IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED:	
.....	.....
DATE	SIGNATURE

CASE NO: 060240/2022

In the matter between:

RHULANI HORWARD NDOBELA Applicant

and

JUDGMENT

COMMUNITY SCHEMES OMBUD SERVICE First Respondent

MIDSTREAM RIDGE HOME OWNERS ASSOCIATION NPC Second Respondent

TOLMAY J

INTRODUCTION

1. In this application the applicant (Mr. Ndobela) seeks orders to review and set aside the first respondent's (the Service) decision and declare it unlawful in terms of the Promotion of Administrative Justice Act,3 of 2000 (PAJA) He also seeks an order remitting the referral back to the Service for reconsideration and to communicate its decision within certain time frames. He furthermore seeks condonation for the late filing of this application.

2. The Service is a juristic person established in terms of section 3 of the Community Schemes Ombud Services Act 9 of 2011 (the CSOS Act). The second respondent is the Midstream Ridge Homeowners Association NPC (the Association). The Association is a non-profit company and its main business and object as set out in its memorandum of incorporation (the MOI) is to provide and maintain essential services, amenities, and activities and to promote, advance and protect the communal interest of members of the Association. Mr. Ndobela is the registered owner of a property in Midstream Ridge Estate and is by virtue thereof a member of the Association. Both the MOI and the title deed provide that all registered owners are members of the Association and are bound by the provisions of the MOI and the Association 's rules. Mr. Ndobela is an attorney and the chairman of the firm of attorneys representing him in these proceedings. Only the Association is opposing this application.

BACKGROUND

3. The genesis of this application is a dispute between Mr. Ndobela and the Association about levies and penalties charged by the Association. The details of the dispute are not relevant for the determination of this application. Section 4(1)(a) of the CSOS Act provides that the Service must develop and provide a dispute resolution service in terms of the act. Section 4(2) empowers the Service to inter alia promote and monitor good governance within community schemes.

4. On 17 December 2020, Mr. Ndobela referred the dispute to the Service (the referral). On 14 January 2021 the Association's attorneys sent a letter of demand for payment of the arrear levies to Mr. Ndobela. On 19 January 2021 Mr. Ndobela informed the attorneys of the Association that the demand was premature as the matter was referred to the Service. On 29 January 2021 the Service requested a response to the referral from the Association by 5 February 2021. On 3 February 2021 the Association instituted proceedings in the Tembisa Magistrate's Court (the Tembisa Proceedings) to recover arrear levies. On 5 February 2021 the Association made interim submissions to the Service to dismiss the referral. On 23 February 2021 the Service sent the Association's submissions to Mr. Ndobela

and on 1 March 2021, Mr. Ndobela served his plea and special plea in the Tembisa proceedings and responded to the Service on the same day. On 3 March 2021, the Service informed Mr. Ndobela that his referral was rejected (the decision), because it was satisfied that the dispute should be dealt with in a court of law or another tribunal of competent jurisdiction.

5. During February 2022 Mr. Ndobela instituted an application in this court (the first application) in which he sought orders declaring the Service's decision unlawful, reviewing and setting aside the decision and directing the Service to hear and consider the referral. He cited the Association as the first respondent and the Service as the second respondent. The Association opposed the application and the Service abided by the decision of the court.

6. The application was argued on 10 November 2022, judgment was handed down on 12 December 2022 and Mr. Ndobela's application was dismissed with costs. On that same day Mr. Ndobela sent a letter to the Association's attorneys in which he indicated his intention to apply for leave to appeal. However, instead of doing that he instituted this application on 15 December 2022. The orders sought in this application and those sought in the first application are for all practical purposes the same. However, Mr. Ndobela attempts to differentiate the applications on the basis that in the first application he merely sought an interdict and mandamus against the Association.

7. Mr. Ndobela argues that the first application was dismissed on the basis that he ought to have followed review proceedings in terms of PAJA and that the "*judgment delivered pointed him in the right direction*." Mr. Ndobela in this application seems to be of the view that he is attempting to assist the Service in carrying out its statutory obligation and asserts that the Service is supporting his application. There is no supporting affidavit from the Service to confirm this. There is as a result no explanation or request from the Service as to if and why its decision should be reviewed and set aside. Mr. Ndobela both in the first and this application relies on a letter purportedly from the Service, however this letter is not supported by an affidavit from the Service. In any event, this letter was considered and rejected by the court in the first application.

RES JUDICATA AND ISSUE ESTOPPEL

8. It is trite that the defence of res judicata or issue estoppel is based on the principle that the dispute raised has already been finally adjudicated in proceedings between the same parties[1]. What is required to establish the defence of res judicata is the same cause of action, the same parties and the same relief[2].The party raising the defence carries the onus to prove it.

[1] Prinsloo and Others v Goldex 15 (Pty) Ltd and Another {2012} JOL 28866 (SCA); {2021} ZASCA 28 (SCA) at para 10 and at para 23.
[2] Ibid at para 23.

