IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 16990/2010

In the matter between:

THE BODY CORPORATE OF NAUTICA **Plaintiff**

and

MISPHA CC **Defendant**
(Registration number: 1994/034490/23)

JUDGMENT DELIVERED ELECTRONICALLY: TUESDAY, 7 DECEMBER 2021

NZIWENI AJ

Background

[1] This trial concerns litigation by the Plaintiff, a sectional title scheme known as Nautica. The Nautica scheme, consists of various units, some of the units have balconies and others do not have. The Nautica sectional title scheme (the Nautica scheme) is situated at 1 Bakke Street, Mossel Bay, Western Cape.

[2] The Defendant is an owner of units 205 and 330 at the Nautica scheme. Unit 205 is a residential unit with a balcony and 330 is a garage unit. Upon registration of

the participation quota of unit 205, with the deeds registry, the balcony of unit 205 was already included in its participation quota.

[3] In terms of South African law, the participation quota allotted to a unit in a scheme, plays a very pivotal role in determining amongst others, the owner's value when voting at the general meeting and the contribution or liability of each owner towards the incurred expenses of the scheme. Critically, participation quota enables the scheme to be able to apportion or determine the owner's indebtedness to the scheme.

[4] It is common cause between the parties that the Defendant has not paid some levies. The Defendant denies that it was obliged to make payments as demanded by Plaintiff.

[5] The Plaintiff brought these proceedings against the Defendant for the payment of an amount of R1 826 366, 86 (one million eight hundred and twenty-six thousand three hundred and sixty-six rand and eighty-six cents). The Plaintiff's case is that the Defendant failed to pay levies for the period of March 2008 up to May 2021. The Plaintiff's claim from the Defendant is for the payment for outstanding levies due for the stated periods. However, the amount demanded by the Plaintiff does not only consists of due levies. It includes amounts charged for the consumption of electricity and the interest charged on arrear levies.

[6] The Defendant in its plea also tendered in terms of rule 34 a payment in the sum of R75 126, 47 (Seventy-Five Thousand One Hundred and Twenty-Six Rand and Forty-Seven Cents).

[7] In the opening remarks of the Plaintiff, it was contended that the dispute between the parties spans for a period of 13 years.

[8] Given the defences raised, I deem it convenient to sketch the outline of what happened on and after 17 May 2008 (17 May resolution).

[9] It is common cause that a resolution, which changed owners' participating quotas, was taken at the Annual General Meeting, on 17 May 2008. The units that were going to be impacted by the 17 May resolution, were units 101 to 105 and 401 to 405. This is so because those units have balconies, and the balconies did not form part of their respective participation quotas.

[10] The taking of 17 May resolution was done without obtaining the affected owners written consents to the changes. Pursuant to the taking of the resolution, on the 21 June 2008, the trustees, during a meeting of Nautica scheme decided to revoke the 17 May resolution.

[11] This was so because, they were of the view that, change was contrary to the provisions of section 31 (4) of the Sectional Title Act 95 of 1986 ('the Act').

[12] Subsequent to this, on 21 March 2009, a new decision to replace the 17 May resolution was taken by the trustees. The new decision taken by the trustees did not have an impact on the participating quota of the owners of Units 101 to 105, as well as Units 401 and 408.

[13] Against this backdrop the following emerges:

[14] In the first place, the only witness for the Plaintiff conceded that the resolution taken at the Annual General Meeting of the 17 May 2008 was unlawful; because the Annual General Meeting was not sufficiently empowered to take it. It is argued on behalf of the Plaintiff that the resolution of 17 May 2008 was a nullity from the onset, because its implementation would constitute a contravention of section 31 (4) of the Act. The argument goes that, the effect of this is that the declaration is a nullity; as such, it does not even need to be set aside.

Pleadings

[15] It is necessary to set out herein some of the averments made in the parties' pleadings. The Plaintiff avers the following in the amended particulars of claim:

"7. Rule 31 (1) stipulates that the liability of owners to make contributions, and the proportions in which owners shall make contributions for purposes of Section 37 (1) of the Act, shall within the effect from the date upon which Plaintiff comes into being, be borne by owners in accordance with a determination made in terms of Section 32 (4) of the Act, in the absence of such determination in accordance with participation quotas attaching to their respective sections.

