REPUBLIC OF SOUTH AFRICA

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

CASE NO: 130295/2023

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

....	...27/12/2023...
SIGNATURE	**DATE**

In the matter between:

STEPHEN LEGGATT	**FIRST APPLICANT**
MARGARET ELIZABETH TAYLOR	**SECOND APPLICANT**

and

BLAIR ATHOLL HOME OWNERS' ASSOCIATION NPC	**RESPONDENT**

REASONS

MANOIM J:

[1] This case came before me in the urgent court. I gave my order in favour of the applicants on 20 December 2023, and I indicated that my reasons for doing so would follow. I do so now, and for convenience the terms of the order I granted earlier are included at the end of these reasons.

[2] The applicants in this case live on a residential estate known as the Blair Athol Golf and Equestrian Estate. ("the Estate"). The first applicant, Stephen Leggat, owns three properties on the Estate. Two are owned by a Trust of which he and the second applicant, Margaret Taylor, are trustees. The one property owned by the Trust has been developed and he and Taylor reside there. The other two remain undeveloped.

[3] The respondent is a non-profit company that manages the estate. It is governed in terms of its constitution and rules. It is known as the Blair Athol Home Owners Association NPC ("the Association"). All owners of property on the Estate, such as Leggat and Taylor are members of the association. This entitles them to certain privileges but also obliges them to be bound by its rules.

[4] One of these privileges which up until recently Leggat as a member enjoyed and, in this respect, includes Taylor, was the right to access the Estate via a biometric system. The Estate is large and visitors who are not members must access the Estate by another entrance. This has two inconveniences. First the visitor must wait to be let in. Second, they have to access via a security point. Those with biometric access do not queue - they simply wave their hands on the reader and hence have instant and speedy access.

[5] Members also enjoy another privilege. They have access to certain facilities which include a restaurant and most significantly for Leggat, access to a golf course, if they pay the requisite golf fees. Leggat regards the golf course as something unique and exceptional. Indeed, he says the primary reason he bought properties at the Estate was to enjoy its spectacular golf course.

[6] However as mentioned members have certain obligations. One of these is that the member must pay the various levies due to the Association for its upkeep and services it provides. Given the nature of the Estate these fees are expensive. Members who do not pay their dues in time forfeit their privileges. This is in terms of clause 9.7 of the Constitution which states:

> *"No member shall he entitled to the privileges of membership unless and until he/she shall have paid every levy and other sum, if any, which may be due and payable to the Association in respect of his/her membership. Biometric access, along with the use of all estate facilities, may be revoked after notification to the member, until all arrears have been paid, at the discretion of the General Manager or the Association's duly authorised representative, unless the member's account is more than three months in arrears, at which time biometric access and use of all estate facilities will be revoked without notice until such time as the account is totally up to date*."

[7] Leggat owes arrear levies to the Association of over R 1million. This is because he refused to pay levies in respect of the two undeveloped properties. He is paying levies in respect of the residential property. There is

no dispute over this.[1] What is in dispute is whether because of this he should be considered a member in default and thus subject to the provisions of clause 9.7. The Association says he is, and hence his, and Ms Taylor's, right to access the property via the biometric system has been withdrawn and so has his access to the Estate's facilities, including, and most upsetting to him, the use of the golf course.

[8] Leggat says he cannot be considered a member in default. This is because he maintains the Association owes him an amount exceeding the arrear levies for breach of contract. When he bought two of the properties there was a pristine lake next to two of them. This lake has now dried up as the pump system no longer works. The lake, or what remains of it, has become infested by parasites. It is now as he describes it "*odorous and unsightly*". Leggat contends that the Association bears responsibility for this and must repair the damage. It has yet to do so. As a result, he has suffered damages because of the diminution to the value of the properties which, he contends, exceeds the outstanding levies on the two undeveloped properties. Thus, on his argument he was entitled to withhold the levy payments on those two properties until this is rectified.

[9] He says a previous manager of the Association acknowledged that the Association was responsible for repairing the pumping system and until they did so, Leggat and the Trust did not need to pay levies on the undeveloped properties The Association denies knowledge of this arrangement but that is not an issue for me to decide. What the implication is for Leggat in the present

[1] Perhaps to be more precise there is a minor dispute over the account but this it is common cause is not triggered clause 9.7.

matter is the assertion that he has prima facie right to enjoy his privileges because he is a member in good standing since he has been justified in not paying the levies.

[10] There is litigation on this issue pending in the High Court in Pretoria. The Association is suing him for the arrear levies. He is counterclaiming. But he argues it is not merely a counterclaim for damages, he also relies on the *exceptio non adempleti contractus*. Hence if he is for this reason not indebted to the Association for arrear levies, he is a member in good standing. This means he is entitled to the associated privileges of membership. Thus, he has established a *prima facie* right, albeit open to some doubt, thus meeting the first requirement entitling him to an interim interdict pending the outcome of this litigation.