9. Issue estoppel is a relaxed version of res judicata as it does not require "..*an absolute identity of the relief and the cause of action*"[3].Issue estoppel requires that the same issues (not cause of action) arise between the same parties. The same issue will arise when, broadly stated, "*the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment relied on*"[4]. Whether the defence of issue estoppel is available will be determined on a case-by-case basis, taking into consideration factors like equity and fairness[5].

10. In the first application, the material relief sought was to declare the Service's decision unlawful, for it to be reviewed and set aside and for the Service to reconsider the referral. Mr. Ndobela based his application on what he termed a common law or legality review. The Association opposed the first application and argued that the review should have been one in terms of PAJA and as a result it should have been brought within 180 days in term of section 7(1) of PAJA, which means it should have been launched by 30 August 2021.The first application was only launched on 7 February 2022, which was more than 11 months after he became aware of the decision. Mr. Ndobela did not apply for an extension in terms of section 9(1) of PAJA and insisted that his review was not in terms of PAJA but was one in terms of the common law and was therefore not subject to the 180-day period.

[3] See Hyprop Investments Ltd and others v NSC Carriers and Forwarding CC and Others [2014] 2 All SA 26 (SCA) at para 14 (Hyprop).
[4] Hyprop at para 14, quoting Smith v Porrit and Others 2008 (6) SA 303 (SCA) at para 10.
[5] Ibid at para 14.

11. The court in the first application held that the decision by the Service was an administrative action in terms of PAJA and Mr. Ndobela could not rely directly on the principle of legality[6]. The court found that in the absence of an application for extension of the 180-day period, the application stands to be dismissed on this ground alone[7]. After considering the merits, which are based on the same facts as this application, the court found that"….*the applicant in any event, failed to furnish sustainable grounds in support of a review"*[8].

12. In the present application Mr. Ndobela seeks orders declaring the Service's decision unlawful and that it be reviewed, set aside and referred back for reconsideration. The only real difference in the relief sought now is that Mr. Ndobela also seeks condonation for the delay in bringing the application. As far as this application is concerned Mr. Ndobela, after eschewing any reliance on PAJA in the replying affidavit of the first application, now expressly relies on PAJA as the basis of the review.

13. It is arguable whether the cause of action in both applications is the same, seeing that he now relies on PAJA, but when the test for issue estoppel is applied it is apparent that all the requirements are met. The parties are the same. Although Mr. Ndobela argues that the Association in this application was merely cited, for any interest it may have in the matter.However, the Association clearly has a

[6] Ndobela v Midstream Ridge Home Owners Association NPC and Another [2022] ZAGPPHC (7036/22) (12 December 2022) {unreported} at para 11.
[7] Ibid at para 11 – 13.
[8] Ibid at para 14 – 16.

vested interest in the outcome of this application and is a necessary party to the proceedings, as it concerns levies charged by the Association. The parties are exactly the same as in the first application. As a result, the first requirement has been met.

14. As far as the second requirement is concerned, both applications sought to review and set aside the same decision by the Service, the only difference is that in the first application Mr. Ndobela relied on a common law or legality review and in this application, he relies on PAJA. The contention that Mr. Ndobela in the first application sought an interdict is not borne out by the facts. The further, rather artificial difference, Mr. Ndobela seeks to rely on is that he in this instance made use of Rule 53 procedures. This however does not change the fact that the same issue, based on the same facts, were raised in this application. The court in the first application found that Mr. Ndobela could not rely on a legality review, that PAJA applied and found that Mr. Ndobela did not make out a case for a review under PAJA. It is abundantly clear that the dispute was finally adjudicated by the court in the first application.

15. Mr. Ndobela failed to apply for an extension or condonation for the delay in the first application. He now seeks to rectify that failure in this application. The condonation application was brought approximately twenty-two months after the Service's decision. Mr. Ndobela should have brought the condonation application

in the first application, but even if he did, he would have had to explain the lapse of the nearly eleven months since the decision had been taken. Ironically, he relies on the first application as a reason for the delay, the fallacy of that argument is self-evident. He also relies on the Tembisa proceedings as an explanation for the delay, but the Tembisa proceedings commenced before the Service's decision and was well under way when the first application was launched. The belated attempt to seek condonation cannot be entertained. No proper explanation is given for the delay, neither will it be in the interest of justice to grant an extension of the time period. As a result, condonation for non-compliance with section 7(1) of PAJA cannot be granted.

COSTS

16. The Association seeks costs on a punitive scale against Mr. Ndobela and his firm. I cannot see any justification for a cost order against the firm. However, this application is an abuse of court processes and court resources and Mr. Ndobela as an officer of the court should have known better, as a result an attorney and client cost order against him is justified.

The following order is made:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of the application on an attorney and client scale.

_____

R G TOLMAY

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant:	Adv M Mathaphuna Instructed by Ndobela and Associates Attorneys
For Second Respondent:	Adv T Ossin Instructed by Tokin Clacey Attorneys
Date of Hearing:	11 October 2023
Date of Judgment:	