IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 2023/085953

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
(4)

SIGNATURE **DATE 21/09/2023**

In the matter between:

MAILE SEKHETHELA	Applicant
and	
THE WILLIAM, FOURWAYS	First Respondent
KEN AINSWORTH	Second Respondent
RAWSON PROPERTIES DAINFERN	Third Respondent

JUDGMENT

PULLINGER, AJ

INTRODUCTION

[1] There are certain sayings that may fairly be described as proverbs pertinent to litigation that have developed over time and are apposite to this application. One is that where one litigates in haste, one repents at leisure. This proverb underlines the importance of properly considering one’s case before the launching of an application, especially an urgent one, to ensure that a proper case for relief is made out. Another is to avoid drafting with the proverbial "hot pen". This leads ineluctably to emotive and sometimes incorrect statements being made in the papers. No regard was had to these proverbs in the present case.

[2] The applicant approached this Court by way of an urgent application, on extremely abridged time periods, claiming relief, couched as follows:

> "1. To the extent necessary, authorising the Applicant to dispense with the ordinary rules relating to forms, service and time periods prescribed in the Uniform Rules of Court and that this application be heard as an urgent application in terms of Rule 6(12);
>
> 1.[*sic*] That all the respondents be ordered, without delay, after service of this order electronically, to restore biometric and/or app [*sic*] access to unit 127 occupants; The William, Fourways.
>
> 2. That the respondents be prohibited and restrained from taking any steps, whether it be directly or indirectly, to prohibit the applicant from granting to visitors, family, friends, delivery services,' [*sic*] access to the premises mentioned at paragraphs [*sic*] 2 of the notice of motion.

> 3. That the first and second respondents pay the costs of this application jointly and severally on the attorney and client scale.
>
> 4. That the applicant be granted leave to approach this court on an urgent basis, should the respondents fail to adhere to the terms of this order…"

[3] Although it is customary to determine the issue of urgency first, an enquiry directed at determining whether the applicant is able to obtain substantive redress at a hearing in due course[1] and whether the abridgment of time periods are commensurate with the degree of urgency asserted,[2] applications brought by way of urgency may be adjudicated without this customary preliminary enquiry in the interests of finality where an application carries no prospect of success.[3] This is one such application.

THE APPLICANT'S CASE

[4] The relief claimed by the applicant is two final interdicts. Those final interdicts are directed at the first and second respondents, but, as will become apparent, the founding affidavit does not make out a case for any relief against the first respondent. In respect of the third respondent, it was cited as the property agent (presumably the agent responsible for the lease agreements concluded by the applicant), and against whom no relief was sought. The reasons for its joinder are not explained.

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[1] ***In re*: Several matters on the urgent court roll** 2013 (1) SA 549 (GSJ) at [7]

[2] **Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another (t/a Makin's Furniture Manufacturers)** 1977 (4) SA 135 (W) at 137 F

[3] **February v Envirochem CC and Another** (2013) 34 ILJ 135 (LC) at [17] quoted with approval in **Gigaba v Minister of Police and Others** [2021] 3 All SA 495 (GP) at [9]

[5] The uncontroversial facts of this application are that the applicant is a tenant in both units 127 and 543 in the sectional title scheme known as "The William" who is cited as the first respondent.

[6] On or about 24 August 2023 the applicant's ability to generate entry and egress codes *via* the first respondent's electronic visitor management system referred to as "the app" was terminated.

[7] The applicant states that he has been evicted, without an order of court, from The William. It transpires that this averment, which was liberally repeated throughout the founding affidavit, is incorrect. The applicant retains full biometric access to The William, thus allowing him unfettered entry and egress to and from The William. He has not been evicted in any manner.

[8] As will appear, the applicant’s real complaint is then that he is unable to grant access to third parties to The William using the app. This access, it is alleged, was terminated without any processes having been followed. But, this is not the case made out in the founding affidavit.

[9] Thus, this is clearly not an unlawful eviction as is repeatedly stated in the founding affidavit. These repeated statements highlight the inadvisability of writing with a “hot pen”. I accept that these statements were not made with the intention of misleading the Court but are demonstrative of the emotion with which the founding affidavit was prepared.

[10] It is trite that an applicant seeking a final interdict must prove, in its founding papers, the requisite jurisdictional facts of a clear right, a reasonable apprehension of harm and the absence of a suitable alternative remedy.

[11] These jurisdictional facts have been discussed in any number of judgments since the landmark judgment of the Appellate Division in **Setlegelo**.[4] It is unnecessary to survey those authorities in this judgment.

