JUDICIAL REDRESS AGAINST A BODY CORPORATE OF A SECTIONAL TITLE SCHEME FOR FAILURE TO COMPLY WITH ITS MAINTENANCE OBLIGATIONS BEFORE AND AFTER THE NEW SECTIONAL TITLE LEGISLATION CAME INTO OPERATION: DISCUSSION OF *LYONS V THE BODY CORPORATE OF SKYWAYS* 2016 6 SA 405 (WCC)

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1 Introduction

One of the most important functions of the body corporate in a sectional title development is to maintain the common property of the development in a state of good repair. The maintenance of residential elevators, for instance, is one of the costliest (and most controversial) items that must be provided for in the operating budgets of sectional and strata title schemes all over the world. In a recent South African case the elderly applicant, Mr Lyons, applied to the Western Cape High Court for an order obliging the body corporate to repair four of the five elevators which had been out of commission for over two years. In this article, I shall dwell on the interesting facts of the case and the court's reasons for granting a final interdict ordering the body corporate to have the elevators repaired within a period of three months.

This case was decided within months before the Community Schemes Ombud Service Act 9 of 2011 ("CSOSA") and the Sectional Titles Schemes Management Act 8 of 2011 ("STSMA") with its accompanying Sectional Titles Schemes Management Regulations ("STSM Regulations")[1] came into operation on 7 October 2016. The second part of this article will, therefore, be devoted to the effect the significant changes, brought about by these enactments, had on the maintenance function of the body corporate with special reference to applicants in the position of Mr Lyons. The CSOSA pertinently makes provision for the enforcement of the maintenance obligation of the body corporate by making specific orders available to applicants in the position of Mr Lyons, to force the body corporate to carry out maintenance and repairs of the common property. The significant change brought about

[1] GN R1233 *GG* 40335 of 07-10-2016

by the STSMA and accompanying STSM Regulations is a sharpening of the provisions pertaining to the financing of the maintenance function of the body corporate. The aim of these provisions is to ensure that in future there should be sufficient funds in the coffers of the bodies corporate such as the Body Corporate of Skyways for the maintenance and repair of elevators and other parts of the common property. When appropriate, reference will be made to the current New South Wales Strata Schemes Management Act 55 of 2015 ("SSMA") on which the new maintenance provisions of the STSMA were modelled as well as the New Zealand Unit Titles Act 22 of 2010 ("Unit Titles Act"), which contains similar provisions.

2 *Lyons v The Body Corporate of Skyways*

2 1 The facts of the case

The applicant in *Lyons v The Body Corporate of Skyways* ("*Lyons*"),[2] heard in the Western Cape High Court, was an elderly gentleman, Mr Lyons. He became the owner of a unit in one of the ten buildings in the Skyways Sectional Title Scheme, situated in Cape Town. The respondent was the body corporate, which manages the scheme through trustees and a managing agent. The source of the applicant's complaint was that the elevators in six of the ten buildings, each being four floors in height,[3] had not been in operation for over two years. This was with the exception of one elevator which had been repaired in February 2016 at a cost of R7 680.00, which represented the cheapest quotation, leaving the other five still inoperable. It was not disputed that the other five elevators needed urgent repairs as the height of the four-floor buildings made it difficult, if not virtually impossible, to gain access to the upper floors without an elevator. This naturally impacted adversely on the large number of elderly and infirm occupants and owners who had no choice but to use the stairs.[4]

On 10 December 2013, the trustees approved a quotation from Thyssen-Krupp to repair the elevators and service them thereafter. When ThyssenKrupp failed to perform, the contract was terminated in November 2014, almost a year later. Six subsequent quotes for the repair of each elevator in the scheme, ranging from R17 730.00 to R29 215.00, were then obtained from another service provider, Kone Elevators, on 28 April 2015. On 19 June 2015, the body corporate accepted the quotes and instructed Kone Elevators to repair the elevators. As Kone Elevators continually failed to respond to correspondence, ignoring the warnings of the managing agent and letters sent by the attorneys of the body corporate, the trustees resolved on 19 January 2016 to contact Kone Elevators and demand that the issue be resolved, failing which the matter would be handed to the attorney of the body corporate. When further attempts to elicit a response from Kone Elevators failed, the matter was finally

