HOLDER OF RIGHT OF EXTENSION IN A SECTIONAL TITLE SCHEME: WHEN DOES LIABILITY FOR MAINTENANCE CONTRIBUTION ARISE?

***Club Kerkira (Pty) Limited v Trustees of Club Kerkira Body Corporate and* Others (D11451/2021) [2024] ZAKZDHC 40 (4 June 2024)**

For the sixteen owners in the Kerkira sectional title scheme, it was onerous to maintain the 44 hectare development which was destined to house 101 owners once the anticipated phases 2, 3 and 4 of the project were finalised. Especially so when the developer and holder of the right of extension refuses to pay levies relating to the maintenance of the common property over which it held the right to extend. The developer argued that it was only liable to make good maintenance expenses after they had been incurred by the body corporate, because the legislation requires of it to make payments of amounts "necessary to defray" the costs.

The judgment and summary below highlight why the court found in favour of the body corporate.

FACTS

Club Kerkira (Pty) Limited ('the developer') owned a property in Palm Beach, KwaZulu-Natal and, in 1992, opened a sectional title scheme thereon. The scheme is known as Club Kerkira.

The estate is set on 44 hectares of land and the sectional title plan provided for 101 units to be developed in four phases. Since registration of the plan and opening the scheme (in 1992) sixteen units have been built and transferred to owners.

The developer installed the majority of the services and roads in the estate, completed a tennis court, two swimming pools with amenities, an administration office, a guardhouse, a workshop, a manager's dwelling, and a club house during the first phase. Thus, the estate was prepared for the inhabitants of 101 units.

Upon the opening of the sectional title register, the developer reserved the rights for itself to develop the balance of the 101 units in future (in what was anticipated to occur in phases 2, 3 and 4 respectively). The rights were reserved by virtue of the provisions of section 25 of the Sectional Titles Act of 1986 (the 'section 25 right' or 'right to extend'). The anticipated further development did not take place. Thus, since the scheme's inception, the body corporate of Club Kerkira has had to levy contributions for the maintenance and upkeep of the large estate (designed to accommodate and benefit 101 sectional title owners and for which the maintenance would be funded by them) from the 16 owners. It was therefore particularly important for it to collect contributions from the holder of the section 25 right, as far as the law provides for.

The body corporate had raised claims against the developer for payment of contributions allowed in terms of the applicable sectional title legislation - initially in terms of the Sectional Titles Act of 1986 ('the STA') and since 2016, in terms of the Sectional Titles Schemes Management Act of 2011 ('the STSMA') - but the developer had consistently denied liability.

Finally, in August 2019, the body corporate submitted an application by virtue of the Community Schemes Ombud Service Act, 2011 (the 'Ombud Service Act') to the Community Schemes Ombud Service ('the Ombud Service') for resolution of the dispute. By this time, a large part of the claim against the developer as holder of a right to extend, had prescribed. The present matter dealt with claims arising from 2016 onwards.

In the application to the Ombud Service, the body corporate asked for determination that the STSMA empowered it to raise and collect levies from the holder of a section 25 right, and that the latter is liable to pay the amounts levied by the body corporate. It also asked the Ombud to order that the developer pays it R798 307,79 together with interest, this amount being the total amount of outstanding levies that it had raised in the period July 2016 to 30 June 2019.

The adjudicator found that levies were indeed payable in terms of the provisions of section 3(1)(d) of the STSMA and instructed the parties appoint an auditor to “ascertain the costs incurred by the body corporate for the costs listed under s 3(1)(d) of the STSMA in relation to the common property”.

The developer lodged a (late) appeal to the High Court. It argued that the adjudicator’s finding was incorrect, in the main because it failed to prove that it had undertaken any of the work in respect of which the claim relates. It argued that, given that section 3(1)(d) of the STSMA empowers the body corporate to require a developer to make contributions “necessary to defray” the costs, the costs had to be incurred before any contributions could be claimed.

Section 3(1)(d) of the STSMA reads as follows.

> *“Functions of Body Corporate*
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> *(1) A body corporate must perform the functions entrusted to it by or under this Act or Rules, and such functions include –*
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> …
>
> *(d) to require from a developer who is entitled to extend the scheme in terms of a right reserved in s 25(1) of the Sectional Titles Act, to make such reasonable additional contribution to the funds as may be necessary to defray the costs of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution for the provision of electricity and water and other expenses and costs in respect of and attributable to the relevant part or parts.”*

HELD

The developer’s argument is rejected

- The adjudicator concluded correctly that the contributions payable by the holder of a right of extension had to be the subject of the ordinary budgeting process followed in respect of levies that are payable and claimable on a monthly basis (as the body corporate herein had done).
- The developer’s contention that the body corporate was obliged first to prove that it had incurred the expenditures, carries with it the implication that a body corporate must incur liabilities at a time when the expenses are not covered by its purse; or, on the other hand, an implication that the levies raised against sectional title owners under section 3(1)(a) of the STSMA must include anticipated expenditures falling within section 3(1)(d) of the Act in the hope or expectation that such would be recovered from the holders of rights of extension. This proposition must be rejected if the language and purport of the STSMA is considered. It is inconsistent with the scheme of section 3 that a scheme should run on credit.
- What section 3(1)(d) obliges a body corporate to do is to secure from holders of section 25 rights an *additional* contribution. Clearly what is contemplated is a contribution in addition to the ordinary levies payable under section 3(1)(a) by the owners of sectional title units.
- The adjudicator was accordingly correct in finding that it was not required that the expenditures be incurred beforehand.

