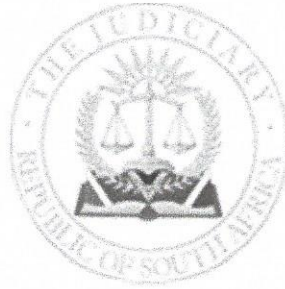


REPUBLIC OF SOUTH AFRICA




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

CASE NO: 2021/ A3094

- (1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

9 November 2021


RT SUTHERLAND

In the matter between:

BODY CORPORATE OF KLEBER

APPELLANT

and

SEHUBE KATLEGO OBAKENG

1ST RESPONDENT

CHOKOE MMABOTHU MALEBO

2ND RESPONDENT

JUDGMENT

SUTHERLAND DJP:

Introduction

1. In this appeal from the judgment of a magistrate, the appellant, the Body Corporate of Kleber, *qua* plaintiff, had unsuccessfully sought a judgment against the two respondents, *qua* defendants, who are joint owners of unit 9 in Kleber sectional title complex. The claim was for R29,256.82 and interest at 24% per annum, compounded from date of a letter of demand, being 20 March 2020 until date of payment. The sum claimed is for levies, special levies, CSOS levy¹, electricity, effluent, water, administration fees, special contributions and interest. Evidence was adduced that the respondents had been in default of sums levied from August 2019 to March 2020. A demand was made on 20 March 2020 to pay up the arrears. The summons was served on the domicilium, being unit 9, on 5 June 2020.
2. The respondents did not oppose. A default judgment was sought. It was dismissed; hence the appeal.

The consideration of the application for default judgment

3. Upon the application for default judgment being considered by the magistrate, it was refused on the premise that the notice to the owner, as prescribed in regulation 25 (1) and (2), promulgated pursuant to the *Sectional Titles Schemes Management Act 8 of 2011*, had not been complied with. Rule 25 provides:

‘Contributions and charges

(1) The body corporate must, as soon as possible but not later than 14 days after the approval of the budgets referred to in rule 17(6)(j)(iv) by a general meeting, give each member written notice of the contributions and charges due and payable by that member to the body corporate, which notice must-

- (a) state that the member has an obligation to pay the specified contributions and charges; and
- (b) specify the due date for each payment; and

¹ The *Community Schemes Ombud Act 9 of 2011* prescribes a tariff of fees that every owner must pay and the body corporate must collect on its behalf.

- (c) if applicable, state that interest at a rate specified in the notice will be payable on any overdue contributions and charges; and
- (d) include details of the dispute resolution process that applies in respect of disputed contributions and charges.

(2) If money owing is not paid on the dates specified in the notice referred to in subrule (1), the body corporate must send a final notice to the member, which notice must state-

- (a) that the member has an obligation to pay the overdue contributions and charges and any applicable interest immediately; and
- (b) if applicable-
 - (i) the interest that is payable in respect of the overdue contributions and charges at the date of the final notice; and
 - (ii) the amount of interest that will accrue daily until the payment of the overdue contributions and charges; and
- (c) that the body corporate intends to take action to recover the amount due if the overdue contributions and charges and interest owing are not paid within 14 days after the date the final notice is given.

(3) Subject to rules 21(3)(a) and (b), after the expiry of a financial year and until they become liable for contributions in respect of the next financial year, members are liable for contributions in the same amounts and payable in the same instalments as were due and payable by them during the past financial year.

(4) A member is liable for and must pay to the body corporate all reasonable legal costs and disbursements, as taxed or agreed by the member, incurred by the body corporate in the collection of arrear contributions or any other arrear amounts due and owing by such member to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.

(5) The body corporate must not debit a member's account with any amount that is not a contribution or a charge levied in terms of the Act or these rules without the member's consent or the authority of a judgment or order by a judge, adjudicator or arbitrator.

(6) The body corporate must in its annual financial statements account for all contributions and any other charges debited to members' accounts.

(7) On request in writing by a member the body corporate must make available a full and detailed account of all amounts debited and credited to the member's account with the body corporate.