[12] For the purposes of this application, only the question of a "clear right" and "the absence of a suitable alternative remedy" are relevant.

[13] The clear right asserted by the applicant was stated as follows:

> "45. I have a clear right to uninterrupted enjoyment of the property including but not limited to visits from family members and friends, right to freedom of movement for the kids and visitors, social gatherings, as protected under the Constitution.
>
> 46. I am advised that the conduct of the Respondents is unlawful, illegal and unconstitutional because it amounts to eviction without a court order."

[14] As a tenant at The William, the applicant's rights to the peaceful and undisturbed possession of the property flow from the lease agreements he has concluded with the owners of the relevant units and are thus an issue of contract law.

[15] The "right" to "*uninterrupted enjoyment of the property including but not limited to visits from family members and friends, right to freedom of movement for*

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[4] **Setlogelo v Setlogelo** 1914 AD 221

the kids and visitors, social gatherings" which the applicant asserts has been infringed, however, is not one which arises from a breach of his contractual rights flowing from the lease agreements.

[16] As is pointed out, the applicant's case concerns a decision taken by the body corporate of The William to terminate his ability to use "the app".

[17] Mr McTurk, who appeared for the first and second respondents, took the point that the founding affidavit does not make out a case for relief against the first respondent. He argued that this is fatal to the application. I agree.

[18] The nature of the point argued by Mr McTurk is akin to that considered in **Hart**[5] where Miller J, as he then was, said:

> "Where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial **and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound**. For the reasons I have stated herein, **I am of the opinion that there is a dearth of such facts as, if true, would support the allegations … and the objection in *limine* must accordingly be upheld**." (emphasis added)

[19] Ms Marule, who appeared for the applicant, was constrained to argue, with reference to the answering affidavit and certain correspondence, that the

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[5] **Hart v Pinetown Drive-in Cinema (Pty) Ltd** 1972 (1) SA 464 (D) at 469 C – E/F

second respondent is clearly the first respondent's agent and, by inference, responsible for the conduct of the first respondent. No such allegations appear from the applicant’s founding affidavit.

[20] In this regard, the law is now long settled. The Supreme Court of Appeal, in **Quartermark**,[6] citing a long line of authorities, said:

> "… It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties, but also to place the essential evidence before the court. **They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit**." (emphasis added)

[21] Adopting a benevolent view of the papers as a whole, it is difficult to discern the “right” upon which the applicant relies. His case appears to be founded on the Conduct Rules of the first respondent, to which I refer more fully below, but the real case only emerges from the heads of argument filed on his behalf. I address this more fully below when I consider the alternative remedies open to the applicant.

[22] This begs the question, what is the clear right upon which the applicant relies?

[23] In the founding affidavit, the applicant appears to place reliance on The William's Conduct Rules.

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6 **Quartermark Investments Pty Ltd v Mkhwanazi and Another** 2014 (3) SA 96 (SCA) at [13]

[24] One is left to infer that the “right” upon which the applicant relies is that:

> “6.3.3. Owners and occupiers may not use their fingerprints to open for their family members, guests and/or service providers. Owners and occupiers must at all times ensure that the complex’s correct access control procedures are strictly followed as protocol. Access codes to be generated via the visitors management system and issued to all visitors and service providers.”

[25] Ms Marule, in argument and in her heads of argument, relied expressly and exclusively, on clause 6.3.3. of the Conduct Rules as being the source of the applicant’s “clear right”.

[26] The applicant, however, did not articulate clearly and expressly a right to use the first respondent’s visitor management system. This falls short of what **Quartermark** requires of an applicant, and accordingly, no clear right emerges from the founding affidavit, but more about this below.

[27] Even if I am incorrect in the conclusion that the applicant has failed to demonstrate a clear right and failed to have made out a case for relief against the first respondent, the application fails for reasons other than those already stated.

[28] At the heart of this matter is a dispute between the applicant and the body corporate of The William concerning the applicant's use of the app and which led to the termination of the applicant's use thereof.

[29] There is other more appropriate alternative remedy available to the applicant.

[30] The William is, as stated, a sectional title scheme. On 7 October 2016 the Sectional Titles Schemes Management Act, 2011 ("**the STSMA**") came into effect.

