Body Corporate Marsh Rose Case Analysis and Comments

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THE BODY CORPORATE MARSH ROSE (SECTIONAL SCHEME NUMBER: 269/2012) v ARNO STEINMULLER, THE STANDARD BANK OF SOUTH AFRICA LIMITED and HAASBROEK & BOEZAART ATTORNEYS INC. CASE NUMBER: A5002/2020

Analysis and Comments by Prof. CG van der Merwe and Graham Paddock

MAJORITY (BINDING) JUDGMENT:
MATOJANE, J WITH NICHOLS, AJ CONCURRING

A. Introduction and Background Facts (pars 1 to 11)

The Marsh Rose body corporate appealed to the Gauteng High Court against an earlier judgment given by a single judge. The appeal court had to interpret section 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986. The court considered whether the single judge in the earlier case was entitled to assess whether the security in the form offered by Steinmuller, the first respondent, was sufficient to oblige the body corporate to issue a clearance certificate.

Steinmuller had purchased unit 24 Marsh Rose at a judicial auction on 30 January 2018. The body corporate's view was that he had agreed in the purchase contract to pay all amounts outstanding by the unit owner to the body corporate. It refused to issue a levy clearance certificate until he paid R312 903,21, which it alleged was owed by the owner. Steinmuller disputed the amounts the body corporate claimed. This amount included unpaid contributions (levies), a judgment debt and untaxed legal costs, all of which the body corporate alleged were due by the owner. The body corporate argued that if taxation of the legal fees was required, this should be done before issue of a levy clearance.

In April 2018 the body corporate reduced its claim to R295 044,81, and Steinmuller again disputed the amount and tendered security of R150 000,00, which the body corporate refused. In February 2019, Steinmuller demanded copies of the body corporate's ledger account for the owner as well as minutes and resolutions relevant to the raising of levies and interest charged from 2014 to the date of demand. The body corporate refused to supply these, on the basis that Steinmuller was not yet the registered owner of the unit he had purchased.

Steinmuller applied to a single judge for an order directing the body corporate to issue the clearance on provision of security held by his attorney. The judge agreed with Steinmuller and made an order obliging the body corporate to issue the clearance once he provided R250 000,00 to be held by his attorney as security, unconditionally and irrevocably promised to the body corporate as security for its claim, which it was to pursue by litigation or arbitration within 10 days. The body corporate appealed against the single judge's order.

Comments and queries:

a) There is no mention of the appeal court asking for evidence that the levies were validly raised by reference to budgets or trustee resolutions, nor any discussion of Steinmuller's entitlement to inspect these documents; however, the majority judges did find that the body corporate had failed to prove that the levies were due (see E12 below).
b) An open question is why Steinmuller did not apply under the Promotion of Access to Information Act to get access to the documents he needed to protect his rights.
c) The type of security ordered by the single judge is, in our view, an entirely reasonable way of securing a disputed debt, giving the body corporate security for the purposes of releasing the unit from the embargo without prejudicing its right to recover all amounts proved due in respect of the unit as at the time of the transfer from the previous owner

B. Applicant's Case (pars 12 to 14)

The body corporate argued that:
(1) The "amounts due" in terms of section 15B(3)(a)(i)(aa) include any amounts owing to it, no matter how they may be comprised, and
(2) Where there is dispute as to any amount, the amount due should first be determined and payment made or provision made for such payment before the issue of a clearance certificate.
The judge rejected these interpretations, stating that Parliament did not intend to oblige the payment of unlawfully raised charges.

The body corporate submitted that the R250 000,00 security ordered should have included an additional sum of R43 380,09 in respect of the legal costs of the judgment it had obtained.

Comments:

a) It is only the body corporate that can 'determine' the amount of its claims it can recover from the owner for the legal costs it incurred—by requiring the attorneys who charged the costs to have them taxed or by obtaining the owner's agreement to the amounts.
b) Only if these amounts are taxed or agreed when the request for a levy clearance is made can they be considered to be part of the moneys due to the body corporate by the transferor.

