In the High Court of South Africa
(Western Cape Division, Cape Town)

REPORTABLE

Case No: A118/2021

In the matter between:

KUTLWANO MOTLHABANE N.O.	First Appellant
PHENYO MOTLHABANE N.O.	Second Appellant
KUTLWANO MOTLHABANE	Third Appellant
THANDOKAZI MOTLHABANE	Fourth Appellant

and

GEORGE WOLFAARDT N.O.	First Respondent
STEVE BROEKMANN N.O.	Second Respondent
EMILY HITEFIELD N.O.	Third Respondent
ALEX FERGUSON N.O	Fourth Respondent
TAMASEN MAASDORP	Fifth Respondent
AMANDA LLOYD-SIM N.O	Sixth Respondent
SEAN DAYTON N.O	Seventh Respondent
TRACY LEE PAULSEN	Eighth Respondent

JUDGMENT DELIVERED : 12 MAY 2022
(Electronically)

NDITA; MANTAME JJ

[1] We have had time to consider the signed minority judgment by our colleague Gamble J. It is unfortunate that this judgment has changed markedly from the judgment which was presented to us and the basis on which we dissented. As a result thereof, we were unable to agree whether we now needed to reply to the new judgment, but finally we resolved to deliver our judgment "**as is**", notwithstanding the substantial differences between the two versions. What appears below is our original dissenting judgment.

[2] We have read the eloquent judgment of our colleague, Gamble J, and we find ourselves in respectful disagreement with the conclusion reached and the resultant order. The reasons for such disagreement will appear herein below. Although our Colleague has ably summarised the facts, we find it necessary to expatiate on them so that our points of disagreement are properly discerned. For the purposes of convenience, the appellants would be referred to as the appellants, save where it is necessary to specifically identify a particular appellant and the respondents would be referred to as the body corporate.

[3] The main issue before this Court, is whether the Court a *quo* erred in dismissing an application by the appellants in which they sought an interdict pending proceedings to be launched in terms of the Community Schemes Ombud Service Act 9 of 2011 ("*CSOS Act*").

[4] The interdict was two-fold, firstly, that the body corporate be interdicted from permitting any contractors from walking on or generally accessing the roof of the Sakalengwe Trust's property *("the property")*.Secondly, that the body corporate be ordered to ensure that the building works being conducted in the section immediately below the property comply with the contractor policy of the body corporate and in particular that noisy building work be carried out between 08h30 – 13h00 and between 15h00 – 17h00 on weekdays.

[5] The appellant conceded that the latter relief sought in respect of building works in the Court a *quo* has been overtaken by events, as the building works have been completed. However, notwithstanding the mootness of the issues, the appellants seek that this Court deal with the costs award of the court a *quo* which

relates to that interdict as well as the one in respect of the access to the roof of the property (which is still a live issue). This judgment will proceed on such basis.

Factual background

[6] The Sakalengwe Trust *("the Trust")* owns a property, being section number 353 in The Adderley Street Sectional Title Scheme (scheme number 212/2003). The body corporate is a body corporate in respect of the sectional title scheme in which the property is situated on. Mr Kutlwano Motlhabane *("Mr Motlhabane")*, the third appellant, represented the trust in dealings with the body corporate.

[7] As can be discerned from Mr Motlhabane' s founding affidavit, during 2017 and 2018 there were waterproofing issues in the building and some leaks on the walls of the property. He states that the body corporate undertook to deal with the issue and repair the damage to the walls of the property. However, despite the undertaking, it failed to do so. In 2018, Mr Motlhabane complained to Ms Paulsen, the managing agent of the body corporate that there was a leaking roof gutter leading to the garden. The appellants contended that that was as a result of work conducted by Skysite, a rope access window cleaning company mandated by the body corporate to clean the windows of the sectional title units. According to the appellants, the leak from the gutter caused water to enter the property and damage the wooden floors. The appellants aver that the leaking gutter was repaired but not the damage to the wooden floors in the property notwithstanding Ms Paulsen's commitment to send her maintenance team to repair it after inspecting the damage. Mr Motlhabane also undertook to provide the wood for the floors, which he did.

[8] Mr Motlhabane states that the number of times Skysite worked on the building increased over time and in order to access the exterior of the building, the contractors walked over the property's roof to hang ropes over the side of the building. As a result of the contractors walking on the roof, it caused the ceiling to crack. According to Mr Motlhabane, this can only be because the weight and vibration on the roof caused the ceiling boards to move and crack the plaster and paint. Mr Motlhabane duly informed Ms Paulsen that the contractors had caused cracks. Ms Paulsen acknowledged this and inspected the damage to the ceiling. The body corporate then arranged for the cracks to be filled and painted. However, so

avers Mr Motlhabane, in 2018, the cracks returned after Skysite was on site and had performed additional work.

[9] Mr Motlhabane further states that he became frustrated by the lack of action and response from the body corporate, and in February 2019, he walked into the eighth respondent's office and they discussed the need for repairs, and it was agreed that same would be carried out. That too did not happen, instead, the eighth respondent neither got back to him, nor returned his calls. Eventually, Mr Motlhabane decided to deal with the building's managing agent, Mr Dereck de Reuck *("Mr de Reuck")*, of Permanent Trust. The latter informed Mr Motlhabane that Ms Paulsen was on leave and arranged for someone to go and inspect the cracks in the ceiling. Subsequent thereto, Mr Motlhabane received an email denying that the cracks were as a result of the contractors, it suggested that they were as a result of *'settling'*. He became increasingly frustrated by the conduct of the body corporate as it had become clear that they would not deal with his queries. On 19 June 2019, Mr Motlhabane sent an email to Mr de Reuck to which he attached a quotation in respect of the repairs to the property. Mr de Reuck did not respond to the email at all. Neither did he respond to the follow up email.

[10] Against this backdrop, on 4 July 2019, Mr Motlhabane received an email notifying him that Skysite would be on site to do the work. On the stated day, the Skysite contractors walked on the roof as they have done before. He states that he went to them and asked that they cease from walking on the roof until the impasse with the body corporate regarding the repairs was dealt with. Mr Motlhabane states that he then called Mr de Reuck and asked him to communicate with the trustees and thereafter the contractors moved off the roof. However, they moved back onto the roof based on the directives of Ms Paulsen. Ms Paulsen's assistant, Mr Imraan Bux, informed Mr Motlhabane that the roof was common property and that the only way he could stop the contractors from walking on the roof was to call the police. Mr Motlhabane states that he then suggested that the contractors should leave the roof to avoid further damage until the issues could be resolved by all the parties involved. The contractors then left the roof.

[11] On 8 July 2019, the Trust's attorneys sent a letter to the seventh respondent wherein they set out the background to the interactions between Mr Motlhabane and the body corporate and the fact that the latter's communications had been blatantly ignored. It concludes thus:

"Our client notes with deep regret that this letter was entirely avoidable and ought not to have been necessary but for the fact that the body corporate has simply refused to engage with our client in a meaningful way and has now taken to ignoring it altogether."

[12] Mr Motlhabane states that on 11 October 2019, he received an email from Mr de Reuck stating that Skysite would be attending to the building on 14 October 2019 to inspect the windows and downpipes around the property where there is water ingress. He responded on that very same day and enquired as to the purpose of the inspection and highlighted that the notice was unsatisfactory. He further stated that he would not subject the property to any further damage and enquired as to what steps would be taken to avoid further damage. He did not receive any response to his query and on 14 October 2019, he heard a noise coming from the roof. He states that he went upstairs to the contractors and asked them to leave the roof, which they did. However, about two hours later, he again heard a noise coming from the roof where the contractors were walking and he went back to the roof and asked them why they were back. They informed him that they had been told by the building supervisor, Mr Warren de Bruin, and the building assistant, Mr Imraan Bux, that he (Mr Motlhabane) had discussed the matter with the sixth respondent and had consented to the workers being on the roof. Mr Motlhabane emphatically denies that such a conversation ever took place. He further states that the Skysite contractors told him that they could conduct their inspection using the fan room in order to avoid access to the roof. He further states that when he returned to the property, he found a fresh crack on the roof, which he undoubtedly believes that it was caused by the contractors on the roof.

