

**REPUBLIC OF SOUTH AFRICA**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

**Case No: 2021/22783**

REPORTABLE: YES/  
OF INTEREST TO OTHER JUDGES: YES  
REVISED.  
03/05/2022

In the matter between:

**GAUTENG HOUSING SECONDARY  
CO-OPERATIVE LIMITED**

**Applicant**

and

**EASTLEIGH COURT HOUSING CO-OPERATIVE  
NOREEN MNYANDA  
THANDAZILE MHLONGO  
TEBOGO SEKOBOANE  
CITY ACCOMMODATIONS  
STANDARD BANK OF SOUTH AFRICA LIMITED  
CITY OF JOHANNESBURG MUNICIPALITY**

**First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent  
Seventh Respondent**

**JUDGMENT**

**TLHOTLHALEMAJE, AJ**

*Introduction:*

[1] On 12 May 2021, the Applicant obtained an urgent interim order before Dippenaar J, in terms of which the Sixth Respondent (Standard Bank) was interdicted and restrained from permitting the monies held under the names and Stokvel Account numbers with it to be withdrawn or be transferred from those accounts to any other bank account, both internally or to any other banking institution.

[2] The interim order was granted pending the determination of the relief sought by the Applicant under Part B of its Notice of Motion. The *rule nisi* was extended on no less than three occasions being on 3 August 2021; 4 October 2021; and on 10 November 2021.

[3] In Part B, the Applicant sought an order that the 1<sup>st</sup> – 5<sup>th</sup> Respondents be interdicted and restrained from demanding and collecting funds from the unit occupants of premises known as Eastleigh Court, situated at 153 Louis Botha Street, Hillbrow, Gauteng ('The Building'); from further intimidating the occupants of the Building, and further preventing the Applicant from administering its duties. The Applicant ultimately seeks that it be confirmed as the only lawful managing agent of the Building.

*The background:*

[4] The Building constitutes of units which were allocated by the Gauteng Department of Housing to people who ordinarily qualified for free state housing. The First Respondent, Eastleigh Court Housing Co-operative ('The Cooperative'), is a government subsidised housing scheme of the Building which was registered by its tenants in 2001. The sole purpose of registration was the collection of levies and utilities, which were then deposited into the Stokvel account held with Standard Bank.

[5] The Second – Fourth Respondents are the tenants in the Building. They are also signatories to the account held with Standard Bank, which account was the subject matter under Part A of the Notice of Motion.

[6] The Fifth Respondent (City Accommodations), is a registered company whose involvement in the dispute is currently to collect management fees of the Building, and which the Applicant contends interferes with its administrative duties as a managing agent.

*The dispute:*

[7] The dispute relates to the management and administration of the 'Building', and in particular, the collection of levies on behalf of the Co-operative with the ultimate purpose of servicing municipal debts and other creditors; attending to insurance of the Building; complying with the bylaws; and maintaining the upkeep of the Building. The issue is whether the Applicant is the lawfully appointed managing agent of the Building. The 1<sup>st</sup>- 5<sup>th</sup> Respondents' case is that the Fifth Respondent is the lawfully appointed managing agent of the Building.

[8] In approaching the Court, the Applicant relied on a '*Management and Business Development Agreement*' (The Main Agreement), entered into between itself and the Co-operative on 01 May 2018. The Agreement aims to regulate the engagement of the Applicant in providing certain administrative, management, and business development services to the Co-operative, in accordance with the terms set out therein.

[9] In the replying affidavit, and further in support of its contention that it was duly appointed, the Applicant also relied on a '*Property Cession and Management Agreement*' entered into between itself and Members of the Co-operative on 10 October 2021. The Applicant contends that a new board of trustees of the Building has since endorsed its role with this agreement.

[10] Until the interim order was obtained, the 1<sup>st</sup> – 5<sup>th</sup> Respondents were in control of the Stokvel Account that is collecting funds from the occupants of the Building. The Applicant contends that notwithstanding its appointment as Managing Agent in accordance with the agreements referred to, the 1<sup>st</sup> – 5<sup>th</sup> Respondents have continued to collect funds from the occupants of the Building, and that this conduct has prevented it from performing its duties as the Managing Agent. The Applicant in

seeking its confirmation as the Managing Agent has also accused the 1<sup>st</sup> – 5<sup>th</sup> Respondents of having demonstrated a lack of accountability and probity in the management of funds held in the Stokvel Account with Standard Bank.