C. Court's examination of Section 15B(3)(a)(i)(aa) (pars 15 to 20)

The majority of appeal judges found that section 15B(3)(a)(i)(aa) of the Sectional Titles Act allows for security as an alternative to payment, a business-like and common sense provision, based on a reasonable apprehension by Parliament that amounts may be disputed. They pointed out that any other interpretation would allow bodies corporate to frustrate transfer on the basis of unlawful claims, which could not have been the legislature's intention.

The judges also noted that the body corporate could have joined parties other than Steinmuller to its action for recovery of the arrear contributions.

Comments:

a) The majority judges' mention of the body corporate's right to join other parties echoes the single judge's earlier order item 4, where the body corporate was required to act against Steinmuller 'and any other party…'. The judge confirmed that the body corporate's statutory rights of recourse for unpaid amounts are against the owner of unit

24 and these remain intact and actionable. It could exercise its embargo to prevent transfer to Steinmuller, but it could also take action against the owner to recover the full amount, or any balance Steinmuller did not pay.

b) Section 15B(3)(a)(i)(aa) provides the body corporate with an embargo against transfer of a unit, but only to the extent that moneys are actually due in respect of that unit. It is not a provision that allows a body corporate to require payment of any claim that is not determined, in the case of a claim for legal fees, by owner agreement or taxation. Even before 2016, when PMR 25(5) came into effect, accounts for legal fees could only be recovered from the body corporate if they were taxed or agreed. The body corporate could agree a fee and pay it, but in the absence of the owner's agreement it could not recover the amount from the owner until the account had been taxed to confirm that the charges were not excessive.

c) The body corporate was able to appeal the judgment of the single judge as an interested party, but it did not have a direct claim against Steinmuller, only the statutory right to frustrate his taking transfer from the owner by refusing to issue the clearance.

D. The issue of security (pars 21 to 24)

The judges confirmed that the Sectional Titles Act does not specify the form of security. The majority judges held that the body corporate must:
(a) act in good faith in accepting or rejecting an offer of security;
(b) exercise a real discretion, and
(c) not act in a manner that prejudices the owner.

The judges cited:

- the ***Mkontwana*** case, in which the Constitutional Court, for an analogous provision, held that a dispute on clearance figures can and should be adjudicated.
- the ***Koumantarakis*** Group case to show the body corporate's obligation to act honestly and reasonably in rejecting an offer of security.
- the ***YST Properties*** case to show that Steinmuller could not pay the amounts without reversing the onus of proof.

After confirming that the order of the single judge required the determination of both the correct amount and the party liable to pay it, the judges confirmed that they found the single judge's order to be reasonable and gave their view that it should have satisfied the body corporate.

Comments:

a) It is an open question why the body corporate did not, before or after the sale in January 2018, exercise its common law right to have its legal costs taxed, so as to convert them into liquid (determined) claims.

b) These were claims that the lawyers had against the body corporate, which could only be debited to the owner's account once they had been taxed or agreed. This process would not have cost the body corporate anything, and would have determined the amounts of its claims, making them certain and collectable.

c) Having contractually assumed liability for the debts of the owner, Steinmuller had a right to ensure that the full amount claimed was legally due.

d) The judges effectively confirmed that the phrase "*all moneys due to the Body Corporate"* in section 15B(3)(a)(i)(aa) must not be interpreted as *"all amounts the body corporate claims are outstanding"* but as *"all amounts that are legally due and payable."*

E. Liability for levies and other costs (pars 25 to 34)

The majority judges:

1. found that the body corporate had unlawfully debited amounts to the owner's account, prejudicing the owner's interests.
2. recorded the body corporate's concession that its claim against Steinmuller was limited to arrear levies that accrued prior to the commencement of the case heard by the single judge;
3. recorded the body corporate's argument that it could withhold the clearance until actual payment;
4. drew a distinction between liability for levies (contribution), which they held were an incident of ownership, and the liability for legal costs;
5. recorded that the body corporate's prior judgment against the owner was for the legal costs, which they found were not a burden on the unit, like arrear levies, *'as the nature of the debt has changed'* to a personal debt;
6. found that once the body corporate had obtained a judgment for the costs these were then due only by the judgment debtor in terms of the judgment. These costs were no longer covered by section 15B(3)(a)(i)(aa) and the body corporate could not claim them from Steinmuller;
7. found that the collection and legal costs of R57 395.89, not having been taxed or agreed, were not due and were unlawfully levied as they did not comply with PMR 25(5) (which they incorrectly cited as section 25(5) of the STSMA);
8. found that the body corporate was not entitled to charge interest on un-taxed legal fees and that these amounts were not due until taxed, when they could be debited to the owners' account;
9. found that the body corporate had incorrectly calculated the interest debited to the owner's account—a total of R142 810,25 charged over 4 years and nine months. It had unlawfully deviated from the court order and charged 24% per annum compounded monthly, rather than the rate of 9% simple interest ordered by the court, which resulted in a breach of the *'in duplum'* rule, i.e. the interest had exceeded the capital amount due;
10. found that the body corporate had failed to substantiate or prove any claim for interest;
11. found that the body corporate had failed to prove authority to charge inflated interest;
12. found that the body corporate had failed to prove that the levies were due;
13. queried why the body corporate was claiming levies from Steinmuller when the Sectional Titles Schemes Management Act allowed it to approach the CSOS for recovery of these amounts from the owner, and
14. found that the single judge was entitled to assess and decide what security was appropriate.

Comments:

a) In this case 'unlawfully' means without legal authorisation in terms of the relevant laws.
b) The statement in par 26: *'I digress to observe that the appellant conceded that it had no claim against the first respondent save for arrear levies at the commencement of the hearing in the court below,'* records a statement that we believe is wrong in principle.

The body corporate never had any claim against Steinmuller, whose obligation arose as a term of his contract to purchase the property on judicial auction when he undertook the obligation to pay all amounts due by the owner of section 24.

F. Dismissal of claim (par 35)

The judges dismissed the appeal with costs.

DISSENTING (NON-BINDING) JUDGMENT BY ADAMS, J

G. Introduction (par 36)

The dissenting appeal judge disagreed that the appeal should be dismissed. In his view the body corporate was entitled to refuse to issue a clearance if, in its view, any monies were due to it in respect of the unit.

He expressed his view that section 15B(3)(i)(aa) of the Sectional Titles Act does not allow of an order such as the single judge gave—it was not in his view a 'competent order'.

Comment:
The judge did not, at this point, motivate his view that the order of the single judge was not competent. However, his views in this regard are set out in pars 51 to 64, dealt with below.

H. Unlawfulness of charges (par 37)

The dissenting judge stated that he was not convinced that the charges raised by the body corporate were unlawful. In his view it was unlawful that charges had not been paid. He said that even if the body corporate's entitlement to payment of some of the amounts was disputed, it was still *"entitled to insist on payment of the amounts due in respect of the unit, before issuing a clearance certificate".*

Comments:
a) The dissenting judge did not specify whether it was the levies, and/or the interest and/or the legal charges to which he referred in these statements.
b) He did not give reasons for his views, or address the issues raised in the majority judgment, which held that some of these amounts were not due.

I. Must the body corporate issue a clearance if there is a dispute? (par 38)

The dissenting judge identified what he considered to be the 'real issue' as being whether the body corporate could be compelled to issue a clearance before payment of the amounts due. He identified what he considered to be 'the question' as *'What should happen in the event of the transferee of the Unit not accepting – either wholly or in part – the amount which the Body Corporate claims to be due in respect of the Unit? Can the transferee, for example, insist on the transfer being registered before the dispute is resolved on the understanding that the dispute and the payment will be resolved later?'*

Comment:
In this paragraph the dissenting judge made no reference to the provision for security, as an alternative to payment, in section 15B(3)(i)(aa) of the Sectional Titles Act, but this issue is dealt with later in pars 51 to 64.

J. Background facts (pars 39 to 45)

The dissenting judge confirmed the purchase of the unit at a sale in execution on 20 January 2018 for R970 000,00. The body corporate had required payment of R312 903,21 before a clearance would be issued, including a sum to cover levies and other charges for a few months in advance. Steinmuller on 19 February 2018 formally disputed these charges and demanded full particulars of how the sum was arrived at. The body corporate's attorneys refused to give the requested information.