Referring the calculation of the levy that is payable by the developer, to an auditor

- The adjudicator then proceeded to address whether the levies raised (and claimed by the body corporate) were reasonable (i.e. at the yearly intervals when the body corporate had accepted a budget and the trustees passed a resolution to levy contributions as determined by them). If they were, they had to be paid, irrespective of whether the expenses were actually incurred after the claims were made.

- In this regard, the adjudicator ordered that an "auditor … be appointed …to peruse the financial statements for the period 2016 to 2019 and ascertain the costs incurred by the body corporate for the costs listed under s 3(1)(d) of the STSMA in relation to the common property" and "that the amount so determined by the auditor must be apportioned accordingly to what the developer owes for the period claimed." This part of the adjudicator's order conveyed that it was now required that an assessment of the costs actually incurred during the period in question had to be prepared, and to allocate the developer's portion thereof after such assessment.
- In making this order the adjudicator erred in law, as she purported to delegate her authority as an adjudicator to a third party who was not a duly appointed adjudicator. The most important issues in the dispute between the parties were left to the proposed auditor. The Ombud Service Act affords no power to an adjudicator to delegate her function.
- In the High Court the body corporate argued that the referral to the auditor was allowed because section 54(3) of the Ombud Service Act states that an adjudicator's order "may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate."
- There is however no merit in this argument because (i) it is contrary to the scheme of the Ombud Service Act that any such "ancillary and ensuing" provision includes the delegation of the adjudicator's decision-making powers to a third party; and (ii) it is contradicted by the provision in section 54(1)(a) of the Ombud Service Act which provides that if an application is not dismissed, an adjudicator must make an order granting or refusing each part of the relief sought by the applicant.
- Essentially the body corporate's claim was for contributions which it had (already) raised, no more and no less.

Condonation of filing the late appeal

- Section 57(2) of the Ombud Service Act provides that an appeal on a question of law must be lodged within 30 days after the date of delivery of the order of the adjudicator. The developer's appeal was lodged more than eight months after the adjudicator's order was made.
- The developer was accordingly obliged to ask the court to condone the late application. This was opposed, the body corporate arguing that the court has no power to extend a period for the launching of an appeal set down by statute.
- The body corporate's argument in this respect had to fail. This is because: (i) It is clear that the Ombud Service Act is designed to provide a relatively inexpensive and speedy resolution of disputes arising within communal living schemes. The confinement of appeal rights to questions of law, and the fixing of a time limit on the institution of such appeals reflect the same philosophy. (ii) Although a High Court has no inherent jurisdiction to condone non-compliance with statutory provisions, it may do so if the relevant legislation expressly or impliedly confers such a power.
- This same enquiry was argued before a full bench of the Western Cape High Court (Cape Town) in *Baxer v Oceanview Body Corporate and Others* (2023) where that court drew attention to the fact that an express provision in the statute is not required to confer a power of condonation on the court. The question as to whether the conferral of such a power is implied turns upon a proper construction of the statutory provision. The court in *Baxter* decided that the 30 day time limit for the lodgment of an appeal was not intended to be an expiry period with the implication that if the relevant right was not exercised within the prescribed time it would *ipso facto* be extinguished and that the provisions of the Act should not be read in a way which limits the proper ventilation of disputes that are appealable under the Act.
- Although it is not clear whether the present court (Durban High Court) is bound by the full bench decision of the Western Cape Court in *Baxter*, it agrees with the outcome in *Baxter*, especially considering that appeals against decisions of adjudicators "are confined to questions of law. Under our Constitution the determination of disputes over questions of law are the preserve of the courts. Errors of law made by adjudicators result in decisions which are not in accordance with law. The legislation recognises that such decisions should not be allowed to prevail and therefore provides for appeals. It is self-evident that some decisions which might be

made by adjudicators will have long-term effects which may indefinitely dictate the course of the relationship between members of community schemes in a manner which is not consistent with the law. That would be an undesirable outcome inconsistent with the purpose of the Act."

- In the circumstances, condonation should be granted.

CONCLUSION

The developer's appeal is therefore successful. The Court further ordered that the adjudication proceedings had to be remitted to the Community Schemes Ombud Service for further consideration and a decision.

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