4. When reasons were requested, what the magistrate stated was, in essence, this:
 - 4.1. The *liability* to pay a levied sum arises upon the trustees resolving so.
 - 4.2. This moment is to be distinguished from the moment that that liability becomes *due and payable*.
 - 4.3. Notice as contemplated by regulation 25, of the liability, must be given in order for payment to become due and payable. It is an ‘absurdity’ to expect an owner to pay the liability before receipt of the notice.²
 - 4.4. Ergo, a failure to plead such notice had been given, and a failure to adduce proof of it having been sent, rendered the application bad; ie there was no whole cause of action pleaded. Thus, no judgment could be granted.

The appellant’s case

5. This rationale of the magistrate is challenged. The appellant argues that the *liability* to pay *accrues* as stipulated in section 3(2) of the *Sectional Titles Management Act* at the moment a resolution is passed and no further step by the creditor is necessary to cause an indebtedness to arise and make the sums become due and payable. It is undisputed that the resolutions were passed.
6. Section 3 reads thus:

“Functions of bodies corporate

(1) A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include-

- (a) to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs-
 - (i) for the repair, maintenance, management and administration of the common property (including reasonable provision for future maintenance and repairs);

² It was evident from the papers in the record that the magistrate uses a printed check-list of requirements to examine applications for default judgments. Among the items is a requirement to adduce evidence that the regulation 25(1) notice was sent.

- (ii) for the payment of rates and taxes and other local municipality charges for the supply of electricity, gas, water, fuel and sanitary or other services to the building or land;
 - (iii) for the payment of any insurance premiums relating to the building or land; and
 - (iv) for the discharge of any duty or fulfilment of any other obligation of the body corporate;
- (b) to establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister;
- (c) to require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs;
- (d) to require from a developer who is entitled to extend the scheme in terms of a right reserved in section 25 (1) of the Sectional Titles Act, to make such reasonable additional contribution to the funds as may be necessary to defray the cost of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution for the provision of electricity and water and other expenses and costs in respect of and attributable to the relevant part or part;
- (e) to determine the amounts to be raised for the purposes of paragraphs (a), (b) and (c);
- (f) to raise the amounts so determined by levying contributions on the owners in proportion to the quotas of their respective sections;
- (g) to open and operate an account with any registered bank or any other financial institution;

- (h) to insure the building or buildings and keep it or them insured to the replacement value thereof against fire and such other risks as may be prescribed;
- (i) to insure against such other risks as the owners may by special resolution determine;
- (j) subject to section 17 and to the rights of the holder of any sectional mortgage bond, forthwith to apply any insurance money received by it in respect of damage to the building, in rebuilding and reinstating the building or buildings in so far as this may be effected;
- (k) to pay the premiums on any insurance policy effected by it;
- (l) to maintain all the common property and to keep it in a state of good and serviceable repair;
- (m) to comply with any notice or order by any competent authority requiring any repairs to or work in respect of the relevant land or building;
- (n) to comply with any reasonable request for the names and addresses of the persons who are the trustees of the body corporate in terms of the rules or who are members of the body corporate;
- (o) to notify the chief ombud, the local municipality concerned and the registrar of its domicilium *citandi et executandi*, which is its address for service of any process;
- (p) to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property;
- (q) to maintain any plant, machinery, fixtures and fittings used in connection with the common property and sections and to keep them in a state of good and serviceable repair;
- (r) subject to the rights of the local municipality concerned, to maintain and repair including renewal where reasonably necessary, pipes, wires, cables and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property;
- (s) on the written request of any owner or registered mortgagee of a section, to produce to such owner or mortgagee, or any person authorised in writing by such owner or mortgagee, the insurance policy effected by the body corporate and the receipt for the last premium in respect thereof; and

(t) in general, to control, manage and administer the common property for the benefit of all owners.

(2) **Liability for contributions levied** under any provision of subsection (1), save for special contributions contemplated by subsection (4), **accrues from the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate** by an application to an ombud from the persons who were owners of units at the time when such resolution was passed: Provided that upon the change of ownership of a unit, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of such ownership.

