A DISCUSSION OF JURISDICTION OF TRIBUNALS IN SOUTH AFRICA

Rashri Baboolal-Frank

University of Pretoria, Pretoria, South Africa

Abstract

In South Africa the jurisdiction of tribunals is dictated by statute and the rules of the tribunals. These rules are easily available on the tribunals’ website, which is easily accessible for lay people. However, if you do not have access to the internet then a person is able to attend their offices and lodge their queries/complaints. Tribunals are established for easy accessibility to people, to ensure that access to justice is established as a reality. The usual practice of approaching a tribunal is for a violation in terms of statute and accordingly to lodge a complaint of the violation that is committed in relation to the statute that governs that tribunals. Jurisdiction is of quintessential importance as it empowers a person/people or juristic entity to ensure that their dispute may be heard at the tribunal and that it will not be dismissed on a technicality. Jurisdiction is a Trojan horse in relation to civil proceedings as one cannot assume jurisdiction, jurisdiction must be proved in relation to statute for tribunals so that unnecessary costs are not incurred. This paper will fully discuss jurisdiction and the importance in relation to tribunals.

Keywords: Jurisdiction, Tribunals, Statute, Prohibited, Practice.

Tribunal Jurisdiction

“The beginning is the most important part of the work”-Plato

1. Introduction

In South Africa, the tribunal system must be dissected from the onset to reveal its true potential and worth to a South African context. It is necessary to begin at the inception of tribunals, not just in the Constitution, but how tribunals found their way into the Constitution and the manner in which a tribunal system was established to illustrate the reasons behind the creation of tribunals.

2. History of tribunals

South Africa was colonised by amongst other countries such as the British. The history of South African law reflects English influence.¹ The necessary glance to the tribunal system in Britain reveals

that specific legislation governed the Tribunals, which illustrates the established connection between these countries in relation to the tribunal system history for South Africa. In the United Kingdom, the Council on Tribunals was formed in 1958,\textsuperscript{2} which council was created because of the 1957 Report by the Committee on Administrative Tribunals and Inquiries (also known as the Franks Committee).\textsuperscript{3} The functions of the Council on Tribunals had amended to allow for an ombudsman in an oversight capacity over specific matters.\textsuperscript{4} When digging deeper, it is apparent that the South African Law Reform Commission proposed a tribunal and in particular an administrative tribunal similar to the British system that would oversee the administrative arm of the decisions made by the State. Thereafter the Constitution contained section 34 that allowed for the birth of tribunals in South Africa.

### 3. Defining a Tribunal System

#### 3.1 What is a tribunal

"Word Origin and History for tribunal (noun.) mid-15c., from Old French tribunal (13c.), from Latin tribunal "platform for the seat of magistrates, elevation, embankment," from tribunus "official in ancient Rome, magistrate," literally "head of a tribe," from tribus (see tribe). Hence, a court of justice or judicial assembly (1580s)."\textsuperscript{5}

The origin of the word is from the old French tribunals that were created with the language source from Latin, the direct translation is a platform for the magistrates to preside to hear disputes. In Rome the tribunal is derived from the word tribunus in ancient Rome an official or magistrate.\textsuperscript{6}

#### Administrative or adjudication

In the United Kingdom (known as Great Britain) the Franks Committee has recommended that tribunals should be ‘regarded as machinery for adjudication rather than a part of the machinery of administration’\textsuperscript{7}

The purpose of the Council on Tribunals as set out by the Tribunals and Inquiries Act\textsuperscript{8} was:

- Review the constitution and operation of tribunals, and feedback to the Lord Chancellor\textsuperscript{9}

---

\textsuperscript{2} Tribunals and Inquiries Act of 1958.
\textsuperscript{3} C.D Alblard “Some Comparisons Between the Council on Tribunals and the Administrative Conference of the United States” 24 American Journal of Comparative Law 73 1936 at 73.
\textsuperscript{4} C.D Alblard “Some Comparisons Between the Council on Tribunals and the Administrative Conference of the United States” 24 American Journal of Comparative Law 73 1936 at 75.
\textsuperscript{6} Ibid.
\textsuperscript{7} Report of the Committee on Tribunals and Inquiries, CMD. 218 July 1957.
\textsuperscript{8} 1971, s1.
\textsuperscript{9} C.D Alblard “Some Comparisons Between the Council on Tribunals and the Administrative Conference of the United States” 24 American Journal of Comparative Law 73 1936 at 75.
To deliberate and report cases as are referred to the Council. To reflect and report special cases that are distinguished in terms of procedures and legislation.

Peter Cane sums up the difficulties in categorising administrative tribunals into one of the tiers of the tripartite system of separation of powers, as the tribunals perform multi task that cross different tiers of the separation of powers, although it is an Australian context.