[2] 2016 6 SA 405 (WCC)
[3] This height scarcely justifies the lofty name *Skyways*
[4] Paras 2–3

handed over to the body corporate's attorneys.[5] Despite the resolutions by the respondent's trustees, the change in service provider and the various steps referred to above, the five elevators still remained inoperable, including the elevator in the building where the applicant owns a unit. The elderly and infirm owners still had to use the stairs which, as reported in the case, impacted adversely on their right to freedom of movement as well as on their health and wellbeing.[6]

2 2 The relief sought

The applicant, therefore, lodged an urgent application to the Western Cape High Court for an interdict compelling the body corporate to comply with its obligation to properly maintain the common property by taking steps to ensure that all elevators situated in and serving the relevant scheme buildings were repaired and rendered operational.

2 3 Issue in dispute

The issue in dispute was whether there was an alternative legal remedy available to the applicant which would deter the court from granting a final interdict in favour of the applicant. The counsel for the body corporate conceded that the first two requirements for an interdict had been satisfied. As the owners are entitled to expect the body corporate to maintain the elevators in a state of good and serviceable repair, the applicant had established a *clear right* not to be prejudiced by the inoperable elevators in the buildings. Moreover, the applicant *suffered an injury* or had a reasonable apprehension that the respondent would continue to violate his right. Consequently, the dispute hinged on whether or not the applicant could prove the third requirement for an interdict, namely that there was no alternative legal remedy available to the applicant that was adequate in the circumstances to dissuade the court from granting a final interdict in favour of the applicant.[7]

The body corporate contended that it was premature for the applicant to approach the court while the body corporate was still taking steps to repair the elevators. The body corporate first could call a special general meeting where much wider remedial measures could be considered and resolved. This could, for instance, include a defined timeline within which steps would have to be undertaken by the trustees to repair the elevators. Secondly, the composition of the board of trustees could be changed to provide more efficient and swift attention to the repair of the elevators.[8]

The applicant countered that the proposed special general meeting and the replacement of the trustees were neither viable nor adequate alternative remedies in the circumstances. A special general meeting would serve no purpose as there was a reasonable likelihood that the body corporate's

5 Paras 4 1–4 9
6 Paras 5–6
7 Paras 7–8
8 Para 9

ongoing failure to fulfil its statutory obligations over a period of more than two years would continue in the future. Moreover, there was nothing to suggest that the resolution already taken in June 2015 to have the elevators repaired, would be implemented with any greater degree of urgency by a new board of trustees. Accordingly, there was no adequate alternative remedy available to the applicant, except to approach the court and seek relief on an urgent basis.[9]

The body corporate responded that the difficulties encountered in repairing the elevators promptly were not of their own making as they were dependent on third-party service providers. They also indicated that a general meeting would have to be convened to raise additional funds and/or special levies from the members to fund the replacement of the defective elevators. It was therefore impossible for the body corporate to take steps to repair the elevators forthwith.[10]

The response of the applicant to this was that the measure of the relief sought and compliance with the statutory obligations of the body corporate both pointed to a clear and simple outcome – namely to ensure that the elevators were operational. In the event that this was too burdensome or vague, the court could prescribe further and/or alternative relief, with objectively verifiable (and time-bound) steps, with an ultimate deadline for rendering the elevators operational.[11]

The applicant relied on section 37(1)(j), (o) and (r) of the Sectional Titles Act 95 of 1986 ("Sectional Titles Act") (re-enacted in principle in section 3(1)(l), (q) and (t) of the STSMA, and corresponding to section 106(1) and (2) of the New South WalesSSMA) in order to establish a *clear right* on the part of the owners and the corresponding obligation of the body corporate to maintain the elevators in a state of good and serviceable repair.[12]

2 4 The judgment

As already indicated, the court found that the first two requirements for a final interdict, namely (1) a clear right on the part of the applicant; and (2) an injury actually committed or reasonably apprehended were complied with. The issue was whether the third requirement, namely (3) the absence of any satisfactory remedy available to the applicant, was satisfied.