8. Since Plaintiff made no determination in terms of Section 32 (4) of the Act, the participation quotas are applied to determine proportions of levies in the relevant scheme.

9. Within 14 days after each annual general meeting the trustees advised each owner in writing of the amount payable by it in respect of the estimate referred to in Rule 31 (2), whereupon such amount becomes payable in instalments, as determined by the trustees.

10 . . .

11. The trustees shall be entitled to charge interest of arrear amounts at such rate as they may from time to time determined (Rule 31 (6)."

[16] Resisting the claim, in its plea the Defendant does not deny non-payment, but denies that it was obliged to make payments as demanded by Plaintiff. The Defendant, furthermore, denies that a trust meeting was convened on the 15 May 2009. Finally, the Defendant pleaded that even if the Court finds that a decision was taken on 15 May 2009 or the 13 April 2012; the trustees were not authorised in terms of any empowering statutory provision(s) or otherwise, to resolve as pleaded.

[17] In its plea, the Defendant avers facts which are aligned with its contention that:

> "In the premise, the defendant admits the liability to make payment of levies, in line with the adjusted percentage participation quota, as calculated by the plaintiff, in sum of R75,126.47, as well as interest thereon a tempore morae at 15.5% per annum. . ."

[18] The Defendant further denies that any decision was taken on 15 May 2009, or any other date in 2009, that compound interest at the rate of 3 % per annum would be added on all arrear levies.

Evidence

[19] In this trial, the only witness who gave testimony is Ronel Swanepoel who gave evidence in support of the claim of the Plaintiff.

[20] Ronel Swanepoel, testified that she works for the appointed managing agent on behalf of Nautica Body Corporate. Before they underwent a name change, they were known as Wisian Properties. Currently, they are known as the New Trend Real Estate. The developer appointed them as managing agent. Hence, they have been involved with the Plaintiff since the beginning. They did introduce themselves to the Defendant as the appointed managing agent of the Plaintiff.

[21] On 15 September 2007, the first Annual General Meeting was held to establish the body corporate. The Defendants was in attendance of that meeting. At that

particular meeting, an opening budget for the Nautica scheme was presented, which all the owners approved.

[22] As the managing agent of the Plaintiff, they are very familiar with the Defendant. Given the fact that they are the managing agent of the Plaintiff, they interacted with the Defendant. They used to attend queries received from the Defendant through emails and they would invoice and handle the normal day-to-day administration of the body corporate with the owners.

[23] In light of the fact that they are the managing agent, they are familiar with how section title scheme works. According to Ms Swanepoel, owners are generally liable to pay for the levies. Levies are determined by using a participation quota recorded on the sectional title scheme itself.

[24] It was her testimony that the participation quota in respect of unit 205 is 2.7819. On the other hand, the participation quota in respect of unit 330 is 0.4088.

[25] Regarding unit 205 the area is 245 square metres and the total levy amount is R2 201.95. In respect of the garage, unit 330, it is 36 square metres and the levy amount is R206.34.

[26] She testified that a Liesel Otten on behalf of the Defendant, sent them an email dated 13 November 2007, complaining that the levies for unit 205 were extremely high and she enquired as to how they got to that amount. She responded to the email by

informing her that it was because of the size of unit 205, which, according to the sectional title plan, is 245 square metres. They also forwarded her the summary of the budget and the participation quota which was approved.

[27] Another Annual General Meeting was held on 17 May 2008 and the Defendant was not represented at that meeting. According to her, the minutes of May 2008 meeting reflect that one Edwin Grobbelaar, who was the developer, informed the trustees that unit 205's participation quota was already calculated inclusive of the balconies. The developer gave a report that units 101 to 105 and 401 to 408, deck areas, were not included in the participation quota and those deck areas were registered as exclusive use areas. It was also indicated that because those units had exclusive use of deck areas, which were not included in their participation quota, the owners did not contribute to the levy fund.

[28] During the meeting of 17 May 2018, it was resolved that units 101 to 105 and 401 to 408 will contribute to the levy fund and that the same rate will be paid. Swanepoel testified that, because the balcony of unit 205 was already included in its participating quota, the Defendant was not affected by the fixed amount that the trustees determined in respect of the balconies.

