LEVIES FOR BALCONY MAINTENANCE: WHOSE RESPONSIBILITY?

Baxter v Ocean View Body Corporate and Others (A170/2022) [2022] ZAWCHC 234 (16 November 2022)

We know that in sectional title schemes the trustees raise levies to apply towards, amongst other things, the maintenance of the common property in the scheme. Where (some) owners have rights to the exclusive use of parts of the common property, their levies will reflect and additional amount in respect thereof. Although this arrangement is common, one must be wary that the rules of a scheme may determine otherwise and provide that an owner enjoying such rights must herself take responsibility for the maintenance of that exclusive use area. This makes particular sense if the exclusive use area is a balcony that only the owner uses. And in such event, the body corporate must ensure that the determination of such owner's levy liability, reflects the fact that she is responsible for the maintenance, as this judgment shows.

The Judgment can be viewed here.

FACTS

In November 2021, the Ocean View Body Corporate ('the Body Corporate') passed a resolution to increase the levy raised in respect of the balcony exclusive use areas in the scheme, from R3 to R23 per square metre. The increase was ostensibly to defray the cost of insurance, maintenance and other expenses and to make provision towards the scheme's 10-year maintenance plan. It was further resolved that the increase would operate retrospectively.

This prompted Mr Baxter, an owner in the scheme, to lodge a dispute with the Community Schemes Ombud Service ('the CSOS'). He argued that the contribution levied had been incorrectly determined and was therefore in conflict with section 3(1)(c) of the Sectional Titles Schemes Management Act ('the STSMA'). He sought an order to that effect and an order that the amount of the levy must revert to what it was before, i.e. R3 per square metre.

Section 3(1)(c) of the STSMA provides as follows:

> *'3. Functions of bodies corporate.-*
>
> *(1) A body corporate must perform the functions entrusted to it by or under this Act or the rules, as such functions include-*
>
> *…*
>
> *(c) to require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs.' (Emphasis supplied.)*

In the CSOS, the Adjudicator found in favour of the body corporate and Mr Baxter appealed to the High Court.

HELD

- Section 3(1)(c) of the STSMA requires of a body corporate to make a policy decision: Either the body corporate maintains the exclusive use areas itself and collects the costs of doing so from the owners of these areas, or the trustees pass a resolution to amend the scheme's conduct rules to provide that the maintenance (and the costs thereof) of exclusive use areas shall be the responsibility of the relevant owners enjoying the use of that area (without the need for a contribution towards maintenance thereof).

- This is indeed what the body corporate in this matter did. It had previously adopted a conduct rule (its Rule 24(4)(a)), which recorded as follows:

  '4. An owner to whom an exclusive use right has been allocated shall:

  a. Maintain and repair that area as if it were part of his/her/its section and keep it clean and tidy.'

- The effect hereof was therefore that the owners of units who enjoyed the rights to exclusive use balcony areas would be responsible for the maintenance and repair of those areas. Accordingly, the body corporate was prohibited by the proviso to section 3(1)(c) of the STSMA from levying a contribution to defray the cost of its maintenance of such areas.

- The Adjudicator erred by failing to recognise the effect of the proviso to section 3(1)(c) read with the scheme's own Rule 24(4)(a) on the determination of the increased levy.

CONCLUSION

The appeal succeeded. However, the request by Mr Baxter for an order that the levy had to revert to R3 per square metre could not be granted. The Court noted that it was not for the CSOS Adjudicator, nor the Court to determine what the adjusted contribution should be. Rather, the Body Corporate must determine the amount that is required, reasonably estimated, to defray the costs for which the owners who have balcony exclusive use areas are not individually liable in terms of the scheme's Rule 24(4)(a).

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