SECTIONAL TITLE SOLUTIONS

DISCONNECTING THE DOTS –

CAN A BODY CORPORATE CUT OFF ELECTRICITY AND / OR LIMIT THE SUPPLY OF WATER DUE TO A UNIT BECAUSE OF NON-PAYMENT?

Disconnecting the electricity, or limiting the supply of water, of a unit owner or occupier for failing to pay their consumption charges for that electricity or water has never been easy. The law is far from certain as to when this is and is not enforceable: some applications are granted, and some are not, whether opposed or unopposed. Clarity and consistency are needed from the courts.

As recently held by the Johannesburg High Court in the *Lion Ridge* cases,[1] where judgment was handed down on 21 September 2022, there is a delicate web of constitutional rights affecting unit owners and occupiers, that must be considered when a court is faced with an application for the disconnection of electricity or water. According to the court in this recent judgment, these are:[2]

(i) the right against arbitrary deprivation of property (section 25 (1) of the Constitution);

(ii) the right to sufficient water (section 27(1)(b) of the Constitution);

(iii) the public law right to receive electricity from a municipality, even where the electricity is transmitted through an intermediary such as a landlord or a body corporate (see *Joseph v City of Johannesburg*[3]); and

(iv) the right of access to adequate housing (section 26 of the Constitution).

In the *Lion Ridge* cases, the body corporate sought monetary judgment applications against owners for arrear levies, and water and electricity charges.[4] We will turn to these claims and the outcome in the court later in this article. The body corporate also sought orders to disconnect the electricity being supplied to the units, and to limit the water being supplied to the units of the respective non-paying unit owners, until such time as the unit owners settled the judgment amounts.[5] As part of the applications, the body corporate also sought to hold the non-paying unit owners liable for the costs of disconnecting and reconnecting these services.[6]

The body corporate claimed that it had entered into agreements with the unit owners for the supply of these services and was therefore entitled to take judgment against them and for an order authorising the disconnection of their services.[7] But the body corporate failed to specify the terms of the agreements upon which it relied, did not attach any of the agreements and also did not attach the Management or Conduct Rules it sought to enforce in this regard.[8] Since no deviation from the prescribed management or conduct rules was alleged, the High Court was satisfied that the prescribed rules applied as per Annexures 1 and 2 of the Sectional Titles Schemes Management Regulations, 2016 (the STSMA Regulations).[9]

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[1] *Lion Ridge Body Corporate v Alexander; Lion Ridge Body Corporate v Morata; Lion Ridge Body Corporate v Mukona and Another* (17074/2022; 18106/2022; 19220/2022) [2022] ZAGPJHC 713 (21 September 2022). Accessible at http://www.saflii.org/za/cases/ZAGPJHC/2022/713.html.
[2] *Lion Ridge*, para 15.
[3] 2010 (4) SA 55 (CC), para 47. Accessible at http://www.saflii.org/za/cases/ZACC/2009/30.html.
[4] *Lion Ridge*, para 2.
[5] *Lion Ridge*, para 3.
[6] *Lion Ridge*, para 3.
[7] *Lion Ridge*, paras 4 and 5.
[8] *Lion Ridge*, paras 7, 8, 11, 12 and 19.
[9] *Lion Ridge*, para 6.

There is no provision in the prescribed rules for the disconnection of services and the body corporate did not allege any common law or statutory basis to do so.[10] It did not allege that it adopted a new rule to empower it to do so and it did not disclose any terms of the agreements it purportedly entered into with the unit owners.

Counsel for the body corporate argued that there was a tacit agreement, allowing the body corporate to disconnect the non-paying unit owners' services to collect arrear levies owed to the body corporate, which came into existence when the unit owners became members of the body corporate.[11] But the terms were not formulated, pleaded or proved in the founding papers for the applications.[12] Such a tacit agreement would need to be formulated, pleaded and proved, and failure to do so was fatal to the body corporate's reliance on the alleged tacit agreement, without the court being able to consider the existence or intricacies of it.[13] The founding papers failed to address under what authority or power the body corporate sought to disconnect or limit the supply of the services, leaving the court with no basis on which to grant such relief.[14]

The court in the *Lion Ridge* applications, also denied the body corporate relief on the collection of arrear levies on the basis that the body corporate had not shown compliance with Prescribed Management Rule ("PMR") 25(1) of the STSMA Regulations (the 14-day notice after the adoption of the body corporate's budget).[15] But this has been established not to be a pre-requisite for debt enforcement in two previous full bench judgments (two judges presiding in each instance) of the same division of the High Court (Johannesburg).[16] Respectfully, the Honourable Court in the *Lion Ridge* applications was not correct here and it should have been argued, by submitting the authorities, that PMRs 25(1) and (2) are not pre-requisites for levy debt enforcement.

However, other aspects of the body corporate's claim may have led to the court's decision to refuse to order payment of the arrear levies, because the judgment also refers to PMR 25(5) of the STSMA Regulations where a 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 Sectional Titles Schemes Management Act[17] or the PMRs, unless the member consents or on the authority of a judgment, or order by a judge, adjudicator or arbitrator.[18] It is unclear from the judgment why the court makes reference to this PMR in respect of the body corporate's levy claims, but it implies that some amounts (charges) were either not levies (contributions) or were charges that could not be substantiated or supported on the papers to get over this hurdle.[19]

The body corporate was given an opportunity to return to court with better papers but it is uncertain whether it will return to court for these claims on the same grounds or different grounds. If it does return, it may be better to return and seek relief on the disconnection of electricity and limitation of the supply of water, only after the Full Bench of the Johannesburg High Court has heard and ruled on the appeal in the matter of *The Body Corporate of Barcelona I v Dyantyi*[20] (the *Barcelona* case) where leave to appeal was granted a month earlier on 12 August 2022 in the Johannesburg High Court.