[29] It was further resolved that to appoint a land surveyor and attorney to recalculate the participation quota for Nautica scheme and then to be registered in the deeds office, would be a costly exercise. It was then resolved that the body corporate should decide on a formula which will include the deck areas, according to their square meterage, in the participation quota.

This meant that the participation quotas of units 101to 105 and 401 to 408, would change to accommodate these decks. It was accepted that a formula would be used to calculate each unit's participation quota. The participation quota was going to be changed by hand on an Excel spreadsheet. It was her testimony that it was resolved during the meeting that the approved option was to be implemented as from the 1 June 2008.

[30] As the managing agent, they advised the trustees that the law does not allow changing of the owner's participating quota without the written consent of each owner affected by such decision. Pursuant to the advice provided, on 21 June 2008, the trustees held another meeting. In that meeting, the trustees made a decision not to proceed with the resolution of 17 May.

[31] Given that it was going to be a difficult task to obtain each owners' written consent. In the implementation of the new decision of the 21 June 2008, the trustees decided that in the alternative to the resolution of 17 May, they would implement a fixed fee for each deck, per the size of the deck and will calculate or decide on a fixed fee per exclusive use area. Therefore, the participation quotas of the affected owners remained unaffected by the new decision.

[32] Consequently, the owners of the units were then charged separately for the participation quota and if the owner has a deck area, then there was an extra charge

added for the deck. An extra fee of R200.00 was charged for bigger decks and R150, 00 for smaller decks.

[33] As managing agent, they sent letters to the Defendant, confirming the levies due and payable. According to her, the trustees' minutes of the meeting held on 21 June 2008, reflects that the trustees fixed interest rate for levies in arrear at prime plus 3 percent. This happened until the advent of the new law in October 2016. On 22 May 2010, the trustees passed a resolution that interest on overdue levy account will be charged at a rate of prime plus 3 percent per annum. On 3 October 2020, the trustees resolved that the owner shall be liable at a rate of 2 percent per month on arrear levies.

[34] On 21 March 2009, Annual General Meeting was held and the Defendant was not represented. The Annual General Meeting confirmed the decision of the trustees meeting to invoice deck area for unit 101 to 105, and 401, to 408.

At the same Annual General meeting, it was also resolved to reduce the levy for garages from 60 percent to 30 percent. The Defendant was sent a letter dated 3 April 2009, containing levies for the 2009 budget and informing the owner what will be invoiced.

[35] It is her testimony that the reduction of the garage levy caused a significant shortfall on their budget. In light of the fact that a body corporate is a non-profit fund

and for each item, they budget for has a direct expense. The managing agent had to pay everything each month.

[36] Due to the shortfall, there was less budget as they did not get 100 percent of the budget. They had to find money elsewhere to make up for the shortfall. It was then decided that the shortfall was going be distributed to all units and stores according to their registered participating quota. The shortfall was then calculated to all the units in the Nautica scheme. Nevertheless, the participation quota remained the same. Each unit had to pay 1.4 percent extra to cover the shortfall in the budget.

[37] A letter was sent to the Defendant, confirming that the levies for unit 205 were approved at the Annual General Meeting and that levies in arrears will be interest prime plus three percent.

[38] The total arrear amount outstanding for the levies and electricity is R775 689.98 excluding interest and legal fees. The levy that is calculated is on the participation quota as registered at the deeds office.

Each item or outstanding amount had its own interest charged separately. The total interest owing came to an amount of one million one hundred and twelve thousand six hundred and eighty-seven rand and thirty-five cents (R1 112 687,35). The interest due and payable far exceeds the levies that the Plaintiff claim to be due and payable. They then stopped charging interest at an amount equal to the amount outstanding for the capital amount. Therefore, the interest owing is R775 689.98, it equals to the total

amount because it exceeded the levies payable. Thus, the total amount outstanding then is R1 551 379.96. Interest was calculated using compound interest. The trustees were entitled to charge compound interest.

[39] Since 2007, in 13 years the Defendant has only made six payments. That is a synopsis of Swanepoel's testimony.

Evaluation

[40] It follows then that few facts in this matter are common cause. To place the strenuously debated issues in context, it is convenient to consider first and set out in some detail the common cause issues in this matter. I now turn to consider the common cause issues.

