HEATHROW PROPERTY HOLDINGS NO 3 CC AND OTHERS v MANHATTAN PLACE BODY CORPORATE AND OTHERS 2022 (1) SA 211 (WCC)

Citation	2022 (1) SA 211 (WCC)
Case No	7235/2017
Court	Western Cape Division, Cape Town
Judge	Sher J
Heard	June 1, 2021
Judgment	June 1, 2021
Counsel	*S Fergus* for the applicants. *S Olivier SC* for the respondents.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Housing — Consumer protection — Community schemes ombud — Dispute falling within ambit of Act — Whether High Court may hear matter as forum of first instance — Community Schemes Ombud Services Act 9 of 2011.

Headnote : Kopnota

Applicants were owners of sections in a sectional title scheme and first respondent was the body corporate (see [2]). The latter had adopted a conduct rule pertaining to short term rentals, and later the trustees had resolved and effected a replacement of the access control system (see [7] and [16]). These actions caused applicants to bring an urgent application to the High Court for declarators on the application of the conduct rule as well as in respect of access control (see [1], [28] and [33]).

Here the court dismissed the application on the basis that it was not urgent, indeed was an abuse of its process (see [20] and [26]); and that it was the wrong forum of first instance to adjudicate the dispute, the appropriate forum being that established under the Community Schemes Ombud Services Act 9 of 2011 for resolution of disputes associated with community schemes (see [29]).

Coming to this conclusion it considered that the law relating to a concurrency of jurisdiction between a magistrates' court and High Court was inapplicable to the relationship of the Ombud and a High Court in that the latter pair's jurisdictions were substantially non-concurrent (see [47]); properly interpreted, the legislature's intention with respect to the Act was that the Ombud should be the primary forum for the adjudication of sectional title scheme disputes, with the High Court retaining an appellate and review jurisdiction (see [56]); authority provided that a specialist adjudicative body should at first instance hear a dispute even where a court had jurisdiction to do so (see [57]); and allowing a court to be approached at the outset would undermine the process provided by the legislature and could eventuate in forum shopping (see [59]).

Thus, a dispute that fell within the ambit of the Act was at first instance to be referred to the Ombud, and a court was obliged to decline to hear it, save in exceptional circumstances (see [61]). What the exceptional circumstances would be that would allow a direct approach to the High Court would have to be determined on a case by case basis (see [62]). But such circumstances would not be convenience or alleged inefficiency or delay in the process provided by the Ombud Service (see [63]).

Cases cited

Absa Bank Ltd v Myburgh 2009 (3) SA 340 (T): considered

Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission, and Others 2013 (5) SA 484 (SCA) ([2012] 4 All SA 365; [2012] ZASCA 134): referred to

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15): dictum in para [45] applied

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Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC) ((2008) 29 *ILJ* 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97; [2007] ZACC 23): referred to

Competition Commission of SA v Telkom SA Ltd [2010] 2 All SA 433 (SCA) ([2009] ZASCA 155): referred to

Coral Island Body Corporate v Hoge 2019 (5) SA 158 (WCC): considered

FirstRand Bank Ltd v Maleke and Three Similar Cases 2010 (1) SA 143 (GSJ): referred to

Gauteng Gambling Board v Silverstar Development Ltd and Others 2005 (4) SA 67 (SCA): referred to

Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC) (2010 (1) BCLR 35; [2009] 12 BLLR 1145; [2009] ZACC 26): referred to

Goldberg v Goldberg 1938 WLD 83: referred to

Hoffmann v South African Airways 2001 (1) SA 1 (CC) (2000 (11) BCLR 1211; (2000) 21 *ILJ* 2357; [2000] 12 BLLR 1365; [2000] ZACC 17): referred to

Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC) (2009 (12) BCLR 1192; [2009] ZACC 23): referred to

Marth NO v Collier and Another [1996] 3 All SA 506 (C): referred to

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13): dictum in para [18] applied

Nedbank Ltd v Gqirana NO and Another, and Similar Matters 2019 (6) SA 139 (ECG) ([2019] 4 All SA 211): referred to

Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another 2008 (4) SA 276 (T): referred to

Nedbank Ltd v Thobejane and Similar Matters 2019 (1) SA 594 (GP) ([2018] 4 All SA 694): referred to

Standard Credit Corporation Ltd v Bester and Others 1987 (1) SA 812 (W): considered

Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another 2020 (1) SA 651 (GJ): referred to

Tikley and Others v Johannes NO and Others 1963 (2) SA 588 (T): referred to

Trustees, Avenues Body Corporate v Shmaryahu and Another 2018 (4) SA 566 (WCC): referred to.

Legislation cited

The Community Schemes Ombud Services Act 9 of 2011: see *Juta's Statutes of South Africa 2020/21* vol 6 at 4-163.

Case Information

S Fergus for the applicants.

S Olivier SC for the respondents.

An application for a declarator concerning a conduct rule adopted by the body corporate of a sectional title scheme.

