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Withholding levies legalised?

An unexpected result of Greenacres

Tertius Maree

Inside This Issue:

It has long been accepted that an owner is not allowed to withhold levy payments for a reason not related to the legality of the levies. In other words, an owner may refuse to pay levies if they had not been properly determined in terms of section 37(2) or the applicable management rules, or if they have been incorrectly calculated. But an owner may not withhold levy payments, for example, because of his dissatisfaction with the performance of the trustees.

In a recent arbitration in Cape Town the circumstances were as follows:

The owner had complained to the trustees regarding the placement of certain refuse bins, adjacent to his exclusive use parking bay. Due to the narrow access to the bin area when his vehicle is parked, the bins, which were wider than the passage, could only be removed with difficulty, often causing contact with and damage to his motor vehicle.

The trustees did not comply with the owner's request to locate the bins elsewhere. Upon advice from his attorney, the owner then stopped payment of his levies, in response to which the trustees issued summons against him for payment of the arrears. The owner's attorney then wrote to the body corporate's attorney, bringing to his attention the Greenacres decision, in terms of which any dispute, including a dispute involving unpaid levies, has to be referred for arbitration. The owner's attorney demanded that the matter be referred accordingly. The body corporate complied by withdrawing the action for recovery of the levies and initiating arbitration proceedings.

In their statement of claim the body corporate asked for payment of the arrear levies. The owner, in response, expressed his willingness to pay the levies, but asked for an award whereby the trustees were directed to remove the offending bins to a more appropriate site.

Because both claims had merit, the arbitrator made an award whereby the arrear levies had to be paid immediately and unconditionally, and the trustees had to remove the bins.

Regarding the fact that the owner's withholding of levies was illegal, the arbitrator could do no more than order that the levies be paid - something which the owner was willing to do in any event, provided that he obtained satisfaction regarding his complaint.

It appears that an owner may now withhold levy payments for any complaint that he may have against the body corporate or trustees. If an owner should complain to trustees about a leaking roof, for example, he will be able to obtain satisfaction by withholding his levies. Any court action by the trustees to recover the levies is then effectively blocked in terms of the Greenacres-decision (because there is a dispute), forcing the trustees to initiate arbitration proceedings. At the arbitration, the worst that can happen to the delinquent owner, is that he is ordered to pay the levies. Even then, if the levies are still not paid, the trustees will not be able to recover the levies without further proceedings in the Magistrates' Court.

This is possibly an unintended result of the judgment by the Supreme Court of Appeal, but it is already happening in practice and it should be considered whether it is a desirable situation. If not, the 'loophole' can only be removed by amended legislation.

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Exclusive use rights to a parking bay

Ilse Kotze

Owners are sometimes under the impression that they have rights of exclusive use of specific parking bays because they purchased the specific bays in terms of their offers to purchase. This is not necessarily the case. Owners should look through their documentation to see whether they have a title deed (a certificate of a real right or a notarial cession) entitling them to the exclusive use of a parking bay. An owner's title deed to an exclusive use area may be in possession of the bank, if his unit is subject to a mortgage bond. Information pertaining to registered exclusive use areas (parking bays) can also be obtained from the deeds office electronically.

Another simple way to see whether parking bays are registered as exclusive use areas, is to peruse the sectional plans of the scheme, as the exclusive use areas would be indicated on the sectional plans. From the sectional plans it may also appear that the parking bays are common property or the parking bays may even have been registered as sections. Once it is ascertained from the sectional plans that the parking bays are not registered as exclusive use areas, one should proceed to peruse the rules of the body corporate, to ascertain whether the parking bays have been allocated as exclusive use areas to owners in the rules. Parking bays may have been allocated as exclusive use areas in terms of Schedule 1 rules under the Sectional Titles

Act, 1971 or in the management rules or conduct rules in accordance with section 27A of the Sectional Titles Act, 1986. The rules of a body corporate may either be obtained from the trustees or managing agent or from the deeds registry, where it should be filed.

If it appears that parking bays are neither registered as exclusive use areas nor as sections, it means that the parking bays are still part of the common property, which is owned by all owners in undivided shares. In accordance with conduct rule 3(1) no owner or occupier of a section shall park or stand any vehicle upon the common property, or permit or allow any vehicle to be parked or stood upon the common property, without the consent of the trustees in writing. Section 38(i) of the Sectional Titles Act, No 95 of 1986 further entitles the trustees to let portions of the common property, including parking bays, to owners or occupiers of sections for a term shorter than 10 years.

