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

CASE NUMBER: A5002/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
23 SEPTEMBER 2021

In the matter between:

THE BODY CORPORATE MARSH ROSE
(SECTIONAL SCHEME NUMBER: 269/2012) Appellant

and

STEINMULLER, ARNO First Respondent

THE STANDARD BANK OF SOUTH AFRICA LIMITED
(REGISTRATION NO. [....]) Second Respondent

THE SHERIFF OF HALFWAY HOUSE Third Respondent

HAASBROEK & BOEZAART ATTORNEYS INC. Fourth Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties or their legal representatives via email and by uploading same onto CaseLines. The handing down of this judgment is deemed to be 23 September 2021.

MATOJANE J (NICHOLS AJ CONCURRING):

Introduction

[1] This appeal concerns the interpretation of s 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 ('the ST Act'). The court has to consider whether the court *a quo* was entitled to assess whether the security in the form tendered by the first respondent would suffice to oblige the appellant to issue the requisite levy clearance certificate.

Background Facts

[2] The appellant is a Body Corporate of Marsh Rose. It is duly constituted in terms of section 36(1) of the ST Act for the sectional scheme known as Marsh Rose. The first respondent purchased a unit in the scheme at a judicial auction on 30 January 2018 and has complied with the conditions of the sale in execution. The registered owner of the property (the soon to be ex-owner) – is not cited in these proceedings.

[3] The body corporate refused to issue a levy clearance certificate required in terms of section 15B(3)(a)(i)(aa) until the outstanding amount of R312 903.21 owed by the current registered owner of the unit has been paid.

[4] The amount demanded by the body corporate does not comprise exclusively of levy amounts due to the body corporate. It includes, amongst others, a judgment debt and un-taxed legal costs against the registered owner granted pursuant to a debt in respect of the property. The appellant contends that the subsection is intended to secure payment of all amounts owing in respect of the unit upon transfer of the property into the name of the transferee. Accordingly, the amount owed cannot be determined subsequent to the provision of a clearance certificate as found by the court *a quo.*

[5] In paragraph 33.3 of the answering affidavit, the body corporate states:

> "In so far as legal fees are concerned, these are legitimately owing. If it is necessary to tax them, then this would need to be done prior to transfer taking place since a levy clearance certificate cannot be issued before they are paid (or proper provision made therefor)."

[6] On 17 April 2018, the body corporate provided the first respondent with a new breakdown of charges in the sum of R295 044.81. The first respondent again disputed the amount claimed and tendered to give security to the body corporate in the amount of R150 000.00 for the clearance certificate to be issued. The body corporate refused to accept the security proffered by the first respondent as being insufficient as to both the amount and form.

[7] On 19 February 2018, the first respondent, through his attorneys, addressed a letter to the body corporate stating:

> "We are instructed that you had claimed an amount from our client which does not comprise exclusively of levy amounts due to the Body Corporate. We are instructed further that when our client requested the ledger detailing this amount, you refused stating instead that our client could pay under protest and raise the dispute at a later stage. This is unacceptable as some of the amounts that the Body Corporate is claiming are patently unlawful, such as the collection costs.
>
> This refusal by the Body Corporate to provide the ledger detailing the amount claimed by the Body Corporate is unreasonable and irrational and is presently causing our client damages due to the delay in the transfer of the property.
>
> We are accordingly instructed to demand, as we hereby do, that you provide:

1. The ledgers detailing the amounts that the Body Corporate is allegedly owed;

2. The minutes circulated by the Body Corporate in respect of the levies raised from 2014 to present;

3. The resolution passed by the Trustees of the Body Corporate in respect of the interest charged on arrear levies from 2014 to present."

[8] The Body Corporate's written response on 22 February 2018 was that the first respondent accepted to pay all amounts outstanding to the body corporate when he signed the conditions of sale. It stated that it was not obliged to provide the first respondent with information detailing the amount claimed as he was not yet a registered owner of the unit.

[9] The first respondent (purchaser in execution) applied to the court *a quo* for an order directing the body corporate to issue the required levy clearance certificate in respect of the unit against payment by him into his attorneys' trust account of an amount as security for any amount which the body corporate might recover in an action or arbitration that the body corporate may institute in respect of the property within ten days of the granting of the order.