Judgment

Sher J:

[1] I have before me an application which was launched as a matter of urgency in October last year, in which certain declaratory relief is principally sought in relation to the application of a conduct rule which was adopted by a body corporate in a sectional title scheme, and the installation by it of a biometric security/access control system. It raises

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important questions about the jurisdiction which has been afforded to courts and adjudicators in terms of the Community Schemes Ombud Services Act [1] ('the CSOS Act'), which is one of two statutes [2] which were introduced in 2011 in relation to sectional title schemes, following a major legislative overhaul of the regulatory scheme which had been introduced some 25 years earlier by means of the Sectional Titles Act 95 of 1986.

The facts

[2] The applicants are the owners of three loft apartments in Manhattan Place, a ten-storey mixed-use sectional title scheme which was established in January 1998 and which is housed in a building located at the junction of Buitengracht and Bree streets in the centre of Cape Town.

[3] The scheme's sectional title plan provides for a hotel which is operated from the 2nd floor (which houses the reception, bar and restaurant); the 5th floor (conference centre, restaurant and administrative offices); the 6th to 8th floors (hotel suites); office and commercial units (on the 3rd and 4th floors); and 37 residential units in the form of loft apartments (on the 9th and 10th floors). Some 80% of the total units in the scheme are owned by a trust. The hotel is accessed via an entrance on Bree Street and the owners of the commercial and loft units access their properties via an entrance in Buitengracht Street. Ten of the loft units are in a rental pool which is run by the hotel.

[4] The units which are owned by the applicants are not included in this arrangement. They were purchased in terms of deeds of sale which expressly acknowledged that whilst certain residential units would be sold subject to the condition that the purchasers thereof would offer them for use to the hotel in terms of a rental pool agreement that they would be required to enter into, the remaining sections in the residential, office and commercial areas were to be 'exclusively' used by the purchasers thereof as residential apartments, offices or commercial enterprises. Owners of such non-rental-pool residential units were-however, entitled to enter into individual rentals with the hotel on an ad hoc basis.

[5] Thus, as the respondents, being the body corporate and its trustees, point out, in the main, the scheme envisaged that residential loft units would predominantly not be subjected to short-term rental use by outside parties and would primarily be occupied and used by their purchasers or their long-term tenants.

[6] Short-term rental use was primarily intended to occur in respect of the 10 hotel suite units which fell into the rental pool agreement and which constitute roughly 25% of the total number of residential units, and such occasional use as might occur by the hotel on an ad hoc basis, from time to time, in respect of the remaining units.

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[7] On 8 December 2003 the body corporate adopted a conduct rule, rule 12, as part of its management and conduct rules, [3] which provides that an owner of a section who leases it out or in any other manner surrenders possession of it to a 3rd party is required to provide particulars thereof to the trustees or managing agents. In addition, the rule provides that a section may not be leased, nor may possession of it otherwise be surrendered, for a period of less than six months, without the prior written consent of the trustees, which consent shall not be unreasonably withheld. Thus, the introduction of the rule sought to acknowledge the right which owners had to let their units, but sought to regulate the terms thereof in respect of short-term rentals for periods of less than six months.

[8] According to the respondents, the rule was adopted with a view to addressing security issues pursuant to an increase in short-term rentals of residential units which began to occur outside of the rental pool agreement, and associated problems which were experienced with such rentals.

[9] In 2017 a number of dissatisfied non-rental pool owners of loft units (which did not include the applicants) challenged the ambit and application of the rule by referring a dispute in this regard to the statutory Ombud, which is provided for by the CSOS Act. The complainants sought to set aside the rule on the basis that it was unreasonable, and they also sought a determination setting aside certain penalties which were levied by the trustees as fines (in terms of a related rule which had been adopted), [4] in instances where rule 12 had not been complied with.

[10] On 29 March 2018 the adjudicator held in favour of the applicants in respect of the imposition of the penalties, but against them in respect of the principal relief which was sought in respect of rule 12. He pointed out with reference to a number of reported decisions that inasmuch as the purpose of conduct rules in a sectional title scheme, which are agreed upon and adopted by a majority of members, is to regulate and promote appropriate neighbourly interaction amongst residents, courts or entities which are required to adjudicate upon their validity should be wary of rewriting them at the instance of a minority who adopt the position that they are unfair and not in their interest.

[11] The adjudicator held [5] that when determining whether a conduct rule was reasonable one must consider whether it is a necessary and sensible rule which is aimed at advancing the interests of a sectional title community by preserving the quality of life of residents in the scheme concerned and the value of their investments therein.

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[12] Having regard for the evidence which was put before him by the owners and the trustees and bearing in mind the unique mixed-use structure in terms of which the scheme operated, and the fact that the applicants had purchased their units well knowing of the intended limitations on their rental use, he held that the provisions of rule 12 were reasonable, as the rule served a legitimate purpose and was not unfair or arbitrary.

[13] As I have already pointed out, the applicants in this matter purchased their units on the basis that their right to let them on a short-term basis was limited. This much is evident both from the terms of the deeds of sale which they entered into and the manner in which the sectional title scheme operates in terms of the sectional title plan and the rental pool agreement. Notwithstanding this, since their acquisition the units which are owned by 1st and 2nd applicants (which are close corporations which are in the business of short-term holiday accommodation) have been let on a short-term basis, ie for less than six months at a time, and often for a few nights only. Similarly, it appears that the unit which is jointly owned by 3rd and 4th applicants, who currently reside in Spain, was acquired and is used for the purpose of generating short-term rental income.