(a) Common cause issues or issues which are not seriously disputed

[41] It is common cause in this matter that:

(a) The Defendant is the member of the Nautica scheme, as he owns two units.
(b) The Defendant as member of the Nautica scheme is liable to contribute towards the running costs of the body corporate.
(c) The Defendant did not pay its levies contributions, for quite a while.
(d) When the Annual General Meeting resolved on the 17 May 2008 to change the participating quota of the owners with decks or balconies; not all the affected members gave their written consents.

(e) At the time when the resolution of the 17 May 2008, was taken the Defendant's participating quota was already inclusive of the balcony in unit 205.

(f) The resolution of 17 May was only in respect of the balconies of units 101 to 105, as well as 401 and 408; did not affect the Defendant.

(g) On 21 June 2008, during the trustees meeting, it was resolved that the Nautica scheme would not go ahead with the resolution of the Annual General Meeting of the 17 May 2008.

(h) Interests accrues when the unpaid levies fall due.

(i) The Nautica scheme is entitled to claim interest incurred on outstanding balances.

(j) The interest will only accrue until it equals the amount of the outstanding capital debt.

(k) Since the time the Defendant has been a member of the Nautica scheme in 2007, the Defendant has only made six payments towards its levies.

(b) Issues

[42] I think, the real question or issue at root here is not whether the trustees could retract the resolution taken on the 17 May 2008 but whether the Plaintiff succeeded in proving the amounts, including the interest they claim are owed by the Defendant. It would seem, however, that in order to be able to make a finding on the real question, one has to traverse the other issues raised by the Defendant. Therefore, the other issues for consideration are whether:

(a) The Plaintiff has the necessary *locus standi* to institute the current proceedings.

(b) The validity of the trustees resolution to retract an initial resolution taken at an Annual General Meeting on 17 May 2008, to change participating quotas to include the balconies of certain units and then recalculate the levies?

(c) Was the decision of the 21 June 2008, to revoke the decision of the 17 May 2008, a nullity?

(d) On what basis was the rate of interest claimed, determined?

(c) The resolution of 17 May 2008

[43] As far as the debt owed is concerned, the Plaintiff bears the onus to prove that it is entitled to the disputed amount. As stated before, it is not in dispute that the Defendant failed perpetually to pay its levy instalments on the due date.

[44] Before proceeding any further, it is significant at the outset to be cognisant of the fact that, while the Defendant admits non-payment, it however denies that it was obliged to make payments as demanded by Plaintiff. Put differently, the Defendant does not deny that it owes money to the Nautica scheme, but, attacks the claim of the Plaintiff on the basis that the manner in which the Plaintiff arrived at the amounts claimed was not in terms of the law. In essence, the Defendant disputes that the Plaintiff is entitled to the monies, which are being claimed from it.

[45] It is the Defendant's strenuous contention that the trustees of the Nautica scheme did not have powers to revoke a resolution taken at an Annual General Meeting, of 17 May 2008. Mr. PJ Greyling further contended on behalf of the Defendant that the initial decision taken at the Annual General Meeting on 17 May 2008, still stands.

[46] Counsel on behalf of the Plaintiff, chiefly submitted that the defences raised by the Defendant are baseless.

[47] On the other hand it is argued on behalf of the Defendant that the members at an Annual General Meeting directed the trustees to alter the participation quota to include the balconies of certain units and then recalculate the levies due in terms of an altered participation quota. So the argument continues, if the Plaintiff wanted to present evidence to alter that position and say that the decision was retracted at a later Annual General Meeting, the Plaintiff had to present clear evidence to that effect.

[48] It is further contended on behalf of the Defendant that the only evidence presented by the Plaintiff is that of Ms Swanepoel; who merely testified that the managing agent advised the trustees that the decision taken at the Annual General Meeting was legally wrong, and they did not specifically advise the trustees how they should correct the wrong decision.

[49] In particular, Mr Greyling pointed out that the trustees simply went out of their own volition and just retracted the decision. It is vehemently, contended on behalf of the Defendant that the board of trustees could not do that; as they were supposed to have gone back to the members, who are actually directing the trustees. Hence, it is persistently contended on behalf of the Defendant that the decision which was retracted by the trustees still stands and is still in effect.

