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

..... **...22/02/2024...**
SIGNATURE **DATE**

In the matter between:

STEPHEN LEGGATT **FIRST APPLICANT**

MARGARET ELIZABETH TAYLOR **SECOND APPLICANT**

and

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

JUDGMENT – LEAVE TO APPEAL

MANOIM J:

[1] This is an application for leave to appeal an order I made on 20 December 2023.[1] The applicant in the leave to appeal is a body corporate known as the

[1] I gave my order on that date in view of the urgency and gave my reasons on 27 December 2023.

Blair Athol Home Owners Association NPC. I will refer it from now as the ("Association"). The Association is the body charged with the administration of a residential Estate known as the Blair Athol Golf and Equestrian Estate ("Estate").

[2] The respondents in the leave to appeal were the applicants in the urgent application. The first respondent, Stephen Leggat, owns three properties on the Estate. Two are owned by a Trust of which he and the second respondent, 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. I will refer to the respondents from now on, when I refer to them collectively, as the residents, otherwise I will refer to the first respondent as ("Leggat").

[3] Leggat has an ongoing dispute with the Association in connection with the undeveloped properties. In brief he considers that the Association is liable to him for a large sum of money because it had failed to maintain a lake situated adjacent to the undeveloped properties. This dispute is now pending before the courts.

[4] Its relevance to the current case is that Leggat has refused to pay certain of the levies on the properties because he considers he is owed more by the Association then he owes to it. The Association does not share this view and in any event considers, despite this, he must pay his levies. Over the years the dispute has festered, and led in December of 2023, to the Association terminating Leggat and Taylor's biometric access to the Estate, and Leggat's

golfing rights at what is considered the highly prestigious golf course on the Estate and use of related facilities including a restaurant known as the Village Green.

[5] Leggat brought an urgent application for interim relief to restore these rights. I granted the order. The Association now appeals not whole order but two of the paragraphs of the order. These are:

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.[2]

[6] The residents' relief is premised on the application of the *mandament van spolie*. They assert the right to biometric access to the Estate is an incident of their possession of the property which they have been deprived of by the Association resorting to self-help. The residents are still able to access the Estate but must do so through the visitors' entrance and have to clear through security. Unlike biometric access, it is time consuming, and in the opinion of Leggat, an affront to his dignity as a resident.

[7] The Association contends that biometric access is not an element of possession, but a contractual issue regulated by its Memorandum of

[2] I was advised at the hearing of the leave to appeal that clause 3 of the order which is an interim order relating to the golf club and usage is not subject to the leave to appeal.

Incorporation which has a provision that if a member is in arrear with levies the Association, may remove its right to biometric access.[3] The same regime applied to the right to enjoy access to the golfing facility.

[8] Both parties agree on two issues. If the Association had entirely removed the right of access to the residents this would have amounted to unlawful spoliation. Second, if the right was purely contractual then the *mandament* could not be used to enforce such a right.

[9] What is not in agreement is the characterisation of the biometric access right when the right to enter by other means is still retained. This issue has been before the courts on several occasions in various divisions with courts coming to different conclusions. The most recent decision in this division is the one I followed. This is *Bill'*s case where Southwood AJ held that the right to biometric access was an incident of possession and therefore could be the subject of a spoliation action.[4]

[10] I found the reasoning in *Bill* persuasive. It is one of the more recent decisions on the issue and it engages with previous decisions. Moreover, Southwood AJ engages fully with the question of why the right is not a mere personal right but an incident of possession. For instance, she states:

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[3] Clause 9.7 of the MOI 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*."

[4] *Bill v Waterfall Estate Homeowners Association NPC and Another* 2020 (6) SA 145 (GJ)

> "*Unlike in Scholtz where the holders of water rights entered into agreements specifically for the conveyance of water, in terms of these rights, for a fee, the applicant did not take assignment of the lease and did not agree to pay levies in relation to the property in order to be able to access the Estate via biometric access or to have his contractors access the estate. The applicant, as a lessee of a property within the Estate, would be entitled to enter and exit the Estate freely subject to any limitations imposed by the MOI and/or the rules for security reasons. Biometric access and access cards give effect to such unrestricted access subject to retaining control for security purposes. Such access is clearly linked to possession of the property. The applicant obtained quasi-possessio of these rights of access by exercising such access*."[5]

[11] Does it matter then that entrance to the Estate is still possible by other means? Southwood AJ answered this in the negative. She reasoned that:

> *"The applicant's right to biometric access to the Estate which is linked to the property is an incident of possession of the property, not the Estate…. 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*

[5] Ibid, paragraph 76.

application, that he has an alternative method of accessing the Estate.

[12] The approach of Southwood AJ on this aspect differs from that taken in an earlier decision in this division by Nicholls J (as she was then) in a case dealing with the same Association as in the present matter. In *Lenz v Blair Atholl,* Nicolls J held it did matter that there was an alternative method for accessing the estate.[6] She reasoned that:

> *"Inherent in the mandament van spolie is that the deprivation is without consent. In this matter the applicants have contractually agreed that where levies are owing, biometric access be invalidated until all levies are paid up. The case they contend for is not access to their homes (which has not been denied them) but rather it is the of biometric access which they seek. In effect what they seek to do is replace one means of restricted access with another which is marginally more convenient. It is exactly this right of access that they contractually agreed to forfeit if their levies went into arrears when they became members of the estate through the ownership and/or residency in the estate. Therefore the respondent's resort to the terms of the contract in order to limit the biometric access cannot be characterised as the unlawful deprivation of possession or control.*[7]

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[6] *Lenz v Blair Atholl Homeowners Association NPC* GJ 2016/36336, an unreported judgment, dated 11 April 2016.
[7] *Lenz*, ibid, at paragraph 28

[13] Although Southwood AJ considered *Lenz* and sought to distinguish it on the facts, I accept the two decisions are in conflict. But the conflict is not confined to judgments in this division. I have been referred to two decisions in other provinces where the conflict in approaches is manifest.