[14] The applicants consider the provisions of rule 12 and its implementation to be unfair and an unjustified fetter on their rights of use of their units. They complain that they are being discriminated against unfairly vis-à-vis the owners of other residential units, which fall within the hotel rental pool agreement, and who are thus not subject to it.

[15] Prior to launching this application 1st and 2nd applicants sought to free themselves from the strictures of rule 12 by launching an audacious application in the Cape Town Magistrates' Court in July 2019 in terms of which they sought an order for the removal of the current trustees and the appointment in their place of an administrator to the body corporate. It is apparent from the judgment of the magistrate whereby the application was dismissed with costs on 13 December 2019, that, just as in this matter, it was similarly based on a contention that the rule was applied unfairly by the trustees and was unreasonable. Not surprisingly, given that trustees can only be replaced in the event of maladministration, the application failed. No appeal was lodged against the magistrate's ruling.

[16] At a meeting which was held on 11 November 2019 the trustees resolved to upgrade the existing tag-based security/access control system which regulated access to the commercial and residential units, and which had been in place for some 22 years, with a biometric fingerprint-based one, as a result of security issues. In this regard it appears that there had allegedly been a number of instances where outsiders had been able to obtain unauthorised access to the building and a murder had occurred in one of the units.

[17] On 2 March 2020, 3rd applicant lodged a complaint with the Ombud in regard to the introduction of the biometric security/access control system, on the basis that, inasmuch as it was not a necessary but

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a luxury improvement, the trustees required the unanimous consent of all the owners in the scheme and were not entitled to adopt a resolution to install the new system by way of a simple majority.

[18] However, on 19 October 2020, whilst the complaint was still awaiting conciliation, and some 10 days after this application had been launched, she withdrew it. No explanation was provided for why she did so and why she did not allow the Ombud to rule on it. Clearly, by lodging the complaint with the Ombud the applicant was prima facie of the view that it had the necessary jurisdiction and authority to pronounce on it.

An evaluation

[19] There are a number of reasons why the application must fail. In the first place, in my view it constitutes an egregious abuse of the process of this court. In the second place, I am of the view that an application such as this is one that should be dealt with in terms of the dispute resolution procedures which have been established by the CSOS Act, and not by a court.

(i) Abuse of process: lack of urgency and standing

[20] In this regard the first difficulty which I have is that the application was brought as a matter of urgency, in circumstances which were clearly not urgent. In terms of the rules of court an applicant is required in an application which is brought as a matter of urgency to pertinently and expressly set out the grounds which justify it not following the ordinary rules and process, and to provide adequate and cogent reasons that it cannot be expected to await a hearing in due course.

[21] In their founding affidavit the applicants averred that ever since November 2017 (some three years before the application was launched), the body corporate has been implementing the rule in a manner which amounts to a blanket prohibition on short-term letting in respect of residential units which do not fall within the rental pool. They referred in this regard to a dispute which arose between the owner of apartment 1007, one Alon Sachs, who is not a party to the application, after his request for permission to let his unit via Air BnB was turned down by the trustees in December 2017, and the subsequent referral of a similar dispute to the Ombud by a group of owners in which they challenged rule 12 on the basis that it was unreasonable, which culminated in the award by the adjudicator in March 2018, and similar alleged refusals which occurred in respect of other owners of loft apartments in June 2018, when they requested permission to short-let.

[22] The applicants pointed out that on 19 February 2020 the managing agents addressed a letter to the owners of units in the scheme in which they indicated that, although applications for short-term lets for a period of less than six months would continue to be considered by the trustees, as from 25 February 2020 applications for daily lets would not be considered, as these had allegedly resulted in a breach of access control

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measures with an increased security risk and an increased administrative burden and complaints. (I mention, in passing, that it appears that over the last four years numerous complaints in respect of noise and other disturbances were received by the body corporate in regard to a number of units that were being short-let, including unit 1001 in particular, which is owned by 2nd applicant).

[23] The managing agents accordingly directed that applications for short-term lets were to be submitted to the trustees at least 30 days in advance. The applicants have not given any explanation for why, having received the letter from the managing agents in February 2020, they did not approach the court until October 2020, some eight months later, and then did so on an urgent basis.

[24] As has previously been pointed out, the applicants state that they have been consistently letting out their units on a short-term basis for a number of years and in their founding affidavit they have not referred to a single instance where any of them have unjustifiably been refused permission to let their units on a short-term basis since February 2020.

[25] All that the applicants put forward in relation to urgency was that with the easing of the Covid 19 lockdown regulations in October 2020 the matter took on a 'degree of urgency' as the summer season was approaching and they wanted to 'obtain clarity' in respect of the relief they sought, as soon as possible, so that they could generate income again from short-term rentals. They contended that it was in the interests of the economy and the country as a whole that they should be able to become economically active and commercially viable again, as soon as possible. However, they acknowledged that their ability to capitalise on the forthcoming summer season was in any event going to be constrained by the fact that there was unlikely to be any significant level of international tourism to Cape Town for the foreseeable future, while the pandemic was raging.