(3) Any special contribution **becomes due on the passing of a resolution in this regard by the trustees of the body corporate levying such contribution and may be recovered by the body corporate** by an application to an ombud, from the persons who were owners of units at the time when such resolution was passed: Provided that upon the change of ownership of a unit, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of such ownership.

(4) 'Special contribution', for the purposes of this section, means any contribution levied under subsection (1) other than contributions which arise from the approval of the estimate of income and expenditure at an annual general meeting of a body corporate, determined to be a contribution to be levied upon the owners during the current financial year.

(5) The body corporate must, annually or whenever there is a change in levy, certify in writing-

- (a) *the* amount determined as the contribution of each owner;
- (b) the manner in which such contribution is payable; and
- (c) the extent to which such contribution has been paid by each owner.

(6) The body corporate is, for the purposes of effecting any insurance under subsection (1) (h), considered to have an insurable interest for the replacement value of the building and must, for the purposes of effecting any other insurance under that subsection, be considered to have an insurable interest in the subject matter of such insurance.” (Emphases added)

The meaning of section 3 of the Sectional Titles Management Act

7. The portions highlighted in section 3(2) and section 3 (3) reveal an inconsistency in style and language in the text of the two sub-sections cited. Does *accrue* mean something different to become *due and payable*? Are they synonyms? What indication is there that it was intentional to contrast the two virtually identical acts of creating a liability?
8. The ordinary levy is dealt with in section 3(2) and is typically revisited annually when the trustees resolve what adjustments, if any, are to be made. These levies are usually paid monthly. The special levy dealt with in section 3(3) contemplates a non-routine expenditure for a particular *ad hoc* need. This can be imposed either by a resolution of the trustees or by a resolution of the body corporate members. Notionally, a special levy could be a one-off payment by owners, but not necessarily so; the expenditure would always be project-specific, but the payment could be received in instalments. These differences are immaterial to the trigger for the amounts to either *accrue* or *become due and payable*.
9. Trying to divine the meaning of 'accrue' in this phrase is not assisted by examining the use of the word in other enactments. The whole phrase, in my view, must be scrutinised because usage of the term 'accrue' is context-specific.
10. It was argued that support for a 'due and payable' meaning for 'accrue' derives from the phrase 'recovery by an application to the ombud' and that, in turn, this must mean that the debt was recoverable *immediately*. I am unpersuaded that the phrase is concerned with the timing of the recovery. The phrase 'recovery by an application to the ombud' unequivocally means that a third party intervenes and if that is needed, it implies a default by the debtor. If payment had been made on the due date, no need for a the ombud to be involved arises. Thus, it clearly is an overdue-debt-collection-step. Of course, the recovery can also occur by another types of intervention too, as in this case, by issuing a summons.
11. However, it seems to me plain that the textual distinction is merely an unhappy example of poor drafting of the legislation. Section 3 (2) creates a liability. A 'liability' means, unequivocally, an obligation to perform the prescribed deed; in this case, to pay up. Both

subsections should be read as meaning that the date of the resolution triggers the duty to pay. There is no cogent rationale that might promote the objects of the statute which could support the proposition that a distinction must exist between *accrue* and *due and payable* in this context.

The significance of regulation 25 to the case

12. The next question is, therefore, what significance can regulation 25(1) have? The appellant did not plead that a regulation 25(1) notice was given. This does not mean that such a notice was not given, nor does it give rise to an inference that in the absence of pleading it, the notice was not given. The statute does not prescribe the giving of a notice to make the debt due; indeed, it could not do so without contradicting section 3 (2) and section 3 (3). Accordingly, pleading the giving of a regulation 25(1) notice is not part of the cause of action. Moreover, regulation 25 does not and cannot purport to impose a pre-condition in the form of such a notice.
13. Even if, in a given example, it was so that regulation 25(1) was not complied with, that non-compliance does not afflict the cause of action. An owner who had not received such a notice, whether deliberately not sent or inadvertently not sent, when faced with a demand to pay arrears, is not excused from the liability to pay. On the facts of this case a demand was made by letter on 20 March 2020, as contemplated by regulation 25(2). It was ignored. Thereafter the summons was served. Insofar as an obligation to give a notice in regulation 25(2) has been created, it is an aspect of an administrative procedure to facilitate good order, not an injunction that is relevant to framing the cause of action. In this case the requirements of regulation 25 were fulfilled.
14. The rationale offered in the magistrates' reasons is misdirected. This error arose, most likely, because of the check-list methodology employed to deal with default judgments. Paradoxically part of the claim is for a special levy which, on the magistrate's reasoning, must have been due and payable on the date of the resolution, yet no order was granted, even for that part of the claim.
15. The result is that the appeal must be upheld. The order of the magistrate must therefore be altered accordingly.