[11] Before I consider this argument on the interdict any further, I must deal with two defences raised by the Association. The first is that Leggat failed to join the other members of the Association given that he was challenging a provision of the Association's constitution. Leggat's answer to this is that he is not challenging the relevant clause of the Association, only its implementation. For that reason, the rest of the members have no legal interest in the matter and do not need to be joined. I agree with this.

[12] The second argument is that Leggat should have proceeded in terms of the Community Schemes Ombud Services Act 9 of 2011 ("CSOS"). This legislation provides for the same remedies that he seeks. There was some

argument from Leggat as to whether CSOS had issued practice notes on this point. I will accept for present purposes that this may well be the case.

[13] The Association relies on a decision in the Western Cape High Court in *Heathrow Property Holdings No 3 CC and Others v Manhattan Place Body Corporate and Others* 2022 (1) SA 211 (WCC) where Sher AJ stated the following;

> "*But even if one were to hold that the applicants were entitled to approach the court for relief as parties whose rights could potentially be affected by the respondents' conduct in relation to rule 12, and whose rights were indeed affected by the installation of the new biometric security/access control system, the further issue which I have with the application is that it effectively seeks to bypass the dispute resolution mechanisms which have been established by the CSOS Act.*
>
> *"In this regard the respondents correctly contend that the issues which the applicants seek to have determined by this court fall squarely within the express jurisdiction of the CSOS Act. They point out that an adjudicator has wide powers in terms of ss 39(3)(c) and (d) of the Act to declare a 'governance provision' which regulates a scheme, ie a rule such as rule 12, to be invalid or unreasonable, and to issue an order directing the scheme to substitute it with an appropriate alternative provision."*
>
> (Emphasis provided)

[14] He went on to state more strongly that:

> *"In the result, I am of the view that where disputes pertaining to community schemes such as sectional title schemes fall within the ambit and purview of the CSOS Act, they are in the first instance to be referred to the Ombud for resolution in accordance with the conciliative and adjudicatory processes established by the Act, and a court is not only entitled to decline to entertain such matters as a forum of first instance, but may in fact also be obliged to do so, save in exceptional circumstances. Such matters will not be matters which are properly before the High Court, and on the strength of the principle which was endorsed in Standard Credit (and a number of courts thereafter, including the Constitutional Court in Agri Wire), it is accordingly entitled to decline to hear them, even if no abuse of process is involved. In this regard, as far as the High Court is concerned, the processes which have been provided for the resolution of disputes in terms of the CSOS Act are in my view tantamount to 'internal remedies' (to borrow a term from the Promotion of Administrative Justice Act), which must ordinarily first be exhausted before the High Court may be approached for relief."*

[15] I do not understand that this case is authority for the point that the High Court's jurisdiction is excluded; only that it should exercise a discretion as to whether to entertain such an application where CSOS exists as an alternative. This may be so. But in the present case the application has been brought urgently at a time of the year where the efficiency of alternative organs of state may be constrained. I consider that an applicant still has the right to

approach the High Court for relief albeit it may decline to do so. Moreover, in this case the applicants are operating at the periphery of the ambit of the CSOS. The rights sought to be exercised do not challenge either the rules or whether they have been exercised reasonably. It does not require the specialist expertise of CSOS. The invocation of common law remedies puts them in the centre of the common law jurisdiction of the courts and I accept that they are entitled to bring the matter in this forum.

[16] I now return to the subject of the golfing interdict. Having established a *prima facie* right to have his membership rights restored, the remaining requirements for interim relief can be dealt with briefly.

[17] Leggat's argument on irreparable harm, the lack of an alternative remedy and urgency are intertwined, and I deal with this later when I deal with urgency. The balance of convenience clearly favours him. There is no prejudice to the Association if he continues to play golf. He has paid his golfing fees. It is not suggested that the exercise of this right entails any great inconvenience or expense to the Association.

[18] I now digress to deal with the biometric access issue. Here Leggat does not rely on enforcing an interim interdict, instead he relies on spoliation. This might appear a surprising remedy given that Leggat has not been denied access to his property and he can still enter through the security-controlled entrance. However, there is existing case law on this precise point. In a well-reasoned decision in the matter of *Bill v Waterfall Estate Homeowners Association NPC and another* 2020 (6) SA 145 (GJ), Southwood AJ explains

why spoliation is an appropriate remedy for the deprival by an association of a member's biometric access.