[26] The respondents point out, as a further indication of the applicants' abuse of the process, that the additional relief which the applicants seek, viz an order declaring that the replacement by the trustees of the former electronic tag-based security/access control system with a biometric one, was an unnecessary improvement which was allegedly effected without the requisite authority and that it should consequently be removed and the old one restored in its place, is relief which could and should properly have been sought already at the end of 2019, considering that the resolution which authorised the acquisition of a new system was adopted by the trustees on 11 November of that year and the new system was installed shortly thereafter. Although the applicants sent the respondents a letter in December 2019 demanding that the new security/access control system should be removed, failing which they threatened to approach the High Court, they did not do so, and have similarly not given any explanation for this, nor have they even attempted to provide an explanation for why they approached this court for relief in this regard on an urgent basis a year later.

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[27] In the circumstances no basis existed for the applicants to bypass the ordinary rules and processes of this court and to force the application before the court as a matter of urgency. Ordinarily, these circumstances would at the very least have resulted in the application being struck from the roll with a punitive order for costs, as a mark of the court's displeasure. The application was, however, not thrown out for lack of urgency when it first came before the duty judge, who adjured the parties to talk to one another and subsequently granted an interim order by agreement, which afforded the applicants some interim relief pending the outcome of the application. Thus, the applicants contend that in the circumstances the application must be heard as any point that might have been taken in regard to lack of urgency is moot.

[28] Even if this is so, and as I have previously pointed out, in their papers the applicants did not set out any instances where they were unjustifiably refused permission to let their units on a short-term basis since February 2020. Consequently, in my view they had no standing to bring an application in this regard, even on the usual basis, let alone on an urgent basis, and for this further reason alone the application is an abuse and cannot be entertained. In essence, what the applicants have sought to do is to obtain a ruling in advance from the court, which could be used against any possible future refusal of a request by them to let their apartments on a short-term basis. In my view, inasmuch as the grant of a declarator is a matter which falls within the discretion of this court, these circumstances compel the refusal thereof. Courts are not to be used for the purpose of obtaining advance relief which is not required by a party at the time, in circumstances where their rights have not been affected and no proper case has been made out of any imminent threat of harm to or breach of their rights, were such relief not to be granted.

(ii) Bypassing the dispute-resolution mechanisms in the CSOS Act

[29] 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.

[30] 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.

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[31] As the definition of what constitutes a 'governance provision' [6] includes not only a sectional title scheme's constitution and its rules and regulations, but also any 'terms, conditions or other provisions' (sic) which serve to control the 'administration or occupation', not only of a scheme's common areas but its 'private' areas as well, the additional limitations which were placed on the short-term letting of residential units by the trustees, in their letter to the owners in February 2020, would arguably also be subject to adjudication in terms of the Act.

[32] Similarly, an adjudicator has the power in terms of ss 39(4)*(c)*, *(d)* and *(e)* of the Act to issue an order declaring that any resolution which was passed by the trustees (such as that which is challenged in this matter in relation to the adoption of a new security/access control system, as well as any resolution which was passed in relation to the implementation and application of rule 12) is void or invalid, and that it unreasonably interferes with the rights of individual owners within a scheme.

[33] The applicants concede that the relief which they seek in relation to the biometric security/access control system is relief which could be obtained from an adjudicator in terms of these provisions of the Act. They contend, however, that the general declaratory relief which is sought in relation to the interpretation and application of rule 12 by the body corporate does not fall within the statutory powers which are afforded to an adjudicator in terms of s 39, and only this court is empowered to grant it.

[34] In the alternative, they contend that inasmuch as the declaratory relief which could be granted in terms of ss 39(3) and (4) could be obtained either from a CSOS adjudicator or this court in the exercise of its concurrent jurisdiction, they were at liberty either to approach the Ombud or to approach the court for it, and the court cannot refuse to entertain the application by declining to exercise its jurisdiction. Relying on comments which were made in this regard by Binns-Ward J in *Coral Island*[7] they contend that all that the court can and should do, in the event that it is of the view that the application should more properly have been brought before the Ombud, is to make an appropriate order in relation to the costs of the application, ie an order either disallowing them their costs in the event that they are successful or mulcting them in some way in regard thereto.

[35] This court has previously pointed out [8] that the object of the CSOS Act is to provide a mechanism for the expeditious, informal and cost-effective resolution of disputes between owners of units in a sectional title scheme and its administrators via an Ombud, who has been given wide inquisitorial powers whereby such disputes can be resolved as informally and cheaply as possible by means of qualified

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conciliators and adjudicators, without the need for legal representation, save in certain limited circumstances.

[36] In *Coral Island*[9] Binns-Ward J warned that the compelling constitutional and social policy considerations which informed the introduction of the Act, including the promotion of quick and affordable access to justice to those who live in sectional title schemes who are not easily able to afford to litigate in the courts, and the social utility to be achieved by the provision of a relatively cheap and informal dispute-resolution mechanism, were liable to be undermined if courts were to indiscriminately entertain matters that should rather be dealt with in terms of the processes which have been established by the Act. However, and with reference to the decision in *Standard Credit*, [10] he expressed the view en passant that insofar as judges and magistrates may not have the power to refuse to hear such matters, they should use their judicial discretion in respect of costs to discourage any inappropriate resort to the courts in relation to cases that should more appropriately have been taken to the Community Scheme Ombud Service.