[10] Wanless AJ accepted the first respondent's interpretation of the statutory provisions. He held in favour of the first respondent and made the following order:

1. That First Respondent (Appellant herein) is to sign any and all papers and take any steps necessary, for the transfer of the property known as section [….] of the Sectional Scheme Marsh Rose SS269/2012, Country View Extension 1 Township ("the property") to the applicant (First Respondent herein) subject to paragraph 2 hereof.

2. Within 10 (TEN) days of the granting of this order the applicant is to provide an amount of R250 000,00 (Two Hundred and Fifty Thousand Rand) for the purposes of Section 15B(3) of the Sectional Titles Act of 1986.

3. The aforesaid sum shall be held as security for any claim that the First Respondent may have in respect of the property in the trust account of the applicant's attorneys of record and shall be unconditional and irrevocable subject to paragraphs 4, 5 and 6 hereof.

4. The first respondent (appellant herein) is to institute an action in respect of, alternatively, refer to arbitration, its claim against the applicant and any other party in respect of the property within 10 (TEN) days of the granting of this order.

5. In the event that the first respondent fails to comply with paragraph 4 hereof the amount paid in terms of paragraph 2 hereof shall be repaid to the applicant.

6. In the event that the first respondent complies with paragraph 4 hereof, the amount paid in terms of paragraph 2 hereof shall be retained in an interest-bearing bank account held by the applicant's attorneys of record pending the finalisation of the action or arbitration as set out in paragraph 4 hereof.

[11] The body corporate appealed against the judgment and order of the Court below, leave to appeal having been granted by Wanless AJ.

[12] It is the body corporate's case that the "*amounts due"* in terms of section 15B(3)(a)(i)(aa) includes any amounts owing to it no matter how it is comprised. The body corporate's view is that the amount due by the owner should first be determined (where there is a dispute concerning them), payment should be made, or provision made therefore and only then would it issue a clearance certificate.

[13] The provisions of the statute, as I will show, does not support the far-reaching interpretation contended for by the appellant. If parliament intended that "amounts due" to the body corporate should also include amounts unlawfully raised to the account of the owner, it would have said so expressly.

[14] The body corporate submits further that the amount of R250 000.00, which the court ordered to be paid into the attorney's trust account, should include a sum of R43 380.09 in respect of the legal costs of the judgment that the body corporate obtained against the registered owner.

[15] I turn now to consider the provisions of Section 15B (3)(a)(i)(aa) of the ST Act, which provides:

> 'The registrar [of deeds] shall not register a transfer of a unit or an undivided share therein unless there is produced to him ─
> (a) a conveyancer's certificate confirming that as at date of registration ─
> (i)(aa) if a Body Corporate is deemed to be established in terms of section 36(1), that Body Corporate has certified that all moneys due to the Body Corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the Body Corporate for the payment thereof;' (my emphasis)

[16] It is trite that when interpreting a statute, the language in the legislation should be read in its ordinary sense and that the words in a statute must be given their ordinary meaning in accordance with the context in which they are found [1]. Consideration must further be given to the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production[2].

[17] The section, when construed in a business-like and common-sense manner, allows for the transferor, instead of making actual payment as at the date of registration, to make provision for the payment of the debt provided it is to the satisfaction of the body corporate. This has the advantage that it will avoid the consequences of payment under protest, namely, costly and unnecessary litigation to reclaim what is not due.

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[1] Bellevue Motors CC v Johannesburg City Council 1994 (4) SA 339 (W) 342F-G].
[2] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA) paras 603-604D.

[18] The legislature must have been aware that the monies due to the bodies' corporate could be disputed on bona fide grounds, which could be an obstacle to the transfer of property and the embargo could amount to an arbitrary deprivation of property where, as in the present case, the property owes substantial amounts which are disputed.

[19] The court below noted that as the indebtedness of the first respondent is admittedly in respect of arrear levies only and that only arises upon the transfer of the property, nothing will prevent the body corporate from joining other parties in the action or contemplated arbitration to claim the other monies due to the body corporate.