Costs

16. A claim for costs on the attorney and client scale was pleaded. It was not pleaded that this scale is provided for in any contractual arrangement between the appellant and the respondents. Nor does the statute address the scale of costs when a body corporate incurs legal costs to recover what is owing. However, regulation 25(4) provides:

‘A member is liable for and must pay to the body corporate all reasonable legal costs and disbursements, as taxed or agreed by the member, incurred by the body corporate in the collection of arrear contributions or any other arrear amounts due and owing by such member to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.’ (Emphasis added)

17. In my view, this regulation points towards a court exercising a discretion wider than the usual discretion about costs as regards the appropriate scale of costs and ‘other disbursements’, the latter category of expenditure not being usually within the purview of a court’s jurisdiction to award. A body corporate is in a special fiduciary relationship to all its members. When a body corporate spends money, it is spending the money of its members. Where one member conducts himself in an inappropriate manner that causes the community of members to have to bear additional costs and disbursements, it is fair that as much as possible of this burden be borne by the delinquent member. The regulation invites an equitable discretion to be exercised by the court. Similarly, a body corporate that is extravagant in pursuing a member might incur more costs and disbursements than ‘reasonably’ necessary. A court could, in such circumstances award less than all costs, using the criterion of ‘reasonableness’. Axiomatically, in this context ‘reasonableness’ is wholly fact-specific. The notion of ‘reasonableness’ might have some resemblance to the discretion that the Labour Courts exercise in awarding costs according to “...the law and fairness.” as provided for in section 162 of the *Labour Relations Act 61 of 1995*. In the field of labour relations warring parties usually have to live together after the battle, and a not dissimilar relationship exists between the members of a sectional title complex. However, it is unnecessary to decide the scope of *reasonableness* in this matter.

18. A further reason why an attorney and client costs order could not be the default injunction is to be found in the history of the legislation about sectional titles property regulation. The *Sectional Titles Act 95 of 1986* regulated matters until repealed to make way for the *Sectional Titles Management Act*. Under the repealed statute, the regulations addressed the question of costs. In annexure 8 of those regulations, paragraph 31 (5) provided:

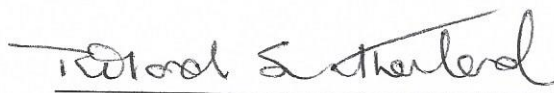
“An owner shall be liable for and pay all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies, or any other arrear amounts due and owing by such owner to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.” (Emphasis added)

19. Plainly, the omission of attorney and client costs in the current statute is a powerful indication that the policy choice was made not to be so rigid as formerly was the case and furthermore, to simply open the question to the exercise of a discretion in relation to what is ‘reasonable’.

20. There are no circumstances that could support an attorney and client costs order on the facts of this case. The respondents are common or garden defaulters on a debt.

The order

1. The appeal is upheld.
2. The order a quo is set aside.
3. The following order is substituted:
 - (1) Payment of the amount of R29,257.82
 - (2) Interest at 24 % per annum compounded from 20 March 2020 until date of final payment.
 - (3) Costs of suit on the party and party scale.
4. The costs of the appeal shall be borne by the respondents and be payable on the party and party scale.

**SUTHERLAND DJP**

I agree:

**MAIER- FRAWLEY J**

Date of hearing: 4 November 2021

Date of judgment: 9 November 2021

For the Plaintiff:

Christo Sutherland,

of Sutherland-Kruger Attorneys.

No other appearances.