[37] These remarks must be seen in the context of the facts in *Coral Island*, where, somewhat unusually, it was the body corporate which proceeded to court, not the owner of a unit in the sectional title scheme concerned. It sought an order declaring that the owner had made certain unauthorised plumbing alterations to piping from a geyser which had been installed in her garage and was utilising the garage for a purpose other than that for which it was designated in terms of the sectional plan, [11] and should consequently be directed to replace the piping with the same kind of piping as that which had been used throughout the scheme. Shortly before the matter was to be heard the respondent made an offer of settlement, which was accepted, in which she conceded that the applicant was entitled to the relief which was

sought, save for costs. In this regard she maintained that costs should not be awarded against her because the body corporate should have sought to resolve the dispute in terms of the procedures provided for in the CSOS Act and not by way of an application to court. The court agreed that it had been inappropriate for the matter to have been brought before it rather than before the Community Schemes Ombud but in the light of the settlement which had been arrived at it granted the relief sought, and ordered that each party should bear its own costs.

[38] In the circumstances, the issue of whether the court was entitled, as a matter of law, to decline to hear the matter was not one which pertinently arose for decision and the comments which were made in this

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regard were obiter, and the reference to the decision in *Standard Credit* should be seen in that light.

[39] *Standard Credit* is one in a long line of cases which have wrestled with the perennial question of whether a High Court is entitled to refuse to exercise its concurrent jurisdiction, in matters where the magistrates' court would ordinarily have jurisdiction. Most, if not all, of these cases concerned monetary claims in instances where loans were advanced in terms of credit agreements.

[40] In *Standard Credit* the plaintiff had opted to proceed in the High Court because it contended that the magistrates' court's rolls were congested and it was more convenient and expeditious for it to do so there. The High Court held that inasmuch as it had concurrent statutory jurisdiction with the magistrates' court over all persons residing, and all causes of action arising, within its area of jurisdiction, as dominus litis the plaintiff had a choice to proceed in either forum, and the High Court was therefore bound to hear all matters that were properly before it in instances where the plaintiff had elected to proceed in the High Court not for any improper purpose or motive. However, on the strength of the dictum of Schreiner J in *Goldberg*[12] it held that in order to discourage litigants from suing out of the High Court instead of the magistrates' court, where that would have been the more appropriate forum, an appropriate costs order should be made against them, ie they should be disallowed their costs or should be ordered to pay any additional costs which may have been incurred by reason of the matter having been brought in the High Court.

[41] Importantly, however, it also reaffirmed the long-standing principle enunciated in *Goldberg*, [13] that in the exercise of its inherent power to regulate its own proceedings the High Court may decline to hear a matter which constitutes an abuse of process, which would include instances where the High Court's process has been used for a purpose for which it was not intended or designed, to the potential prejudice of the other party. [14]

[42] In 2009, some 22 years after the decision in *Standard Credit*, the issue came up before the same division of the High Court again, in *Absa Bank Ltd v Myburgh*.[15] It held that issuing process out of the High Court in respect of a debt which could be recovered in the magistrates' court went against the purpose of the National Credit Act [16] and any consent which was obtained from a debtor to have such a matter heard in the

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High Court was illegal. Although the decision was subsequently overruled by a full bench in *Mateman*, [17] a year later a single judge of the same division expressed the view in *Maleke*[18] that unless 'difficult' principles of law or fact required that a matter which fell within the jurisdiction of the magistrates' court should be heard in the High Court, it had an unfettered discretion to decline to hear it.

[43] In 2018 another full bench of the selfsame division held in *Thobejane*[19] that it would indeed constitute an abuse of the process of the High Court to allow matters which could be decided in the magistrates' court to be heard in the High Court, simply because it had concurrent jurisdiction, unless the court granted leave to do so, and only using costs orders to discourage this practice would not promote or give due cognisance to the constitutional imperative of affording access to justice to impecunious litigants. It was of the view that the notion that a plaintiff was dominus litis and could therefore choose which of two available forums best suited it, was outdated, and did not have regard to the deep-seated inequalities in our society. [20]

[44] In the most recent decision on point, a full bench of the Eastern Cape Division held in *Gqirana*[21] that *Thobejane* went too far and that in circumstances where there was a concurrency of jurisdiction the High Court was not entitled to refuse to hear a matter which was properly before it and which could have been heard in the magistrates' court, unless there was an abuse of process, which was something which had to be determined on a case-by-case basis, and not on the basis of a blanket rule to this effect. In doing so it followed the line adopted in *Standard Credit*, which was referred to by the Constitutional Court in 2013 in *Agriwire*. [22]

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[45] However, that said, it also held that, given that the NCA was an Act which was intended to render assistance and protection to persons who were financially disadvantaged (to this end the jurisdiction of the magistrates' court had been extended to all matters arising from credit agreements, irrespective of the monetary value of the claim concerned), and in order to promote access to justice in terms of s 34 of the Constitution, the magistrates' court was to be the court of 'first adjudication' in respect of all NCA matters, unless there were 'unusual or extraordinary' factual or legal issues involved in a particular matter which in the opinion of the High Court warranted it being heard by it. In this regard it held [23] that 'insufficiency' (presumably this was a typographical error and should read 'inefficiency') and delays in the processes of the magistrates' court would not constitute such circumstances.

