determining the appropriate procedure by which appeals in terms of s 57 should be prosecuted in the High Court. It held that such appeals are of the second category described in *Tikly* viz. '*an appeal in the ordinary strict sense, that is, a complete rehearing of, and fresh determination on the merits of the matter with or without additional evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong'*. The court, perforce, qualified its adoption of that classification by adding the proviso that appeals in terms of s 57 are limited to appeals on questions of law. In my respectful opinion, the proviso attached to the characterisation actually serves to highlight why such appeals are *not*, in essential respects, of the second type. This is because, being limited to questions of law, they do *not* involve a rehearing of

[3] That there are different types of 'review', just as there are different types of 'appeal', was acknowledged in *Kham and Others v Electoral Commission and Others* [2015] ZACC 37 (30 November 2015); 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC), at para 41.

and fresh determination of the merits (as distinct from just the result), and they would *not* allow for the introduction of additional evidence or factual information.

[14] The judgment in *Stenersen* records (at para 26) that subsequent to the judgment of this court in *Shmaryahu* the Chief Ombud issued a practice directive advising that appeals in terms of s 57 of the CSOS Act should be brought on notice of motion. The directive purported to lay down that that procedure should be followed '*until such time that the Full Bench of the High Court has made a determination or order on the process to be followed for appeals under section 57 of the CSOS Act*'. The directive suggests that the Chief Ombud may have been under a misapprehension that a determination on the applicable procedure by a full bench of the Gauteng Division - which it would appear he must have been anticipating when the practice note was issued - would prevail nationally, even if it differed from the procedures adopted by other divisions of the High Court elsewhere in the country.[4] That was, of course, misdirected. The guidance provided in *Shmaryahu* continues in effect in the Western Cape Division and, it would seem, also at least in KwaZulu-Natal. Sitting as a single judge, I am bound by the judgment in *Shmaryahu* in this Division, but it might be useful if I proceed nevertheless to explain why the judgment in *Stenersen* has not persuaded me that what was held in *Shmaryahu* concerning the appropriate procedure merits revision.

[15] On reflection, I think there is little profit in the categorisation debate, and it was perhaps unfortunate that I sparked it, with reference to *Tikly*, when I wrote the judgment in *Shmaryahu*. I do not read Trollip J's judgment in *Tikly* as having been intended by the learned judge to provide an exhaustive taxonomy,[5] and it does not deal at all with the appropriate procedures by which the different types of appeal should be brought. Where not expressly provided for by the enabling statute, the appropriate form for the bringing to court of a statutory appeal is a matter to be regulated by the courts with an eye to practicality.

[16] What has given rise to the procedural debate concerning s 57(1) is the absence of any statutory prescription in respect of the form or procedure, in or by which, the appeal therein provided for is to be brought before court. In *Shmaryahu*, I plumped for the application

[4] The chief ombud is enjoined, in terms of s 36 of the CSOS Act, to 'issue practice directives with regard to any matter pertaining to the operation of the Service'. That responsibility obviously does not extend to prescribing the procedure by which appeal proceedings in terms of s 57 fall to be instituted in the High Court. The regulation of the courts' processes and procedures lies within their own inherent power, as entrenched by s 173 of the Constitution.

[5] So, for example, in *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190 (13 December 2019); 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA), in para 52, Wallis JA referred to the *Tikly* categorisation as giving rise to three possibilities 'broadly speaking'.

procedure. In consequence, appeals in terms of s 57 brought in this Division fall to be brought in the same way, procedurally, as various other statutory appeals are, such as those in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964 for instance.[6]

[17] In *Stenersen* by contrast, apparently predicated on the full court's categorisation of the appeal provided for in s 57 as of the second category in *Tikly*, it was determined that such appeals brought in Gauteng should be brought 'by way of notice of appeal where the grounds of appeal are set out succinctly', and not on notice of motion. According to the procedure adopted in Gauteng, the notice of appeal has to be served on the Ombud Service and the adjudicator, who must be cited as respondents, as well as on the other parties to the proceedings before the adjudicator. But the procedure does not provide for how, or by when, or in what manner, such parties are to respond should they wish to oppose the appeal. As I understand it, the full court's judgment proceeds on the apprehension that a s 57 appeal can only entail argument on neatly isolated questions of law to be deduced from the succinctly stated grounds of appeal.