[13] On 16 October 2019, the Trust's attorneys sent a letter to the body corporate, care of the managing agent in which they recorded their frustration at the lack of response and threatened legal action. They stated that:

". . . it is regrettable in the extreme that legal intervention should be required in circumstances such as these, but your unfortunate and irrational response approach to this matter cannot be tolerated any further. "

[14] On 17 October 2019, the Trust's attorneys received a response from Mr de Reuck in which he stated that the letter had been forwarded to the trustees of the body corporate for their comments and reply. No comments or reply ever came. However, on 29 October 2019, Mr Motlhabane received a message from the managing agent of the property that Skysite would be on site in order to repair leaks entering the F-level in the Singer building and unit 401 Adderley Terraces. In his response to the message, Mr Motlhabane voiced his astonishment that the body corporate would authorise contractors to carry out work in the light of the Trust's attorney's correspondence. In response, the respondents stated that the contractor needed to attend to and deal with water ingress into the property and denying access would not resolve the matter. Mr Motlhabane responded on the very same day and stated that the issue of access to the roof should be dealt with, for the reasons outlined in the Trust's attorneys' letter. It is common cause that despite the aforegoing exchange, the contractors on 30 October 2019 accessed the roof, and when Mr Motlhabane protested they informed him that they were instructed by the trustees and if he had any issue with that he should call the police.

[15] Regarding the interdict pertaining to the noise, Mr Motlhabane states that construction work had been conducted in the apartment unit below the Trusts property for some time and the noise emanating therefrom was considerable as it involved drilling and banging. According to Mr Motlhabane, the noise was so intense that one could feel the vibrations and it was very disturbing. His wife, who is a student also found the noise very disturbing when she was trying to study. He further states that the noise started on weekdays at 08h00 and continued until 16h00. To this end, Mr Motlhabane states that he sent an email on 3 October 2019 to Ms Paulsen and copied Mr de Reuck enquiring how long the drilling and banging in the apartment below would continue. He did not receive any response. He further states that he would have expected that the Trust would have been given notice that noisy work was to commence in the apartment below. Mr de Reuck responded to Mr

Motlhabane' s email of 3 October 2019 and on 30 October 2019 and advised that the building noise was likely to continue for a further two months. The time frames are according to him, in violation of the body corporate's contractor policy, which provides that where building operations generate excessive or continuous noise, such work may only be undertaken on weekdays between 08h00 and 13h00 and between 15h00 and 17h00 and should not unreasonably interfere with the use and enjoyment of the property of other occupants of the building. According to Mr Motlhabane, the noise started in about September 2019 and continued for a long period of time. Furthermore, the present application, launched on 15 November 2019 was due to the non-responsiveness of the body corporate.

[16] Mr Motlhabane further explains that after the application was launched, there was engagement between the parties and various proposals and undertakings were made. In order to assist with the technical aspects of those discussions, the appellants appointed Alphadrone to provide a report regarding rope access. Alphadrone compiled a report wherein it set out a number of options available to access the exterior of the building without walking over the roof of the property. It is common cause that the report was placed before the court a *quo* in an affidavit. The body corporate also delivered a report compiled by Skysite as being incorrect and incapable of implementation.

[17] In respect of the issue of noise and contractor's policy, the respondents placed evidence before court to the effect that the building works should be completed during February 2020. Mr Motlhabane also deposed to an affidavit on 3 March 2020 stating the following:

"I deny that the 'remaining work' which was to be completed in February generated little noise. The work has continued and although it is less noisy than before, there still has been loud banging and drilling and on 17 February, I had to go to the unit again to remind the builder that noisy work was permitted not between 1 pm and 3 pm. They stated that they would take longer to finish the work if they could not do noisy work during those times. I repeated that it was not permitted in terms of policy."

[18] The sixth respondent also deposed to an affidavit on 9 March 2020, prior to the hearing of the matter stating that the renovations would be completed by the end of March 2020. The matter was then heard on 10 March 2020 and judgment was delivered on 8 May 2020.

[19] Mr Motlhabane explained that the Trust, as set out in the notice of motion was seeking, pending the determination of relief before CSOS an order to the effect that:

> 19.1 the body corporate be interdicted from allowing contractors to access the roof of the property;
>
> 19.2 the body corporate be compelled to enforce the contractor's policy and cause the building works below the property to be conducted in a manner which complies with that policy.

[20] According to Mr Motlhabane, CSOS makes no provision for urgent relief and as such there is no prospect of obtaining urgent relief in that forum.

The body corporates' answering affidavit

[21] The body corporate in their answering affidavit raise an issue that the exclusive use area of the appellant's property contains an illegal structure in the form of a habitable dwelling which covers most of it, and which was built without the consent of the body corporate, nor has such consent ever been given subsequently. In an affidavit deposed by the first respondent, the body corporate explains that it is the roof of the illegal structure that is being complained of, not the roof of the entire property.

[22] With regard to the merits, the body corporate denies that contractors have caused damage to the ceiling of the property. Besides, so goes the contention, whenever, contractors require access to the roof they use wooden boards placed on the roof in order to protect same. According to the body corporate, the roof of the structure of the exclusive use area of the property consists of metal galvanised sheeting divided by sharp metal edges approximately 25cm to 35cm apart.

[23] Regarding the noise emanating from the unit below the Trust's property, the body corporate avers that it is not the owner of the unit, and as such, there has been

a form of misjoinder in that the appellants have failed to join the registered owner of the relevant unit where the noise was emanating from. In addition, the sixth respondent should have been joined in her personal capacity. According to the body corporate, it has a duty to maintain common property and the appellants, and any other owners are expected to endure some inconvenience resulting therefrom. Furthermore, so aver the respondents, the appellants ought to have referred the matter in terms of section 39 of the Community Schemes Ombud Service Act No 9 of 2011 to the CSOS as the relief sought by the appellants on urgent basis is incompetent.

The replying affidavit

[24] In response to the body corporate's answering affidavit, the Trust, through Mr Motlhabane reiterates that there is no forum established by CSOS for the bringing and adjudication of urgent applications. Furthermore, whereas the body corporate is required to ensure that the property is maintained, it is not permitted to cause damage to the Trust's property whilst doing so. With regard to the alleged illegality of the structure, Mr Motlhabane states that as far back as 2015, the managing agents of the body corporate were aware of the fact that the extent of the apartment needed to be regularised and did not have difficulty with the structures as built or the Trust's occupation.

[25] Insofar as the body corporates' averment that damage to the roof could not have been caused by the contractors as they put a plank over the roof, Mr Motlhabane states that it is indeed so that on occasion, wooden boards were used, but they were placed in such a way that they did not distribute the weight of the workers and in fact probably made things worse due to the added weight of the board. He emphasised the fact that whenever they worked on the roof, the ceiling was damaged.

The findings of the court a quo

[26] In respect of the two interdicts, which were sought by the appellants, the court *a quo* made the findings appearing below. First in respect of the damage to the ceiling of the property, the following are the relevant findings:

26.1 The applicants demonstrated a *prima facie* right not to have their property damaged by the respondents and rejected the argument advanced by respondents to the effect that a portion of the property in question was unlawfully constructed.

26.2 The appellants did not fulfil the remaining requirements for an interdict.

26.3 The balance of convenience does not favour the granting of relief sought in that the body corporate had a duty to maintain the building and the damage to the applicants' property was not extensive and could be repaired. Furthermore, there is no alternative means to access the building.

26.4 There was an alternative remedy available to the appellants in that they could seek damages from the Body Corporate or approach the Ombud established in terms of CSOS for a remedy, and in fact the appellants should have approached the CSOS before launching the application.

[27] With regard to the noise and building works, the court a *quo* reasoned as follows:

27.1 The appellants had a *prima facie* right to seek the enforcement of the body corporate's contractor policy;

27.2 The appellants did not fulfil the remaining requirements for an interdict;

27.3 The noise levels were confined to the times suggested by the sixth respondent;

27.4 There should have been little or no noise interruptions since March 2020 and thus the issue is moot and;

27.5 The appellants have thus not established irreparable harm nor that the balance of convenience favours the granting of the interdict.

