

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A3064/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....	6 Dec 2021
SIGNATURE	DATE

In the matter between:

BODY CORPORATE OF CENTRAL PARK

Appellant

and

MAKHALEMELE MOSA

Respondent

Summary: Interpretation of s 3(2) of the Sectional Title Schemes Management Act – meaning of phrase “liability ...accrues from the passing of a resolution to that effect by the trustees and may be recovered”. his means that liability for normal levies/contributions

accrues from date of the passing of a resolution to that effect by the trustees and can be recovered by the body corporate. In other words, the body corporate's right to claim payment of contributions/normal levies vests on passing of a resolution by the trustees and becomes due and payable by an owner of a unit in the sectional titles scheme in each consecutive month thereafter.

J U D G M E N T

KATHREE-SETILOANE J (Modise AJ concurring):

[1] This is an appeal against the judgment and order of the Magistrates Court (Randburg) dismissing an application for default judgment for the payment of arrear contributions by the respondent. The respondent does not oppose the appeal.

Background facts

[2] The appellant is the Body Corporate of Central Park ("the appellant"), a sectional title scheme, established in terms of section 36(1) of the Sectional Titles Act 95 of 1986 ("the Sectional Titles Act"). The respondent is the registered owner of unit 22 Central Park and a member of the appellant.

[3] The Sectional Titles Act was repealed by the Sectional Title Schemes Management Act¹ ("ST SMA") which was promulgated on 7 October 2016. The

¹ No. 8 of 2011.

appellant is required to perform the functions entrusted to it under the STSMA. These functions include the power to:

- 3.1. Establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs of the appellant;²
- 3.2. To establish and maintain a reserve fund to cover the costs of future maintenance and repair of common property;³
- 3.3. Require the owners, whenever necessary, to make contributions to such funds;⁴ and
- 3.4. Raise amounts from owners by levying contributions on the owners in proportion to the quotas of their respective sections.⁵

[4] Section 19 of the STSMA authorises the Minister of Human Settlements to make Regulations. On 7 October 2016 the Minister of Human Settlements published the Sectional Titles Regulations (“Regulations”).⁶ Annexed to these Regulations are the Management Rules and the Conduct Rules⁷ which apply to the body corporates of sectional title schemes. These Rules are directly applicable to the appellant.

[5] In terms of the Management Rules, the appellant claimed levies, special levies and other contributions from its members (the unit holders). In terms of Rule 21(3)(a) of the Management Rules, the trustees of the appellant are entitled to charge interest on any overdue amounts payable by a member. This rule also permits the appellant on the authority of a trustees’ resolution, to levy owners with a special contribution or levy if additional income is required.

² Section 3(1)(a) of the STSMA.

³ Section 3(1)(b) of the STSMA.

⁴ Section 3(1)(c) of the STSMA.

⁵ Section 3(1)(f) of the STSMA.

⁶ GN R1231, GG 40335, 7 October 2016.

⁷ The Management Rules and Conduct Rules are Annexure 1 and 2 to the Regulations, respectively. Annexure 3 to the Regulations are the Forms.

- [6] On 7 October 2016, the Minister published a notice in the GG no: 40335 (“the Notice”) which determines the levies and fees payable by unit owners in sectional title schemes to the Community Ombud Service.⁸
- [7] The trustees of the appellant had duly resolved to levy, charge and determine the amounts as set out in Annexure “A” to the particulars of claim. Of the total amount of R65 360,87 owing, the respondent made payment of R23 584.94 which was deducted from the total amount owing.
- [8] In compliance with rule 25(2) of the Management Rules, the appellant sent a final notice of payment to the respondent on 21 August 2019 informing her that she is indebted to the appellant in the amount of of R41 775.93 plus interest and that it (the appellant) intends to take legal action to recover the amount due if it is not paid within 14 days of the date of the final notice.
- [9] The respondent failed to make payment and the appellant instituted an action in the Magistrates Court (Randburg) for payment of the outstanding amount made up as follows:

Levies	R 22 667-08
Special Levies	R 23 375-00
CSOS levies	R 337-68
Electricity, effluent and water	R 10 033-65
Admin Fees and Special Contributions	R 3 190-00
Interest	<u>R 5 757-46</u>
Sub-Total	R 65 360-87
Less Payments	<u>R 23 584-94</u>
TOTAL OUTSTANDING	<u>R41 775-93</u>

⁸ In terms of Chapter 2 of the Notice, the appellant is obliged to collect a levy from every unit within its scheme calculated on the basis set out in the table which appears at paragraph 21 of the Particulars of Claim.