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9 Para 10

10 Para 11

11 Para 12

12 The Sectional Titles Act stipulated that the body corporate must properly maintain the common property (including elevators) and keep it in a state of good repair; properly maintain the plant, machinery, fixtures and fittings used in connection with the common property (and individual sections); and in general to control, manage and administer the common property for the benefit of all owners Section 106(1) of the SSMA provides that an owners corporation (body corporate) must properly maintain and keep in a state of good and serviceable repair the common property and any personal property (movables) vested in the owners corporation Section 106(2) provides that an owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property (movables) vested in the owners corporation See also CG van der Merwe "Third Generation Sectional Titles: Basic Features" (2017) 2 *TSAR* 280 284:

> "For the purposes at hand, it is important to note that the most important aim of the Act primarily purports to ensure the proper maintenance of sectional title scheme buildings, as to preserve their physical integrity for their continued and intended use"

The court reviewed the unfortunate dealings with the two service providers in repairing or replacing the defective elevators and held that the delays were unreasonably long. This naturally begged the question as to why the body corporate, through its trustees and managing agent, did not intervene in the appropriate manner and implement their resolutions within a reasonable period of time, with due regard to the rights of the applicant and the other vulnerable people making use of the buildings.[13] Furthermore, the body corporate failed to substantiate that the difficulties experienced in the repair of the elevators were not of its own making and that additional funds or special levies would need to be raised to fund the replacement of the elevators. Taking into account the quotations from Kone Elevators in April 2015, the court held that the cost of the repairs seemed nominal considering the length of time and trouble that the body corporate went through without the resultant redress for the applicant. While accepting that the body corporate and its trustees were not completely idle at all times and that it was dealing with problematic service providers, the court found that no substantive reasons were offered for the body corporate's own dilatory conduct at crucial times when a reasonable intervention was required. The court, therefore, reached the inescapable conclusion that the body corporate (acting through its trustees) was grossly incompetent in the management and implementation of the resolutions adopted by the body corporate and that the steps taken through its managing agent were wholly inadequate, resulting in unreasonable delay in replacing the elevators in the buildings.[14]

The court then found that the two internal remedies suggested by the body corporate did not engender prompt, enforceable action, and their success was dependent upon a range of factors. Further delays may have ensued from these internal remedies, compounding the pattern of delayed interventions that have already been established, and would cause the continued violation of the clear right and ongoing injury to the applicant. The court was particularly mindful of the fact that the applicant, an elderly gentleman, had a very good reason to bring the application on an urgent basis.[15]

Putting the plight of the affected persons in a constitutional context, the court found that the class of people affected by the inoperable elevators was much broader than the elderly and the infirm inasmuch as the upper floors of the buildings were rendered inaccessible to people using wheelchairs and other devices. The court went so far as to record that these people constitute the most vulnerable in South African society and that the inoperable elevators create an unsustainable, undignified and intolerable situation for them. To ignore the applicant's cries for urgent relief, in view of the court, would render the vulnerable invisible and continually marginalised.[16] The court, therefore, concluded that the purported internal remedial processes neither provided adequate redress nor offered an ordinary or reasonable remedy

[13] Paras 18–21
[14] Paras 22–23
[15] Paras 24–26
[16] Para 27

for the persistent marginalisation of the rights of the applicant and the other vulnerable people. As these internal regulatory mechanisms had thus far failed the applicant, the court had to intervene to protect the rights of these individuals who all enjoy the right to equal protection and benefit of the law as provided for in section 9(1) of the Constitution of the Republic of South Africa, 1996 ("Constitution").[17]