The grounds of appeal

[28] With regard to the building works, which gave rise to damage to the ceiling of the appellants' property, the grounds of appeal are as follows:

28.1 That the court a *quo* erred in the application of authorities in respect of the requirements for "irreparable harm" in that the harm need not be absolutely irreparable. All that the appellants needed to show was that the *status quo* would be more difficult and costly to restore at a later stage;

28.2 That the court a *quo* erred in finding that the appellants had not established that they would suffer irreparable harm. The appellants established that they would suffer irreparable harm as required by the relevant authorities for the following reasons:

28.2.1 The harm caused by the contractors would recur several times each year and would not be a once off event;

28.2.2 The *status quo* would be more difficult to restore in that it would cause substantial inconvenience to the appellants, which would occur repeatedly;

28.2.3 The costs in repairing the cracks in the celling, although not large, do not account for the unacceptable inconvenience, which would be suffered as a result of the recurrent repairs;

28.2.4 The body corporate refused to pay the costs and an action to recover the costs would not be practical or an adequate remedy, not least because the Sakalengwe Trust would be liable for a portion of those costs as it is a member of the body corporate. Moreover, a never-ending series of actions would inevitably be required due to the recurrent nature of the damage;

28.3 That the court a *quo* erred in finding that the appellants had not established that the balance of convenience favoured the granting of the interim relief;

28.4 That the court a *quo* erred in not dealing with the merits of the Alphadrone report and making a determination on the methods available to access the portion of the building which was relevant;

28.5 Furthermore, in particular:

28.5.1 The court a *quo* erred in not finding that only a small portion of members of the body corporate would be affected if the relief sought was granted;

28.5.2 The appellants tender that access could be granted for emergency repairs or work would mitigate any potential prejudice and what constituted an emergency could be reasonably and objectively determined, failing which the parties could approach the Court;

28.6 That the court a *quo* erred in the application of the authorities in respect of the requirement of alternative remedies and that the availability of

a damages claim does not in itself constitute an adequate alternative remedy.

28.7 That the appellants established that they did not have an adequate alternative remedy for the following reasons:

28.7.1 An action against the body corporate would take a long time, would be expensive in respect of the quantum of the claim and would not be satisfactory in respect of the ongoing damage and inconvenience;

28.7.2 The Sakalengwe Trust would also be liable for a portion of those damages as it is a member of the body corporate. It could not be expected to pay for even a portion of the damages it has claimed.

28.8 That the court a *quo* erred in holding that CSOS was an adequate alternative remedy as:

28.8.1 The application was brought as one of urgency and there was no urgent procedure in respect of CSOS;

28.8.2 The proceedings before CSOS would take months if not longer which was not an adequate remedy on the facts of the matter;

28.8.3 There was already evidence before the Court that the body corporate had disregarded and was continuing to disregard an existing CSOS order.

Discussion

[29] *Setlogelo v Setlogelo*[1] continues to be the leading authority in interim interdicts. The well-established requirements for the granting of an interdict were then refined in *Webster v Mitchell*[2] and the test requires that the applicant that claims an interim interdict must establish the following:

29.1 a *prima facie* right, even if it is subject to some doubt;

29.2 a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;

29.3 the balance of convenience must favour the granting of the interdict; and;

29.4 the applicant must have no other satisfactory remedy.

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[1] 1914 AD 221

[2] 1948 (1) SA 1186 (W)

[30] This segment of the law has evolved throughout the years. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[3] *("OUTA")* the Constitutional Court stated:

"*It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' court and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.*"

[31] It should be recalled that the court a *quo* concluded that the 'appellants accordingly have at least a *prima facie* right not to have their property damaged by the respondents, or contractors appointed by the respondents in order to conduct maintenance and / or repair work to the building'[4]. However, the court a *quo* held that the appellants fall short on the remainder of the requirements for an interim interdict. The balance of convenience does not favour the granting of the relief sought in that the body corporate had a duty to maintain the building and the damage to the appellants' property was not extensive and could be repaired. Further, there was no alternative means to access the side of the building. Furthermore, there was an alternative remedy available to the appellants in that they could seek damages from the body corporate or approach the Ombud established in terms of the CSOS Act for a remedy, and that the appellant should have approached CSOS before launching this application.

[32] It is common cause that "… *The right which the applicant must prove is also a right which can be protected*."[5] In our opinion, in circumstances where the appellants' lamentations were brazenly ignored by the body corporate, the appellants were

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[3] 2012 (6) SA 223 (CC) at para 45
[4] Vol 3 Record page 290 para 15
[5] Minister of Law and Order v Committee of the Church Summit 1994 (3) SA 89 (B) at 98

entitled to approach the Court for an urgent relief for their rights to be protected. In the absence of an equivalent procedure and/or relief from the Ombud, it is unimaginable how the appellants could have first approached the Ombud for an urgent relief. It appears that, the appellants had problems in their property as there were some leaks in the walls in 2017 already. The leak from the gutter caused water to enter the appellants' property and damage to the wooden floors. This was as a result of Skysite, a rope access company whose employees accessed the side of the building using ropes and thereby caused damage to the gutter. Skysite seems to be the preferred service provider for the body corporate on maintenance or repair work in The Adderley title scheme.

[33] As the maintenance work on the building became frequent, for the Skysite workers to have access to the exterior of the building, they walked over the appellants' property roof in order to hang ropes over the side of the building. This resulted in visible cracks on the appellants' ceiling. As stated by the appellants, the weight and vibration on the roof caused the ceiling boards to move and cracked the plaster and the paint. In my understanding, this is not an inconsequential or insignificant damage. The fact that it induced a discomfort and later on a complaint on the manner in which the roof of the penthouse appeared, suggest that the complaint was indeed legitimate. Hence, the body corporate repaired the cracks and painted the ceiling initially.

[34] In 2019, the appellants became more frustrated as the cracks returned after the Skysite was on site, but the body corporate at this juncture took no steps to investigate or repair them. Instead, the body corporate kept on notifying the appellants that Skysite would return on the site to do work. The workers at that stage continued walking over the roof and drilling and banging with their tools and machines, which additionally caused serious noise. This was despite the fact that they were advised that the fourth appellant is a student and the noise was disturbing when she tried to concentrate on her studies.

[35] On 16 October 2019, when the appellants returned to their property, they found a fresh crack in the ceiling, which was without a doubt caused by the

contractors on the roof. The appellants' attorney caused a letter of complaint to be dispatched to the Body Corporate, which was met with silence.

[36] On 29 October 2019, the appellants instead received a correspondence that workers would be on site to attend to repair some works. Throughout this interaction, there is no decency to even request for permission. This stance was adopted by the body corporate despite the appellants' request that this work be postponed up until the appellants' issues have been resolved. The said request was not heeded. The noise and the walking over the roof continued unabated, even after the appellants advised that their action was in violation of the body corporates contractor's policy.

[37] In circumstances where the appellants have demonstrated that they have a *prima facie* right not to have their property damaged, it is incomprehensible why the interim interdict was not granted. In other words, the appellants discharged the onus, that they have a right to use and enjoy the property unhindered. In my view, whether the cracks are negligible or extensive, that is irrelevant for purposes of the issues for determination. The fact that the appellants were offended and/or seriously undermined by the actions of the body corporate necessitated them to approach this Court on an urgent basis on 15 November 2019.

[38] Notwithstanding, in circumstances where a clear right has been established, the requirement of irreparable harm need not have been established. In *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others*[6], it was stated that:

"*1. A prima facie right though open to some doubt exists when there is a prospect of success in the claim for the principal relief albeit that such prospect that may be assessed as weak by the Judge hearing the interim application.*
2. Provided that there is a prospect of success, there is no further threshold which must be crossed before proceeding to a consideration of the other elements of an interim interdict.
3. The strength of one element may make up for the frailty of another.

[6] 1995 (2) SA 813 (W) at 832I – 833B

4. The process of measuring each element requires a holistic approach to the affidavits in the case, examining and balancing the facts and coming to such conclusion as one may as to the probabilities where such disputes exist."

[39] It would appear that the onus is less stringent in interim interdicts as compared to a final interdict. In *Nieuwoudt v Maswabi NO*[7], it was held that where an applicant sought interlocutory relief to protect his right pending the resolution of the dispute in the main action, he was required to prove not a clear right but a *prima facie* right to payment for the work he had done. Likewise, the appellant was supposed to have been granted an interim interdict pending its referral of the dispute to CSOS.

[40] However, in *Setlogelo*[8] *(supra)*, it was held that if the applicant can establish a clear right, which in this case the appellants have established its right not to have its property damaged, its apprehension of irreparable harm need not be established. The Court stated:

"*But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such a case he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party …*"[9]

[41] If regard is had to *Setlogelo (supra),* 'a right clearly established', is whether applicants have a clear right or not is a matter of substantive law, and whether that right is clearly established is a matter of evidence.[10]

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[7] 2002 (6) SA 96 (O) at 102H - I
[8] 1914 AD 221 At page 227
[9] Erasmus Superior Court Practice, Second Edition, Vol 2 (2019) Part D : Appendices – Interdicts at D6 - 20
[10] Erasmus Superior Court Practice, Second Edition, Vol 2 (2021) Part D : Appendices – Interdicts at D6 - 13

[42] The Constitutional Court had an opportunity to consider the issue of protected rights (albeit in the context of a final interdict) in *Masstores (Pty) Ltd v Pick 'n Pay Retailers* where it was held that *'[i]f the conduct complained of is illegal or is not justified in law, then the interdict may be granted to protect the applicant's rights. Nobody is entitled to violate another person's rights if the law does not authorise the breach.'*[11]

[43] Even though irreparable harm, strictly speaking does not find application in this case, the appellants have demonstrated that the harm is recurring and the cracks would not only cost money, but the appellants would be required to seek damages against the body corporate on a continuous basis. The unfortunate scenario is that the first appellant would contribute to those costs in the sense that it had to pay a portion of such damages.