[10] The respondent did not oppose the action and on 28 October 2019, the appellant made application for judgment to be given against the respondent for payment of the sum of R41 775-93 plus interest at the rate of 24% per annum compounded from the date of letter of demand being 21 August to date of final payment. The appellant sought costs on the scale of attorney and client.

Magistrates Court reasons

[11] On 21 October 2019, the Magistrates Court (per L Etchell) refused judgment against the respondent. Its reasons for refusing judgment are *inter alia* as follows:

‘ Contributions levied under the Act do not become due and payable from the passing of a resolution and may not be recovered forthwith as suggested by the [appellant].

Liability for contributions levied, save for special contributions, **accrues** from the passing of resolutions to that effect by the trustees of the body corporate. (Section 3(2)).

Special contributions become due on the passing of a resolution in this regard by the trustees of the body corporate. (Section 3(3))

Section 3(5) specifically states that the body corporate must annually or whenever there is a change in levies, 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.

It would be absurd to suggest that a body corporate could issue summons for outstanding levies without informing the owners of the amount due and the manner in which the contributions are payable.

The Act requires notice and Regulation 25(1) expounds upon this requirement. It does not override, take away, restrict or negate the Act nor is there any need to use it to interpret the Act.

The wording of both the Act and the Regulations are clear and unambiguous. They complement each other.

The appellants have to comply with regulation 25(1), and it's continual and determined refusal to do so concluded in the refusal of judgment.'

[12] The appeal lies against the refusal of the Magistrates Court to grant judgment against the respondent.

The appeal

[13] Regulations *are* a form of subordinate or delegated legislation which are made under the authority of original legislation.⁹

[14] The 2016 Regulations and the Management Rules annexed thereto are subordinate legislation made under the authority of *the STSMA* - the original or empowering legislation. Subordinate or delegated legislation can never override any Act of Parliament,¹⁰ or take away any right granted by it.¹¹ A court cannot use subordinate or delegated legislation (or similar instruments) as an aid to interpret primary legislation.¹²

[15] It is therefore impermissible for a court to attribute a meaning to an Act of Parliament contrary to the clear language used, simply because the subordinate legislation (made under the such Act) appears to restrict, override or negate the right granted by the enabling Act.¹³

⁹ Ian Currie, *The New Constitutional and Administrative Law, Vol II 'Administrative Law'* (2002) at pp 28 - 31

¹⁰ *FirstRand Bank Ltd v Pather* 2005 (4) SA 429 (N) at 432. Confirmed in *Computer Brilliance CC v Swanepoel* 2005 (4) SA 433 (T).

¹¹ *S v Zoya and another* 2002 (4) SA 362 (W) at 365

¹² *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) (2012 (8) BCLR 785, para 62; *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) para 24 and *National Lotteries Board v Bruss* NO 2009 (4) SA 362 (SCA) para 37

¹³ *S v Zoya and another* 2002 (4) SA 362 (W) at 365

[16] It follows from this that nothing in the 2016 Regulations (including the Management Rules and the Conduct Rules) may (a) override any provision of *the STSMA*; (b) take away, restrict or negate any right granted by *the STSMA*; and (c) be used to interpret *the STSMA*. In other words, a regulation or rule which constitutes delegated or subordinate legislation cannot trump an express primary statutory provision.¹⁴

Interpretation of sections 3(2) of the *STSMA*

[17] In relation to normal contributions section 3(2) of the *STSMA* provides:

‘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.....’¹⁵ [Own emphasis]

[18] On the other hand, in relation to special contributions section 3(3) of *the STSMA* provides:

“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.....”¹⁶

[19] The question that arises in respect to the payment of normal contributions is what meaning should be ascribed to the sentence “*liability accrues from the passing of a resolution*” in section 3(2) of the *STMA*?

¹⁴ *Griesel and another v Lizemore and others* 2016 (6) SA 236 (GJ) at page 264

¹⁵ Section 3(2) of the *STSMA*

¹⁶ Section 3(3) of the *STSMA*

[20] Whilst in the context of tax, succession and interest, the word “accrue” has been interpreted to mean something due but not necessarily payable,¹⁷ the Supreme Court of Appeal (“SCA”) in *Commissioner South African Revenue Service v Executor, Frith’s Estate*¹⁸ has recognised that in our jurisprudence it is used in contexts which require that it be given the meaning 'entitled to' in contrast to a meaning such as 'actually receive or received'. Some examples of this are maintenance which is due but not yet paid, expenses incurred but not yet paid and interest earned but not yet paid.¹⁹

[21] The wording of section 3(2) of *the STSMA* eliminates any ambiguity in its meaning as it specifies that “liability ...accrues from the passing of a resolution to that effect by the trustees and may be recovered”. Properly construed this means that liability for normal levies/contributions accrues from date of the passing of a resolution to that effect by the trustees and can be recovered by the body corporate. In other words, the body corporate’s right to claim payment of contributions/normal levies vests on passing of a resolution by the trustees and becomes due and payable in each consecutive month thereafter.