[11] Subsequent to the *rule nisi* having been obtained, the 1<sup>st</sup> – 5<sup>th</sup> Respondents approached the Court in terms of Rule 6(12)(c) of the Uniform Rules, effectively seeking an order to set aside the preservation order. A supplementary affidavit was similarly filed by the 1<sup>st</sup> – 5<sup>th</sup> Respondents in opposing the relief sought under Part B of the Applicant's Notice of Motion. It is further significant to note that there has also been other interlocutory applications and counter applications since the *rule nisi* was issued, which either appeared to have fizzled out or were not pursued for one reason or the other.

[12] In resisting the relief sought by the Applicant, the 1<sup>st</sup> – 5<sup>th</sup> Respondents initially disputed the validity of the Main Agreement relied upon by the Applicant. This challenge was however not pursued with any vigour in that in the end, the 1<sup>st</sup> – 5<sup>th</sup> Respondents' case essentially rested on whether this Court had the requisite jurisdiction to determine the application, and whether the Applicant had made out a case for final relief.

[13] In the Rule 6(12)(c) application, and further supplementary affidavits, the 1<sup>st</sup> – 5<sup>th</sup> Respondent had also raised various disputes related to the Applicant's lack of *locus standi* to have brought the urgent application. Allegations in this regard were that the Applicant had not registered itself with the Estate Agents Affairs Board, and was accordingly not in possession of the requisite Fidelity Fund Certificate for it to operate as Estate Agent or management agent.

[14] The 1<sup>st</sup> - 5<sup>th</sup> Respondents also disputed the mandate of the Applicant as managing agent, contending that if there was indeed an Agreement, that mandate has since been terminated. Reliance was placed on a separate *Service Agreement Contract* entered into between the Directors of the Cooperative and City Accommodations on 01 February 2020, in terms of which the latter was duly appointed as the management agent of the Cooperative. These disputed facts will be dealt with later in this judgment.

*Jurisdiction:*

[15] Notwithstanding a myriad of disputes of fact raised in all the pleadings, on the return date, central to the 1<sup>st</sup> – 5<sup>th</sup> Respondents' defence in resisting the relief sought by the Applicant was that this Court lacks jurisdiction to consider the application. In *Zhongji Development Construction Engineering Company Limited vs Kamoto Copper Company SARL*<sup>1</sup>, it was reaffirmed that when a party raises a challenge to the jurisdiction of a court, this issue must necessarily be resolved before any other issues in the proceedings. This was so in that if the court lacked jurisdiction, it is precluded from dealing with the merits of the matter brought to it<sup>2</sup>.

[16] The question of jurisdiction arose flowing from the provisions of Clause 5 of the Main Agreement<sup>3</sup>, which provides that disputes between the parties (*i.e.*, The Applicant and the Co-operative), must be referred for a final and binding arbitration process before a Co-operative Tribunal.

[17] The submissions made by the 1<sup>st</sup> – 5<sup>th</sup> Respondents were that the Applicant had not pleaded that the Court had the requisite jurisdiction to determine its

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<sup>1</sup> 421/13) [2014] ZASCA 160 (1 October 2014); (2014) JOL 32421 (SCA),

<sup>2</sup> At para 50

<sup>3</sup> 5. DISPUTE RESOLUTION:

'Except as provided below, no civil action concerning any dispute under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration before the Co-operative Tribunal. The place for any arbitration shall be directed by the Tribunal, and provisions of the Co-operatives laws shall govern, and the arbitrator solely shall apply them to, the interpretation and construction of this Agreement. Such arbitration shall be in accordance with provisions of the Co-operatives Act before a single neutral arbitrator. If possible, the choice of arbitrators presented to the parties shall include persons who have experience with management agreements and contractual matters. Any award issued shall be made in accordance with the Co-operative law of the Republic in which the arbitration is conducted and shall include the award to the prevailing party of its costs and expenses (including but not limited to attorneys' fees and costs and arbitration costs and arbitrator's fees and the costs of all dispute resolution proceedings (including, but not limited to those incurred in or relating to any and all trial and appellate proceedings)). An award shall be final and binding and may not be appealed or reviewed, except upon the ground of malfeasance or fraud by the arbitrator. Judgment upon the award may be enforced in any court of competent jurisdiction, wherever located. Notwithstanding the foregoing, either party shall have the right, at its sole discretion, to seek equitable relief from the Higher court of competent jurisdiction, without being limited in recourse to arbitration, in the event that a breach by the other party of this Agreement shall result in irreparable injury to it or if monetary damages would be inadequate and impossible to calculate adequately, which equitable relief shall include (but not be limited to) the entering of a temporary restraining order and/or a preliminary injunction. This Section shall survive the termination for any reason.'

application. Reference was made to *Girdwood v Theron*<sup>4</sup> for the proposition that it was fatal for an applicant in pleadings to fail to set forth particulars showing that the court has jurisdiction. Aligned to this submission was that the Applicant failed to explain why the Court ought to disregard the provisions of the very same agreement it had relied upon in seeking relief.

[18] The legal position in regards to the jurisdiction of this Court in the face of an agreement to submit disputes to final and binding arbitration can be said to be fairly settled. As a starting point, counsel for the 1<sup>st</sup> – 5<sup>th</sup> Respondents had correctly pointed out that the Applicant failed to plead the basis upon which this Court had jurisdiction. However, in *Foize Beheer BV and Others*<sup>5</sup>, the Supreme Court of Appeal (SCA) has since reaffirmed the legal position that in the end, jurisdiction is determined by the court and not the parties. Once this issue is raised as a preliminary point, it is for the Court to decide, even if the Applicant's founding affidavit was found wanting in that regard. It follows that the application cannot merely be dismissed based on a failure to plead jurisdiction. This is but one of the overall factors to be considered by the Court.

[19] The starting point is that at a general level, the decision to refer a dispute to private arbitration is a choice exercised by contracting parties, which as long as it is voluntarily made, should be respected by the courts<sup>6</sup>. This is so in that when the parties agree on such a clause, they not only contemplate it as a matter of commercial convenience and a mechanism for resolving any disputes that may arise in the course of their relationship, but also view such a mechanism as being best suited for their interests. To this end, courts generally avoid enforcing any contrary construction of the agreement, that would allow parties to frustrate this common intention. A further consideration is based on the fundamental principle that parties should, in general, keep and be held to their agreements (*pacta servanda sunt*).

[20] Notwithstanding the need to respect the sanctity of commercial contracts, it is equally acknowledged that arbitration clauses do not necessarily oust the

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<sup>4</sup> 1913 CPD 859

<sup>5</sup> 752/2011) [2012] ZASCA 123; [2012] 4 All SA 387 (SCA); 2013 (3) SA 91 (SCA)

<sup>6</sup> *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC) at [219]

jurisdiction of the courts<sup>7</sup>. This point was confirmed in *Foize*<sup>8</sup>. The SCA in that matter further held that to the extent that the objection *in limine* was raised (as in this case), the Court nonetheless still enjoyed a discretion whether to enforce the clause<sup>9</sup>. As to how and when a court should exercise its discretion to enforce the arbitration clause was dependent upon the particular facts and circumstances of each case, as well as the stage at which and the manner in which the issue of enforcement of the clause in question was raised<sup>10</sup>.