[44] If the circumstances were to be allowed to continue without sanction from this Court, the damage to the appellants' property would continue in perpetuity and the damage would likely escalate to be more serious. That would mean therefore that the appellants are deprived of the use and enjoyment of their property – the harm would be more than irreparable with time.

[45] With regard to the balance of convenience requirement, the inquiry is the one relating to prejudice to the parties and third parties. That is, the court must weigh the prejudice to the applicant if the interlocutory interdict is refused against the prejudice to the respondents if it is granted – See *City of Tshwane Metropolitan Municipality v Afriforum and Another* [12].

[46] The appellants established that the prejudice to the body corporate would be limited to certain units, which would not have their windows cleaned. With regard to maintenance work, there was no indication of what would be required from the appellant. In the event of an emergency, access was tendered by the appellants upfront as a condition of the relief sought.

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[11] 2017 (1) SA 613 (CC) at 87
[12] 2016 (6) SA 279 (CC) at 302 B - C

[47] It appears that the appellants established that there were in fact other means of accessing the side of the building without crossing over the appellants' roof. However, the court a *quo* rejected the appellants' suggestion without the consideration and analysis of the competing expert reports and the evidence before Court. The court a *quo* concluded that the building could only be accessed in the same manner in which the body corporate's contractors had. The court a *quo* failed to appreciate that the appellant's property, which is the subject matter of this application, in particular the roof structure, was not approved by the body corporate and was not lawfully built. This means that the illegal status of this roof should be allowed to prevail. It boggles one's mind on whether these cracks are not caused by the bad workmanship on that roof structure that was not approved.

[48] In essence, the appellants' expert, Alphadrone opined that the anchor bolts currently installed adjacent to Longmarket Street are situated too low for best practice methodologies and should be raised to reduce the angle on the ropes as a minimum. It is best practice to refrain from walking on roof structures that are constructed from formed sheet metal. The clip in type sheet metal panel system is not designed for frequent usage as an access way or walk way and that any rope access services should be done without accessing the roof. The chemical anchors could be placed into the brickwork.

[49] The Skysite rejected the appellants' expert opinion. In their view, they considered the feasibility of installing rope anchor points below the level of the said roof, but are of the view that the substrate there was likely to be brickwork, which was unsuitable for that purpose. It was strongly recommended that the rope anchor points should not be placed into brickwork, especially brickwork of the quality in question, as it is unlikely to provide sufficient strength.

[50] The court a *quo*, it was stated merely rejected the appellants' expert opinion on rope access without taking into account that Skysite expressed views on the unlikely suitability of brickwork without conducting any tests to ensure that was in fact the case. In fact, Skysite's finding was unsupported.

[51] In any event, it was said that the court a *quo* ignored the simple fact that it was not called upon to decide whether there was an alternative means to access the side of the building. That was the issue to be determined by CSOS in the proceedings to be launched by the appellants. The appellants merely needed to demonstrate that there was an issue, which could have been decided in their favour in the proceedings to be launched at a later stage. In the interim, the court a *quo* should have granted the interdict to protect the appellants' property from damage pending the CSOS proceedings.

[52] The court a *quo's* finding that the appellants had an alternative remedy in that it should have brought proceedings before CSOS was incorrect, so it was said. The damage to the appellants' property was ongoing. That involved a deprivation of the use and enjoyment of their property in the event that the crack remains unfixed. The CSOS does not grant interdictory relief – See *Kinghaven Homeowners' Association v Botha and Others*[13]; where it was observed that the body corporate had ignored previous orders by CSOS orders. Further, due to the attitude of the body corporate any conciliation proceedings required by CSOS would not have been successful. The appellants addressed a plethora of correspondences to the body corporate and were ignored. If damages or declaratory relief were to be sought before CSOS, it would be a futile exercise as such proceedings would be lengthy and damages to the property would continue unabated. The appellants' lamentations in this regard made sense.

[53] It is therefore clear that the body corporate decided to adopt a hostile attitude towards the appellants. Despite the fact that the appellants were willing to engage with the body corporate in order to resolve the issues, the body corporate in return adopted an aloof attitude. In circumstances when the appellants sought an urgent relief, it is inconceivable on how the CSOS would have dealt with the appellants' urgent complaints having had no such procedure and remedy in place. The appellants clearly have demonstrated more than what is expected in interim interdicts, that is a *prima facie* right. Having had regard to the aforementioned

[13] (6220/2019) [2020] ZAWCHC 92 (4 September 2020)

authorities, the appellants had a clear right to be protected, and in our view, there is no valid reason why the appellants should be mulched with a cost order.

[54] It remains to be said that Counsel for the body corporate, as pointed out in the main judgment, contended that the attitude adopted by the Trust in failing to lodge a complaint with CSOS suggests a complete lack of *bona fides* on its parts. The judgment of Gamble J holds that:

"But what its tardiness does demonstrate is that the initial urgency in respect of the roof issue has undoubtedly dissipated and the downside which it must now tolerate in enduring occasional cracks to the ceiling is not as bad as it suggested. It must now bear the consequences of its decision (or more properly its indecision)."

If regard is had to the excerpt from the judgment of Gamble J, it seems that the basis of the dismissal of the application is that the appellants had failed to lodge a complaint with the CSOS from 2020 up until the appeal was heard by this Court. In addition to our view that the appellants satisfied the requirements of an interdict, we are in respectful disagreement with the court's approach to the evidence elicited during the hearing of the appeal, namely, that because of its tardiness, the Trust must suffer the consequences. The general principle is that in deciding an appeal, the court decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given, not in accordance with new circumstances, which came into existence afterwards. That said, a court may elicit facts relevant for the determination of an issue in the appeal. The overriding principles applicable in such circumstances are set out in *Donelly v Barclays National Bank Ltd*[14]:

"Secondly, it is a wholly new defence line that is being taken. It was not mentioned in the summary judgment proceedings, nor in the plea. It was never referred to in evidence or argument at the trial, its mere novelty, of course, is no ground per se for rejecting it. However, generally speaking, a Court of Appeal will not entertain a point not raised in the court below. In this regard I need do no more than to refer to Herbstein and Van Wissen The Civil Practice of the Superior Courts in South Africa

[14] 1990 (1) SA 375 at 380H-381B

3rd ed at 736-737. In principle, a Court of Appeal is disinclined to allow a point to be raised for the first time before it, Generally, it will decline to do so unless

(1) The point is covered by the pleadings;

(2) There would be no unfairness to the other party

(3) The facts are common cause or well-known and incontrovertible; and

(4) There is no ground for thinking that the other or further evidence would have been produced that could have affected the point."

In *Fischer v Ramahlele*[15] the Court explained thus:

"[13] Turning to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which sere the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even when the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for (i) it is impermissible for a party to rely on a constitutional complaint that was not pleaded. There are three cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone."

In the matter at hand, although the elicited facts are incontrovertible, it is our considered view that when those facts form the basis of an adverse finding against a party, unfairness results. Furthermore, it may well be that had the Trust been made aware of that a finding would be based on its failure to lodge a complaint with CSOS from 2020 until the appeal was heard, could produce evidence that could have affected the point.

[55] The Constitutional Court in *SAPS v Solidarity obo Barnard*[16], restated this principle thus:

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[15] 2014 (4) SA SCA 614 at 620
[16] 2014 (6) SA 123 CC 123

"[217] The general principle of our law is that it is the parties themselves who identify and raise issues to be determined by a court. The parties may have their own reasons for not raising an issue which the court finds interesting or important to determine. The scope of what falls to be determined depends on what the pleadings contain. In CUSA this court formulated the principle in these terms:

'Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the (Labour Relations Act) specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award may not, on appeal raise a new ground of review. To permit a party to do so may well undermine the objective of the [Labour Relations Act] to have labour disputes resolved as speedily as possible.'

