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*A free newsletter to the sectional title community by Tertius Maree Associates*

# THE ARREAR LEVIES CONUNDRUM

## *Undue protection of defaulters; a self-defeating policy?*

*When considering* the effects of Management Rules 21 and 25 it seems that the legislature's objective is a weird variant of consumer protection. The first and most important counterintuitive aspect is that by protecting the defaulting owners, the other '*consumers'*, being the owners who pay their levies meticulously, are actually being penalised by having to bear expenses for which the defaulters should be responsible.

Consider the effects of MR 25(4) and (5):-

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

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

It is necessary to deal with these provisions in reverse, due to the fact that recovery of costs can only take place after the debtor's account in the body corporate's books has been debited with such costs. The attorney collecting the legal costs

must do so on behalf of the body corporate which is her client. For the attorney to issue a summons in her own name would not be the prudent or correct procedure. In order to be able to collect the costs from the defaulter, such costs must therefore first be debited against his levy account. In order to do this in the normal course of events, a court judgement must first be obtained, which follows upon the issue of a summons. Thereafter the costs must be taxed, adding further costs.

The first question which arises is why magistrates were omitted from subrule (5). Must we assume that the term '*judge*' includes a magistrate? I have no answer. Fortunately most, but not all, magistrates still assume jurisdiction in respect of such actions.

The requirements of these provisions preclude the possibility of collecting arrears without the, often unnecessary, costs of a summons and judgement. In fact, the costs payable by the defaulter are ultimately considerably more, due to the poorly considered requirements of these provisions.

Yes, the provisions do allow for an agreement with the defaulter as to costs, but such agreements will seldom materialise due to no fault of the body corporate or its attorney.

Should the attorney succeed in collecting payment without summons, the costs will not be collectable from the defaulter and must be for account of the body corporate, which must in turn make provision for payment in its annual budget and which will ultimately be paid by the guiltless members.

The alternative to the latter would be for the attorney to issue a summons in her own name, which would be an unnecessary duplication of proceedings, probably incorrect, and certainly not in the interest of the defaulter.

As far as taxation is concerned, not only does it add to the costs eventually payable by the defaulter, but in practice it causes a considerable delay in payment. Is it reasonable that the attorney must carry the costs burden until eventual payment? Is it reasonable that the body corporate must?

You might say that payment of interest must compensate for such delays. But the attorney is very unlikely to benefit therefrom, and the raising of interest is in any event problematic. Consider MR 21:-

*(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 (Act 34 of 2005), compounded monthly in arrear.*

Let us first look at the resolution which is required. I have always suggested to trustees that they should determine the interest rate at the time and under the same resolution by which the levies are determined. This seems to make sense, but is it correct? The provision requires a written resolution by the trustees. In terms of MR 14(4) there are two methods of adopting trustees' resolutions, namely by voting upon it at a meeting of trustees, or by adoption of a written resolution sent to the trustees. Does this mean that MR 21 requires that the latter procedure must be followed? If not, what does a '*written trustee resolution'* mean? Would it be sufficient to adopt the resolution at a trustees' meeting and subsequently to record it in the minutes '*in writing'*? I doubt that this is what the legislator had in mind, leaving the question: Why must this resolution, as opposed to other equally important trustees' resolutions be in writing?

If this sounds petty, keep in mind that 'petty' questions such as this are the causes of many disputes. Having not settled this issue, let's look at the maximum rate prescribed under the National Credit Act. Consider the meaning of the instruction that the interest charged in respect of arrear levies *'must not exceed the maximum rate of interest payable per annum under the National Credit Act.*

Such rate is currently 26.75% per annum, being the rate prescribed for unsecured credit (20%) plus the current Reserve Bank repurchase rate (6,75%).

The NCR, not surprisingly, makes no mention of arrear levies. One will also not find in the NCR a category of credit agreements which can be considered to apply specifically to levies at sectional title schemes. Therefore it would be incorrect to assume that the provisions of the NCR apply to sectional title levies, as some do.