The court concluded that the applicant established on a balance of probabilities that no adequate alternative remedies were at his disposal and thus made out a case for a final interdict. The court held that the refusal of an interdict would lead to an unjust result, impacting adversely on the applicant and other vulnerable people using the buildings. The court, therefore, granted a final interdict and ordered the body corporate to take the necessary steps to ensure that all the elevators in and serving the scheme buildings were repaired and rendered fully operational within three months from the date of the order.[18]

2 5 Comment

This decision highlights the failure of the trustees (acting on behalf of the body corporate) to effectively discharge their maintenance obligations, and in turn to warrant members' statutory rights to reasonable use and enjoyment of the common property. This case illustrates that although internal measures are available in order to resolve certain shortcomings of the body corporate, there are instances where judicial redress is the only appropriate remedy. The substantive factors considered in this case, such as the rights of the affected parties and the inadequate observance of statutory guarantees, placed the court in a position to allow for judicial redress as the appropriate remedy over internal mechanisms provided for by statute. The protracted nature of the events leading up to the application illustrates that a body corporate cannot merely comply *prima facie* with maintenance and procedural obligations imposed by the Sectional Titles Act. Pinning the blame on a contracting third party in order to substantiate lack of action is not a complete defence; the court will need to be satisfied that adequate measures have been taken by the trustees to rectify an intolerable situation.

Another interesting consideration put forward by the court is the constitutional protection afforded to the applicant and other vulnerable members within the scheme and how this served as an important factor in determining whether a judicial mechanism would be the appropriate relief. The court touched upon the infringement of rights other than those found in the Sectional Titles Act, namely the right to freedom of movement as well as the right of health and wellbeing. The fact that the preamble to the Constitution establishes the Constitution as the supreme law of the country, means that the Constitution should inform all law and judgments made by the

[17] Paras 27–28
[18] Paras 29–30

courts. The court does acknowledge this[19] with reference to the infringement and subsequent marginalisation of the most vulnerable members of society. Arguably, only the freedom of movement of occupiers above the ground floor are harmed but it would be more encompassing to argue that the discrimination operates indirectly against the elderly, infirm and disabled as well as against all owners and occupiers who are not able to enjoy the full ownership rights and property value which attaches to a scheme with properly maintained common property. The court notes that some occupiers are in wheelchairs but fails to imply that the infraction of rights extends beyond those who are most vulnerable. The implication being that in order to acquire an urgent interdict against a body corporate who have failed in their functions, one needs to belong to a vulnerable part of society as well as having no suitable alternative remedy. The fact that the events leading to this dispute had so badly prejudiced so many vulnerable occupiers is a pressing concern; the court, however, does not seem to illustrate that the interdict would be granted without such vulnerability. The idea that sectional owners become entitled to an urgent interdict based more on their vulnerability than the infraction of their clear rights appears an oversight by the court which could frustrate and delay non-vulnerable owners who would also seek a remedy against equally ineffective trustees.

3 Relief made available by the ombud service

As already mentioned, some four and a half months after the judgment in *Lyons*, the new dispute resolution mechanism introduced by the CSOSA came into operation on 7 October 2016. The newly established ombud service offers 39 different orders of relief to parties materially affected[20] by a sectional titles dispute.[21] One of the orders in respect of works pertaining to the common property is an order requiring the body corporate to have repairs and maintenance carried out.[22] Another pertinent order is an order requiring the body corporate to carry out, within a specified time, specified works to or on the common property for the use, convenience or safety of owners or occupiers.[23]

If Mr Lyons had lodged his application with the ombud service after 7 October 2016 for the maintenance, repair or replacement of the elevators,

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19 See para 28

20 In terms of s 38(1) of the CSOSA any person may make an application if such person is a party to or affected materially by a dispute