[*218] However, this principle is subject to one exception. The point raised mero motu by the court must be apparent from the papers in the sense that it was sufficiently canvassed and established by the facts, and that its determination must be necessary for the proper adjudication of the case."*

Here, whereas the parties readily disclosed the fact that the Trust had not yet lodged a complaint, upon questioning by the Court, the Trust had a right to expect that no finding would be made on the basis of the disclosure as the issues for determination were crystallised on the notice of appeal. The issue was raised quite inadvertently upon engagement with the parties during the hearing. It is in our view impermissible for a court to decide a matter on the basis of such an issue. Furthermore, as we emphasised, it raises an issue of procedural fairness. We are of the firm view that this constitutes an irregularity as the party concerned had not been forewarned that such information may well form the basis of an adverse costs order.

[56] We now turn to consider the issue of costs concerning the noise interdict, which had become moot.

The noise interdict

[57] It is trite that when the hearing of any civil appeal to the Supreme Court of Appeal or any division of the High Court, an order will have no practical effect, the appeal may be dismissed on this ground alone. However, notwithstanding the

dismissal of the appeal on the basis that the order will have no practical effect, the court concerned may still consider the question of law and of fact and the appropriate order as to costs[17]. Put in another way, the merits of the interdict relating to the body corporate's responsibility to enforce the contractor's policy concerning the noise and disturbance experienced by the appellants must be considered in determining the issue of costs. It will be recalled that the court *a quo* correctly found that the body corporate is bound by the contractor's policy but dismissed the interdict on the basis that it was moot as noise during the prohibited times had not occurred or had stopped by March 2020.

[58] It is clear from the evidence that at the time the appellants launched the interdict application, the question of noise was very much alive. Although the sixth respondent had stated that the work would be completed by February 2020, that did not occur. In the supplementary affidavit deposed to by Mr Motlhabane, on 3 March 2020, he stated that:

"I deny that 'the remaining work' which was to be completed by during February 2020 has generated little noise. The work has continued and although it is less noisy than before there still has been loud banging and drilling

...

On 17 February 2020 I had to go to the unit again to remind the builder that noisy work was not permitted between 1pm and 3 pm. They stated that they would take longer to finish the work if they could not do noisy work during those times. I repeated that it was not permitted in terms of the policy.

. . .

I point out that the work shows no sign of being completed during February 2020. I have attached pictures of materials which are presumably to be installed in the unit marked "S5". It seems clear that the work will not be completed by the end of February 2020."

[59] The sixth respondent in an affidavit she deposed to on 9 March 2020 stated that the renovations should be completed by the end of March 2020. That was a

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[17] See *Herbstein and Van Winsen; The Civil Practice of the High Courts and the Supreme Court of Appeal,* 5th ed at page 1239

mere estimate. Mr van Reenen correctly contended that the basis on which the court *a quo* held that the noise had ceased by March 2020 is not borne out by evidence. The evidence that was before court clearly established that the noise was continuing and the appellants therefore were fully justified in approaching the court for the relief they sought.

[60] The court *a quo* found that the appellants had a *prima facie* right to insist on the enforcement of the Contractor's Policy. Mr van Reenen further contended that when regard is had to the provisions of the Sectional Titles Schemes Management Act 8 of 2011 and Regulations thereof, the appellants had established a clear right. In terms of Section 13 (1) (d), (e) and (f) of the Sectional Titles Schemes Management Act, an owner must use and enjoy the common property in such a manner as not to interfere unreasonably with the use and enjoyment thereof by other owners or persons lawfully on the premises. Regulation 30 reads thus:
"30 The body corporate must take all reasonable steps to ensure that a member or any other occupier of a section or exclusive use area does not: - use the common property so as to unreasonably interfere with other persons lawfully on the premises, in breach of section 13 (1)(d) of the Act; use a section or exclusive area so as to cause nuisance, in breach of section 13(1) (e) of the Act."

[61] The appellants therefore had a clear right to insist that the body corporate take steps to ensure that the nuisance emanating from the unit below the property was properly dealt with.

[62] With regard to irreparable harm, the court *a quo* found that it had not been alleged. The facts as alluded to by Mr Motlhabane establish that the noise would start at 08h00 and end at 16h00 and that its extent was unbearable. This evidence is uncontroverted. Furthermore, the appellants specifically alleged that the noise was interfering with the use of the property, more so that the fourth appellant was attempting to study. This version is supported by the sixth respondent who admitted in correspondence that the construction work was very noisy as there was no buffer between the floors. In my view, these facts are sufficient to justify an interdict to stop the nuisance.

[63] Insofar as the balance of convenience is concerned, it is well to remind oneself that this requirement is only a requirement in cases where an applicant has not established a clear right. The inevitable result is that in the case of a clear right, this need not be established. In *Hydro Holdings (EDMS) BPK v Minister of Public Works* and Another[18], the court said the following:

"It was argued somewhat tentatively that I should have regard to the balance of convenience in this case before granting an interdict. It seems to me, however, that I need not discuss the respective contentions in this regard. According to the authorities questions of the balance of convenience arise only if an applicant for an interdict has not established a clear right, but only a right which, though prima facie established, is open to doubt. (See e.g., Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (AD) at p. 691C-G)".

[64] It is clear that in respect of costs of the building works and enforcement of the contractors' policy, the appellants had established a clear right that the body corporate has the responsibility to enforce its own policy. Therefore, the court a *quo* ought to have granted the interdict that was sought by the appellants and the costs should have been borne by the body corporate. Given that an order reversing the order of the court a *quo* will have no practical effect, it is our judgment that the body corporate should pay the costs of the application.

Conclusion

[65] We have in this judgment held that the appellants were fully justified in approaching the court for interdictory relief in respect of both legs of the interdict application. However, with regard to the noise and the enforcement of the contractors' policy, the appellants may recover only the costs as the granting of the interdict has no practical effect. In the same vein, we have held that the applicants are entitled to the interdictory relief concerning damage to the roof of the property. In the result, the following order is issued:

65.1 The body corporate is interdicted from permitting any contractors from walking on or generally access the roof of Section 353 in the Adderley

[18] 1977 (2) SA 778 (T) at 787

Sectional Title Scheme (scheme number 212/2003) save for emergency repairs or maintenance;

65.2 The interdict shall operate as an interim interdict pending the determination of the proceedings in terms of the CSOS Act in which the appellants will seek relief relating to the issue above within fifteen (15) days of the granting of this order failing which the interim interdict will lapse.

65.3 The body corporate is ordered to pay the costs of this application, including the costs relating to the order of the Supreme Court of Appeal granting leave to appeal.

NDITA J

MANTAME J

MINORITY JUDGMENT

GAMBLE, J:

INTRODUCTION

1. "The Adderley" is a sectional title complex situated at the top of Adderley Street in Cape Town's CBD. It is an amalgam of historic buildings which have been interlinked with each other for purposes of creating an urban complex comprising residential, business and retail units registered as "The Adderley Sectional Title Scheme" ("The Adderley") under the Sectional Titles Act, 95 of 1986.

2. The first and second appellants are the trustees for the time being of the Sakalengwe Trust (duly registered under Master's reference no. IT 2960/2012 and hereinafter conveniently referred to as "the Trust"), which is the registered owner of section 353 of The Adderley ("the unit"). The unit comprises a penthouse apartment beneficially occupied by the third and fourth appellants, Mr. and Ms. Motlhabane,

who are from Gauteng and consequently spend only part of the year in Cape Town.

3. The Adderley is managed, under the Sectional Titles Schemes Management Act, 8 of 2011, by the seven respondents herein who are the trustees of its body corporate. I shall accordingly refer to the respondents collectively as “the body corporate”. The body corporate appointed a local company, Permanent Trust, as the managing agent for the scheme.

4. The Trust purchased the unit in 2015. Upon acquisition, says Mr. Motlhabane, the unit included an enclosed area replete with internal ceiling and lights, which covered an area originally used as an external patio with the roof having been extended to cover it. As I understand it this area now forms an integral part of the apartment. For the sake of convenience, I shall refer to this part of the apartment as “the extension”. The body corporate’s suggestion that the extension had been unlawfully constructed by a prior owner of the unit is irrelevant to this litigation.

5. Given the integrated configuration of The Adderley, it comprises various levels – the unit being located at “Level HM”. From time to time it is necessary for workers employed by a contractor (“Skysite”) appointed by Permanent Trust to access the roof, gutters and side windows of the scheme to effect maintenance and repairs thereto. To do their work, these workers are harnessed to anchor points on the building and they then abseil down the sides thereof.