[50] However, the real difficulty with the argument proffered on behalf of the Defendant is that it chiefly focusses on the fact that a resolution which was initially taken at the Annual General Meeting was simply retracted solely on advice by the managing agent to retract it. I simply cannot fathom why the failure to pay the claimed amount significantly hinges on the 17 May resolution.

[51] The reason for this difficulty is that, it must be borne in mind that, when regard is had to the testimony led or the evidence before this Court; it becomes quite clear that, there can be no question that the resolution of 17 May, was even going to affect the Defendant; regardless, whether it was retracted or not. This is so because of the important fact that, he was not part and parcel of the members or owners who were going to be affected by the of 17 May resolution.

[52] Swanepoel's evidence, which was hardly disavowed by the Defendant, was specific that the Defendant was not going to be affected by the changes, which were envisaged by the resolution of 17 May. It is particularly significant that this evidence by Swanepoel, was not disputed or challenged by the Defendant during cross examination. It is settled that unchallenged evidence stands.

[53] Accordingly, by corollary the Defendant has simply taken upon itself an issue, which did not even have an impact on the calculation of its own levies. Yet it is using the very same issue to avoid paying the amount claimed.

[54] The evidence in this matter is clear that the calculations for the outstanding levies of unit 205 were in accordance with its participating quota.

[55] Yet, quite strangely, the overarching theme in the argument of the Defendant is that because of the retraction of the resolution of 17 May, the claim for the outstanding levies is tainted. Even more surprising is that this aspect of retraction of the resolution of 17 May; has been argued and used as if it is the silver bullet solution in the Defendant's case, to respond and circumvent the claim of the Plaintiff.

[56] The real difficulty for the Defendant is that, when it comes to his indebtedness to the Nautica scheme, it does not matter for the purposes of this case; whether the retraction of the 17 May resolution was illegal or not, as the resolution of 17 May had absolutely nothing to do with units 205 and 330.

[57] This is so because, the Defendant's balcony was already included in its participating quota even before the resolution of 17 May 2008 was taken. I pause to mention that, there is even evidence to the effect that, before the resolution of 17 May, was even taken; the Defendant had already lodged a complaint that he was paying higher levies compared to other owners with balconies. I even highly suspect that the complaint by the Defendant is linked to the fact that his balcony, unlike others, was included in his participation quota. Hence, the resolution was taken to include others' balconies in their participation quotas.

[58] What is particularly significant in this matter is that at the end of the trial, there was absolutely no evidence that suggested or demonstrated or warranted a finding that the retraction of the resolution of 17 May 2008, affected the calculation of the levies payable by the Defendant. In any event, though the resolution of 17 May was retracted the trustees devised alternative way to charge the owners of the affected units, for the balconies. On those bases therefore, it cannot be said that the Defendant was left at a disadvantage by the retraction of the resolution.

[59] One thing, which is abundantly clear in this case is that the Defendant elected not to lead any evidence. To better understand that the defence of the Defendant does not hold water; it is important to appreciate that it is not the contention of the Defendant that the retraction of the resolution of 17 May had any impact on its levies. In this matter, it is significant that it must be borne in mind that the Plaintiff's claim simply arose factually from a failure to pay overdue levies. The Defendant does not dispute this. In the context of this case, as to why the Defendant believed that he was justified in withholding the payment for his levies, is simply incomprehensible.

[60] In the argument preferred on behalf of the Defendant, there is an immediate apparent anomaly about it, which strikes this court as contradictory. What the argument of the Defendant completely ignores is that; as far as this case is concerned it would rather be a preposterous notion to suggest that the outstanding claimed amounts were influenced by the retraction of 17 May resolution. The argument in the circumstances of this case would rather be bizarre and defy all logic. Little wonder this argument, was never raised by the Defendant.

[61] In my view, there can be no gainsaying that the Defendant counsel's attempt of poking holes at the version of the Plaintiff has clearly demonstrated that the Defendant is really grasping at straws. The argument used to avoid payment of the outstanding levies in my view turned out to be nothing more than a mirage. There is a glaring leap of logic in this argument. It just beggars belief as to why use the argument in the first place. To attack the retraction of a resolution, which had absolutely, nothing to do with the levies payable by the Defendant, is rather an odd way for trying to escape payment of levies.

[62] Certainly, the Defendant may not seek refuge or escape its indebtedness behind its own preferred construction of events.