[21] In this case, it will be recalled that the Applicant does not seek enforcement of the relevant dispute resolution clause. Instead, it seeks to escape from it. In the Main Agreement, provision is made for any disputes between the parties to be referred to the Cooperative Tribunal. In the *'Property Cession and Management Agreement'*<sup>11</sup>, a similar provision is made, but for the disputes to be referred to

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<sup>7</sup>See *Universiteit Van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333G – 334B; *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 98/06 [2007] ZASCA 9; [2007] SCA 9 (RSA); 2009 (4) SA 68 (SCA) at para 7; *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D)

<sup>8</sup> At para 21, where it was held that;

“...It can now be regarded as well settled that a foreign jurisdiction or arbitration clause does not exclude the court's jurisdiction. Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction or arbitration clause, it should do so by way of a special or dilatory plea seeking a stay of the proceedings. That having been done, the court will then be called on to exercise its discretion whether or not to enforce the clause in question — see e.g. *Commissioner for Inland Revenue and another v Isaacs* NO 1960 (1) SA 126 (A) at 134B-H, *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C), *Butler v Banimar Shipping Co* SA 1978 (4) SA 753 (SE) and *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333G-H.” (Other citations omitted)

<sup>9</sup> At para 22

<sup>10</sup> At para 26

<sup>11</sup> 'Clause 5. DISPUTE RESOLUTION

Except as provided below, no civil action concerning any dispute under this Cession Agreement shall be instituted before any court, until all such disputes have been submitted to final and binding arbitration before the appointed arbitrator. The place for any arbitration shall be directed by the Arbitrator, and provisions of the Company laws shall govern, and the arbitrator solely shall apply them to, the interpretation and construction of this Cession Agreement. Such arbitration shall be in accordance with provisions of the Company Act before a single neutral arbitrator. If possible, the choice of arbitrators presented to the parties shall include persons who have experience with management Cession Agreements and contractual matters. Any award issued shall be made in accordance with the Company's law of the Republic in which the arbitration is conducted and shall include the award to the prevailing party of its costs and expenses (including but not limited to attorneys' fees and costs and arbitration costs and arbitrator's fees and the costs of all dispute resolution proceedings (including, but not limited to those incurred in or relating to any and trial and appellate proceedings)). An award shall be final and binding and may not be appealed or reviewed, except upon the ground of malfeasance or fraud by the arbitrator. Judgment upon the award may be enforced in any court of competent jurisdiction, wherever located. Notwithstanding the foregoing, either party shall have the right, at its sole discretion, to seek

private arbitration. In approaching the Court rather than referring a dispute to the Co-operative Tribunal or arbitration proceedings, the Applicant's contention was that it elected to do so, as the Court could not abdicate its Constitutional mandate to determine the matter even under its powers to regulate its processes<sup>12</sup>.

[22] The approach when determining whether the Court has jurisdiction is not confined to its Constitutional mandate. It has long been held in *Gcaba*<sup>13</sup> that in the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. For the purposes of determining jurisdiction in this case, the test remains whether the Applicant has made out a case (i.e., discharged the onus) in the pleadings, to convince the Court that it should not in the exercise of its discretion, refer the matter to arbitration<sup>14</sup>.

[23] The Applicant correctly pointed out that a close reading of Clause 5 in both the agreements it relied on revealed that the parties did not expressly exclude the jurisdiction of the court. This however does not at first blush imply that the Court ought to retain the power to hear the matter. The relevant portions of clause 5 in both agreements is similar, and provides that;

*'...Notwithstanding the foregoing, either party shall have the right, at its sole discretion, to seek equitable relief from the Higher court of competent jurisdiction, without being limited in recourse to arbitration, in the event that a breach by the other party of this Cession Agreement shall result in irreparable injury to it or if monetary damages would be inadequate and impossible to calculate adequately, which equitable relief shall include (but*

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equitable relief from the Higher court of competent jurisdiction, without being limited in recourse to arbitration, in the event that a breach by the other party of this Cession Agreement shall result in irreparable injury to it or if monetary damages would be inadequate and impossible to calculate adequately, which equitable relief shall include (but not be limited to) the entering of a temporary restraining order and/or a preliminary injunction. This Section shall survive the termination of this Cession Agreement for any reason.'