[18] It has frequently been acknowledged in the past by eminent judges seized of appeals limited to questions of law that it can often be difficult to distinguish the factual questions from the legal ones in a case. The observations of Lord Parker of Waddington *Farmer v Cotton's Trustee* 1915 AC 922; 6 TC 590,[7] are frequently cited in this regard. [8] Whilst it seems clear that when a statutory right of appeal is provided against an administrative decision and the ambit thereof is limited in terms only to 'questions of law', a revisitation by the appellate tribunal of the initial arbiter's finding of facts is not contemplated, that is a far cry, however, from accepting that questions of law can be decided in isolation from the facts.

[19] In *Farmer v Cotton's Trustee*, the legislation provided for the form in which the relevant appeals only on grounds of law were to be brought; viz. on a stated case. It is

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[6] Section 47(9)(e) provides: '*An appeal against any such determination* [by the Commissioner in respect of the payment of duty or the rate of duty applicable] *shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.*'

[7] The Official Tax Case Reports report of the judgment may be accessed online at http://www.bailii.org/uk/cases/UKHL/1915/TC_6_590.html .

[8] See, for example, *Platt v Commissioner for Inland Revenue* 1922 AD 42 at 49, *R v Lusu* 1953 (2) SA 484 (A), *S v Petro Louise Enterprises (Pty) Ltd* 1978 (1) SA 271 (T), [1978] 1 All SA 571, at 277 (SALR). In *S v Petro Louise Enterprises* at p.279 (SALR) Botha J (as he then was) remarked that '[i]*n many cases it is a problem of considerable difficulty to decide whether a question is one of fact or one of law'*. The learned judge pointed to '*the infinite variety of circumstances in the difficulty can arise*' and thought it appropriate to '*steer clear of any attempt to formulate a general rule or principle for resolving such a problem*'.

evident from the speeches given by the members of the Appellate Committee that the framing of the stated case in that matter, which no doubt would have been in comparable form to a notice of appeal succinctly stating the grounds for it, yet also still directed at highlighting the relevant factual underpinnings, could give rise to problems. Thus, Earl Loreburn remarked, at p. 600 of the Tax Case Reports, '*I desire to say that when cases are stated for the opinion of a Court of Law it is very much to be desired that the point of law should be clearly stated together with the decision upon it arrived at by the inferior Court. Otherwise it may prove difficult for a Court of Law to distinguish between conclusions of law and conclusions of fact.*' The procedure laid down in *Stenersen* does not, in terms, provide for the distillation of the 'question of law'; as I understand it, it contemplates rather that the appellant set out the grounds upon which it contends that the adjudicator's decision erred in law.[9]

[20] Lord Parker's remarks in *Farmer v Cotton's Trustee* were uttered in the context of an assumption that the initial arbiter had made all the pertinent findings of fact necessary for a consideration of the question of law. It is very conceivable, however, that a situation might arise where the initial arbiter has not made a finding on relevant facts that had been established on the evidence and subsequently became pertinent to the question of law put in issue on appeal. It is by no means uncommon for a tribunal to arrive at a decision without finding it necessary to make findings on all the factual evidence that has been adduced before it. It might be necessary in such matters, if the evidence on which findings have not been made is alleged to be germane to the question of law relied on in the appeal, for the appellate tribunal itself to consider and make a finding on such facts for the purpose of its task. The alternative would be to remit the issue of fact to the initial arbiter for it to make the finding of fact considered necessary to inform the determination of the question of law. The identification of such matters of fact for the purposes of an appeal of the sort provided in terms of s 57, and the motivation of their relevance for the determination of the question of law contended for, would, in my view, be better done through an exchange of affidavits than in a notice of appeal stating shortly the grounds upon which it is brought.