[22] The Community Schemes Ombud Service Act²⁰ (“Ombud Service Act”) was promulgated on the very same day as the STSMA and the 2016 Regulations, namely 7 October 2016. Section 38 of the Ombud Service Act empowers any person to may make an application to the Ombud, if such person is “a party to” or “affected materially” by a dispute. In *Durdoc Centre Body Corporate v Singh*,²¹ a Full Court of the KZP division of the High Court has interpreted this to mean that the right to lodge a dispute “was prescribed by legislation as a right that accrued to owners of units who were materially affected by a community scheme related matter.

¹⁷ *Commissioner South African Revenue Service v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) at para 5 (“SARS”)

¹⁸ SARS at para 6

¹⁹ SARS at para 6

²⁰ Act 9 of 2011

²¹ *Durdoc Centre Body Corporate v Singh* 2019 (6) SA 45 (KZP) par 16.

[23] This means that such owners can immediately lodge a dispute and that a right accruing can be acted upon immediately. The same applies to rights of action in the context of prescription. In *Botha v Standard Bank of South Africa Ltd*²² the SCA held in relation to section 12(1) of the Prescription Act²³ that “[p]rescription runs from the date on which the debt becomes due, in terms of s 12(1), which is simply another way of saying it runs when the right of action accrues.”²⁴

[24] The tenor of these authorities is that a right or obligation that “accrues” is immediately enforceable. It is thus clear from the wording of section 3(2) that contributions levied become due and payable every consecutive month after the passing of the resolution when the right to claim accrues to the body corporate.

[25] On a proper interpretation of section 3(2) of the STSMA, a body corporate is not compelled to make application to the Community Schemes Ombud to enforce payment. It may institute court proceedings instead. This much is clear from the use of the word “may” which properly construed implies a permissive conferral of power. Simply put, the trustees may in the exercise of their discretion consider it best to approach a court to enforce payment as opposed to making application to the Community Schemes Ombud.

Enforcement of contributions

[26] Management Rule 25 (1) stipulates that:

‘The body corporate must, as soon as possible but not later than 14 (fourteen) days after the approval of the budgets referred to in Rule 17(6)(j)(iv) by a general meeting, give each

²² *Botha v Standard Bank of South Africa Ltd* 2019 (6) SA 388 (SCA) para 25. See also R H Christie *The Law of Contract in South Africa* 3rd edition at 541 where he states that ‘A debt becomes due (and prescription begins to run) when it is recoverable, owing and already payable; immediately claimable; when the creditor acquires a complete cause of action for its recovery; or when the cause or right of action **accrues**; which are synonymous expressions.’ (own emphasis)

²³ No. 68 of 1969

²⁴ *Botha* at para 25.

member written notice of the contributions and charges due and payable by that member to the body corporate, which notice must:

25.1.1 state that the member has an obligation to pay the specified contributions and charges; and

25.1.2 specify the due date for each payment; and

25.1.3 if applicable, state that interest at a rate specified in the notice will be payable on any overdue contributions and charges; and

25.1.4 include details of the dispute resolution process that applies in respect of disputed contributions and charges.”

[27] Although this Rule is couched in peremptory terms, as a form of subordinate legislation it cannot override the provisions of section 3(2) and (3)(3) of the STSMA which vest the body corporate with a right to claim contributions and levies on passing of a resolution to that effect. It is not clear from the papers whether the respondent received a Rule 25(1) notice. However, a failure by a body corporate, such as the appellant, to issue such notice cannot negate its right to claim payment of arrear contributions levied under sections 3(2) and 3(3) of the STSMA as the STSMA makes no provision for such a notice. Accordingly, compliance with Rule 25(1) is not a pre-requisite for contributions levied under section 3(2) and (3) of the STSMA to be claimed by a body corporate.

[28] Management Rule 25(2) in turn makes provision for a final letter of demand to be sent by a body corporate if arrear contributions levied are not paid. It reads as follows:

‘ 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.”