21 CSOSA s 39 This corresponds broadly to the more detailed part 12 of the SSMA, which deals with Disputes and Tribunal powers This part gives power to the Tribunal to settle disputes about certain matters relating to the operation and management of a strata scheme It also contains general provisions about the powers of the Tribunal See introductory note to Part 12 The appropriate order in this case, is in terms of s 126 of the Act For a discussion of this complicated New South Wales two-tier mechanism for dispute resolution in strata title schemes in terms of chapter V of the SSMA; see CG van der Merwe "The various policy options for the settlement of disputes in residential community schemes" (2014) 25 *Stell LR* 385 400–402 The South African Community Schemes Ombud Service Act was modelled on the less complicated chapter 6 of the Queensland Body Corporate and Community Management Act 28 of 1997 See Schedule 5 titled Adjudicator's Orders

22 Section 39(6)(a)

23 Section 39(6)(c)(i)

he would certainly have been considered as a person materially affected by a dispute with the body corporate and thus would have had to approach the ombud service for one or both the above-mentioned orders. As the adjudicator's order on lodgement with the High Court and registration by the registrar with the High Court, may be enforced as if it were a judgment of the High Court,[24] such an order would provide the same level of protection as the final interdict granted by the High Court. It is a known fact that court litigation is a time-consuming and costly process. By contrast, the primary function of the ombud service is to provide a swift, alternative, impartial, cost-effective and transparent service for the resolution of disputes in community schemes.[25] The cost involved in approaching the ombud service for an order would be minimal (R50 for the application and R100 for the adjudication[26]) whereas the cost awarded against the body corporate (to be divided between its members), could have amounted to more than R50 000 in the High Court proceedings. Once the initial backlog for applications to the ombud service has been cleared, the time for obtaining an order should be no more than four months. Urgent applications for interdicts usually take three to four months to be heard and if the judge does not decide the matter immediately, it could take up to six months before the judge reaches a final decision.

4 Applicable provisions of the STSMA and the STSM Regulations on the financing of maintenance expenses

The coming into operation of the STSMA and the related STSM Regulations[27] on 7 October 2016 had a significant impact on the function of the body corporate to finance the maintenance and repair of the common property.

First, the manner in which operational maintenance expenses are calculated was tightened. In *Lyons,* it was contended on behalf of the body corporate that an additional loan and or special levies would need to be raised to fund the repair or replacement of the defective elevators. No submissions were made regarding funding constraints and, as I have mentioned above, the court found that the cost of the repairs as reflected in the Kone Elevators quotations seemed nominal considering the length of time and trouble that the body corporate had been forced to endure without any relief for the applicant.[28] At the time of *Lyons* the body corporate had to establish an administrative fund sufficient *in the opinion of the body corporate* to cover the yearly operational expenses of the scheme, including the maintenance of the common property.[29] This subjective standard allowed the trustees to set inappropriately low levies to cover the operating costs of the body corporate for that particular financial year. As a result, insufficient funds could have been available for the repair of

[24] Section 56(2) of CSOSA
[25] Section 4(1)(a)
[26] Community Schemes Ombud Service Regulations: Levies and Fees 7 Oct0ber 2016 reg 3(1) and (2)
[27] GN R1231 *GG* 40336 of 07-10-2016
[28] Para 22
[29] Section 37(1)(a) of the Sectional Titles Act

the elevators of the Skyways sectional title scheme during the financial years in question.

This provision has been replaced by a provision in the STSMA[30] which obliges the body corporate to maintain an administrative fund which is *reasonably sufficient* to cover amongst others the estimated annual costs for the repair, maintenance, management and administration of the common property.[31] This objective standard will compel bodies corporate, such as the Skyways Body Corporate, to draw up an appropriate budget for each financial year designed to ensure the common property is properly maintained. The STSM Regulations[32] specify that the administrative fund must be used to fund the operating expenses of the body corporate for a particular financial year and that money may be paid out of the administrative fund in accordance with trustees' resolutions and the approved budget for the administrative fund.[33]