[21] A proper determination on a question of law might also in a given case even be hindered or blocked entirely by a lacuna in the found facts and in such a matter the question of whether or not the found facts disclose such a lacuna might also legitimately be a matter for argument. I give this as another example of a situation in which a close examination of

[9] *Stenersen*, in para 43-44.

the findings on the merits, which might only be properly understood upon a consideration of the underpinning evidence, might be necessary, and where there would be no question of a neat isolation of a question of law. And then there are those cases where the issue is 'a mixed question of law and fact'; cf. the quotation by Gardiner AJP from the judgment of Warrington LJ in *Lievers v Barber, Walker Co., Ltd* 131 L.T. 12 in *Rex v Sawkins* 1925 CPD 338 at 342. In my view, advancing and distilling the relevant points of law in such circumstances is better facilitated by way of an exchange of affidavits than on the basis of a notice of appeal setting forth the grounds of appeal.

[22] On the other hand, if the question of law in the given case can be simply and succinctly stated, as might frequently happen, proceedings on notice of motion do not have to be voluminous. In such a case the supporting papers should be short and to the point, and the answer might appropriately be given in accordance with rule 6(5)(d) of the Uniform Rules, and not on affidavit.

[23] The motion procedure has the added advantage that it informs the respondent parties what they must do if they wish to oppose the appeal, and by when they should do so. As mentioned, the procedure laid down in *Stenersen* does not.

[24] A further practical difficulty that is liable to arise in the application of the procedure adopted by the Gauteng court is that in a case like the one currently before this court, in which the decision in question was subject to an application for judicial review, alternatively an appeal in terms of s 57, dichotomous proceedings would need to be instituted, even if they would in all probability be heard together. There would have to be a notice of motion in the review and a notice of appeal in the appeal. Two discrete procedures would have to be followed in tandem, probably culminating in an application for consolidation. As the current case has demonstrated, the cumbersomeness entailed in that does not arise in terms of the procedure followed in this Division.

[25] The notion that such cases will arise quite commonly is not far-fetched because the right of appeal in terms of s 57 is not exclusive of the right of an aggrieved party also to impugn the adjudicator's decision on review grounds that might not involve 'questions of law' within the meaning of that term in s 57.[10] A party might be well advised in many cases

[10] Cf. *Turley Manor Body Corporate v Pillay and Others* [2020] ZAGPJHC 190 (6 March 2020). In that matter, the respondent contended that the application for review was incompetent because the applicant should have proceeded by way of appeal in terms of s 57. Notwithstanding that the matters in issue were susceptible to determination as questions of law, the court (Unterhalter J) held (that the right to challenge an adjudicator's decision by appeal in terms of s 57 was not inconsistent with an aggrieved party's right to impugn the decision

to adopt a double-barrelled approach because of the difficulty not infrequently encountered in defining whether or not a particular complaint entails only 'a question of law' within the meaning of that term in the statute, which might itself be a matter in contention.

[26] I shall direct the Chief Registrar of the court to forward a copy of this judgment to the Chief Ombud of the second respondent for her information and guidance.

[27] Moving onto the substance of the present case: The facts that gave rise to the application to the Ombud Service were straightforward and not in dispute. They involved the repeated breach by the first respondent of one of the applicant association's conduct rules. The conduct rules were duly made by the trustees of the Association in terms of clause 17 of the applicant's constitution and approved by the members in general meeting.

[28] Rule 10 regulates parking within the Kingshaven estate. It provides as follows:

> 1. Residents must park their motor vehicles, motor bikes, caravans, boats or trailers inside, or in front of their garages within the boundaries of their property.
> 2. Visitors must park on the property of the residents they visit or use any of the available visitors' parking bays on the estate.
> 3. Motor vehicles are not permitted to park on any garden verge, or in the street in front of any house, unless there is a demarcated parking bay available.
> 4. A caravan, trailer, or other goods in a garage may not cause a resident's motor vehicle to be parked in a visitor's parking Bay.
> 5. The trustees may have a vehicle towed away, at the risk and expense of the property owner or owner of the vehicle, if it is parked in an unauthorized location on the estate.