6. One of the workers’ points of access is via a parking area adjacent to the corrugated iron roof of the unit. Having anchored their ropes to concrete pillars in the parking area, the workers sometimes access the side of the building by walking over the roof of the extension. On occasion, this pedestrian traffic over the roof of the unit causes the ceiling below the extension to crack. While these cracks do not present any structural danger to the building or the unit, they do result in unsightly cracking lines in the ceiling. This irks Mr. Motlhabane no end as he is then required to attend to the cosmetic repair of the cracks.

7. During the second half of 2019 matters came to a head when fresh cracks appeared in the ceiling of the extension after workers had again allegedly walked

across the roof. Attorneys' letters bustled back and forth and eventually the Trust approached this Division for urgent interdictory relief designed to restrict the access of the managing agent's contractors over the roof of the unit (and the extension) pending a referral of a dispute for determination under the auspices of an adjudicator appointed under the Community Schemes Ombud Services Act, 9 of 2011 ("CSOS").

8. What the Trust in essence sought to do was to preclude workmen, who were otherwise lawfully going about their contractual obligations to Permanent Trust and the body corporate, from walking over the roof of the extension while their entitlement to do so was resolved in an alternate forum specifically designed to address the type of disputes ordinarily arising out of communal living arrangements. It was, in the circumstances, a classic application for an interdict *pendente lite* intended to suspend the passage of the workmen over the unit while the real issue was resolved in that other forum.

9. Recently, in Heathrow Property[19] Sher J considered the approach to litigation arising from the application of CSOS and its interplay with other *fora* such as the Magistrates' and High Courts. He described the object of the CSOS thus.

"[35] This Court has previously pointed out 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 conciliators and adjudicators, without the need for legal representation, save in certain limited circumstances.

[36] In Coral Island[20], 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

[19] Heathrow Property Holdings No 33 CC v Manhattan Place Body Corporate and others 2022 (1) SA 211 (WCC)
[20] Coral Island Body Corporate v Hoge 2019 (5) SA 158 (WCC)

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,[21] 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 utilizing the garage for a purpose other than that for which it was designated in terms of the sectional plan, 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 their own costs.

[38] In the circumstances, the issue of whether or not 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 regard were obiter, and the reference to the decision in Standard Credit should be seen in that light." (Internal references otherwise omitted)

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[21] Standard Credit Corporation Ltd v Bester and others 1987 (1) SA 812 (W)

10. In Coral Island, Binns Ward J commented as follows regarding the purpose of the CSOS.

"[8] The disputes that lay at the heart of the current litigation, namely the appearance and utility of plumbing appurtenances and the permitted usage of designated areas, are of the sort that commonly arise in the context of the shared ownership and close neighbour interaction that are inherently part and parcel of membership of the body corporate of any sectional title scheme. They are essentially of a domestic character and involve issues that fall to be determined with reference not only to statutory law and rules and regulations, but also the common law principles of private nuisance or neighbour law; in the context of which, as one judge sagely observed, '[t]he homely phrases "give and take" and "live and let live" are much nearer the truth than the Latin maxim *sic utere tuo ut alienum non laedas'*.

[9] It was no doubt because of their common occurrence, the desirability that they be determined as informally and cheaply as possible, and the fact that the cost of litigating such disputes in the courts is beyond the reach of the vast majority of individual owners of sectional title units that the Ombud Act was enacted as part of the tranche of sectional title-related reform measures adopted by the legislature nearly a decade ago. The Ombud Act provided for the establishment of a service to provide for a dispute resolution mechanism in community schemes. All community schemes are required to raise a levy on their members to contribute to the funding requirements of the Ombud Service. The Act's provisions allow for the adjudication of disputes such as those that presented in the current litigation by a suitably qualified adjudicator who will deal with the matter on an inquisitorial basis and, save in especially indicated circumstances, without the involvement of legal representation on behalf of any of the parties. The Ombud Act also provides for the adjudicator to refer disputes for conciliation in suitable cases. Conciliation is undertaken by appropriately trained and qualified conciliators employed by the Community Schemes Ombud Service. The adjudicators' determinations are amenable to being made orders of court by means of an inexpensive administrative process, and are subject to appeal to the High Court." (Internal references omitted)

11. In the circumstances, and while this issue did not fall for determination, the

decision by the Trust to seek interim relief before this court to effectively freeze the situation regarding access to the roof while a speedy extra-curial process was pursued, cannot be faulted. It is to be likened to a party bound contractually to go to arbitration to resolve a dispute, approaching the High Court for an interim interdict pending resolution of such dispute.

12. When the Trust approached the urgent court, it went further and included a second cause for complaint against the body corporate in its notice of motion in which it sought a temporary interdict pending a referral of a separate dispute to the CSOS. That dispute related to building renovations which were being conducted in an apartment directly below that of the Trust. These renovations, said Mr. Motlhabane, were excessively noisy and in breach of the body corporate's so-called "contractor policy", which restricted the time when such work might be done in the scheme. The Trust complained that the body corporate was remiss in failing to enforce its own policy by restricting the times when the building works might take place, but the body corporate contended that it was not bound by the policy to do so. In the result, the Trust indicated that this dispute, too, would be referred to the CSOS and asked for an interdict *pendent lite* in that regard too.

PROCEEDINGS IN THE COURT A QUO

13. The Trust lodged the application on 15 November 2019 for a hearing on 9 December 2019 in which, in addition to the customary prayers for urgency and costs, it asked for the following relief.

"2. That the First to Seventh Respondents, in their capacities as trustees of The Adderley Body Corporate ("the Body Corporate") be:

> 2.1 Interdicted from permitting any contractors from working on or generally accessing the roof of section number 353 in The Adderley Sectional Title scheme (scheme number 212/2003) ("the Property").
>
> 2.2 Ordered to ensure that the building works being conducted in the section immediately below the Property comply with the contractor policy of the Body

Corporate and in particular that noisy building work be carried out between 08h30 and 13h00 and between 15h00 and 17h00 on weekdays."

3. That the interdict and order in paragraph 2 above operate as an interim interdict pending the determination of the proceedings described in paragraph 4 below.

4. That the Applicants shall institute proceedings in terms of the Community Schemes Ombud Services Act 9 of 2011 ("CSOS") in which the Applicants will seek relief relating to the issues on 2.1 and 2.2 above will (sic) within 15 days of the granting of this order failing which the interim interdict an order will automatically lapse."

14. The body corporate filed its answering affidavit on 2 December 2019 and the Trust replied thereto on 6 December 2019. On the designated day the matter was postponed by agreement between the parties and was eventually heard by Golden AJ on 10 March 2020. In the interim, the parties' engaged with each other in an endeavour to resolve their disputes but were evidently unable to settle. And, during that interregnum, certain further affidavits were filed to address issues which had become contentious as the parties had engaged with each other.

15. On 8 May 2020 Golden AJ handed down judgment, dismissing the application with costs. In her judgment the learned Acting Judge found that the Trust had established

"at least a *prima facie* right not to have their property damaged by the respondents, or contractors appointed by the respondents in order to conduct maintenance and/or repair work to the building."

However, Her Ladyship found that the Trust had failed to establish the remainder of the requirements for an interim interdict.

16. In that regard, the Court *a quo* found, firstly, that the Trust did not establish that it would suffer irreparable harm if the contractor's workers were permitted to walk on the roof over the extension. The Court *a quo* was satisfied that any damage

that occurred in the circumstances (minimal as it might be) was readily capable of being recovered in an action for damages. This, of course, points to the availability of an alternative remedy – a further consideration for the refusal of an interim interdict. Furthermore, as the Court *a quo* pointed out, the Trust was entitled to make use of the CSOS procedure to recover any amounts found to be due to it by the body corporate.

17. Then, said the Court *a quo*, the balance of convenience favoured the body corporate which was required to effect regular maintenance and repairs to the exterior of The Adderley. On this score, said the learned Acting Judge, the evidence placed before the court (including the supplementary affidavits filed after the parties were unable to settle), established sufficiently for the purposes of interim relief that the method of access employed by Skysite for its workers was the safest and most practical. As a consequence, the Court *a quo* held that there was no alternative for its workers but to make use of the roof over the extension to do the necessary maintenance and repairs.

18. Turning to the noise complaint, Golden AJ found that the Trust had demonstrated that it enjoyed a *prima facie* right to demand of the body corporate that it comply with the terms of its "Contractors' Policy" and limit the building work to the times specified therein. But, said the Court *a quo*, the evidence established that by the time the application was finally heard in March 2020, the noise had effectively abated. In the result, the Court *a quo* found that the nuisance issue was moot at that stage.