[63] In all the circumstances, therefore, I hold the view that the resolution of the 17 May 2008 is neither here nor there as far as the outstanding levies which are claimed by the Plaintiff are concerned. Besides, the resolution was indeed null and void. Hence, it was not necessary for the trustees to embark on lengthy process of referring the issue of revocation to the general meeting of owners. Additionally, in the context of this case, it cannot be convincingly argued that a resolution that was withdrawn by the trustees because it was null and void *ab initio* was an administrative act.

[64] Consequently, it is thus not necessary to traverse the aspect whether the trustees had the authority to retract the resolution of 17 May.

(d) Locus standi

[65] In the matter of *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* [2019] ZACC 16 the following is stated at paragraph 35:

> "[35] That section 36(6) read with section 37(1) of the Act empowers a body corporate to enforce laws and other rules . . ."

[66] In the *Spilhaus* matter, supra, in footnote 14 the court explained that:

> "Section 41 of the Act has been repealed by the Sectional Title Schemes Management Act 8 of 2011 (STSM). The STSM came into effect on 7 October 2016 which is after the High Court proceedings had commenced. Section 9 of the STSM has a similar wording to section 41 of the Act. Section 36(6) of the Act has been repealed by the STSM. Section 2(7) of the STSM is identical to section 36(6) of the Act."

[67] In the matter of *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 on page 427 at para 47, the following is stated:

> "I accept that the applicant, being a creature of statute, must find its powers within statutory provisions. . . A body corporate established in terms of STA is a legal person. It is therefore a person as envisaged in the opening words of s 32(1) of NEMA; the section therefore thereby adds to, and enlarges, the locus *standi in iudicio* of bodies corporate provided for in s 36(6) of STA."

[68] The Plaintiff in the amended particulars of claim has been described as the Body Corporate of Nautica, performing functions in accordance with the Management Rule contained in Annexure 8 of the Act.

[69] It is not disputed in this matter that the Plaintiff, the body corporate of Nautica, was duly incorporated in terms of section 36 of the Act.

[70] Likewise, it is not in dispute that the two units of the Defendant forms part of the building or buildings comprised in a scheme in terms of the Act.

[71] It was contended on behalf of the Defendant that there is no single fact before this court indicating that the party described as the body corporate of Nautica is in fact a body corporate in terms of the Act. In the context of this matter it is really hard to understand the reasoning behind this contention.

[72] Ms Swanepoel testified that her agency is the appointed managing agent on behalf of Nautica body corporate. That as the managing agent, the developer appointed them and they have been involved with the Plaintiff since the beginning. They did introduce themselves to the Defendant as the appointed managing agent of the Plaintiff. This evidence was never disputed or challenged when Ms Swanepoel testified. It is further not disputed that the Defendant made some payments to the Plaintiff in the past.

[73] Once again, it just beggars belief that the argument of *locus standi* is raised in the context of this case. A point missed by the counsel of the Defendant is that the Plaintiff in the amended particulars of claim relies mainly on the provisions of the Act. The Plaintiff in paragraphs five and six of the amended particulars of claim pertinently mentions the statutory provisions upon which it derives the power to institute proceedings.

[74] On the other hand, there is absolutely nothing to support the contention that the Plaintiff does not have *locus standi* to prosecute these proceedings. It is again difficult to see on what basis the Defendant denies this.

[75] Section 36 of the Act provided for the formation of a body corporate for a sectional title scheme. It is settled that a body corporate is a legal person with concomitant rights and obligations. See *Stad Tshwane v Body Corporate Feariedale* 2003 (6) SA 440 SCA on page 445 at para 9 B.

[76] Section 2 (7) of the Sectional Title Schemes Management Act, 8 of 2011 confers standing upon the body corporate to sue. Similarly, section 36(6) of the Act stated that the body corporate is capable of suing and of being sued in its corporate name. This is exactly what is happening in this matter. The body corporate is suing in its corporate name. Again, the defence contention of lack of *locus standi* is another highly technical point without any merit in it.

[77] There is overwhelming evidence in this matter to show that the Plaintiff has the necessary legal standing to institute the action for monies owed to it by the Defendant. Therefore, insofar as the *locus standi* objection is concerned, it cannot be sustained.

[78] I am thus satisfied that the Plaintiff succeeded in proving that the Defendant owes the claimed amounts for the outstanding levies. This brings me to the interest claimed.