If it appears that individual owners purchased the exclusive use of parking bays, but they do not hold the exclusive use thereof in terms of a title deed or according to the rules, the trustees should endeavour to rectify the situation. The members of the body corporate may create and allocate rights of exclusive use in respect of parking bays to owners by one of the following methods:

The first method requires the authorization of the members of the body corporate by unanimous resolution, whereupon the exclusive use areas must be delineated on the sectional plan. The sectional plan must be prepared by an architect or land surveyor and then approved by the surveyor-general. Each parking bay must then be transferred by the body corporate to each owner by notarial cession and subsequently registration must take place in the deeds registry.

Another method is to create and allocate the exclusive use of parking bays to owners in the management rules or conduct rules of the scheme in accordance with section 27A of the Act. This method entails the preparation of a special rule in terms of which the parking bays are allocated to specific owners with reference to a schedule of allocation and a layout plan to scale. The parking bays must be clearly indicated and distinctively numbered as P1, P2, P3 for example on the layout plan to scale and on the schedule of allocation it should be indicated to whom (which unit) each parking bay is allocated. Once the special rule has been prepared, it has to be approved by the members of the body corporate. To adopt a special management rule requires a unanimous resolution of the members of the body corporate, whilst only a special resolution is required to adopt a special conduct rule. An owner will be entitled to the exclusive use of a parking bay, once the special rule has been filed in the deeds registry.

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EXTENSION OF SECTIONS : TIPS FOR TRUSTEES

Jacques Maree

Many of us are aware of the onerous procedures and high costs pertaining to the extension of sections in terms of section 24 of the Act, especially when the floor area of the particular section increases by more than 10%. In short it entails consent by the owners by way of a special resolution followed by appointment of a land surveyor to draft a new sectional plan and an attorney to effect the registration.

When the trustees are faced with an application by an owner to extend a section the first thing to consider is whether there are other extensions in the pipeline. If they are uncertain they may take the sectional plan of the scheme and do an audit of the existing sections to see if it corresponds with the plan. When there is any doubt about the status of a structure or enclosure a sectional title expert should be consulted.

The reason for the above is to save possible costs. When there are more extensions to be registered they may be combined. A land surveyor will only have to draft and register one plan of extension and if the same attorney is appointed the relevant owners may negotiate an appropriate fee.

Let us go one step back. The extension of a section affects the common property and therefore the trustees, on behalf of the body corporate, should ensure that everything goes according to plan. In fact, they should take control from the moment an application by an owner is received. Many schemes have unique rules regarding alterations to sections which must be complied with. Another aspect to consider is the impact of the proposed extension on the aesthetics of the scheme. An application for an extension is usually submitted with approved municipal plans. Take note that municipal approval and owners' approval are two entirely different things. The owner must obtain both.

At this stage the trustees should consider the application thoroughly and if in order they should arrange a special general meeting of owners or a postal vote. Of utmost importance is that they should prepare a proposed special resolution to the owners. All conditions, if any, should be incorporated in this special resolution. In this regard the following may be considered:

(1) Period for completion.

(2) Payment of a deposit.

(3) Security measures.

(4) Use of common property such as lifts.

(5) Standard of workmanship by contractors.

(6) Removal of rubble.

(7) Times of work.

(8) Damage to the common property or other sections.

(9) Nuisance to other occupiers.

(10) Imposition of penalties (if provided for in terms of the rules).

(11) Structural engineer's report.

(12) Compliance with the plan approved by the municipality.

(13) Payment of any other monies due to the body corporate and the terms thereof.

If the special resolution is adopted the conditions imposed in terms thereof are valid and binding upon the owner and the body corporate will be able to take appropriate action should an owner fail to abide by such conditions.

It is also recommended that the trustees remain in control of the process after the necessary approval from the owners is obtained. In this regard trustees may request the respective owners to sign a power of attorney authorising them to appoint an attorney and land surveyor, and to obtain bondholders' consent (if applicable), on the extending owners' behalf, and to do all things reasonably necessary to register the extensions. I say this because the extension of a section affects the common property and therefore it is important that the process be carefully monitored from date of application until completion. Rather have the trustees do a proper job according to the standards required by the body corporate than having to rectify the mistakes made by the extending owners.