[46] In the absence of a definitive ruling from the Supreme Court of Appeal or the Constitutional Court, [24] the final word on the issue of the ambit and limits of concurrent jurisdictions has yet to be spoken.

[47] To my mind, however, I am not bound by the jurisprudence which has emanated from the cases to which I have referred in this regard and they are distinguishable because the jurisdiction of this court is in substantial respects not concurrent with that which is afforded to adjudicators in terms of the CSOS Act, and in many instances an adjudicator has powers in terms of the Act which this court does not have, or which exceed those which it has.

[48] Thus, in terms of ss 39(1) – (7) of the Act an adjudicator has a number of express statutory powers in respect of financial, 'behavioural', governance, management, regulatory and other issues pertaining to a sectional title scheme, which a court does not. In this regard, and by way of example, in respect of financial issues an adjudicator has the power to make orders (i) requiring a scheme to take out insurance or to increase the amount thereof; [25] or (ii) to take action under an insurance policy to recover an amount; [26] or (iii) to declare that a contribution which was levied on owners is 'unreasonable' and that it be adjusted to a 'reasonable' amount, [27] and (iv) may even grant an order requiring a tenant to pay over the rental which is payable under a lease agreement to the body corporate and not to his landlord, until an amount which is due by the landlord to the body corporate has been settled. [28]

[49] Similarly, in regard to governance issues an adjudicator has the power to make orders not only declaring a governance provision to be

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invalid or 'unreasonable', but directing a scheme to amend or substitute it with another provision. [29] And in regard to a resolution which has been passed an adjudicator has the power not only to declare that it is void for want of compliance with the formal requirements necessary, but may also do so on the grounds that it 'unreasonably interferes' with the rights of an owner or occupier, or a group of owners or occupiers, [30] and may even make an order declaring that because a resolution was not passed as a result of 'unreasonable' opposition to it, it should be given

effect to as if it had been passed, either in its original proposed form, or as varied by the adjudicator. [31]

[50] An adjudicator not only has the power to direct a body corporate to have certain repairs and maintenance carried out, [32] but may also make an order requiring it to carry out certain specified works to or on the common areas for the 'use, convenience or safety' of owners or occupiers, [33] or may make an order declaring that a body corporate's decision to reject certain proposed improvements or alterations to common areas was 'unreasonable', and may direct it to agree thereto. [34] In similar vein an adjudicator may make an order declaring that a body corporate has 'unreasonably' refused to grant exclusive use rights to an owner or occupier over a certain part of a common area and may direct it to do so, on terms that may require periodic payments to be made to the body corporate.

[51] Finally, the Act provides [35] that any order which an adjudicator makes may contain such ancillary and 'ensuing' [sic] provisions as the adjudicator considers to be necessary or appropriate, and may provide that it has the effect of 'any type of resolution or decision' [sic] provided for in the scheme governance documentation.

[52] As is thus apparent, the statutory powers which an adjudicator has in terms of the Act are extremely wide and go beyond the powers which a court has in relation to neighbourly disputes and associations in terms of common law, not only insofar as their reach is concerned, but also in relation to their ambit. In numerous instances an adjudicator has an equity, ie fairness-based power, not only to decide what is 'reasonable' in relation to the conduct of, or the decisions which have been taken by, an association such as a body corporate of a sectional title scheme, [36] but also to direct what should 'reasonably' be done in place thereof. A High Court does not have such powers.

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[53] It is confined to reviewing the legality or rationality of the conduct of a decision-making body and not the fairness thereof, and when doing so it generally does not have the power to substitute its own decision, as to what would be fair or reasonable, in place of the body. The best it can do ordinarily, unless it is clear that no other decision can be made on the issue and the relief which is sought must inevitably follow as a matter of law or logic, is to set aside the decision or conduct concerned and refer the matter back to the body for decision anew. As far as the High Court's appellate jurisdiction in respect of the decisions of adjudicators is concerned, in terms of s 57(1) of the Act this is limited to questions of law only. [37]

[54] The difference between the powers which an adjudicator has vis-à-vis those which a court has, is starkly illustrated by the relief which the applicants seek in the notice of motion, whereby they ask for an order declaring that the trustees' application of rule 12 is 'prejudicial' and 'unfair' and that the body corporate should be ordered to consider all applications for short-term rentals within five business days from receipt thereof. Whilst these are orders which an adjudicator can make in terms of the Act, when counsel for the applicants was asked on what basis the court was entitled to make an order based on fairness, and on what basis the court was empowered to stipulate a period of time for the consideration of applications for short-term lets by the body corporate of the Manhattan Place sectional title scheme, thereby effectively rewriting one of its conduct rules, he was constrained to concede that it did not have such powers, either statutorily or at common law. That is why adjudicators are best placed to decide on the reasonableness or otherwise of conduct rules and resolutions, and to propose the necessary remedial measures in respect of those which they take issue with.