<sup>12</sup>In reliance on *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another* (38/2019; 47/2019; 999/2019) [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA)

<sup>13</sup>*Gcaba v Minister for Safety and Security and Others* (CCT 64 of 2008) [2009] ZACC 26 (07 October 2009); 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) at para 75

<sup>14</sup>See *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) 498 (A) at 504H



*not be limited to) the entering of a temporary restraining order and/or a preliminary injunction. This Section shall survive the termination of this Cession Agreement for any reason.'*

[24] What the above implies is that where the Court is implored to exercise its discretion and hear the matter, at a minimum, and based on the above portion of the relevant clauses, the Applicant is required to demonstrate that *a breach by the other party of the Cession Agreement or of the Main Agreement shall result in irreparable injury to it or if monetary damages would be inadequate and impossible to calculate adequately.*

[25] It has repeatedly been stated that an applicant in motion proceedings must make out a proper case in the founding papers, and is bound to the case made out therein. Thus, the applicant is not permitted to make out a new case in the replying affidavit<sup>15</sup>. In the founding affidavit, and beyond the obvious fact that the basis upon which this Court had jurisdiction was not pleaded, the Applicant in seeking urgent relief under the rubric '*Irreparable harm*' had merely stated that the continued control of the funds by the 1<sup>st</sup> – 5<sup>th</sup> Fifth Respondents puts the Building and its occupants in danger, as it is not being serviced properly and its debts had increased. This contention was the sum total of the Applicant's case in regards to any harm to it as a result of the alleged breach by the 1<sup>st</sup> – 5<sup>th</sup> Respondents.

[26] The above contentions hardly demonstrates in what material respects the Applicant will suffer or continues to suffer any irreparable injury as a result of a breach (if any) on the part of the 1<sup>st</sup> – 5<sup>th</sup> Respondents. It was correctly pointed out on behalf of the 1<sup>st</sup> – 5<sup>th</sup> Respondents that the Applicant's argument unwittingly advanced a case on behalf of the residents of the Cooperative, who nonetheless are (or at least most of them), the respondent party in this matter. Effectively, the Applicant's pleadings spectacularly failed to pass the minimum hurdle of

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<sup>15</sup> See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635F-636A; *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at para [177]; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paragraphs 29 to 30; *Bowman NO v De Souza Raoldao* 1988 (4) SA 326 (T) at 327D – H; *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 143 (SCA) at paragraph 16

demonstrating a breach or irreparable harm or injury as required in the agreements, for the purposes of engaging the jurisdiction of this Court.

[27] Purely on the basis of the Applicant's failure to demonstrate that it satisfied the exception under the very same clause on which it alleged that this Court has jurisdiction, the Court should be therefore be disinclined to exercise its discretion in its favour and assume jurisdiction, and that ought to be the end of the matter.

[28] Other facts that led to this Court to decline to assume jurisdiction relates to disputed facts arising from the pleadings of both parties. As a general proposition, it is accepted that applications are not designed to resolve factual disputes between the parties. Applications are generally decided on common cause facts. Effectively, where final relief is sought, issues surrounding probabilities and onus are amenable to being determined in motion proceedings<sup>16</sup>.

[29] In this case, unfortunately, the parties' pleadings are replete with relevant irresoluble factual disputes which are real and genuine, and which invariably fortifies the conclusions reached in this judgment that this matter ought to have been placed before the Cooperative Tribunal for determination in the first place.

[30] It will be recalled that the Applicant relied on the '*Management and Business Development Agreement*' entered into between itself and the Cooperative on 01 May 2018, together with the '*Property Cession and Management Agreement*' entered into between itself and Members of the Cooperative on 10 October 2021, in claiming legitimate authority to manage and administer the Building. The 1<sup>st</sup> – 5<sup>th</sup>

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<sup>16</sup>See *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 A at 634 – 635; *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) at para 26, where it was held that;

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version." (Internal Citations omitted)

Respondents on the other hand had relied on another separate *Service Agreement Contract*, which is said to have been entered into between the Directors of the Cooperative and the Fifth Respondent on 01 February 2020, in terms of which the latter was duly appointed as the management agent of the Cooperative.

[31] In all three agreements, the central entity is the Cooperative, and in the end, the dispute revolved around individuals in its board, who had purported authority for the purposes of entering into those agreements. The fact that one Cooperative could have entered into three disputed separate agreements in terms of which different managing agents for the same Building were appointed, points to deep-seated fissures within the Cooperative.