19. An application for leave to appeal was dismissed by Golden AJ on 14 September 2020. (No doubt some of the overall delays in the matter were attributable to the hard lockdown enforced at the end of March 2020 in response to the COVID-19 pandemic). The Trust is before this Court with the leave of the Supreme Court of Appeal ("SCA"), same having been granted on 22 February 2021.

THE ISSUES ON APPEAL

20. Notwithstanding that this matter concerned the refusal of a temporary

interdict, the order of the SCA is unrestricted in respect the ambit of the appeal granted. Counsel for the Trust, Mr. van Reenen, accepted that the noise complaint was moot and did not fall for determination on appeal. However, he argued that the costs order granted against the Trust in the Court *a quo,* should be reversed on appeal because the application (and the cause for complaint) in that regard was well-founded at the time it was lodged in November 2019.

21. In relation to the roof issue, Mr. van Reenen argued that the Court *a quo* was wrong in finding that the Trust had established a *prima facie* right to the relief sought. Rather, said counsel, the Court *a quo* should have found that the Trust had established a clear right to demand the avoidance of damage to its property and that in such circumstances it did not have to establish the criterion of irreparable harm.

22. In the result, this Court was requested by counsel to uphold the appeal, set aside the order of the Court *a quo* and grant an interim interdict in relation to the roof issue in the same terms sought before the Court *a quo* pending a referral of the dispute for adjudication under CSOS. It bears mention that the exact nature of that dispute has never been fully articulated. But, whatever the formulation of the dispute might ultimately encompass, it follows that, in asking this Court to make the order which it is averred should have been made by the Court *a quo*, the Trust has not yet lodged its request for arbitration with the CSOS: if it had done so, counsel would not have formulated the order on the basis that it would automatically lapse if the proceedings had not been lodged within 15 days of the order to be made on appeal.

23. Given that more than two years had expired since the lodging of the original application, and having regard to the formulation of the order sought on appeal, this Court enquired from counsel during the virtual hearing of the appeal on 19 January 2022 whether they were prepared to inform the Court of the status of any referral by the Trust to the CSOS for dispute resolution, and if so, what the status was. After a brief adjournment to take instructions and discuss this request, counsel reverted and had no hesitation in jointly informing the Court that it was common cause that, as of the middle of January 2022, the position which obtained before the Court *a quo* still prevailed.

24. The position then is that the Trust, having tolerated Skysite's workers traipsing over the roof covering the extension for the past two years and more and, no doubt having had to endure similar cracks in the ceiling to those that it complained about in late 2019, requests this Court now to interdict the body corporate from allowing such workers to continue with essential maintenance and repair work for an undetermined period of time while the Trust looks to resolving the issue in an application yet to be instituted before the CSOS.

25. In categorizing the time period as "undetermined", I am mindful of the fact that, as pointed out by Binns Ward J in Coral Island, a party which is unsuccessful in an application under the CSOS has an automatic right of appeal to the High Court on a point of law in terms of s57 of the CSOS, and may request that the operation of the order appealed against is suspended "to secure the effectiveness of the appeal".

IS AN INTERIM INTERDICT IN RESPECT OF THE ROOF ISSUE WARRANTED AT THIS STAGE?

26. The requirements for the granting of an interim interdict *pendent lite* are by now trite.[22] The following *dictum* by Corbett J in LF Boshoff [23] provides a useful summary of the requisite approach.

"Briefly these requisites are that the applicant for temporary relief must show –

> (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if it is not clear, is *prima facie* established, though open to some doubt;
>
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
>
> (c) that the balance of convenience favours the granting of the of interim relief; and

[22] See generally in that regard, Erasmus, Superior Court Practice Vol 2 at D6-1 *et seq*.
[23] LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267A-F

(d) that the applicant has no other remedy."

That approach follows the earlier cases such as Setlogelo[24] and has been endorsed more recently in cases such as Hix Networking[25].

27. These criteria are, however, all subject to the court's overriding discretion. In his seminal work[26], CB Prest notes the following.

"In every case of an application for an interdict *pendent lite* the court has a discretion whether or not to grant the application. It exercises this discretion upon consideration of all the circumstances and particularly upon a consideration of the probabilities of success of the applicant in the action. It considers the nature of the injury which the respondent, on the one hand, will suffer if the application is granted and he should ultimately turn out to be right, and that which the applicant, on the other hand, might sustain if the application is refused and *he* should ultimately turn out to be right. For though there may be no balance of probability that the applicant will succeed in the action, it may be proper to grant an interdict where the balance of convenience is strongly in favour of doing so, just as it may be proper to refuse the application where the probabilities favour the applicant, if the balance of convenience is against the grant of interim relief.

The exercise of the court's discretion usually resolves itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less the need for such balance to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him.

It follows that even where an applicant establishes the necessary requisites for the grant of an interdict, there may well be factors and circumstances present which will cause the court to find against him and to refuse the grant of the interdict." (Internal references omitted)

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[24] Setlogelo v Setlogelo 1914 AD 221
[25] Hix Networking Technologies v System Publishers (Pty) Ltd and another 1997 (1) SA 391 (A) at 398I - 399B.
[26] The Law and Practice of Interdicts at 79

28. It seems to me that Mr. van Reenen is correct: the Trust has a clear right that its property (and more particularly, the ceiling of the extension) is not damaged when an aspirant abseil specialist trudges over the roof of the unit before plunging over the edge of the building in pursuance of a day's work. That being so, considerations (c) and (d) in LF Boshoff come into play, subject to the Court's residual discretion. Further, in giving consideration to the exercise suggested by Prest - weighing up the prospects of success in the envisaged litigation against the balance of convenience - it must be emphasized that neither the Court *a quo* nor this Court has been presented with any facts in order to make that assessment.

OTHER REMEDIES

29. Consideration (d) in LF Boshoff can be disposed of without more. While it cannot ask the CSOS for interim relief *pendent lite,* the Trust manifestly has other remedies available to it to address any further damage which might occur to the roof. In this regard, it seems to me on the available evidence that it is not every passage of workers over the roof of the extension that results in cracking of the ceiling. Perhaps some trudge less resolutely than others? Be that as it may, whatever the frequency and extent of the cracking, the Trust has inexpensive remedies in the Small Claims Court and before the CSOS, and a relatively inexpensive remedy before the Magistrates' Court whose jurisdiction presently stands at R200 000 in respect of damages' claims.

BALANCE OF CONVENIENCE

30. As already alluded to, the Court *a quo* carefully evaluated the expert evidence presented on affidavit and came to the conclusion that the balance of convenience lay with the body corporate, hence the refusal of the interim interdict. I cannot fault Golden AJ's reasoning in that regard.

31. In considering the balance of convenience, it is important, in my considered view, to have regard to the function of the body corporate which the Trust seeks to restrict while it goes about litigating with it under the auspices of the CSOS. That function is an important one and is executed in respect of all the unit owners in The

Adderley. It includes attending to the maintenance and repair of the exterior of the building, cleaning windows, repairing the roof and gutters and so on.

32. The body corporate's stance is that there is no other way for Skysite's workers to discharge their functions than in the way they have hitherto done. In the second set of affidavits filed before the hearing in March 2020, the Trust put up an affidavit and an expert report by another company that provides a similar service to Skysite. It was thereby suggested by the Trust that there were other available places for the fixing of anchor points to which workers' ropes could be attached.

33. The body corporate countered this by stating (through an affidavit from Skysite) that the alternative anchor points suggested by the Trust were not safe as they were to be located in parts of the building where the walls were old and the cement and bricks crumbling. Possibly this proposal will form the backbone of the Trust's case before the CSOS where it may seek to force the body corporate to utilize other anchor points, thereby avoiding the necessity for the passage of workers over its roof. I say possibly, because this Court still does not know what the envisaged CSOS process will embrace, notwithstanding the lapse of more than two years in which the alternate dispute resolution process might have been commenced by the Trust.

34. And so, the obvious question that arises is what to do in the meantime? The answer is self-evident. If the proposal of the Trust's expert is followed, there is a risk that workers may not operate in a safe working environment. The consequences might ultimately be fatal for them and damaging for other unit owners and members of the public strolling along one of Cape Town's more important streets. The counterpoint is that while the parties tussle about where the abseiling ropes should be anchored, the Trust and the occupants of the unit might have to put up with occasional cracking of the ceiling of the extension and the resultant "polyfilla job" to restore it to its sought-after pristine condition.