“The distinction between implementation and adjudication should not be understood in terms of accounts of separation of powers that divide the institutions of government into three ‘branches’- the legislature, the executive, and the judiciary-and allocate respectively to each branch as it characteristic task one of three types of functions-legislative, executive and judicial. In particular, implementation should not be thought of as an administrative function of the executive, and adjudication should not be thought of as a judicial function of the judiciary. There are several reasons to resist this way of thinking about administrative tribunals. First, although we recognise sets of governmental institutions called respectively the legislature, the executive and the judiciary, it is widely accepted that not every governmental agency can be fitted neatly into one or other of these three branches. Thus, we might want to resist the straightforward allocation of administrative tribunals to either the executive or the judicial branch of government as traditionally conceived. Secondly, it is now recognised that all agencies thought of as belonging to one or other of the three ‘core’ branches of government perform a complex mix of functions that may defy easy classification in terms of the traditional tripartite division. Perhaps most importantly of all, it is now widely agreed that the terms ‘legislative,’ ‘administrative,’ and ‘judicial,’ when used to describe and differentiate governmental functions, are vague and imprecise. The problem is sometimes signalled by the use of the prefix ‘quasi’ to describe a function, performed by an agency allocated by separation theory to one of the core branches of government, which is essentially similar to a function attributed by separation theory to one of the other branches: ‘quasi-legislative,’ ‘quasi-judicial’.

Civil tribunals

Civil matters deal with an action/application before a tribunal such as a rental dispute pertaining to the lease agreement. The cause of action is based on contract and in particular clarification of the terms of the agreement.

---

10C.D Alblard “Some Comparisons Between the Council on Tribunals and the Administrative Conference of the United States” 24 American Journal of Comparative Law 73 1936 at 75.
11C.D Alblard “Some Comparisons Between the Council on Tribunals and the Administrative Conference of the United States” 24 American Journal of Comparative Law 73 1936 at 75-76.
Five models of tribunals

‘Three phases, four variables and five models’ of tribunals are described by Asimow as:

Model 1-Adversarial hearing/combined function/limited judicial review

- The initial decision is made by a combined function agency in an adversarial hearing, this model is used in the United States.

Model 2-Inquisitorial hearing/combined function/limited judicial review

- Similar to model one except the hearing is inquisitorial, the European Union adopts this model.

Model 3-Tribunal system

- The tribunal as an independent body adopts an adversarial approach when deliberating upon matters. This model is used in the United Kingdom and in Australia.

Model 4-Open judicial review

- Similar to model 2 except new evidence can be submitted for consideration. This model is adopted in China, Argentina and Japan.

Model 5-Specialised court

- Similar to model 2, however the courts hear judicial review separately to the general court system and the specialised court only makes decisions on administrative law cases only. This model is adopted in France, Germany and countries in Europe, Asia and Latin America.

Adversarial vs inquisitorial

The adversarial approach is adopted by courts as judges/magistrates’ allow the parties to be heard (Audi al partem) and makes a decision on the evidence that is presented. However, the inquisitorial approach is when the commissioner/chairperson of a tribunal conducts the investigation and questions

---

13M Asimow ‘Five Models of Administrative Adjudication’ Available at http://ssrn.com/abstract=2502210 at 5-6, the initial decision, which is made by the agency staff and is binding. The second phase is administrative reconsideration as the initial decision can be considered administratively. The third phase is judicial review the private party is entitled to seek review to the court.

14M Asimow ‘Five Models of Administrative Adjudication’ Available at http://ssrn.com/abstract=2502210 6-7 The four key variable relate to “Is the adjudicating body a combined function agency or a separate tribunal? Is the proceeding adversarial or inquisitorial? Is judicial review open or closed? Does a reviewing court have generalized jurisdiction or is it a specialized administrative court?”

15M Asimow ‘Five Models of Administrative Adjudication’ Available at http://ssrn.com/abstract=2502210


17Ibid.

18Ibid.

19Ibid at 10.

20Ibid.
the parties and is actively involved in reaching a decision and does not oversee the proceedings but is involved and may require more evidence if the evidence presented is insufficient to make a decision.

3.2 A tribunal system

A tribunal system is the modus operandi of tribunals. Each tribunal has its own system that it operates in adherence. However, in certain jurisdictions there is a symphony and in the manner that the tribunal is orchestrated. In the South African context, the tribunal system, is that each tribunal has its own rules that governs the procedures of the tribunal without harmonisation.