(e) Interest on arrears

[79] The Plaintiff, over and above the owed debt on arrear levies, it is also entitled to the interest borne by the debt. In the amended particulars of claim the Plaintiff is also claiming *mora* interest. The trustees of a body corporate are entitled in terms of the law to charge interest on arrear amounts at such rate as they may from time to time determine.

[80] Interest charges on arrear amounts are by no stretch of imagination meant to be penalties against the defaulter. They are there to mitigate the inevitable depreciation or decline in value of the currency, which is ordinarily occasioned by inflation. The interest charged on those arrear amounts is thus, intended to protect the equity of the original debt amount. In the case of *Davehill (Pty) LTD Community Development Board* 1988 (1) SA 290, on page 297 G-H, the Court succinctly states:

> "The liability to pay interest arises from considerations of equity, and was designed to compensate a person . . . for his loss and fruits of his property . . . up until the time the compensation was made . . ."

[81] Our courts have stated in the past that interest and compound interests are the lifeblood of finance in modern times.

[82] Manifestly, there is a dispute between the parties as to the calculation of interests. The parties are not in agreement regarding the quantum of the interest charged in respect of the outstanding levies. The Defendant considered the amount claimed by the Plaintiff as being inflated. It is argued on behalf of the Defendant that the Plaintiff charged compound interest, instead of simple interest.

(a) Dates from when the statutory interest is payable or starts running

[83] It is certainly readily apparent from Exhibits "C" that in this matter there is accumulation of arrears that spans for several years. The period of the arrears ranges from of 25 March 2008 until September 2021. Throughout all the months covered by this period, the Defendant never made payments.

(b) Rate at which interests is to be calculated and the period of calculation (applicable interest rate and period of application).

[84] Ms Swanepoel's testimony reveals that they used pastel programme to calculate the interest payable. It was further her testimony during cross-examination

that the pastel programme also charged the Defendant with compound interest on all the arrears.

[85] The central question which aptly arises in this matter is whether the Plaintiff is entitled to the interest amount which it claimed. When I determine this question a conspectus of all the evidence is required. Of importance, I need to look at the evidence of Ms Swanepoel together with the documentary evidence, which was presented by the Plaintiff.

[86] On a proper conspectus, it is evident that the trustees did determine the interest rate applicable to arrear levies. By all accounts, the evidence also establishes that compound interest was added to the simple interest.

Equally important or true is that the conspectus of evidence further reveals that the trustees determined interest rates applicable for relevant periods as follows:

PERIOD	INTEREST RATE
2007	Prime Plus Three Percent
2008	Prime Plus Three Percent
2009	Prime Plus Three Percent
2010	Prime Plus Three Percent
2012	Prime Plus Three Percent
2019	Two percent per month
2020	Two percent per month
01 May 2021- 30 April 2022	Two Percent per month

(c) *No determined interest rate*

[87] On the other hand, having had regard to the trustees resolution and minutes, I could not find any evidence to attest to the fact the trustees in fact determined the applicable interest at a stipulated annual rate during the periods of 2013 to 2018.

[88] In the case of *Mitchell v Beheerliggaam RNS Mansions* (34386/08) [2010] ZAGPPHC 44; 2010 (5) SA 75 (GNP) (4 June 2010), the following was stated at paragraph 14:

“It will be noted immediately that rule 31(5) draws a distinction between "arrear levies" on the one hand, and "any other arrear amounts due and owing" on the other; and that rule 31(6) entitles the trustees to charge interest on arrear amounts and not only on arrear levies. The term "arrear" bears its ordinary meaning of "outstanding" or being that which remains unpaid. "Arrear amounts" is thus a broader category of unpaid debts than "arrear levies" and would thus include unpaid interest on levies. Accordingly, rule 31(6), on a literal interpretation, permits the trustees to charge interest *(mora* interest) on unpaid interest charged on arrear levies, in other words - compound interest. The Act, therefore, specifically provides for the payment of such interest. Considering also the fiduciary duties of the trustees to act in the interest and for the benefit of the body corporate (section 40(2)) and not to negligently cause it loss (section 40(3)(a)), were the trustees not to charge defaulting members compound interest (which they would be able to earn on money invested in a commercial bank), they would possibly fall short of their duties.”