On 17 April 2018 Steinmuller obtained a reconciliation showing that R295 044.81 was outstanding, R17 858,40 less than the original amount quoted, which the judge considered understandable, as the original figure included estimated future levies and charges. The reconciliation amount comprised levies, CSOS Levies, special levies of R103 324,35; water consumption and sewerage services of R31 52,02; an 'arrear cost liability' of R12 264,25; interest of R97 137,55 and legal fees of R50 615,65, debited from 14 May 2014 until 14 April 2018. Of the reconciliation amount, Steinmuller contended that R203 397,53 had either been unlawfully debited to the owner's account or was not due by him. He disputed the 'arrear cost liability' and 'legal fees' on the basis that the body corporate was not entitled to debit these to the owner's the account without being authorised.

Comments:
a) The dissenting judge records the body corporate's refusal to give Steinmuller the information he required without comment. Our view is that he was entitled to such information, not as an owner but as a person who had a genuine financial interest in ensuring that he paid no more than he was legally obliged to pay.
b) The judge referred to the levies and charges as being "*the usual type of levies and charges raised by Body Corporates",* but did not suggest that the 'arrear cost liability' was a charge the body corporate was entitled to raise in terms of the scheme's rules.

K. Legal charges and interest (pars 46 to 48)

The dissenting judge recorded his disagreement with the majority view that the un-taxed legal charges should not have been included in the payments demanded by the body corporate under s 15B(3)(a)(i)(aa). He cited as support for his view the judgment in ***Barnard NO v Regspersoon van Aminie en 'n Ander*** in which the SCA held that legal costs were covered by this provision. He rejected the argument that the legal costs should have been taxed, but agreed that if Steinmuller insisted on taxation, then that could and should have been done, but before the clearance certificate was issued. He then suggested that this issue is not clear, but that it is not absolutely certain that the majority should have upheld Steinmuller's objection.

The judge confirmed that Steinmuller questioned the total interest charged, alleging a breach of the *in duplum* rule. He stated that he was not convinced on this point. He referred to Steinmuller's allegation that about R55 000,00 of the body corporate's claim had prescribed

and pointed out that the body corporate had obtained judgment against the owner for R43 270,03 on 25 June 2015, which he considered evidence that prescription did not apply.

Comments:

a) The judge relied on ***Barnard NO v Regspersoon van Aminie en 'n Ander 2001 (3) SA 973 (SCA),*** without noting that this judgment was delivered before 7 October 2016, when the current Sectional Titles Schemes Management Act and its prescribed rules became applicable.
b) When the judge states, in par 47, that "this issue" is not clear-cut, it is not clear whether he was referring to either or both of the issues of inclusion of the legal costs in the body corporate's claim or the body corporate's obligation to tax the costs if required to do so, both of which he dealt with in par 46.
c) It would have been helpful, in understanding the dissenting judge's views in regard to interest charged, if he had disclosed the basis on which he came to his conclusions.

L. Dissenting judge's conclusions on merits (pars 49 and 50)

The dissenting judge gave his view, but without deciding the point, that the body corporate was entitled to require payment of, R312 903,21, or an amount close to that, rather than the amount of R250 000,00 that he stated the trial court had decided was the maximum it could recover, and gave his view that Steinmuller should have paid this amount before demanding the issue of a clearance certificate.

The judge suggested that, alternatively, Steinmuller should have brought an application for a declaratory order.

The judge explained that it 'weighed heavily' on his mind that the order of the single judge had unfairly deprived the body corporate of its protection under s 15B(3)(a)(i)(aa), and even worse, the body corporate had not been paid since April 2014.

Comments:

a) The judge's view that "R312 903,21 or an amount close to that" should have been paid prior to issue of a clearance certificate under protest ignores the points made in the majority judgment in this regard in par 23. As this dissenting view is a direct contradiction of findings in the binding majority judgment, it should have been supported by contrary findings of fact or an alternative application of the law. As expressed, this was simply another unmotivated expression of disagreement, similar to the judge's earlier statements that he remained unconvinced on issues and his stated views that certain issues were not as clear-cut as Steinmuller contended they were.
b) The single judge required the provision of security for R250 000,00, but did not decide that the body corporate's claim was limited to this amount.
c) The judge's suggestion that Steinmuller should have approached the court for a declaratory order ignores the fact that the body corporate was the only party that could have arranged for taxation of the accounts rendered to it for legal services, and it failed to do this over an extended period.
d) In our view the single judge's order did not deprive the body corporate of any protection under the law. It simply required the body corporate to prove the amounts it alleged were 'due' to it. Furthermore, the dissenting judge's concern with the fact that the body

corporate had not been paid for a long time was inappropriate, as it was the owner, not Steinmuller, who failed to pay whatever contributions and charges were in fact due.