3.3 Specialized courts vs specialised tribunals

Specialised courts and specialised tribunals both have specific tribunals and courts with a particular nature, that presiding officers only hear matters of the specialist nature and there are a few such as children’s court, competition appeal court, labour court, labour appeal court, equality court, tax court, admiralty court to mention a few. The specialised tribunals are national consumer tribunal, rental housing tribunal, company’s tribunal and water tribunal.

Tribunal system a concept with a difference

Conceptually tribunals are different to courts in that the approach used by the chairperson and deputy chairperson is the inquisitorial approach. The dispute is usually a complaint that is lodged that the chairperson and deputy chairperson and its members consider. The decisions are taken and delivered robustly to the complainant. The procedure is not complicated so that the tribunals are easily accessible to the public.

3.4 Function of a tribunal system

The tribunals in South Africa have various functions and it seems that the functions are not just singular but multi-faceted. It may be argued that tribunals can consist of the following functions simultaneously:

3.4.1 administrative in nature because tribunals are governed by subsidiary legislature in relation to carrying out the protection of public and private bodies, and the tribunal is the forum to ventilated the complaints in relation to legislation such as the rental housing tribunal is governed by the rental housing act to balance the rights and the landlord and tenant and to ensure that there are no unfair practices in relation to tenancy.

3.4.2 judicial is if the powers have the same powers as a court in relation to orders made that are binding so the tribunal is judicial in nature.

3.4.3 hybrid is when the tribunal can be described to have both administrative and judicial function in that it is described as hybrid in nature.
3.4.4 quasi-judicial is when the tribunal does not fit into the paradigm of only being judicial in nature in that the decisions are binding but the effect of the decision may not be of the same status as a court, and the process of the tribunal may be a paper process, which eventually turns into an oral hearing and the presiding officer becomes the investigator in the manner that the hearing is carried out.

3.4.5 sui generis a tribunal can be described to be of its own kind and that no particular function can explain the nature of the tribunal as the complexities of functions is multi-faceted.

3.5 Role of a tribunal system

Role of the tribunals is governed by the legislation that created the tribunal.

3.5.1 nature of matters - The nature of matters is diverse and range from company matters, competition matter to water disputes to consumer protection and consumer credit and rental housing disputes.

3.5.2 complexity - The complexity is that as a general matter are not complexed and are governed in terms of the act that governs the tribunal so that the matters may be dealt with expeditiously.

3.5.3 objectives of a tribunal system - The objectives of the tribunal are governed by legislation and the rules of the tribunal.

3.6 Powers of a tribunal system

3.6.1 Overview of jurisdiction - The tribunal system in South Africa, and the nature of matters are determined from the prohibited practices that are governed by legislation that are heard before the tribunal.

There five tribunals that will be discussed briefly are:

_Rental Housing Tribunal_

In terms of the Rental Housing Act\textsuperscript{21} the jurisdiction of the tribunal hears disputes that pertain to tenant and owner disputes relating to the lease agreement and unfair practices in relation to tenancy. The Rental Housing Tribunal functions on a dispute that is lodged by either the tenant or the landlord on the complaint form and the responding party is afforded an opportunity to respond. Thereafter the parties are called into the offices of the Tribunal to consult regarding the issues so that the matter can try to be settled using a mediator. Failure of the issues settled then the matter will be heard before a panel in the same likeness of a trial. Once a matter is before the rental housing tribunal then it must be finalised before one can approach the civil courts.\textsuperscript{22}

\textsuperscript{21} Act 50 of 1999.
\textsuperscript{22}Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd (Inner City Resources Centre as Amicus Curia) 2012 (5) BCLR 449 (CC) at paragraph 63: ‘The conclusion that the Tribunal had jurisdiction to determine the tenants’ grievance against the landlord, including its cancellation of their leases, brings the question of remedy to the fore. Once a tenant has
Companies Tribunal

The vision of the statement of the companies tribunal is “A world-class adjudication and dispute resolution body enhancing simple, efficient and fair company law practices.” It is required to exercise its functions in accordance with the Companies Act No 71 of 2008 in a transparent manner in conjunction with the principles of the Constitution.

The tribunals values are:

- Accountability
- Predictability
- Impartiality
- Transparency
- Equitability
- Efficiency
- Accessibility
- Ubuntu/respect

Strategic goals of the companies tribunal:

- Adjudicate and make order in relation to any application
- Resolution of disputes in terms of Alternative Dispute Resolution (ADR)
- Perform any function assigned to it in terms of the Companies Act No. 71 of 2008
- Ensure the operational effectiveness of the Tribunal
- Effective stakeholder engagement

The Tribunal’s functions are as follows:

lodged a complaint with the Tribunal, the Act imposes a three-month moratorium on evictions. In this case, the landlord waited out the three-month period before instituting eviction proceedings. That it was entitled to do so had no effect on the validity or otherwise of the tenants’ complaint that the termination of the leases constituted an unfair practice under the Act. Nor did it deprive the Tribunal of jurisdiction to rule that it was, and to grant the tenants appropriate relief. In other words, while the Act imposes only a limited moratorium on evictions, it does not follow that a court from which an eviction order is sought may not stay the proceedings before it in order to give the Tribunal a chance to make a ruling.”