[29] The first respondent's property on the estate has the amenity of a double garage. He has three vehicles, however, and the household equipment that he stores in his garages means that there is space to park only one of the vehicles inside them. Furthermore, the driveway area in front of his garages is not deep enough to accommodate a parked car, or at least one with the dimensions of his vehicles, within the boundary of his property. In consequence, one of the vehicles is frequently parked in front of the house so that part of it juts out into the street and the other is parked in one of the parking bays on the estate that are reserved for visitors. The respondent's conduct in these respects is in obvious (and undisputed) breach of subrules 10.1 and 10.4.

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by way of judicial review. The learned judge characterised the respective remedies as complementary, not mutually exclusionary. I respectfully agree.

[30] The first respondent's persistent contravention of the rules of conduct occasioned complaints by certain of the members of the applicant association to the trustees. The trustees are authorised by the association's constitution to investigate such complaints and take appropriate action to enforce compliance with the constitution and any rules made in terms of it.

[31] The trustees' endeavours to persuade the first respondent to comply with the rules were fruitless. They were unwilling to agree to his proposal that he should be permitted to purchase or rent a visitors' bay. The first respondent maintained that it was commonplace for residents on the estate to park vehicles in front of their garages in such a manner that the adjacent roadways were encroached upon to a greater or lesser extent. This was because most of the properties have very short driveways. He put in evidence a great number of photographs of vehicles parked at various places on the estate, some of which bore out his evidence concerning the parking of other vehicles in a manner that resulted in some encroachment on the roadways. He also contended that his use of his garage space for purposes apart from housing his vehicles accorded with a widespread practice by other homeowners to keep fridges and washing machines in their garages. He took numerous photographs over a number of days to show that there were several cars that were parked regularly in the visitors' parking bays, some of them consistently in the same bay. It is not clear, however, to whom these vehicles belonged. It may be that some of them belonged to persons who visited the estate regularly. I accept though that it seems likely that some of them probably belong to persons living on the estate.

[32] As a settlement could not be attained, the applicant lodged the application with the Ombud Service described in the opening paragraphs of this judgment. It was referred by the local ombud for adjudication before the third respondent, who refused, on the grounds described in paragraph [7] above, to grant the interdictory relief sought.

[33] In the proceedings before this court it was common cause that the interdict sought by the applicant was not within the range of remedies for which orders may be sought in terms of the CSOS Act, and therefore beyond the competence of the adjudicator to grant. That had also been the first respondent's contention before the adjudicator. As mentioned, the reasons given by the adjudicator for her decision, which was delivered on 15 March 2019,[11] indicate that she was aware that that was the case. It had therefore been unnecessary for her to have

[11] The decision is misdated 12 March 2018.

gone so far as to state in her decision that the regulation of the use of the visitors' parking bays was not within the applicant's jurisdiction. It is apparent, however, that in voicing that opinion, the adjudicator had been influenced by the reasoning in *Singh and Another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and Others* [2017] ZAKZPHC 48 (17 November 2017); [2018] 1 All SA 279 (KZP); 2018 (1) SA 615 (KZP), in which a full court of the KwaZulu-Natal Division of the High Court held that the imposition of road rules by a homeowners' association in respect of the roads within the Mount Edgecombe Country Club Estate encroached impermissibly upon the remit of the relevant authorities responsible for traffic regulation and policing on public roads in terms of the National Road Traffic Act 93 of 1996 and the Criminal Procedure Act 51 of 1977. The Supreme Court of Appeal, recognising that the roads within the estate were not public roads, subsequently reversed the full court's decision; see *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others* [2019] ZASCA 30 (28 March 2019); 2019 (4) SA 471 (SCA).

[34] It is clear then that the adjudicator was right to have refused to make an order that was not provided for in s 39 of the Act (cf. *Shmaryahu* at para 17, and *Evergreen Property Investments (Pty) Ltd v Messershmidt* [2018] ZAGPPHC 786 (10 October 2018); 2019 (3) SA 481 (GP)).[12] It was within her powers to refuse the relief sought by the applicant; see s 54(1)(a) of the CSOS Act. As remarked in *Shmaryahu* (in note 19[13]), '[d]espite the fact that the ombud is meant to confirm that the Service has jurisdiction before a matter is referred to an adjudicator,[14] it cannot have been the legislative intention that an adjudicator to whom an application was referred would be required to proceed to make an order in favour of an applicant in the face of a challenge by the respondent to the adjudicator's jurisdiction that the adjudicator considered to be well-founded'. The adjudicator would, however, be acting within her powers were she to refuse such an application. The challenge to the adjudicator's order refusing the application on the ground that it was beyond her competence to make it is therefore without merit.