In the initial application heard in the *Barcelona* case back in June 2022, a body corporate applied to have electricity to a unit disconnected due to non-payment of electricity charges, and this application was dismissed.[21] The body corporate then applied for leave to appeal, which was granted, on the basis that there were conflicting decisions out of the Johannesburg High Court and certainty was required in terms of such applications.[22]

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[10] *Lion Ridge*, para 7.
[11] *Lion Ridge*, para 8.
[12] *Lion Ridge*, para 8.
[13] *Lion Ridge*, para 8.
[14] *Lion Ridge*, para 7.
[15] *Lion Ridge*, para 13.
[16] See the unreported Johannesburg High Court judgment of *Body Corporate of Central Park v Mosa* (A3064/2021) of 24 November 2021 (two judges presiding) at para 27. And see the unreported Johannesburg High Court judgment of *Body Corporate of Kleber v Obakeng and Another* (A3094/2021) of 9 November 2021 (two judges presiding) at paras 12 – 15. For more detail, see the highlighted article written in this regard, and the relevant cases cited therein. M Ghannam *The tail cannot wag the dog* (15 December 2021) https://www.stsolutions.co.za/the-tail-cannot-wag-the-dog/.
[17] Act 8 of 2011.
[18] *Lion Ridge*, para 13.
[19] It could be that the electricity and water charges did not form part of the levies and were separate charges as these appear to have been itemised separately by the court and claimed separately by the body corporate. See *Lion Ridge* para 2.
[20] (2022/9206) [2022] ZAGPJHC 553 (12 August 2022). See http://www.saflii.org/za/cases/ZAGPJHC/2022/553.html.
[21] *Barcelona*, para 1.
[22] *Barcelona*, para 13.

The community scheme industry, as a whole, needs to know if a community scheme is entitled to limit, and in some cases, disconnect such services in circumstances where a unit owner does not pay certain amounts due by them. Would such limitation or disconnection require a court order or would a specific valid rule amendment, permitting the body corporate to do so under specific circumstances, be sufficient? Would a body corporate be permitted to disconnect electricity if arrear levies were not settled? Or only if electricity charges were not settled? If a body corporate links the disconnection of electricity to the non-payment of levies (which do not include electricity charges), then it may be problematic and unenforceable. But if community schemes are continuously forced to subsidise those non-paying owners who continue to enjoy free services at the expense of the paying owners, this is also unjustifiable.

Is a valid rule amendment permitting the disconnection of electricity or limitation of water supply due to non-payment of electricity or water services provided by the body corporate unenforceable? In the current Community Schemes Ombud Service (CSOS) Circular 1 of 2021, it states that "*Disconnecting a member's water and electricity for non-payment of levies is against the Constitution of the Republic of South Africa.*"[23] So what seems to be a rule that would not be approved by CSOS is one which suggests or empowers the body corporate to disconnect these services due to the non-payment of levies. So, what about a rule permitting the disconnection of the services due to non-payment of the services? What if the levies budgeted for a specific financial year contain a portion of electricity and water consumption (either for the common property usage or the unit owner's section's usage measured via post-paid meter)? Are all such proposed rules unenforceable; would they all be disapproved by the CSOS on submission of proposed amendments if validly passed by the ownership? These questions should be tested in court with real cases where a rule amendment is either unreasonably rejected by the CSOS (judicial review), or where the body corporate seeks to enforce existing rules for the disconnection of the services due to non-payment of those services.

To expand on the above, in some cases, primarily due to the endemic culture of non-payment of statutory levy contributions and the lengthy, drawn-out collection process, the levy debtor's indebtedness to a community scheme could exceed the market value of the levy debtor's unit. It may be prudent of a community scheme, and in the best interests of the owners, to initiate the collection process as early as possible, to mitigate its potential loss by applying for an order to limit or disconnect the services which remain unpaid, and to ensure that the outstanding arrears remain recoverable. Not doing so would allow the arrears to snowball beyond recovery. Another solution would be to start the process of installing prepaid meters to measure the supply of these services in terms of PMR 29(4) of the STSMA Regulations, as suggested by Professor Paddock.[24] Paddock also recommends the "rent diversion" order available through the CSOS dispute resolution processes which is one of the prayers for relief for which a community scheme could apply to CSOS.[25]

We will soon see what the Full Bench of the Johannesburg High Court states about the rights and powers of bodies corporate to disconnect electricity and the rights of unit owners and occupiers in the process.

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UPDATED 10-FEB-23

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[23] See Item 28 of Annexure A to the Circular. Accessible here: https://www.stsolutions.co.za/wp-content/uploads/2021/06/CSOS-Circular-No-1-of-2021-Amendment-of-Rules-ito-STSMA-6-May-21.pdf.
[24] Prof G Paddock *Water and electricity disconnection in sectional title: What you can and cannot do, with recommendations* (28 September 2022). Accessible at: https://www.paddocks.co.za/paddocks-press-newsletter/water-and-electricity-disconnection-in-sectional-title-what-you-can-and-cannot-do-with-recommendations/.
[25] See s 39(1)(f) of the CSOS Act.