[32] Aligned to the above is that the 1<sup>st</sup> – 5<sup>th</sup> Respondents also raised disputes pertaining to the authority and mandate of certain individuals who purportedly signed the agreements in question on behalf of the Cooperative. Furthermore, the 1<sup>st</sup> – 5<sup>th</sup> Respondent also questioned the suitability of the Applicant as a managing agent on the grounds that it did not have a fidelity fund certificate, which would have allowed it to hold monies in its trust account. It was contended that the Applicant was also disqualified as it was not registered with the relevant authorities.

[33] In equal measure, the Applicant disputed the fact that the individuals within the Cooperative or the Building that signed the resolution authorising the deponent to the answering affidavit to do so had such capacity. The Applicant alleged that the majority of them were mere tenants, with some of them having had their membership terminated. Furthermore, it was alleged that the deponent does not appear in any records of the Cooperative as being a chairperson or a member of the board, and that her *locus standi* was challenged on the basis that she was not in possession of a South African ID document. In this regard, it was alleged that the deponent as an undocumented foreign national, who would not ordinarily have benefitted in terms of the general scheme of the Cooperative and as a legitimate tenant of the Building.

[34] In the light of all the numerous disputes of fact arising from the papers, even if the Court was inclined to resolve these by applying the so-called “robust approach”

referenced in *Fakie NO v CCII Systems (Pty) Ltd*<sup>17</sup>, it should nonetheless refuse to do so, as clearly there is no scope for such a manoeuvre. Of importance however is that these disputed facts ought to have been foreseen by the Applicant.

[35] In summary, the above disputed facts and the conclusions reached in that regard sought to highlight again the reasons this Court declined jurisdiction. This is so in that the Applicant has not demonstrated why this Court should determine this application when both the agreements it had relied on, directed it to refer such disputes to the Cooperative Tribunal or arbitration, or where these agreements were placed in dispute. In the end, based on the very same agreements, and what the Applicant has pleaded, it has not demonstrated the basis upon which this Court should accept that there exist exceptions (*i.e.*, breach which has caused irreparable injury or otherwise), that necessitates that a discretion be exercised in its favour, and that the matter under Part B of the Applicant's Notice of Motion be determined. Further in the light of these conclusions, it follows that the enquiry ought to end at that point, without the necessity of establishing whether the requirements of final relief on the *Setlogelo v Setlogelo*<sup>18</sup> test have been met.

[36] It further follows that the *rule nisi* granted on 12 May 2021 ought to be discharged. This is so in that the 1<sup>st</sup> – 5<sup>th</sup> Respondents have demonstrated the prejudice the preservation order has caused to the Cooperative and the tenants of the Building in particular. Inasmuch as the Applicant has complained about its inability to carry out its mandate in managing and administering the Building, and also cast aspersions on the integrity of the 2<sup>nd</sup> – 4<sup>th</sup> Respondents, in the same token, the preservation order has clearly hampered any effort in ensuring that the Cooperative maintains minimum services in the Building.

[37] At this point of the dispute, the interests of the tenants are paramount, and whether it is the Applicant or the Fifth Respondent that is the rightful managing agent of the Building is an issue that can be resolved through the alternative dispute resolution route the contesting parties chose in accordance with the agreements relied upon. It is for these reasons that the following order is deemed appropriate;

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<sup>17</sup> 2006 (4) SA 326 (SCA)

<sup>18</sup> 1914 AD 221

Order:

1. The interim order granted by the Court on 12 May 2021 is discharged, and the freezing or suspension of the First Respondent's bank account number [....] held at Standard Bank is set aside;
2. The Court lacks jurisdiction to determine Part B of the Applicant's Notice of Motion.
3. The Applicant is to pay the costs of this application

**Edwin Tlhotlhemaje**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

*Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 03 May 2022.*

**Heard on : 26 January 2022 (Via Microsoft Teams)**

**Delivered: 03 May 2022**

**Appearances:**

For the Applicant: Adv. I Mureriwa, instructed by Mncube Attorneys INC.

For the 1<sup>st</sup> – 5<sup>th</sup> Respondents: Adv S. G Zwane, instructed by Dube N Attorneys INC