[89] In my view, the fact that there is no evidence in the Plaintiff's case to indicate that the trustees determined the rate payable for interest on overdue levies, during the period of 2011 up until 2018; does not necessarily mean that the Plaintiff foregoes the interest that would have been incurred for those periods. After all, the Plaintiff is entitled to the payment of interest at an applicable rate for the applicable period.

[90] Put otherwise, absence of stipulated interest rate to levies in arrears does not necessarily imply that the Plaintiff is not entitled to interest rate for those periods. The question, which then begs, is, in terms of what rate are the undetermined interest payable and whether compound interest can be added?

[91] The trustees have a statutory duty to determine from time to time what interest rate will be applied. Regulation 31(6) of Annexure 8 of the Regulations GNR 664/1988 in terms of the Sectional Title Act 95 of 1986 stipulates:

> "The trustees shall be entitled to charge interest on arrear amounts at such rate as they may from time to time."

[92] Similarly, Rule 21 (3) (c), contained of Annexure 1 to the Regulations to Sectional Management Act, reads as follows:

"The body corporate may, on the authority of a written trustee resolution 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 No 34 of 2005), compounded monthly in arrears."

[93] In my mind, the term from "time to time" in rule 31 (6) connotes something, which does not occur regularly. The rule does not state that the interest rate must be determined annually or for the year ahead.

[94] The fact that there are periods during which the trustees did not change the rate, is not an insuperable obstacle. Particularly, if regard is had to the provisions of rule 31 (1) (6) of the Act and the *Mitchell* case, *supra*.

[95] Given the fact that the applicable rate of interest before 2011, was last determined by the trustees in 2010; it then follows that the applicable rate for those periods without stipulated rate; is the rate which was determined by the trustees a year ahead of 2011, which is 2010.

[96] Additionally, sight should not be lost of the fact that the Defendant is obligated by law to pay interest on levies which are in arrears or overdue debt. In the *Davehill* matter, supra, on page 297 at paragraph H-I, it is stated that the statutory interests runs from day to day on the outstanding portion of the amount of compensation payable, and ceases the moment compensation is paid in full.

[97] First and foremost, Swanepoel testified that all the interest rate was charged on simple interest and compound interest was added as the trustees had the authority to do so. I have no reason to reject her testimony in this regard. The case law entirely confirms that the Plaintiff was entitled to levy compound interest on arrears. Consequently, I do not have a problem with the manner in which the Plaintiff calculated the interest.

(d) *Mora / post judgment interest*

[98] Lastly, the Plaintiff is also praying for *mora* interest. Insofar as the lifting of *in duplum rule* post judgment is concerned, it is now trite that the *in duplum rule* is suspended post judgment. However, the converse is true when it comes to the applicability of the in *duplum rule* during the course or pendency of litigation. See *Paulsen and another v Slip Knot Investment 777 (Pty) Limited* [2015] ZACC 5. Dealing with the *in duplum rule* post judgment, the Constitutional Court in the *Paulsen* case, at paragraphs 96 and 100, perfectly encapsulates the application of *in duplum rule* post judgment, when it opined:

> "[96] It is settled law that the *in duplum rule* permits interest to run anew from the date that the judgment debt is due and payable. . .

[100] With regard to the first two questions, the order of the Supreme Court of Appeal provided that the interest runs on – and is limited to an amount equal to – the whole of the judgment debt, including the portion which consists of previously accrued interest. The parties do not dispute these aspects of the Supreme Court of Appeal's order, therefore this Court will not disturb them."

[99] From the foregoing, it is thus apparent that the Plaintiff is also entitled to the *mora* interests applicable to the amount of R 1 826 366.86.

Costs

[100] It has been staunchly maintained on behalf of the Plaintiff, that considering the conduct of the Defendant; particularly the fact that he was a habitual defaulter, a punitive cost order is warranted. I am not persuaded that a punitive cost order would be appropriate.

[101] Accordingly, I make the following order:

The Defendant shall pay:

(a) the sum of R 1 826 366.86;

(b) Interest on the aforesaid sum at the rate of 9.5 % per annum from the date of this judgment, 07 December 2021, to date of payment, limited to

R 1 826 366.86

(c) Costs of suit.

CN NZIWENI
Acting Judge of the High Court