The corresponding section of the New South Wales SSMA[34] obliges owners corporations (bodies corporate) at each general meeting to estimate actual and expected expenditure relating to the maintenance of the common property in good condition. In estimating the amounts needed, the owners corporation (body corporate) must take into account the scheme's financial statements and an estimate of receipts and payments.[35] This indicates that, as is the case under the South African Act, objective standards must be employed to estimate amounts credited to the administrative fund for maintenance. In the case of a large strata scheme,[36] an owners corporation must include in the estimates prepared at an annual general meeting specific amounts in relation to each item of expenditure (or potential expenditure) in the period up to the next annual general meeting.[37] An estimate prepared before the first annual general meeting of the body corporate (owners corporation) is to take into account the "initial maintenance schedule" provided by the original owner (developer) for that meeting.[38]

Second, the STSMA pertinently makes provision for the establishment of a reserve fund to cover future maintenance expenses, which must be *reasonably sufficient* to fund future maintenance and repair of the common property and must not be less than a certain minimum threshold but not less than such

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30 Section 3(1)(a)(i) of the STSMA

31 Section 3(1)(a)(i) – (iv); see also s 115 of the Unit Titles Act dealing with the operating account of the body corporate

32 GN R1231 *GG* 40336 of 07-10-2016

33 Annexure 1 rule 24(1) and (4) respectively

34 Section 79(1)(a) of the SSMA

35 Section 79(3)

36 In terms of s 6(1) and (2), a *large strata scheme* means a strata scheme comprising more than 100 lots (sections)

37 Section 79(6)

38 Section 79(6) In terms of s 92(1) of the SSMA, an owners corporation (body corporate) must cause financial statements, and a statement of key financial information, to be prepared for each reporting period for the administrative fund, the capital works fund (reserve fund) and any other fund kept by the owners corporation

amounts as prescribed by the Minister of Housing.[39] This replaces the vague provision in the Sectional Titles Act that the administrative fund must include reasonable provision for future maintenance and repairs.[40] The *Lyons* case report does not contain any information as to whether the body corporate had a reserve fund by which the repair of the elevators could be financed. In future, the bodies corporate such as Skyways Body Corporate will be obliged to maintain a reserve fund for future expenses which must be used for the implementation of the maintenance, repair and replacement plan.[41]

Section 79(2) of the New South Wales SSMA[42] requires that the owners corporation (body corporate), when estimating amounts needed to be credited to the capital works fund (reserve fund), must consider the financial statements of the scheme and an estimate of receipts and payments. Whereas the financial position of the strata scheme seems an appropriate starting point from which to estimate amounts needed to be credited to the capital works fund, an estimate of receipts and payments seems more appropriate for estimating amounts needed to be credited to the administrative fund. Even so, the standard used is more pertinent to the matter in question than the vague standard employed by the South African Act, namely "reasonably sufficient to cover the cost of future maintenance and repair". Similar to the South African STSMA, the New South Wales SSMA provides that the owners corporation (body corporate) must in estimating amounts to be credited to the capital works fund (reserve fund), take into account anticipated major expenditure identified in the ten-year plan for the capital works fund.[43]

Third, the STSM Regulations provide in its new prescribed management rules that the body corporate must prepare a written maintenance, repair and replacement plan for each ten-year period.[44] This plan must set out the major capital items which include elevators[45] that are likely to require maintenance, repair or replacement in any ten-year period. The ten-year plan must identify the present condition or state of repair of each major capital item; prescribe a timeline for the maintenance, repair or replacement of each of these items (or their components); specify the estimated cost to maintain, repair or replace these items (or their components);[46] and state the expected life of a

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[39] Section 3(1)(b) of the STSMA The STSM Regulations (GN R1231 *GG* 40336 of 07-10-2016) reg 2 contains an intricate formula to calculate the provision needed each year to keep the reserve fund replenished from year to year See CG van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-sharing* Volume 1 *Sectional Titles* (2017) 14-45 – 14-46 "Reserve funds" are defined in the prescribed management rules (Annexure 1 rule 2(1)(p)) as an amount set aside by the body corporate to meet the unexpected costs that may arise in future, including future costs of maintenance