[35] The challenge to her finding that the regulation of the use of the visitors' parking bays was not within the applicant's jurisdiction also cannot be sustained because the finding did

[12] The omission of any provision in s 39 of the CSOS for an order to compel a member of a community scheme to comply with the constitution or rules of the scheme appears to have been an obvious oversight by the legislature.

[13] Where the reference to s 53 of CSOS Act should have been to s 54.

[14] Section 42(a) of the CSOS Act.

not constitute a decision. In appeals, the court is concerned only with the correctness of the result, not the means by which it was reached except to the extent to which they demonstrate the correctness or incorrectness of the result. Similarly, judicial review in terms of PAJA is directed only at 'administrative action' (which can include the failure by an administrator to make a decision), not, substantively at least, at the administrator's reasons for making the decision that constitutes the administrative action. In the current case it was the decision to refuse the Association's application that constituted the administrative action by the adjudicator. The legal propriety of the adjudicator's decision to refuse the application is not challenged by the applicant, only the correctness of the opinion that she expressed in passing (i.e. obiter) that the Association did not have jurisdiction over the visitors' parking bays. The expression of opinion did not constitute 'administrative action' as defined in s 1 of PAJA, and is not a matter susceptible to judicial review.

[36] The first respondent's counsel was accordingly correct in his contention that the appeal, alternatively, application for judicial review, brought by the applicant was an unnecessary and purposeless distraction and that the only question of substance for determination is the interdict application. The applicant's counsel conceded as much, and explained that appeal/review relief had been sought only because the applicant had been uncertain when the current proceedings were instituted what the first respondent's attitude was going to be concerning the effect of the adjudicator's decision on its application for an interdict in these proceedings. As the application for relief on appeal, alternatively review, was not withdrawn, an order will be made formally dismissing the applicant's appeal in terms of s 57 of the CSOS Act.

[37] The first respondent opposed the applicant's prayer for interdictory relief on three grounds: (i) that the trustees had not resolved to institute proceedings for interdictory relief; (ii) that the Association had waived compliance with the relevant parking rules and (iii) that the trustees were applying the rules in a discriminatory manner and could not be permitted to do so.

[38] Any enquiry whether the application was competently instituted by the Association must proceed from the terms of its constitution. Clause 5.1 of the constitution records that the Association 'has legal personality and is capable of suing and being sued in its own name'. Clause 24 of the constitution provides for the election of trustees as a matter to be undertaken at every annual general meeting of the Association. In terms of clause 15 the trustees are empowered to deal with any breach by a member of the constitution or rules of

the Association by various enforcement measures including the institution of legal proceedings. Clause 17 reiterates that the duties and powers of the trustees include 'instituting and defending actions in the name of the association and to appoint legal representatives for such purpose'. There is no doubting therefore that it was within the powers of the trustees to cause the proceedings to be instituted in the Association's name, and I did not understand the first respondent to dispute that. The issue then is whether the trustees did resolve that the proceedings be instituted. That is a question of fact.

[39] The first respondent contends that the evidence does not establish the fact. He takes that point on the basis of the content of the minutes of various resolutions relied upon by the chairperson of the trustees, who was the deponent to the founding affidavit. The respondent says that the wording of these resolutions does not support the allegation that the trustees authorised the institution of the application by the Association. The wording of the resolutions is inept, and if considered purely literally, without reference to the context, might well not support the fact that the trustees had resolved to institute the proceedings. The context, however, makes it clear that, regardless of the wording of their resolutions, the trustees did resolve to institute the proceedings for all of the relief sought in the notice of motion.