[20] To hold otherwise would mean that Bodies Corporate, which have raised charges to an account of the owner without any lawful right to do so, may withhold transfer of the unit indefinitely to secure payment of disputed monies that may turn out not to be due. This could hardly have been the intention of the legislature.

[21] This brings me to the second issue. The statute requires the payment provisions to be to the satisfaction of the body corporate without specifying what form of security is needed. The body corporate is not required to satisfy itself by any particular method or means.

[22] There can be no question that the decision of the Body Corporate would be amenable to challenge if the Body Corporate does not act in good faith; it refuses to exercise any real discretion at all; or if its discretion is exercised in a manner prejudicial to the interest of the owner. In Mkontwana[3] the Constitutional Court, in dealing with embargo provision in terms of section 11(3) of the Municipal Systems Act, which are similar to section 15B, held that a dispute on clearance figures is susceptible to judicial intervention. The court held:

> "… A dispute about the amount of the consumption charge that must be settled before a section 118(1) certificate can be issued is a justiciable issue.

[3] Mkontwana v Nelson Mandela Metropolitan Municipality (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004).

There is nothing to prevent any owner or purchaser of the property, including any applicant in this case, from accessing a court to have the justiciable issue resolved. The last argument has nothing to commend it".

[23] The body corporate must exercise its discretion according to the rules of reason and justice[4]. It must exercise an honest judgment and its decision to reject the payment provision must be based on reasonable grounds. See **Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd**[5]. The onus rests on it to prove that it is entitled to the disputed amount[6]. The body corporate cannot contend for a payment in full 'under protest'. As Sishi J found in *YST Properties CC v Ethekwini Municipality and Other*[7], such payments are not conditional and constitute full payment of the debt owed. The onus then rests on the person paying the debt to establish, in other proceedings, that the amount paid was not actually due and should not have been paid. This would have the effect of reversing of the onus which rests on the body corporate to prove the amount due to it. Additionally, the court below has already made provision for proceedings to be instituted by the body corporate for it to establish not only the amount due to it but also the party liable for such amount.

[24] The form of security which has been ordered by the court *a quo* is unconditional, irrevocable and will earn interest. It takes account of the amount which may, in totality be due, to the body corporate by all parties, not just the transferor. The court a quo was correct, in my view, in finding that the payment provision was objectively reasonable and the body corporate ought to have been satisfied with the security offered and issued the clearance certificate.

[25] The appellant, it would appear, has taken upon itself the power to unlawfully raise to the account of the owner amounts which are not due to it, thereby exercising its discretion in a manner prejudicial to the first respondent's interest.

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[4] See Pretoria North Town Council v A.1 Electric Ice-Cream Factory(Pty) Ltd., 1953(3) S.A. 1 (A.D).
[5] (172/07) [2008] ZASCA 53 (14 May 2008).
[6] Euphosia (Pty) Ltd t/a Gallagher Estates v City of Johannesburg (5052/2015) [2016] ZAGPPHC 548 (17 June 2016).
[7] 2010 (2) SA 98 (D) para 45.

[26] I digress to observe that the appellant conceded that it had no claim against the first respondent save for arrear levies at the commencement of the hearing in the court below. It argued, however that until all the charges were paid, it was entitled to apply the “embargo” provided to it in terms of section 15B(3)(a)(i)(aa) by refusing to issue the clearance certificate.

[27] The liability for levies is the incident of ownership of a sectional title unit and is a burden that attaches to such ownership[8]. The amount of R43 380.09 being legal costs in respect of which the body corporate has taken judgment against the owner and has attached the property in execution, is not a burden on the unit as the nature of the debt has changed. The judgment debtor remains personally liable for the debt and costs, and his credit rating is impugned thereby. The body corporate cannot claim the same amount again from the first respondent as it has done.

[28] The amount of collection and legal costs claimed before a clearance certificate could be issued is R57 395.89. These costs have not been taxed or agreed to as provided for in section 25(5)[9] of the STSMA[10] and are accordingly unlawfully levied as the amount is not due.