[31] The STSMA creates body corporates[7] as bodies that enjoy perpetual succession, capable of suing and being sued in its own name and enjoying contractual capacity in regard to matters concerning the management of the body corporate and the property that falls within it.[8] It has numerous obligations imposed upon it,[9] wide powers to meet those obligations.[10] The functions and powers of a body corporate must be manages by elected trustees in accordance with the STSMA, the rules of the body corporate and directions given to the trustees at a general meeting of members.[11]

[32] A person becomes a member of a body corporate when he/she becomes an owner of a unit in the scheme and, concomitantly that membership ends when the unit is sold and transferred to another person.[12]

[7] Section 2(1)
[8] Section 2(7)
[9] Section 3
[10] Section 4
[11] Section 7(1)
[12] Section 2(1) read with section 2(3)

[33] Section 10 of the STSMA empowers a sectional title scheme to regulate and manage its affairs by way of rules. The rules must provide for the management, administration, use and enjoyment of sections and common property. These rules must be applied fairly and uniformly. These rules must be quality assured by the Ombud, created in terms of the Community Schemes Ombud Service Act, 2011 ("**CSOS Act**"), which Act came into effect on 7 October 2016.

[34] The import of section 10 of the STSMA is that every person who becomes a member of a body corporate consequent upon the registration of a unit in his/her name is bound by the conduct rules and the rules of the STSMA. The same applies to all occupiers of a sectional title scheme who occupy a unit in terms of a lease.

[35] The business of a sectional title scheme, such as The William is regulated by the CSOS Act.

[36] A community scheme is defined in section 1 of the CSOS Act as meaning:

> "any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a **sectional titles development scheme**, a share block company, a home or property owner's association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing co-operative as contemplated in the South African Co-operatives Act, 2005 (Act 14 of 2005) and 'scheme' has the same meaning;" (emphasis added)

[37] The purpose of the CSOS Act is described in section 2 thereof as follows:

"The purpose of this Act is to provide for-

(a) the establishment of the Service;

(b) the functions, operations and governance of the Service; and

(c) **a dispute resolution mechanism in community schemes**." (emphasis added)

[38] Chapter 3 of the CSOS Act provides for applications to be made to it for the resolution of disputes. It provides for conciliation in terms of section 47 and where conciliation fails, a dispute will be referred to an adjudicator in terms of section 48. Section 38 of the CSOS Act stipulates the process to be followed to lodge a complaint with CSOS.

[39] Section 39 of the CSOS Act provides seven clearly demarcated categories in respect of which a CSOS appointed adjudicator may make an order. These include conduct on the part of the managing agent which are alleged to adversely affect an owner or occupier pursuant to any decision taken in the management of the sectional title scheme or the enforcement of any conduct rule.

[40] In the applicant's heads of argument, as opposed to the founding affidavit, the true "right" that was allegedly infringed is stated. That is the first respondent's alleged failure to have afforded the applicant the right of *audi alteram partem* before depriving him of access to the app. The high-water mark of the applicant's case is that:

"26 It is important to note that I have no notification that the access would be revoked or any prior notice. I'm not aware if there is any conduct rule which I have breached and even if I have breached such conduct rule, I was supposed to be given notice of it and time to remedy such a breach. To unilaterally revoke my full access to the property is nothing short of unlawful."

[41] This passage intimates that the applicant's true complaint is not founded in the Conduct Rules but, rather, in the absence of a fair process in depriving him of the use of the app. As already set out, the applicant does not rely on any fair and just administrative action which grounds the "clear right" on which this application is predicated.

[42] It is apparent that the applicant's true complaint falls within the ambit of CSOS's powers to adjudicate and should be ventilated there.

CONCLUSION

[43] In the circumstances, the applicant has not established a clear right to use the app and has statutory remedies at his disposal. He has accordingly failed to establish the jurisdictional facts necessary to found an interdict.

[44] The position may well have been different had the applicant approached the Court for relief in terms of the *mandament van spolie* but, as the relief claimed is squarely interdictory, no further comment is made is in relation to the *mandament* relief.

[45] Accordingly, this application falls to be dismissed.

[46] Each of the parties to this application sought costs on a punative scale. I am disinclined to make any order as to costs. I do not consider it just and equitable, in the circumstances of this case.

[47] In the result I make the following order:

"*The application is dismissed.*"

A W PULLINGER

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 21 September 2023.

DATE OF HEARING: **8 September 2023**

DATE OF JUDGMENT: **21 September 2023**

APPEARANCES:

COUNSEL FOR THE APPLICANT: **Adv Marule (Ms)**

ATTORNEY FOR THE APPLICANT:	**Ledwaba Attorneys**
COUNSEL FOR THE RESPONDENTS:	**Adv McTurk**
ATTORNEY FOR THE RESPONDENTS:	**Otto Krause Inc. Attorneys**