35. In the circumstances, I similarly conclude that the balance of convenience overwhelmingly favoured the body corporate and the application for an interdict *pendent lite* was correctly refused. There is thus no merit in the appeal against that

part of the Court *a quo's* judgment.

DISCRETION

36. If I am wrong in my assessment of the balance of convenience, as the majority of this Court holds, I consider that it would in any event be appropriate for this Court, in considering the appropriate relief to be granted on appeal under s19(d) of the Superior Courts Act, 10 of 2013, to exercise its residual discretion and refuse the granting of interim relief. That discretion, which is now being exercised as it might have been had the learned Acting Judge considered it relevant, must, of necessity, be exercised with due consideration for all the relevant background circumstances that obtained before the lower court. In this case that includes the fact that the Trust had taken no steps to approach the CSOS before the judgment had been delivered.

37. So, for instance, a court of appeal being asked to reconsider the granting of an interdict *pendent lite* in circumstances where there had previously been High Court litigation pending, would want to know the status of that litigation before exercising its discretion. A discretion such as that under consideration can manifestly not be properly exercised at this stage in the absence of the knowledge of all the relevant facts.

38. My Colleagues for the majority say that consideration of the current status of the CSOS proceedings constitutes the inadmissible receipt of new evidence on appeal. I disagree. As I have already pointed out, the failure of the Trust to approach the CSOS was a fact which existed before the Court *a quo* and was a fact implicitly existed before this Court, given that Mr. van Reenen asked that an interim order be granted that the Trust be directed to lodge its complaint within 15 days of this Court's order, failing which the interim interdict would lapse.

39. There is in any event no prejudice occasioned to either party by consideration of that fact – the persistent failure to lodge the complaint with the CSOS. As I have said, during the virtual hearing of the appeal the parties were asked, firstly, whether they wished to disclose to this Court the current status of the CSOS matter, and if so, what that status was. Neither party voiced any objection to this Court receiving that

evidence, which was thus admitted by agreement.

40. An important consideration in this Court now exercising that discretion, in my considered view, is therefore the Trust's manifest tardiness in taking the steps before the CSOS it so urgently contemplated in November 2019. It wanted to stop the body corporate's contractors from walking across the roof at all costs, while it sought alternative dispute resolution which was available to it for speedy and inexpensive resolution, yet it has done nothing to advance that case.

41. Given that the parties engaged in settlement negotiations in January and February 2020, it might be unfair to hold it against the Trust that it had not initiated the CSOS application in the interim. But when it became apparent that settlement was elusive, the Trust had every opportunity to commence the process immediately. It did not need to wait for the Court *a quo* to rule on the matter. After all, it then had the breathing-space it ostensibly so urgently needed several months before, and even more so, while it sought leave to appeal both before the Court *a quo* and later the SCA. Yet it did nothing then and has done even less since.

42. Mr. Rogers (for the body corporate) argued that the supine attitude adopted by the Trust suggests a complete lack of bona fides on its part and asked for the appeal to be dismissed on that basis. Counsel may be right but that issue cannot be determined on the papers as they stand. However, what the Trust's tardiness does demonstrate is that the initial urgency raised in respect of the roof issue has undoubtedly dissipated and the downside which it must now tolerate in enduring occasional cracks to the ceiling is not as bad as it suggested. It must now bear the consequences of its decision (or, more properly, its indecision) while it pursues the matter before the CSOS.

43. At the cost of repetition, I stress that the Trust is not precluded from asking for the CSOS to hear its complaint. It is simply not entitled to an interdict while it does so. And, if there is further damage to the roof, it will be entitled to recover its damages in that regard if the CSOS finds that the body corporate is liable therefor.

COSTS IN THE COURT *A QUO*

44. As I have said, Golden AJ ordered the Trust to bear the costs of the body corporate in the postponed urgent application before her. The irony of the situation is that, as a member of the body corporate, the Trust will also be liable for its *pro rata* share of the attorney and client costs incurred by the body corporate in opposing the Trust's proceedings. But that is how it goes in litigation of this nature, and potential applicants would surely have been advised of the consequences of taking on their body corporates. This makes the case for early resolution of such disputes under the CSOS all the more pressing.

45. Be that as it may, Mr. van Reenen argued that the appeal should be upheld with costs and the order of the Court *a quo* varied to provide for an interim interdict pending resolution of the roof issue before the CSOS. That argument cannot succeed in light of the findings made above and I am satisfied that the Court *a quo* correctly dismissed the application for relief in terms of prayer 2.1 of the notice of motion. The Court *a quo* also correctly held that the relief sought in prayer 2.2 was moot by the time the matter was finally determined.

46. But what of the costs expended by the Trust in relation to the litigation around the noise issue? Mr. van Reenen submitted that the noise issue was substantial and worthy of an approach to court. I agree. The sixth respondent, who resided in an adjacent unit to that being renovated, confirmed in October 2019 that she regarded the noise as excessive and unduly prolonged. In such circumstances the Trust was entitled to call upon the body corporate to enforce its own policy relating to the employment of outside contractors to perform building work at The Adderley. It was not required, in the circumstances, to take nuisance action at common law directly against the owner of the unit from whence the noise emanated.

47. When the Trust engaged with the body corporate in relation to the noise issue it was uncooperative and ultimately dismissive of Mr. Motlhabane in relation to the nature and extent of his complaint. He said that his wife was a student at the time and that her studies had regularly been interrupted by the noise. It goes without saying that the beneficial owner of a unit such as number 353 is entitled to the reasonable use and enjoyment of the property. By failing to properly address the Trust's reasonable complaints and enforce its own policy aimed at limiting the extent

of contractors' interference with the rights of other occupants, the body corporate ran the risk of litigation ensuing.

48. In finding that the issue was moot by the time that the matter was finally heard, Golden AJ did not have regard to the fact that the Trust was, at the very least, entitled to approach the court for such relief in November 2019 and that it incurred costs in relation to that aspect of the litigation. No doubt it would have been difficult to separate out those costs from the costs of the roof issue (which certainly enjoyed considerable attention after the matter was postponed in December 2019) with any degree of exactitude but a court considering a costs order has a wide discretion and must do its best to do justice between the litigants before it with due regard to all the circumstances of the matter.[27]

49. Having considered the matter carefully, I am of the view that the Court *a quo* erred in not limiting the body corporate's entitlement to recover costs to the roof issue. Employing a robust approach, I am of the view that it would have been just and equitable to grant the body corporate only 60% of its costs in the Court *a quo.* The order of that court should be amended accordingly.

COSTS ON APPEAL

50. The order of the SCA granting the Trust leave to appeal provided that the costs in that regard before Golden AJ and in the SCA are to be costs in the appeal. What then of the costs of the appeal itself? The Trust has successfully avoided an order that it should bear all of the body corporate's costs in the Court *a quo* and to that extent it should be considered to have achieved a measure of success. On the other hand, the body corporate has successfully batted off an attack on the finding of that court on the roof issue.

51. Once again, the calculation of the measure of the parties' relative successes cannot readily be achieved through the use of a pair of intellectual calipers. The most equitable outcome in the circumstances seems to me to be an order that each party to bear its own costs on appeal.

[27] Ferreira v Levin NO and others 1996 (2) SA 621 (CC) at [7], [8] & [11].

52. It now transpires that my Colleagues are not in agreement with my assessment of the appeal and that this judgment constitutes a minority opinion. Had there been consensus in the matter, I would have proposed the following order:

A. The appeal succeeds only to the extent that Paragraph 2 of the order made by Golden AJ on 8 May 2020 is set aside and replaced with the following –

> "The applicants, jointly and severally, shall pay 60% (sixty percent) of the costs incurred by those respondents who constitute The Adderley body corporate.

B. Save as aforesaid, the appeal is dismissed.

C. Each party shall bear its own costs on appeal, such costs to include the costs contemplated in paragraph 3 of the order of the Supreme Court of Appeal dated 22 February 2021.

GAMBLE, J

Coram	**:**	**NDTIA J et GAMBLE J et MANTAME J**
Judgment by	**:**	**NDITA J et B P MANTAME, J (Majority)** **GAMBLE J (Minority)**
FOR APPELLANTS	**:**	**ADV D VAN REENEN** **021 422 0787/0844044564** **deneysvanreenen@gmail.com**
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Instructed by		**C E Van Geuns & Ass**
Date (s) of Hearing	**:**	**19 January 2022**
Judgment delivered on	**:**	**12 MAY 2022**