The generally accepted view that the maximum rate of 2% per month, as prescribed in respect of incidental credit agreements applies, is also not correct, as it is not '*the maximum rate of interest payable per annum under the National Credit Act.'*

*Tertius Maree*

# THE CONUNDRUM CONTINUED

*How many types of levies are there in fact?*

*We know* that there are ordinary levies and special levies. '*Additional contributions*' as referred to in S 3(1)(c) of the Management Act are levies payable in respect of exclusive use areas and which are dealt with differently, not to be discussed today.

Is it correct also to see as separate levy obligations the contributions to the reserve fund and CSOS levies? Let us first look at the reserve fund contributions. Managing agents and trustees are inclined to consider these to be separate levies and indicate them as such on the members' levy statements. But is this procedure correct?

In terms of MR 22(2) an annual '*contribution'* to the reserve fund must be determined according to a prescribed formula. I think it is right here where the problem starts, namely with the term '*contribution to the reserve fund*,' a term which is used by the legislature in the Act as well as the Management Rules to indicate what is generally understood to be '*levies*,' and which suggests a separate levy or contribution. The misconception is intensified by the wording of MR 24(3):-

*(3) The following amounts must be paid into the reserve fund-*

*(a) any part of the annual levies designated as being for the purpose of reserves or the maintenance, repair and replacement plan.*

This may be understood to indicate that each member's contribution to the reserve fund must be indicated separately on his levy statement. If this is done, how must the situation be handled if the levy is not paid in full?

Section 11 of the Management Act determines how the budget expenses are to be apportioned to members, namely according to participation quotas. The proviso '*subject to section 3(1)(b)*' in section 11(1)(c) makes no difference and is meaningless, (except for the reference to the minister prescribing minima), as s 3(1)(b) introduces no deviation from the participation quota formula.

The words of the rules make it sufficiently clear that whereas the '*annual contribution to the reserve fund*' must be budgeted for and calculated separately, it then becomes 'part' of the ordinary levies. Accordingly the amount of the reserve fund budget should be added as a line item in the normal budget before the sum is apportioned to owners as per participation quotas. Accordingly such contributions need not be shown as a separate item on the members' levy statements.

The question then still arises as to how the situation must be dealt with if Jeremiah Jackson pays not his full levy but only a portion thereof. And the answer is simple, namely that the percentage must be calculated, namely what the proportion of the reserve fund budget is in relation to the combined budget. Such percentage must then be applied towards all levy payments received in order to determine which portion thereof must go towards the reserve fund.

Should my view on the above still be regarded as incorrect, it needs to be explained how the provisions of MR 21(3)(b) must be dealt with, namely the 10% interim increase in levies at the year-end. Would this then relate only to the administrative levies or to the combined levies or the two separately? The result in each case would be different.

More difficult are the levies which must be paid to the Community Schemes Ombud Service. Such levies constitute a liability of the body corporate and not of its members individually as clearly stated by section 59 of the Ombud Act:-

'*Every community scheme must –*

*(a) pay to the Service a levy in an amount calculated as prescribed, subject to such discounts and waivers as may be prescribed*.'

Being a body corporate liability, both the Management Act and the Management Rules determine that all expenses of the body corporate must be included in the annual budget and must be assigned to members according to their participation quotas.

But now the Minister comes along and prescribes in the regulations to the Ombud Act that levies payable to the Ombud Service must be collected from individual members and then according to a completely different formula.

This is a substantial deviation from the provisions of the legislation and in fact constitutes a new provision in conflict with statutory provisions, which the Minister is not competent to enact. It is an ultra vires provision which should be regarded as invalid, rendering all levies paid to the Ombud Service in terms thereof as undue, illegal payments.

Because the regulatory provisions that the levies must be calculated and apportioned as per the formula is in my view illegal, the better way would be to make the prescribed calculations per unit, to add the individual amounts together and to place the sum thereof in the annual budget, to be apportioned to owners as part of their levies according to their participation quotas.

I know that this is not what is being done in practice, but in order to regularise the current provisions it is essential for the legislature either to change the Regulations or to introduce an amendment of section 11 of the Sectional Title Schemes Management Act.

It would be interesting to see our judiciary's views on this problem, particularly in view of the fact that levies paid to the Ombud Service seem to be disappearing into a black hole.

*Tertius Maree*

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