[40] Section 37(1)(a) of the Sectional Titles Act

[41] STSM Regulations of 2016 Annexure 1 rule 24(2)

[42] Section 79(2) of the SSMA

[43] Section 79(5)

[44] STSM Regulations Annexure 1 rule 22(1)(a) Section 16(3)(a)–(c) of the Unit Titles Act, advises that the purpose of the long-term maintenance plan is to identify future maintenance requirements and estimate the costs involved; support the establishment and management of the funds; provide a basis for the levying of owners of principal units; and provide ongoing guidance to the body corporate to assist it in making its annual maintenance decisions See also CG van der Merwe "Third generation sectional titles: basic features" (2017) *TSAR* 280 285

[45] STSM Regulations Annexure 1 rule 2(i) under "major capital item"

[46] Annexure 1 rule 2(1)(e) under "estimated costs"

particular item (or its component) once repaired or replaced.[47] The following complicated formula is prescribed to determine the annual contribution to the reserve fund for the maintenance, repair or replacement of each major capital item: Estimated cost minus past contribution divided by expected life.[48]

The plan takes effect when the members approve it at a general meeting[49] and importantly the trustees must report at each annual general meeting the extent to which the approved maintenance, repair and replacement plan has been implemented.[50] Money may be paid out of the reserve fund in accordance with resolutions of the trustees and the approved maintenance, repair and replacement plan,[51] or if the trustees resolve that such payment is required for the purpose of urgent maintenance, repair and replacement expenses.[52] Such "urgent" works include, amongst others, work necessary to comply with an order of court or an adjudicator.[53]

The New South Wales SSMA obliges an owners corporation (body corporate) to prepare a *plan of anticipated major expenditure* to be met from the capital works fund for a ten-year period commencing on the first annual general meeting of the owners corporation.[54] Thereafter, a plan must be prepared for each successive ten-year period for the annual general meeting at which the period covered by the previous plan expires.[55] The owners corporation (body corporate) may engage expert assistance in the preparation of a ten-year plan.[56] The owners corporation must review the plan every five years and provision is made for an earlier review, revision or replacement if authorised by a majority resolution at a general meeting.[57] A plan must include the following: Details of the proposed work or maintenance; the timing and anticipated costs of any proposed work; the source of funding for any proposed work; any other matter the owners corporation thinks fit; and any other matter prescribed by the regulations for the purposes of this section.[58] The plan must be finalised by the end of the second annual general meeting of the owners

47 Annexure 1 rule 22(1)(b)–(e) Annexure 1 rule 2(1) under "expected life" defines expected life as the estimated number of years before it is expected that the cost of maintenance, repair of replacement of a major capital item will be incurred The estimated number of years before it is expected that the cost of maintenance, repair of replacement of a major capital item will be incurred

48 Annexure 1 rule 22(2)

49 Annexure 1 rule 22(3)

50 Annexure 1 rule 22(4)

51 Annexure 1 rule 24(5)(a)

52 Annexure 1 rule 14(5)(b)

53 Annexure 1 rule 14(5)(b)(i)

54 Section 80(1) of the SSMA

55 Section 80(2)

56 Section 80(6)

57 Section 80(3) Similarly, reg 30(2) and (3) of the New Zealand Unit Titles Regulations 2011 (SR2011/122) ("Unit Titles Regulations") provides that a body corporate must carry out a review of the long-term maintenance plan at least once every three years and that subject to the three years' review, a body corporate may carry out a review of the plan as frequently as it considers necessary

58 Section 80(4)

corporation after the initial annual general meeting.[59] An owners corporation is obliged to implement each plan as far as practicable.[60]

5 Conclusion

If a similar case arises in future, the proactive measures embodied in the STSMA and Regulations[61] could avoid an approach to the court or the ombud service for an interdict or order to have the elevators repaired. The STSMA obliges the body corporate to maintain an administrative fund which is *reasonably sufficient* to cover amongst others the estimated annual costs for the repair, maintenance, management and administration of the common property.[62] This objective standard will compel the body corporate concerned to draw up an appropriate budget for each financial year designed to ensure that the common property, which includes the elevators, are properly maintained. The body corporate must thus only go ahead and implement their maintenance function regarding the elevators as envisaged in the budget for that financial year.