[29] Again, the STSMA makes no provision for such notice to be sent to a unit owner who has defaulted in paying the contributions contemplated in sections 3(2) and (3) thereof, before a body corporate can institute legal action to enforce such payment. Hence, a failure to send a defaulting owner a Rule 25(2) final notice would not negate a body corporate’s right in terms of sections 3(2) and (3) of the STSMA to claim arrear contributions levied. This is, in any event, a non-issue as it is common cause that a notice in terms of Rule 25(2) of the Management Rules was e-mailed to the respondent on 21 August 2020.

Magistrates Court’s incorrect reasoning

[30] The Magistrates Court states in its reasons for refusing judgment against the respondent that “in terms of Section 1(1) of the Act “this Act includes regulations.” It is important to bear in mind that this does not mean that the Regulations and Management Rules have the same legislative force as the STSMA itself or that they may negate or override its provisions.²⁵

[31] In its judgment, the Magistrates Court cites the decision of *Rossouw and another v Firstrand Bank Ltd*²⁶ where the SCA held that: “it is generally impermissible do use regulations created by a minister as an aid to interpret the intention of the legislature

²⁵ *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2016 (6) SA 596 (CC) para 151.

²⁶ *Rossouw and another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) par 24.

in an Act of Parliament, notwithstanding that the Act may include the regulations.” Needless to say, the Magistrates Court did exactly that by finding that the 2016 Regulations “expound upon the Act”.

[32] The Magistrates court also cites the decision of *Slims (Pty) Ltd & another v Morris NO*²⁷ which held that: “... the rule of statutory interpretation that a specific provision overrides a general provision applies to provisions within the same legislative instrument. A specific provision in a regulation cannot override a general provision in the statute. To read the act conjunctively with the regulation and to construe the regulation in the manner resorted to by the court below is in effect to have the tail wag the dog.”

[33] These authorities make clear that the 2016 Regulations cannot be used to interpret the STSMA and no specific provision in a regulation or rules can override a general provision in a statute. Furthermore, the two instruments cannot be read conjunctively. Once again, this is precisely what the Magistrates Court did.

[34] The Magistrates Court also found that the contributions levies do not become due and payable from the passing of a resolution and may not be recovered by the appellant, despite section 3(2) and 3(3) of the STSMA specifically entitling the appellant to do so. Curiously, although the Magistrates Court concluded that special levies under section 3(3) of the STSMA become due and payable on the passing of a resolution by the trustees of a body corporate, it failed to grant judgment for the special levies which are due and payable by the respondent.

[35] Lastly, the Magistrates Court erred in concluding that the appellant was obliged to give the respondent notice in terms of Rule 25(1) of the Management Rules before instituting an action to recovery overdue contributions levied. As indicated, Rule 25(1) cannot negate the right to claim payment of overdue contributions levied which

²⁷ *Slims (Pty) Ltd and Another v Morris NO* 1988 (1) SA 715 (A) at 734D-F.

sections 3(2) and (3) of the STSMA expressly entitle the appellant to do. In any event, the appellant did, indeed, make final demand for payment of the arrears in terms of Rule 25(2) of the Management Rules.

[36] Accordingly, the levied contributions claimed in terms of section 3(2) of the STSMA became due and payable at the end of each consecutive month after the passing of a resolution (by the trustees of the appellant) and the appellant was entitled to enforce payment of overdue contributions by way of instituting an action in the Magistrates Court.

[37] For all these reasons, the appeal must succeed.

Costs

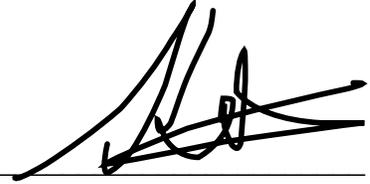
[38] The appellant is entitled to costs on the scale as between attorney and client in the application for default judgment as well as in the appeal. The basis for this order is Rule 25(4) of the Management Rules which provides that a member is liable for and must pay to the body corporate all reasonable 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 the Management Rules, the Conduct Rules or the STSMA.

Order

[39] In the result, I make the following order:

1. The appeal succeeds with costs on the scale as between attorney and client, to be taxed.
2. The order of the magistrates court (Randburg) refusing judgment against the respondent is set aside and replaced with the following order:
 - “ Judgment is granted against the defendant for:
 - (a) Payment of the sum of R41 775.93;

- (b) Interest at 24% per annum compounded from date of letter of demand being 21 August 2019 to date of final payment; and
- (c) Cost of the application on the scale as between attorney and client, to be taxed.”



**F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances

Counsel for the Appellant: Mr Christo Van der Merwe

Instructed by: Sutherland and Kruger Inc

Date of hearing: 26 October 2021

Date of Judgment: 24 November 2021

Judgment uploaded to Caselines and emailed to the parties