[55] Even at a purely procedural level it is apparent that an adjudicator has powers in terms of the Act which a court of law does not have statutorily or in terms of the rules of court. Thus, when considering an application an adjudicator may require the applicant or the managing agent or any other relevant person (even persons who may not be parties to the application) to provide information or documentation and affidavits or statements, and may require such person(s) to attend his office for

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an interview. [38] Furthermore, in the process of obtaining evidence necessary for a determination an adjudicator is not bound to apply the exclusionary rules of evidence which are applicable in civil courts. [39]

[56] To my mind, considering the sections referred to in the context of the CSOS Act as a whole and adopting a purposive and sensible interpretation thereof, ie one which has regard to the language of the provisions concerned, the context in which they are found, and the apparent purpose to which they are directed, [40] it is apparent that the legislature intended that the primary forum for adjudication of disputes in terms of the Act is the Ombud service and the adjudicators appointed by it, [41] who are required to have suitable qualifications and the necessary experience (not only in relation to the adjudication of disputes, but also in relation to community scheme governance). [42] The High Court is intended to be a secondary, supervisory forum which is to exercise review and appellate jurisdiction (ie oversight of the discharge by the Ombud and its adjudicators of their duties and powers), not adjudicatory jurisdiction.

[57] In the second place, a further reason why it would in my view be inappropriate to consider the jurisprudence pertaining to concurrent jurisdictions as being necessarily applicable in matters such as these is that the SCA and the Constitutional Court have repeatedly confirmed [43] that, where specialist administrative or adjudicatory bodies or structures which are not courts proper have been established by statute for the expeditious, informal and cost-effective resolution of particular disputes which involve the application of specialised or technical knowledge or experience, they are the forums which are required to deal with such disputes in the first instance, even though a court may also have jurisdiction to do so.

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[58] Not only does a court have institutional limitations in such matters [44] but at a policy level it has also been held that it should defer to the decisions of such specialised bodies and take care not to usurp their powers and functions. [45]

[59] In my view, to allow litigants to proceed directly to a court instead of the primary adjudicative forum which has been established by the CSOS Act, would undermine [46] the administrative and quasi-judicial processes which have been provided and result in 'forum-shopping' [47] by better-resourced litigants.

[60] It may also in certain instances allow litigants to bypass restrictions or requirements which have been set out in the Act. In this regard, for example, s 41 stipulates that an application for an order declaring that a decision which was taken by an association is void, must be made to the Ombud no later than 60 days after the decision was taken, subject to the power of the Ombud to condone any late filing on good cause shown. If litigants are allowed to approach the High Court directly to set aside such decisions, they would bypass this restriction, contrary to the intention of the legislature, and would be able to challenge decisions which have been made by a body corporate years earlier, as the applicants have attempted to do in this matter. To my mind that would defeat the legislative intention of having disputes in relation to decisions which have been taken by a body corporate of a sectional title scheme, dealt with expeditiously. Similarly, allowing litigants to bypass the mechanisms provided in the Act for the resolution of disputes would allow them to avoid the conciliation process provided for by it, thereby defeating the legislative purpose of having community-scheme disputes resolved, if at all possible, by way of an informal, expeditious and cheap mechanism, instead of via the courts.

Conclusion

[61] 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

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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), [48] which must ordinarily first be exhausted before the High Court may be approached for relief.

[62] 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. [49]

[63] In each instance a litigant will have to make out good cause for why a dispute which can and should be heard by an adjudicator in terms of the Act should nonetheless be heard by the court instead. In this regard, in my view convenience will not constitute an exceptional circumstance and, as was held in *Gqirana*, [50] neither, ordinarily, will an alleged inefficiency or delay in the conciliative or adjudicatory processes or mechanisms which have been provided by the CSOS Act. [51]

[64] Of course, where, for example, the constitutionality or legal validity or status of a particular statutory power or provision in the Act is challenged or is at issue, a litigant would obviously be entitled to approach the court for the appropriate relief (as a forum of first instance or as an appellate tribunal, as the case may be). So too, in certain instances it is conceivable that the High Court may be approached in the first instance as a review court.

[65] The applicants submit that were I to decline to entertain the application I should transfer it to the Ombud for adjudication in the exercise of the court's inherent and constitutional power to regulate its process, and in such an event I should not mulct the applicants and should direct that the costs should be costs in the cause.

[66] In my view, given that this is not only a matter which should not have been brought before this court and should have been taken to the Ombud, but is also one which constitutes an abuse of process (for the reasons outlined in [20] – [28] above), the appropriate order to make is one striking the matter from the roll, with costs, on the scale as between attorney and client.

Applicants' Attorneys: *Pike Law*, Constantia.

Respondents' Attorneys: *Werksmans*, Cape Town.