23 Companies Tribunal Annual Report 2012/13 at 1.
24 Ibid at 4.
25 Ibid at 4.
26 Ibid at 4.
27 Ibid at 4.
• Adjudicate in relation to any application in terms of the Act and make an order in relation thereof
• Assist in resolution of disputes
• Perform any function in terms of the Act

**Competition Tribunal**

The Competition Tribunal jurisdiction relates to investigating complaints that are lodged in terms of the Competition Act.²⁸ The Competition Tribunal employs and trains specialist Commissioners to preside over the matter that specialise in competition disputes and hence are one of the most efficient tribunals, in the management and finalisation of disputes. The Competition Tribunal Annual Report of 2012-2013 revealed that in 2010/2011 there were 55 large mergers, 1 intermediate mergers, 8 complaint referrals, 22.72 consent orders and 0 interim relief applications. In 2011/2012 there were 81 large mergers, 6 intermediate mergers, 5 complaint referrals, 27 consent orders and interim applications.²⁹

**National Consumer Tribunal**

The National Consumer Protection Tribunal³⁰ jurisdiction hears matter that deal with the Consumer Protection Act³¹ that relate to unfair practices that relate to consumers. A consumer approaches the Tribunal by lodging a complaint and filling out the prescribed forms and thereafter the complaint is investigated by the Tribunal. The National Consumer Protection Tribunal fulfils an administrative function in order to satisfy the legal demands of the people, it was recommended that it plays a dual role adjudicative and administrative function.³² An issue with the Tribunal is that it does not enjoy the same status as a Court in terms of execution.³³ The shortcoming that the Tribunal does not have an enforcement mechanism, takes away the grit of the tribunal, as it is still easier accessible to people.³⁴

**Water Tribunal**

In terms of the National Water Act³⁵ the jurisdiction of the water tribunal’s disputes are heard regarding the access of water for irrigation, mining, farming and other services as specified in the Act.

---

²⁸ Competition Act 89 of 1998.
³⁰ MA Du Plessis ‘Enforcement and execution shortcomings of consumer courts’ (2010) 22 South African Mercantile Law Journal 517 at 518. It is criticised that a consumer ‘court’ is not a court but a tribunal and no reference is made to it in the Act.
The Water Tribunal has been disbanded, and is still disbanded to date, despite the Court directing the Minister to appoint a Commissioner and a Chairperson to deliberate over disputes dealing with the National Water Act, no one has been appointed. Hence the Water Tribunal can be considered to be dysfunctional in that it cannot operate due to the Minister failing to appoint a Commissioner.\textsuperscript{36} Unfortunately the history of the matter was because a matter was heard and interpreted incorrectly due to lack of training and incompetence by the Chairperson. The High Court when it overruled the decision by the Water Tribunal gave a personal costs order against the Chairperson that caused the Chairperson to resign, and after that costs order further no candidate as a Chairperson could be obtained.\textsuperscript{37}

4. Conclusion

In certain circumstances tribunals have illustrated the current need from the caseload on a theoretical plane, however in other instances the tribunals are not functioning properly and are further contributing to a frustrated legal system. In South Africa the jurisdiction of tribunals is dictated by statute and the rules of the tribunals. These rules are easily available on the tribunals’ website, which is easily accessible for lay people. However, if you do not have access to the internet then a person is able to attend their offices and lodge their queries/complaints. Tribunals are established for easy accessibility to people, to ensure that access to justice is established as a reality. The usual practice of approaching a tribunal is for a violation in terms of statute and accordingly to lodge a complaint of the violation that is committed in relation to the statute that governs that tribunals. Jurisdiction is of quintessential importance as it empowers a person/people or juristic entity to ensure that their dispute may be heard at the tribunal and that it will not be dismissed on a technicality. Jurisdiction is a Trojan horse in relation to civil proceedings as one cannot assume jurisdiction, jurisdiction must be proved in relation to statute for tribunals so that unnecessary costs are not incurred.

\textsuperscript{36} N. Olivier & N. Olivier ‘Non-performance of constitutional obligations and the demise of the water tribunal-access to justice denied?’ (2014) Tydskrif vir SuidAfrikaanseReg 163.
\textsuperscript{37}Goede Wellington Boerdery (Pty) Ltd v Makhanya NO & Another [2011] JOL 27640 (GNP) 49.