M. Inappropriateness of order issued by the single judge (pars 51 to 65)

The dissenting appeal judge stated that Section 15B(3)(a)(i)(aa) requires that transfer of a unit not be registered *"unless the body corporate has certified that all moneys due to it by the transferor in respect of the said unit have been paid."* This, he contended, supported his interpretation that *"The Body Corporate is the entity who must indicate whether monies are due to it and how much. And only when all that money, as indicated by the Body Corporate to be due to it, has been paid, can the registration of the transfer proceed. If not, then the transfer shall not be registered."*

The judge confirmed that his interpretation of Section 15B(3)(a)(i)(aa) is that *"payment of monies due to the Body Corporate shall always and inevitably be preceded by the registration of the transfer - that is how the section is constructed and what its words say."* He compared the body corporate's embargo on transfer of a unit in terms of the section to the rights of a secured creditor. He referred to ***Nel NO v Body Corporate of the Seaways Building and Another***. His interpretation of this case is that "the practical effect of the section is that a body corporate will be paid before transfer of immovable property is effected."

The judge referred to ***First Rand Bank Ltd v Body Corporate of Geovy Villa*** to support his view that the body corporate could compromise its claim when there is a dispute as to its entitlement, but it is not obliged to do so.

The judge expressed his concern with the difficulties experienced by bodies corporate in recovering money from owners who default on their financial obligations. Citing the ***Tswane City v Blair Athol*** **case**, he expressed his view that the majority decision was not a sensible interpretation of the section, but lead to an un-businesslike result.

The judge's conclusion was that it makes no business sense that*: "an amount due to the Body Corporate, which changes and increases on a monthly basis, can and should be allowed to be the subject of a dispute and litigation before being paid, whilst at the same time the transferee of a unit is allowed effectively to be exempted from paying his dues to the BC."*

The judge concluded that the interpretation put on the section by the majority could not possibly have been the intention of the legislature. He expressed his agreement with the body corporate's argument that 'provision for payment' does not equate to the posting of security for payment subject to certain conditions. His view was that the wording of the section requires actual payment.

Finally, the dissenting appeal judge stated that he would have upheld the body corporate's appeal and dismissed the application with costs.

Comments:

a) In referring to the ***Nel v Seaways*** case, the dissenting judge ignored the changes in the law brought into effect by the Sectional Titles Schemes Management Act in 2016.

b) It appears that the judge's interpretation of Section 15B(3)(a)(i)(aa) would have been better stated as "that payment of monies...shall always and inevitably precede the registration of transfer".
c) The judge's reference to the ***First Rand Bank v Body Corporate of Geovy Villa*** case appears to be inappropriate. The issue of the body corporate compromising its claim was not raised in any part of the majority judgment, nor does the judge suggest that this was an issue in the case.
d) It is surprising that the judge considered it "business-like" that the body corporate should be able to demand payment of amounts it is not entitled to debit to the owner's account and that Steinmuller should be obliged to pay amounts he considered were not due and payable and legal costs which the body corporate, over a considerable period, failed to have taxed.
e) In his conclusion, the judge confuses the position of the registered owner of the unit with that of Steinmuller. He repeatedly imputes culpability to Steinmuller, when any fault could only be imputed to the registered owner of the unit.
f) In giving his summary of Section 15B(3)(a)(i)(aa), in his interpretation of its terms, in giving his view of the legislature's intention in enacting the section and in stating what he considered a requirement for exact compliance, the judge failed to take account of the explicit reference in this section to the provision of satisfactory security as an alternative to payment. In our view the single judge's order had decided what 'adequate security' was in the circumstances.
g) The dissenting judge's interpretation of 'provision for payment' in the section requires that disputed amounts be paid, or that the security should be unconditional, so that even if amounts are not legally due, they must be paid.