[29] It is common cause that the body corporate has charged interest on un-taxed legal fees, which it is not entitled to do. The interest charges raised to the account are R142 810.25 over 4 years and nine months. Instead of charging 9% simple interest on the judgment amount as ordered by the court, the appellant unlawfully varied the court order and charged interest at an inflated rate of 24% compounded monthly, which meant that certain amounts raised to the account would have exceeded the capital balance which offends against the *in duplum* rule.

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[8] Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd 2020 (2) SA 61 (SCA) at para 20.
[9] Section 25 (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." See also Nkata v Firstrand Bank Limited and Others 2016 (4) SA 257 (CC).
[10] "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 lo the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.

[30] The body corporate has refused to provide a resolution authorizing the charging of the aforementioned interest. Section 3(2) of the STSMA read with the management rules 21(3) provides:

> (3) The body corporate may, on the authority of a written trustee resolution-...
> (c) charge interest on any overdue amount payable by a member to the body corporate, provided that the interest rate must not exceed the maximum rate of interest payable per annum under the National Credit Act, 2005 (Act 34 of 2005), compounded monthly in arrear;"

[31] The body corporate has failed to prove that it was authorized to charge the inflated interest on the overdue amount.

[32] All contributions levied are due and payable once the trustees of the body corporate have passed a resolution to that effect[11]. The first respondent took issue with the computation of the claimed amount and requested the body corporate to produce the resolutions passed as proof that the amounts claimed are owing and payable. The explanation or supporting documents were refused. On the *Plascon-Evans* test, the body corporate's version that levies are due and payable falls to be rejected as they have not been proved.

[33] It is not clear why the body corporate is claiming levies from the first respondent when section 3(2) of the Sectional Titles Schemes Management Act[12] states that ordinary levies, additional levies and levies payable to the reserve fund may be recovered by the body corporate by an application to a regional ombud from persons who were owners of units at the time when such resolution was passed.

[34] In the light of the aforegoing, the Court *a quo* was entitled to assess whether the security in the form tendered by the first respondent was sufficient to oblige the body corporate to issue the clearance certificate under the circumstances.

[35] In the result, the appeal is dismissed with costs.

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[11] S 37(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(2)).
[12] Act 8 of 2011.

K. E. MATOJANE

Judge of the High Court

Gauteng Local Division, Johannesburg

I agree,

T H NICHOLS

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Adams J (Dissenting):

[36] I have had the benefit of reading the well-crafted judgment of my colleague, Matojane J. Regrettably, I do not agree that the order of the Court *a quo* should be confirmed and that the appeal should be dismissed. I do so because, in my view, section 15B(3)(a)(i)(aa) of the Sectional Titles Act, Act 95 of 1986 ('the ST Act') and the scheme envisaged by the said section, properly interpreted, together with the relevant case law, make it clear that a Body Corporate has the right to refuse to issue a clearance certificate if, in its view, there are monies due to it in relation to a Sectional Title Unit which is the subject of a transfer. Secondly, the order of the trial court is not a competent order if regard is had to the wording of s 15B(3)(i)(aa).

[37] In my view, it is not as clear cut as the first respondent would have us believe that the charges raised by the Body Corporate were unlawfully raised. What is, in my view, unlawful, is the fact that the Body Corporate, which has as part of its statutory duties and obligations, the administration of a Sectional Title Scheme, has been deprived of the benefit of some R200 000, being the contributions in respect of the Unit in question. Even if the Body Corporate's entitlement to payment of some of these amounts is disputed, then, in my view, the Body Corporate is still entitled to insist on payment of the amounts due in respect of the Unit, before issuing a clearance certificate.

[38] Therefore, I am of the view that the real issue in this appeal is whether a Body Corporate can be compelled to provide a clearance certificate before it has received payment of the amounts due, even if the sum due is disputed by the transferee or by any other interested party for that matter. Put another way, the issue in the appeal is whether a Body Corporate is entitled to refuse to issue a clearance certificate in the event of there being a dispute relating to the amount due to it by the owner of the Unit. The question is this: What should happen in the event of the transferee of the Unit not accepting – either wholly or in part – the amount which the Body Corporate claims to be due in respect of the Unit? Can the transferee, for example, insist on the transfer being registered before the dispute is resolved on the understanding that the dispute and the payment will be resolved later?