In the event that a ten-year maintenance, repair or replacement plan has been approved by the general meeting, the present condition and state of repair of the elevators will already have been identified, a timeline for their repair or replacement will have been prescribed, the estimated cost for their repair or replacement will have been specified and the annual contribution to the reserve fund would have included the estimated cost for the repair or replacement of the elevators. The body corporate will then only have to implement the ten-year maintenance, repair and replacement plan to have the elevators repaired.

In the event that the body corporate does not implement the maintenance envisaged in the annual budget or the provisions of the ten-year maintenance, repair and replacement plan, any member of the scheme may approach the ombud service concerned for an order compelling the body corporate to repair the elevators. Once granted, the order can be registered as an order of the Western Cape High Court with the same effect as a final interdict.

The body corporate is then still faced with the difficulty of appointing service providers who could repair or replace the elevator efficiently within a strict timeline. I suggest that the contract of appointment of a specific service provider should set a strict time limit to repair or replace the elevator, as the case may be. It should further contain a penalty clause that in case of a delay

[59] Section 80(5)

[60] Section 80(7) For possible amendments to the South African Sectional Titles Schemes Management Regulations contain in the prescribed management rules of Annexure 1 in view of the new SSMA and Regulations of 2016 and the Unit Titles Act and Unit Titles Regulations See CG van der Merwe "The duty of the body corporate to make adequate financial provision for the proper maintenance of the common property of a sectional titles scheme: Lessons to be learnt from the provisions of the strata legislation of New South Wales and New Zealand" (2018) 3 *THRHR* 461–462

[61] GN R1233 *GG* 40335 of 07-10-2016

[62] Section 3(1)(a)(i)–(iv) of the STSMA; see also s 115 of the Unit Titles Act dealing with the operating account of the body corporate

after the date set for completion of the repairs. The penalty would enable the body corporate to appoint another service provider to finish the task.[63]

SUMMARY

In this case an elderly applicant, Mr Lyons, applied to the Western Cape High Court for an interdict obliging the body corporate to repair four of the five elevators in his sectional title scheme which had been out of commission for over two years. As it was common cause that the first two requirements for an interdict were satisfied, the court considered the argument of the body corporate regarding the third requirement, that there were other remedies available namely the convention of a special meeting to discuss the matter and the election of new trustees to compel the engaged elevator service providers to repair the lifts speedily. The court rejected this stance as an inefficient solution to the problem and granted the interdict compelling the body corporate to have the elevators repaired within a period of three months.

In the second part of the article, I have shown that Mr Lyons would have been in a better position if he sought relief after the coming into operation on 7 October 2016 of the Community Schemes Ombud Service Act 9 of 2011 ("CSOSA") and the Sectional Titles Schemes Management Act 8 of 2011 ("STSMA") and the related Regulations. The CSOSA pertinently makes specific orders available to applicants in the position of Mr Lyons, to force the body corporate to carry out maintenance and repair of the common property. The STSMA and related Regulations oblige the body corporate to ensure that the administrative and reserve funds of bodies corporate contain sufficient money for the maintenance and repair of elevators. In addition, the Regulations oblige the body corporate to prepare a 10-year maintenance, repair and replacement plan for major capital items (including escalators). This plan would ensure that escalators are always kept in good working condition.

[63] See in general on contracts on letting and hiring of work, F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2017) 941–947