[40] So, for example, the minutes of a trustees' meeting on 8 May 2019, more than three weeks after the institution of the current proceedings records in item 8(a): 'The HOA lodged an appeal with the High Court which had to be done within the allotted 30-day timeframe [clearly a reference to the timeframe referred to in s 57(2) of the CSOS]. Notice of Motion has been served.' That this item pertained to the current matter is supported by the content of item 8(b): 'The Trustees resolved approval for the transcription of the CSOS adjudication hearing with associated costs'. That those items were related to the current proceedings was further borne out an item in the minutes of the trustees' meeting on 10 April 2019: 'The CSOS Adjudication Order was sent to all homeowners with a cover note on email dated 2nd April 2019. The Judgement of the Supreme Court of Appeal (SCA) in the Mount Edgecombe case dated 28 March 2019 was debated at length and the Trustees resolved that legal opinion should be obtained. The 30-day time limit for an appeal must be borne in mind.' On 16 April 2019, the estate manager, who appears to attend the trustees' meetings, sent an email to all homeowners from the email address kingshaventrsutees@gmail.com stating 'Subsequent to the email that was distributed on 2 April 2019 regarding the CSOS Adjudication Order, the Trustee Committee became aware of the Judgement that was handed

down on 28 March 2019 by the Supreme Court of Appeal (Mt Edgecombe High Court Judgement had been overturned). The Trustee Committee resolved that an appeal would be lodged with the High Court.' The current proceedings, which included the prayer for interdictory relief, had been instituted on the previous day, 15 April 2019.

[41] After the first respondent had raised the matter of the authorisation of the institution of proceedings in his answering papers, all of the trustees and the estate manager executed a document, dated 22 August 2019, recording that it had been resolved on 14 August 2019 that 'to the extent necessary, and in the event of it being found that the 'trustees' resolutions of [13 February 2018 and 10 April 2019, upon which the deponent to the applicant's founding affidavit had purported to rely] were in any way ineffective, the steps outlined above [which included the bringing of an appeal against the adjudicator's decision, the instruction of Biccari Bolo Mariano Inc. (BBM) attorneys and counsel to prosecute the appeal and the authorisation of the chairman of board of trustees to depose to the required affidavits] and taken by the Committee, Japie Botha [the deponent to the founding affidavit], and/or BBM be now ratified and confirmed.'

[42] The first respondent's counsel argued, however, that the intended act of ratification evidenced by the trustees' resolution of 10 August 2019 pertained, according to its tenor, only to the appeal in terms of s 57 of the CSOS Act and did not cover the other relief sought in the application, and in particular the interdictory relief. I do not agree. Counsel's argument is premised on too narrow and literalist a reading of the resolution. In the given context it is plain, in my judgment, that the trustees were ratifying, to the extent necessary, the proceedings that had been instituted on the Association's behalf by BBM attorneys.

[43] The matter was put beyond debate, in my view, when, on 5 September 2019, the first respondent delivered a notice in terms of rule 7 of the Uniform Rules challenging the authority of BBM to act on behalf of the Association in the proceedings. The notice appears to have been delivered out of time, but it elicited a response in the form of a power of attorney signed by the chairman of the board of trustees authorising BBM attorneys to prosecute the proceedings under case no. 6220/2019. Although the power of attorney speaks of 'the prosecution of the appeal', it is obvious that that was an expression intended to embrace all of the relief sought by the Association in terms of the notice of motion in case no. 6220/2019, which has from the outset included the interdictory relief. It is also clear that the trustees and their legal representatives would have been astute when the proceedings were instituted that an order setting aside the adjudicator's order, whether on appeal or review,

would go limping if it were not accompanied by an order directing the first respondent to stop breaching the parking rules, which was the remedy sought from the adjudicator.[15]

[44] For all these reasons, I am satisfied that the institution of the proceedings by or on behalf of the Association for all of the relief sought in terms of the notice of motion was duly authorised or has been ratified.

[45] Turning now to the first respondent's contention that the Association has waived compliance with the parking rules. In my view there is no merit in it.