[39] I will for the sake of convenience, refer to the appellant as 'the Body Corporate' and the first respondent as 'Mr Steinmuller' or sometimes simply as 'the first respondent'.

[40] *In casu*, the first respondent bought the Unit at a Sale in Execution on 20 January 2018 for the purchase price of R970 000. Thereafter, during February 2018, the Body Corporate indicated that it would issue a clearance certificate on receipt of payment of the amount of R312 903.21. A summary was also furnished by the Body Corporate, giving an indication of how this sum is arrived at. In the nature of these 'clearance figures', a certain portion thereof related to provision for levies and other charges for a few months in advance.

[41] On receipt of these clearance figures, Mr Steinmuller immediately went on the defensive and formed the view that the Body Corporate was 'claiming amounts which it unlawfully raised and which [were] not due by [him]'. On 19 February 2018, the first respondent caused a letter to be sent by his attorneys to the Body Corporate making these views known. The said communiqué also demanded from the Body Corporate that it furnished full and precise particulars of how the sum total is arrived at. This, so the letter demanded, was to be provided in the form of the ledger card and other documentation. On 22 February 2018, the attorneys of the Body Corporate responded to this demand and, in essence, denied the first respondent's entitlement to the requested information.

[42] On 17 April 2018, the first respondent was able to obtain a reconciliation of the account relating to the Unit from the Body Corporate to the previous owner. What was apparent from the reconciliation is that right from inception of the account during April 2014 – presumably when the previous owner took transfer of the Unit – not one cent was paid on the account. It is therefore understandable that from an early stage collection charges and interest were debited to the account. The very first 'interest charge' debited was an amount of R119.46 on 14 June 2014, and the first 'arrear cost liability' charge of R256.50 was debited on 14 August 2014. The total amount due as at 14 April 2018, according to this reconciliation, was R295 044.81, which was R17 858.40 less than the amount quoted in the 'clearance figures' presented to the first respondent by the Body Corporate during February 2018. This, I think, is understandable. As already indicated, included in the 'clearance figures' furnished by the Body Corporate was an amount relating to estimated future levies and charges in respect of the few months which it would have taken for the transfer to be registered.

[43] The total of R295 044.81 consisted of the usual type of levies and charges raised by Body Corporates, namely levy charges (comprising levies, CSOS Levies, and special levies) - R103 324.35; water consumption and sewerage services in the amount of – R31 523.02; arrear cost liability – R12 264.25; interest charges – R97 137.55; legal fees - R50 615.65. These charges were raised during approximately a four-year period from 14 May 2014 until 14 April 2018.

[44] The first respondent took issue with and disputed, sometimes on rather spurious grounds, all but a rather insignificant portion of this total. The first respondent contended that of the R295 044.81 claimed in the reconciliation, R203 397.53 has either been unlawfully raised to the account or was not due by him.

[45] So, for example, the first respondent disputed the sums debited in respect of 'arrear cost liability' and 'legal fees' – which clearly relates to collection charges and legal fees necessitated by the fact that the previous owner right from the start was defaulting on payment of his monthly levies and other charges. This objection was ostensibly based on the fact that the Body Corporate debited the account without authority.

[46] Maybe it is apposite at this juncture to deal with the issue of the legal charges, which, according to the first respondent, should not be included in the payments due under s 15B(3)(a)(i)(aa). The trial court agreed with the first respondent on this issue. I don't. I find support for my view in *Barnard NO v Regspersoon van Aminie en 'n Ander*[13], in which the SCA held that, in giving expression to the intention of the provision [s 15B(3)(a)(i)(aa)] to give effective protection to the body corporate, it was clear that the contributions were covered by the provision and therefore the relevant legal costs also fell within the ambit of the provision. I am therefore of the view that the Body Corporate was entitled to insist on the legal costs being paid before issuing the clearance certificate. To say that these costs should have been taxed, as did the first respondent, is, in my view, not sustainable. In that regard, I agree with the contention by the Body Corporate that, if the transferee insisted on taxation, then that can and should be done, but before the clearance certificate is issued.

[47] At best for the first respondent, this issue is not as clear cut as he had the trial Court believe. It is not a dispute which can unequivocally be said would have been decided in favour of the first respondent.