The extension of a section is fraught with dangers lurking behind every corner but, if done properly, can be of benefit not only to the extending owners, but to the body corporate as a whole.

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Strafbepalings vir Boutydperke wettig?

Extract from the series DeeltitelForum, published weekly in Die Burger.

Tertius Maree

EEN van DeeltitelForum se gereëlde lesers besig 'n onbeboude erf in 'n beveiligde, sogenaamde enkeltitel-woonbuurt onder beheer van 'n huiseienaarsvereniging. Hy doen navraag oor of die verhaling van boetes van eienaars van oop erwe wat nalaat om binne 'n voorgeskrewe tydperk daarop te bou, wetlik afdwingbaar is.

Hy het 'n erf gekoop met die oog op die inrigting van 'n woning daarop, maar was weens omstandighede nie in staat om binne die tydperk van drie jaar, soos in sy koopkontrak bepaal, die bouwerk te voltooi nie.

Die feit dat boetes wel van huiseienaars verhaalbaar is, is by implikasie bevestig in die gerapporteerde saak van *Murcia Lands BK teen Erinvale Country Estate Home Owners' Association*. Die belangrikheid hiervan vir deeltiteleienaars is dus dat dit dien as bevestiging dat dit, ten minste in beginsel, moontlik is om boetes te verhaal vir oortreding van deeltitelreëls. Bouboetes kom normaalweg nie by deeltiteleiendom ter sprake nie, aangesien die buurt ten volle deur die ontwikkelaar opgerig word. Ander tipes boetes kan egter wel ter sprake kom

Die Erinvale-saak het betrekking op die volgende vrae:

- of die Wet op Strafgedinge ten opsigte van boetes deur huiseienaarsverenigings opgelê, geld (hierdie punt is egter nie in die saak geargumenteer nie, aangesien albei advokate en die regte dit as vanselfsprekend aanvaar het);

- of die opgelegde boete buite verhouding is met die nadeel gely deur die vereniging;

- of dit regverdig sou wees om die boete te verminder; en

- die bedrag waartoe dit verminder moet word.

Om dié vrae te beantwoord het die hof ten eerste gekyk na getuienis dat daar daadwerklike benadeling was. Die getuienis wat daar wel was, was skraps en twyfelagtig. Die regter het nogtans aanvaar dat, sou 'n groot aantal eienaars die bouvoorwaardes ignoreer, die effek besonder nadelig vir die oord sou wees. As gevolg van die feit dat die oorgrote meerderheid wel die bouvoorwaardes nagekom het, kan afgelei word dat die boetebepaling 'n doeltreffende

dwangmiddel was. Die regter het dus aanvaar dat nienakoming wel die oord benadeel.

In die betrokke geval was die opgelegde boete tien keer die normale heffing, wat verder verdubbel is omdat die erf 'n konsolidasie van twee erwe was. Om te bepaal of dit buite verhouding met die werklike benadeling was, het dit regter die boeteformule vergelyk met soortgelyke formules in ander behuisingsoorde, en het hy tot die slotsom gekom dat Erinvale se boetes wel buitensporig was.

Die regter het verder in ag geneem dat die bedrag van die boete 'n aansienlike persentasie uitgemaak het van sowel die oord se begrote uitgawes as die inkomste uit ledegeld, en dat die bedrag van boete indruis teen 'n gevoel van wat regverdig is.

Gevolglik het die hof beslis dat dit billik sou wees om die opgelegde boete te verminder en het hy, met verwysing na sy vergelyking met soortgelyke oorde, tot die slotsom gekom dat 'n formule van vier keer die normale heffings in die omstandighede billik sou wees.

Hoewel dit nie duidelik uit die hofverslag blyk nie, is dit blykbaar 'n vereiste dat die boetebepaling in die grondwet van die oord opgeneem moet wees. Navraag by 'n advokaat wat by die saak betrokke was, het bevestig dat dit in die Erinvale-saak wel in die grondwet opgeneem was. 'n Bepaling wat slegs in 'n koopkontrak van 'n erf opgelê is, kan nie deur die vereniging afgedwing word nie, aangesien die vereniging normaalweg nie 'n party tot die koopooreenkoms is nie.