[14] In *Singh* a decision which was later decided on appeal on other points, Topping AJ follows the same line of reasoning later followed in *Bill*.[8] He in turn followed a decision in *Fisher v Body Corporate Misty Bay*.[9] Yet in the same division in Kwa Zulu Natal, a full court took the opposite view in *McGregor v Selborne Park Body Corporate and Others*.[10]

[15] I do not see much point in analysing each one these differing judgments. What I seek to demonstrate is that there is up until now no judicial consensus on this issue. What is more is that it is apparent from these cases that these conflicts are occurring regularly in community schemes and that certainty on this point is necessary whichever way it is to be decided. It raises questions of the extent of property rights as well as the protection of the rule of law from the point of view of residents. From the point of view of Associations or Bodies Corporate, the issue is one of whether they must resort to court to enforce their MOI's or rules against defaulting residents, or whether they can act without a court order where there has been prior consent, as in the present MOI of the Association.

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[8] *Singh and Another v Mount Edgecombe Country Club Estate Management Association (RF) NPC AND Others* 2016 (5) SA 134 (KZD).
[9] 2012(4) SA 215 (GNP)
[10] AR224/2020) [2021] ZAKZPHC 87 (8 October 2021).

[16] For this reason, I consider the appeal raises issues of conflicting judgements on the issue and therefore an appeal is justified in terms of section 17(1)(a)(ii) of the Superior Courts Act, 2013. Given that the conflict also relates to conflicts in different divisions in several decisions, not just this division, it would be appropriate for the appeal to be heard by the Supreme Court of Appeal.

[17] A second issue raised in the case was whether the dispute should have been heard by the court or been dealt with by the Community Schemes Ombud Service in terms of the Community Schemes Ombud Service Act, 9 of 2011. ("CSOS")

[18] I do not know if the court on appeal needs to grapple with this issue as well, since the two approaches by the Association are in tension. It wants the SCA to settle the law on spoliation but at the same time seems to consider that it is a matter for an administrative body to decide. I deal with this issue nevertheless for the sake of completeness.

[19] There are two decisions in the Western Cape that deal with this point. In the first Binns-Ward J outlined the objectives of CSOS and went on to say:

> "*It requires little insight to appreciate that those commendable policy considerations would be liable to be undermined if the courts were indiscriminately to entertain and dispose of matters that should rather have been brought under the Ombud Act. Whilst judges and magistrates may not have the power to refuse to hear such cases, they should, in my view, nonetheless use*

> *their judicial discretion in respect of costs to discourage the inappropriate resort to the courts in respect of matters that could, and more appropriately should, have been taken to the Community Schemes Ombud Service.*"[11]

[20] This sentiment was taken a further step in another case from the Western Cape where Sher AJ went on to suggest a test that courts should only hear such cases if exceptional circumstance exist:

> "'*In the result, I am of the view that where disputes pertaining to community schemes such as sectional title schemes fall within the ambit . . . 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 process established by the Act, and the court is not only entitled to decline to entertain such matters as a forum of first instance, but may in fact 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 principle which was endorsed in Standard Credit (and a number of courts thereafter including the Constitutional Court in Agriwire), it is accordingly entitled to decline to hear them, even if no abuse of process is involved. In this, 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*

[11] *Coral Island Body Corporate v Hoge 2019* (5) SA 158 (WCC) paragraph 10.

> *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. What will constitute exceptional circumstances entitling a litigant to approach the High Court directly will have to be determined on a case-by-case basis.*"[12]

[21] There is nothing in CSOS which excludes the High Court's jurisdiction only to exceptional circumstances, so this test goes too far. Much of what the Ombudsman should engage on is usefully set out in section 39 of CSOS which deals with prayers for relief. Whilst courts should show a deference to respecting the jurisdiction of the Ombud, for the reasons Binns-Ward gives in *Coral Island*, applying a test of exceptional circumstances before a court should entertain an application, goes too far.

[22] In any even in the present case the issue in dispute – the extent of the right to spoliate - is something for courts to decide as it deals with issues of both the common law and rule of law. Doubtless ombuds would welcome the courts giving clarity on these points as much as anyone else.

[23] Finally, I deal with the issue of condonation. Leave was sought albeit three days late. Leave was not opposed by the residents, and I granted condonation.

ORDER:-

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

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[12] *Heathrow Property Holdings v Manhattan Place Body Corporate* 2022 (1) SA 211 (WCC), Paragraph 61

a. Condonation is granted for the late filing of leave to appeal.

b. Leave to appeal to the Supreme Court of Appeal, is granted in respect of paragraphs 1 and 2 of the order dated 20 December 2023(Judgment on 27 December 2023).

c. Costs are to be costs in the appeal.

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N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHNANNESBURG

Date of hearing: 21 February 2024

Date of Reasons: 22 February 2024

Appearances:

Counsel for the Applicant (Respondent in the leave to appeal):	L Hollander
Instructed by.	Faber Goertz Ellis Austen Inc
Counsel for the Respondent (Applicant in the leave to appeal):	SJ Mushet
Instructed by:	AJ Van Rensburg Incorporated