[48] Secondly, the first respondent questioned the total interest charged. The first respondent suggests that there may have a breach of the *in duplum* rule. I am not convinced. Then, the first respondent rather speculatively suggests that about R55 000 had become prescribed by the time the clearance figures were issued by the Body Corporate. What the first respondent conveniently forgets is that the Body Corporate had obtained a judgment against the previous owner for the total due as and at 25 June 2015, being R43 270.03. This puts paid to the argument of prescription.

[49] The point about what is said in the preceding paragraphs is that the disputes raised by the first respondent are, in my view, not as obviously in favour of the first respondent as he contends. There is merit in the counter arguments by the Body Corporate. I think, without deciding the point, that the Body Corporate was fully

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[13] *Barnard NO v Regspersoon van Aminie en 'n Ander* 2001 (3) SA 973 (SCA).

within its right to insist on payment of the amount of R312 903.21 or an amount close to that. The trial Court appears to have been of the view that R250 000 is the maximum amount to which the Body Corporate could possibly be entitled to insist on for purposes of it to issue the clearance certificate.

[50] All the same, in my judgment, the first respondent should have paid the R312 903.21 before it could have demanded that the Body Corporate issue the clearance certificate. I agree with the Body Corporate that what the first respondent could and should have done was to pay the said amount under protest and then challenge his liability later. Alternatively, he should have brought an application for a declaratory order as to the amount lawfully due to the Body Corporate. What weighs heavily on my mind in forming this view, is the fact that the Order of the trial Court had unfairly deprived the Body Corporate of the protection afforded to it by s 15B(3)(a)(i)(aa) and the scheme envisaged by the section to receive contributions from the owners of Units in their scheme. What is worse is the fact that since April 2014 the Body Corporate has not received one cent in respect of levies, service charges and other contributions relating to the Unit in question.

[51] More importantly, the Order does not, in my view, accord with the letter and the spirit of the said section and I say so for the reasons which follow.

[52] As indicated by the wording of the section, as cited in full in the majority judgment, section 15B(3)(a)(i)(aa) of the ST Act provides that the Registrar of Deeds shall not register a transfer of a unit unless the body corporate has certified that all moneys due to it by the transferor in respect of the said unit have been paid. At the outset, I need to make the point that the construction of this section lends itself to the interpretation which I contend for. The Body Corporate is the entity who must indicate whether monies are due to it and how much. And only when all that money, as indicated by the Body Corporate to be due to it, has been paid, can the registration of the transfer proceed. If not, then the transfer shall not be registered.

[53] My interpretation of the section is that payment of monies due to the Body Corporate shall always and inevitably be preceded by the registration of the transfer – that is how the section is constructed and what its words say. If that requires the

resolution of disputes relating to the amounts due in respect of the Unit then that should be attended to prior to transfer. The registration of the transfer shall not be registered unless and until monies due have been paid. Monies due cannot and will not be paid if there is a dispute. Therefore, it stands to reason that the transfer cannot and will not be registered until the dispute is resolved.

[54] As has been held by case law, to which I shall revert to later on in the judgment, a body corporate is given the power to resist the transfer of immovable property until moneys due and owing to it have been paid or until arrangements to pay have been made to its satisfaction. It therefore enjoys an effective preference which translates into a right not dissimilar to that of a secured creditor such as a mortgagor.

[55] In *Nel NO v Body Corporate of the Seaways Building and Another*[14] the AD considered the provisions of the section. In that case the appellant was the liquidator of a company which, at the time it was placed in liquidation, was the owner of a number of units in a sectional title development. These units were mortgaged in favour of a bank. The liquidator sold the units by public auction but was unable to pass transfer to the purchaser because of a dispute concerning the interpretation of the provisions of the section. Grosskopf JA said at 135C - D:

> 'The position then is that the contested provision, although it did not create a preference in the ordinary sense, nevertheless gave the body corporate a power to resist transfer of units until moneys due to it were paid. The question at issue was the exact ambit of this power.'