In die lig van hierdie beslissing mote dus aanvaar word dat:

- die oplegging van boetes deur huiseienaarsverenigings en deeltitel-regspersone in beginsel wettig is;

- dat die Wet op Strafbedinge vereis dat die boete 'n redelike een moet wees; en

- 'n afdwingbare formule vir bepaling van maksimum boetes vir verontagsaming van die tradisionele bouvoorwaardes by huiseienaarsverenigings, 'n bedrag gelyk aan vier maal die normale heffings moet wees.

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ASK THE EDITOR:

Dear Editor

I read in a recent newsletter that it is not legally allowed to charge fines for transgressions because of the Conventional Penalties Act. It is stated that fines may only be imposed with the consent of each and every member of the body corporate. This is of course hardly likely to happen. Because we have some years ago made a special rule to enable trustees to impose fines and it has worked very well in practice, we trustees would appreciate you comments.

Concerned Trustee

Dear Concerned Trustee,

The imposition of penalties in sectional title schemes has always been a controversial issue, due to its radical nature.

However, I am of the opinion that it is perfectly legal and enforceable provided that a carefully drafted special conduct rule is made in terms of which trustees are empowered to impose levies in terms of a procedure which recognises the transgressors right to be heard (the so-called audi alteram partem principle). This principle is entrenched in the Constitution and the Promotion of Administrative Justice Act.

If an adequate rule is in place, conforming to the said constitutional requirements, the procedures set out therein must be meticulously applied by the trustees when seeking to impose a penalty.

A last requirement is that the penalty imposed must be a fair one in the circumstances. It is here that the Conventional Penalties Act may be relevant, as applied in the recent Cape High Court case of Murcia Lands CC v Erinvale Country Estate Home Owners Association in which it was in effect confirmed that a home owners' association may impose penalties, but the penalty in question was reduced to a reasonable level in term of the Conventional Penalties Act. (See the discussion thereof elsewhere in this issue).

I therefore disagree with the view that imposition of penalties in sectional title schemes are illegal or that the consent of every owner is necessary for such purpose.

Editor

Geagte Redakteur,

Ek is 'n eienaar van 'n deeltiteleenheid en 'n trustee van die oord. Een van die eienaars is ver agterstallig met haar heffings. 'n Saak is reeds teen haar gemaak en sal een of ander tyd op die hof se rol kom.

Wat egter vir my 'n probleem is, is dat daar gesê word dat die trustees nie haar water en elektrisiteit mag afsit nie. Ons het almal meters by ons eenhede en elkeen moet volgens gebruik betaal. Sy weier egter om ook dit te betaal. Dan het sy nog huurders ook in haar eenheid wat die verbruik soveel hoër maak.
Die regspersoon is tog seker die verskaffer van water en elektrisiteit aangesien ons die krag van die munisipaliteit aankoop en dit dan weer aan die eienaars verkoop. Of redeneer ek verkeerd?

Haar wanbetalings het nou gelei dat ons ander 'n spesiale heffing moet betaal om haar wanbetaling uit te kanselleer in terme van die begroting.

Kan u asb help met raad?

Onseker

Geagte Onseker,

U is korrek dat die regspersoon in u geval die verskaffer van die betrokke dienste is.

Dit moet egter verstaan word dat selfs 'n munisipaliteit nie by magte sou wees om kragtoevoer af te sny, indien daardie bevoegdheid nie spesifiek deur ondergeskikte wetgewing aan munisipaliteite toegeken was nie. Sonder sodanige magtiging, sou die afsny van elektrisiteit neerkom op onregmatige spoliasie en sou die gebruiker in staat wees om deur middel van die gemeenregtelike mandament van spolie 'n interdik te verkry om die krag weer te laat aanskakel. Die regsmiddel is gebaseer op die beginsel dat niemand die reg in hul eie hande mag neem nie.

Deeltitel regspersone is ook deur artikel 35 van die Deeltitelwet gemagtig om quasi-wetgewing, in die vorm van reëls te maak. Voordat trustees dus enige stappe neem, moet sorg gedra word dat 'n besondere reël in plek is wat die trustees se magte sowel as die nodige prosedures uiteen sit.

Sonder die ondersteuning van 'n gepaste reël en nakoming van die prosedures daarin omskryf, sal 'n eienaar wie se kragtoevoer afgesny word suksesvol teen die regspersoon kan optree om die krag weer aan te sluit.

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