> *"In the premises, none of the authorities relied on by the respondents nor the contentions made disturb my prima facie view, based on Nienaber and Scholtz, that the biometric access exercised by the applicant is an incident of the applicant's possession of the property and, thus, constitutes a possessory right which may be protected by the mandament".*

[19] As to why the remedy still applies notwithstanding that the member can still access the property Southwood AJ states:

> *"Accordingly, given that it is the particular method of access, in other words, biometric access linked to the property, which has been deactivated, the applicant has been dispossessed of this right. In these circumstances, it matters not, where this right is the subject-matter of the application, that he has an alternative method of accessing the Estate."*

[20] Based on the reasoning in the *Bill* case, which I have no reason to differ from, in the present circumstances of Leggat's case, he and Taylor have been deprived of the right to exercise a property right and they are entitled to rely on the spoliation remedy to restore their biometric access to the property.

[21] I now return to the issue of urgency, and the remaining requirements for an interim interdict: irreparable harm and lack of an alternative remedy. Understandably, the Association argued that asserting the right to play golf at

the Estate, and being denied the right to biometric access to the facility, when normal access is still available, are hardly issues that should occupy the time of the urgent courts, let alone during recess when other people seeking the courts indulgence face far more serious consequences.

[22] Leggat spent much time in his affidavit describing the humiliation he felt at having to use the visitors and not members entrance and why golfing elsewhere was not an alternative to golfing at Blair Athol. It is of course easy to parody these misfortunes as elitist fancies unworthy of urgent court intervention. I have some sympathy with this argument and a lack of sympathy for Leggat’s blushes if he has to access the Estate with the *hoi polloi* and play golf at some less prestigious course.

[23] However, this comparative sociology should not detract from a more compelling argument for urgency.

[24] First there was an issue that urgency was self-created. Leggat was warned in September that his rights would be taken away. However, nothing was done to action this until 4 December. It was only after that date that the physical denial was implemented, and he has acted reasonably expeditiously in proceeding since then. I do not consider that the urgency was self-[i]created.

[25] But the more important argument this case raises, relevant both to urgency and the remaining requirements for an interim interdict, is whether he can get recourse in the ordinary course. In the oft cited case of *Eastrock* the following test was formulated which is regularly followed in the courts.

> *"The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application."*[2]

[26] The rights that Leggat is being deprived of – biometric access and the golfing rights, are ongoing rights. Even if restored at some later stage the ongoing right to exercise them through the effluxion of time cannot be restored, financially or otherwise. Leggat does not need the money even if his injured dignity and alternative golf venue fees were compensated for financially in some later action. It is the ongoing enjoyment of those rights which is forever lost. That is the basis on which I considered this matter technically urgent and hence he has suffered an irreparable harm in the temporal sense. Later success will not restore the time-period during which he was deprived of the ongoing exercise of those rights.

[27] Ordinarily costs should follow the outcome. But I have decided not to give Leggat his costs. He could have made use of the CSOS facilities but chose not to do so. He has chosen to come to the court in recess, in one of its busiest weeks, just before the commencement of the festive period, when we

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[2] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011 paragraph 9.

are inundated with claims from people being evicted from their homes, facing deportation, and losing custody of their children. Leggat's claims, whilst I accept are subjectively important to him, meant that scarce court time was diverted to resolving the disputes of the privileged over their rights to be privileged, at the expense of those less fortunate who seek to vindicate rights which have a far more compelling public interest,

[28] As a measure of censure, I have deprived him of the right to claim costs.

ORDER:-

[29] In the result the following order is made:

1. The Respondent shall reinstate, within 12 hours of the granting of this order, the Applicants' access to the Blair Atholl Golfing and Equestrian Estate ("the Estate") using the Estate's Biometric Access system.

2. The Respondent shall allow the Applicants to enjoy free and undisturbed access to the Respondent's facilities at and on the Estate, in particular, the Club House with its related facilities and the Village Green restaurant.

3. Pending the final determination of the actions under case number 023373/2023 and 023421/2023 in the Gauteng Division, Pretoria:

3.1. The Respondent shall immediately reinstate the full membership rights and privileges of the First Applicant as member of the Blair Athol Golf Club ("the Club").

3.2. The Respondent is interdicted from preventing the First Applicant from playing golf on the Blair Atholl golf course (“the golf course”) on the ground that the First Applicant or the Leggatt-Taylor Family Trust has not paid levies allegedly due to the Respondent in its capacity as the administrator of the Estate.

3.3. The Respondent is interdicted from preventing, restricting or prohibiting (in any manner), on the ground that the First Applicant has not paid such levies, the First Applicant from making use of the facilities of the Club provided for golfing members of the Club.

3.4. The Respondent is directed forthwith to take all steps necessary to ensure the reinstatement of the First Applicant’s affiliation status with the South African Golf Association.

4. No order as to costs.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHNANNESBURG

Date of hearing: 20 December 2023

Date of Reasons: 27 December 2023

Appearances:

Counsel for the Applicant:	L Hollander
Instructed by.	Faber Goertz Ellis Austen Inc
Counsel for the Respondent:	SJ Mushet
Instructed by:	AJ Van Rensburg Incorporated

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