[56] I interpret the aforegoing as authority for the simple proposition that the scheme of section 15B(3)(a)(i)(aa) contemplates and creates an embargo or veto provision as general security for the payment of debt to Body Corporates. The practical effect of the section is that a body corporate will be paid before transfer of immovable property is effected. A reasonable body corporate might arrive at an accommodation where there are insufficient funds available to cover the total of the

[14] *Nel NO v Body Corporate of the Seaways Building and Another* 1996 (1) SA 131 (A).

debts owing to it – but is not obliged in law to do so. See: *First Rand Bank Ltd v Body Corporate of Geovy Villa*[15]. Correspondingly, a reasonable body corporate might arrive at an accommodation where there is a dispute concerning the amount due to it, but is not obliged to do so.

[57] In interpreting the section, one should also consider the difficulties experienced by bodies corporate who are faced with owners who default in their obligations to pay levies and related costs and the consequent socio-economic problems. These difficulties weigh heavily with me when I interpret the section. The point is that this statutory embargo serves a vital and legitimate purpose as effective security for debt recovery in respect of contributions to bodies corporate for water, electricity, rates and taxes, etc. Thus they ensure the continued supply of such services and the economic viability and sustainability of bodies corporate in the interest of all its members.

[58] Moreover, the trial Court's interpretation of the section does not, in my opinion, give effect to the principle – as *inter alia* per *Tshwane City v Blair Athol Homeowners Association*[16] – that a written instrument should be interpreted sensibly and that the words should not be interpreted so as to have an unbusinesslike result.

[59] This point is aptly demonstrated by the following facts. In April 2018 the Body Corporate issued clearance figures, indicating that an amount of about R312 000 should be paid. At that stage, the account ran up in respect of the Unit was standing at R295 000. By 14 October 2018 – when the Body Corporate's answering affidavit was filed – that total, according to the BC, had increased to R369 000. The monthly debits at that stage, excluding interest altogether, amounted to R3264 per month. It's been three years since then, which means that to date the account would have escalated by 36 X R3264 = R117 504, none of which has been paid by the first respondent. The point is that it makes very little business sense that an amount due to the Body Corporate, which changes and increases on a monthly basis, can and should be allowed to be the subject of a dispute and litigation before being paid,

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[15] *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA).
[16] *Tshwane City v Blair Athol Homeowners Association* 2019 (3) SA 398 (SCA).

whilst at the same time the transferee of a unit is allowed effectively to be exempted from paying his dues to the BC.

[60] In sum, my view is that this result could not possibly have been the intention of the Legislature when it enacted the section. The effect of such an interpretation is that it can lead to a BC ending up in dire financial straits, which, in turn, would severely prejudice all the other members and the owners of the other units – not very businesslike.

[61] Furthermore, as I have indicated above, the section is explicit and peremptory, which means that exact compliance is required and failure to comply will result in the ensuing act being null and void. In other words, the registration of a transfer before payment of amounts due to a Body Corporate may very well be invalid.

[62] In sum, having regard to the wording of the section and the scheme at which it is aimed, the Body Corporate was entitled to embargo the transfer as monies due to it had not been paid. For this reason alone, the appeal should be upheld.

[63] There is, however, another reason why the order of the Court *a quo* should not be confirmed, and that relates to its interpretation of the words 'provision for payment'.

[64] The Body Corporate contended that security for payment is not a form of payment to the Body Corporate or provision for payment. I agree. To post security for a payment subject to certain conditions does not equate to 'provision for payment'. Provision for payment should have exactly the same effect as payment. In other words, before the registration of the transfer, the Body Corporate should be in receipt of payment, which clearly is not the case if security is provided.

[65] In the circumstances, I would have upheld the appeal and substituted the order of the trial Court with the following order:

'The applicant's application is dismissed with costs'.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard:	16 August 2021 – in a 'virtual hearing' during a videoconference on the Microsoft Teams digital platform.
Judgment:	23 September 2021 – judgment handed down electronically
For Appellant:	Advocate K Lavine, together with Advocate Ashil Naidoo
Instructed by:	Alan Levy Attorneys Incorporated, Johannesburg
For First Respondent:	Advocate C Van der Merwe
Instructed by:	Vermaak & Partners Incorporated, Johannesburg
For Second, Third, and Fourth Respondents:	No Appearance
Instructed by:	No Appearance