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1 Act 9 of 2011.
2 The other being the Sectional Titles Schemes Management Act 8 of 2011.
3 In terms of the Sectional Titles Schemes Management Act 8 of 2011.
4 Conduct Rule 13.
5 With reference to the commentary by Paddock in his *Manual on the Sectional Titles Act* (8 ed).
6 In terms of s 1 of the CSOS Act.
7 *Coral Island Body Corporate v Hoge* 2019 (5) SA 158 (WCC).
8 *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC); *Coral Island* above n7 paras 8 and 9.
9 Id para 10.
10 *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W), endorsed by this court in *Marth NO v Collier and Another* [1996] 3 All SA 506 (C).
11 Contrary to the provisions of s 13(1)*(g)* of the Sectional Title Schemes Management Act.
12 *Goldberg v Goldberg* 1938 WLD 83 at 85 – 86.
13 Id.
14 *Standard Credit* above n10 at 820B.
15 2009 (3) SA 340 (T).
16 Act 34 of 2005.
17 *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another* 2008 (4) SA 276 (T).
18 *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ).
19 *Nedbank Ltd v Thobejane and Similar Matters* 2019 (1) SA 594 (GP) ([2018] 4 All SA 694) paras 76 and 81.
20 Id para 79.
21 *Nedbank Ltd v Gqirana NO and Another, and Similar Matters* 2019 (6) SA 139 (ECG) ([2019] 4 All SA 211) paras 74 – 75.
22 In *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission, and Others* 2013 (5) SA 484 (SCA) ([2012] 4 All SA 365; [2012] ZASCA 134) para 19 the SCA confirmed that a court is not entitled generally in the exercise of its jurisdiction to decline to hear cases which have been properly brought before it, whilst at the same time also acknowledging that where the legislature has created specialist structures to resolve particular disputes effectively and speedily it would be 'best' to use those structures, and a court might in such circumstances be entitled to decline to exercise its jurisdiction. In *Agri Wire* the question was whether the Competition Tribunal had exclusive jurisdiction to hear appeals or reviews in respect of decisions of the Competition Commissioner. The SCA found that, on a proper interpretation of ss 27(1)*(c)* and 62 of the Competition Act, it had concurrent jurisdiction to hear such matters.
23 *Gqirana* above n21 para 75.7.
24 According to counsel the decisions in *Thobejane* and *Gqirana* are on appeal to the SCA.
25 Section 39(1)*(a)*.
26 Section 39(1)*(b)*.
27 Section 39(1)*(c)*.
28 Section 39(1)*(f)*.
29 Sections 39(3)*(a)* – *(d)*(iv).
30 Section 39(4)*(e)*.
31 Section 39(4)*(d)*.
32 Section 39(6)*(a)* – *(b)*.
33 Section 39(6)*(c)*(i).
34 Section 39(6)*(d)*(i).
35 Sections 54(3) and 54(5).
36 In terms of s 1 of the Act an 'association' means any structure which is responsible for the administration of a community scheme.
37 In *Shmaryahu* above n 8 paras 25 – 26 this division held (per Binns-Ward J, Langa AJ concurring), with reference to the different types of appeal listed in *Tikley and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590 – 591 that the relief available in terms of s 57 was closely analogous to that which could be sought on review, ie a consideration of whether or not an adjudicator had exercised his powers and discretion 'honestly and properly' and not whether the decision under appeal was right or wrong. In *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ) a full bench of the Gauteng Division disagreed with this categorisation, and held that an appeal in terms of s 57 is a true appeal, in the strict sense (ie the second category of appeal referred to in *Tikley*), and involves a consideration of whether the adjudicator's decision was right or wrong, on the material before him.
38 Section 51(1)*(a)*(i) – (iii).
39 Section 50*(c)*.
40 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18.
41 In terms of s 21(2)*(b)*.
42 Sections 21(2)*(b)*(i) – (ii).
43 Vide *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) (2000 (11) BCLR 1211; (2000) 21 *ILJ* 2357; [2000] 12 BLLR 1365; [2000] ZACC 17) para 20; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) para 45; *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) para 29; *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) (2010 (1) BCLR 35; [2009] 12 BLLR 1145; [2009] ZACC 26) para 56; *Competition Commission of SA v Telkom SA Ltd* [2010] 2 All SA 433 (SCA) ([2009] ZASCA 155) para 56; *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) (2009 (12) BCLR 1192; [2009] ZACC 23) paras 36 – 38; *Agri Wire* above n22.
44 *Gauteng Gambling Board* n43 para 29.
45 *Bato Star* n43 paras 45 and 48.
46 *Koyabe* n43.
47 See *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) ((2008) 29 *ILJ* 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97; [2007] ZACC 23).
48 Section 7(2)*(a)* and *(c)* of Act 3 of 2000 provide that, save in exceptional circumstances, no court shall review an administrative action unless any internal remedy provided for in any other law has first been exhausted.
49 *Koyabe* n43 para 39.
50 Note 21 para 75.7.
51 In *Koyabe* n43 para 39 the Constitutional Court held that where an internal remedy would be ineffective or futile (because, for example, of the adoption of a rigid policy position by the forum required to adjudicate a dispute), a court might permit a litigant to approach it directly.