[46] Mr *Brink*, who appeared of counsel for the applicant, submitted that the rules were not capable of waiver. I am inclined to agree; certainly not without compliance by the trustees with a number of prescribed requirements. The constitution and rules create a contractual relationship between the Association and its members.[16] The instruments are intended to operate not only between the Association and each subscribing member on a mutual basis, but they also constitute a pact between each subscribing member and the Association for the benefit of all the other subscribing members. That much is clearly evident from their objects and provisions which are directed at the common good of all the homeowners and at regulating their conduct *inter se*. By subscribing to the constitution, each member accepts the benefits stipulated in his or her favour by the other subscribing members. One of those benefits is that there shall be rules of conduct to give substance to the objectives and rights promised and conferred by the constitution (clause 6.3) and that the other members will be required to comply with them (clause 8.1) and that any breaches thereof will be called to account (clause 15).

[47] The constitution gives the trustees the power to make rules of conduct, but, unsurprisingly, it does not give them the power to waive compliance with them. On the contrary, a proper reading of the constitution puts them under a duty to enforce the rules. They can rescind or vary the rules, but any such decision to rescind or vary them would have to be adopted by a majority of the trustees in meeting or unanimously by round robin. The decision would become effective only upon approval by the members in general meeting. One can waive a right, but not a duty.

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[15] That much was expressly acknowledged by the deponent to the founding affidavit, who averred that if the adjudicator's refusal of the application in terms of the CSOS Act were set aside, the applicant would be at 'square one', and still in need of interdictory relief.

[16] Cf. e.g. *Mount Edgecombe* (SCA) supra, at para 19.

[48] The exercise of the trustees' power to enforce the rules falls to be seen as an exercise by the Association, through its appointed agents, of the Association's contractual rights. It has not been established that such right was waived in this case. Whether one conceives of waiver as a bilateral concept in the nature of a contract, as contended for by some,[17] or as a unilateral manifestation of the waiving party's intention as reasonably deduced by the benefitted party from the former's words or conduct, I do not think that the first respondent, as a party to contractual framework established by the constitution and rules, could reasonably have perceived in the circumstances that any laxity in enforcement constituted a waiver of the parking rules.[18] A reasonable person in his position would have appreciated that an apparent abandonment by the trustees of the Association's right to enforce the rules could not be effective without the support of at least 75% of the members of the Association in general meeting. He put up no evidence to support a finding that it did. There is on the contrary evidence that the trustees had in fact been enforcing the parking rules against other homeowners.[19] An acknowledgment by the trustees of the need for them to apply enforcement measures more conscientiously than they had been doing did not on any approach make out a waiver by their principal; it actually contradicted any notion of abandonment. Establishing waiver based on conduct is always a challenging exercise for '[t]he conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis.'[20]

[49] Mr *White*, who appeared for the first respondent, sought support for his client's defence of waiver in the decision in *Buffelsdrift Game Reserve Owner's Association v Holkom and Others* [2014] ZAGPPHC 474 (7 July 2014), in which the court dismissed an application by a homeowners' association for an interdict enforcing a provision in its constitution prohibiting the keeping of pets. I agree with Mr *Brink* that *Buffelsdrift* is distinguishable on the facts. It also seems to me on careful consideration that the interdict prayed for in that matter was refused in the exercise of the judge's discretion with regard to

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[17] See e.g. GB Bradfield, *Christie's Law of Contract in South Africa* 7ed (LexisNexis) at 12.2 (p. 504 ff).

[18] Cf. *Road Accident Fund v Mothupi* [2003] 3 All SA 181(A); 2000 (4) SA 38 (SCA) at para 15-17 and the other authority cited there. I am conscious that the case in *Mothupi* involved the waiver of a right conferred in law, rather than by contract, but the principles involved are the same as far as the present discussion is concerned.

[19] The Associations records showed that 38 fines and warnings had been issued to multiple homeowners in respect of contraventions of rule 10 in the period between June 2017 and May 2019.

[20] *Mothupi* supra, para 19 (per Nienaber JA), citing *Hepner v Roodepoort-Maraisburg Town Co*uncil 1962 (4) SA 772 (A) at 778D-779A and *Borstlap v Spangenberg en andere* 1974 (3) SA 695 (A) at 704F-H.

the equities, rather than on the basis of an established waiver of rights by the homeowners' association. It is in any event not clear why the judge even reached that point, having concluded earlier in the judgment (whether correctly or not is not important for current purposes[21]) that the applicant had not demonstrated that the impugned conduct was occasioning it cognisable harm or prejudice.

[50] It therefore remains only to consider the first respondent's contention that the trustees were applying the rules in a discriminatory manner and could not be permitted to do so.

[51] Mr *White* relied in support of his argument on this leg of the case on the oft-quoted passage from the judgment of Corbett J (Van Winsen J concurring) in *ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C), at 809F, to the effect that '[w]here a plaintiff sues to enforce performance of an obligation which is conditional upon performance by himself of a reciprocal obligation owed to the defendant, then the performance by him of this latter obligation (or, in cases where they are not consecutive, the tender of such performance) is a necessary prerequisite of his right to sue and should be pleaded by him. Conversely in such a case the defendant may raise as a defence, known as the *exceptio non adimpleti contractus*, the fact that the plaintiff has failed to perform, or, in the appropriate case, tender performance of, his own reciprocal obligation (see generally De Wet and Yeats, *Kontraktereg* pp.138-9 and cases there in cited, to which may be added *Myburgh v Central Motor Works* supra [1968 (4) SA 864 (T)]; *Anastasopoulos v Gelderblom* supra [1970 (2) SA 631 (N)]'.

[52] The passage relied upon by the first respondent's counsel self-evidently pertains only in a context of reciprocity of obligations, a concept equated by Corbett J to what De Wet and Yeats had termed '*wederkerigheid van verbintenisse*'. I do not think that the enforcement by Association of its parking rules was subject to the principle of reciprocity. An irrationally discriminatory system of enforcement might well in a given case justify a decision by the court in a matter like this to refuse to grant the interdictory relief in the exercise of its equitable discretion, but that is another matter. It was no doubt with those considerations in mind that Swain J uttered the dictum in *Riverland Resort Shareblock (Pty) Ltd v Letschert* [2012] ZAKZDHC 101 (25 April 2012) at para 30 relied upon by the applicant's counsel that '... if due regard is had to the fact that the relationship arising out of the agreement between

[21] A breach of a contractual obligation is ordinarily accepted as constituting relevant injury or harm when it comes to assessing whether the requirements for a mandatory interdict enforcing compliance have been satisfied; cf. *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* [2012] ZASCA 123 (20 September 2012); 2013 (3) SA 91 (SCA); [2012] 4 All SA 387 (SCA), at para 32.

the applicant [shareblock company] and individual shareblock owners is contractual, a failure to enforce a breach by the applicant, against another shareblock owner, can have no bearing upon its election to enforce such a breach against the respondent'.[22]

[53] In the circumstances I am satisfied that the applicant has made out a case for the interdictory relief that it seeks, and that there is no merit in any of the grounds upon which the first respondent sought to oppose it. The applicant has therefore achieved substantial success in the application and is entitled to a costs order in its favour.

[54] The following order is made:

1. The applicant's appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 is dismissed.
2. The first respondent is hereby prohibited from parking his vehicles, motor bikes, caravans, boats or trailers anywhere within the Kingshaven estate other than in his garages or outside his house wholly within the boundary of his property.
3. The first respondent is ordered to pay the applicant's costs of suit.
4. The Chief Registrar is directed to forward a copy of this judgment to the Chief Ombud of the Community Schemes Ombud Service for information and guidance.

A.G. BINNS-WARD
Judge of the High Court

[22] Cf. also *Bushwillow Park Home Owners v Fernandes and others* [2015] ZAGPJHC 250 (23 October 2015) at para 15.

APPEARANCES

Applicant's counsel:	**A.A. Brink**
Applicant's attorneys:	**Biccari Bollo Mariano Inc.** **Cape Town**
First respondent's counsel:	**J.P. White**
First respondent's attorneys:	**Mostert & Bosman Attorneys** **Bellville**