ARREAR LEVIES AND UNLAWFUL PRACTICES

Community Schemes Ombud Service

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If you think nobody cares if you're alive, try missing a couple of levy payments!

Adapted from an Earl Wilson quote!

Levy contributions are the lifeblood of ***ALL*** community schemes.

Owners who fail to contribute towards the levy fund are being subsidized by those who pay their monthly contributions.

There are TWO (2) grounds of relief that avail a community scheme under section 39(1) of the CSOS Act to collect arrear levies

- **Section 39(1)**

  (e) an order for the payment or re-payment of a contribution or any other amount;

  and

- **Section 39(1)**

  (f) an order requiring a specified tenant in a community scheme to pay to the association and not to his or her landlord, all or part of the rentals payable under a lease agreement, from a specified date and until a specified amount due by the landlord to the association has been paid:

  Provided that in terms of such an order—

  (i) the tenant must make the payments specified and may not rely on any right of deduction, set-off or counterclaim that he or she has against the landlord to reduce the amount to be paid to the association;

  (ii) payments made by the tenant to the association discharge the tenant's liability to the landlord in terms of the lease; and

  (iii) the association must credit amounts received from the tenant to the account of the landlord.

IN THIS INSTANCE, THE TENANT MUST BE CITED AS A CO-RESPONDENT ,AND HIS/HER DETAILS MUST BE PROVIDED, INCLUDING THE RENTAL PAYABLE MONTHLY, because the order is made against both the owner and tenant!

There are also *TWO (2) grounds of relief* that avail an individual owner/joint owners of a unit under section 39(1) of the CSOS Act to seek financial redress if they believe that they have been charged levies incorrectly

- **Section 39(1)**

  (e) an order for the payment or re-payment of a contribution or any other amount;

and

- **Section 39(1)**

  (c) an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way.

(For example, levies charged by nominated value OR a section/sections in a sectional title scheme have been extended and the sectional plans (and therefore the p.q. schedule) has not been altered, or the levies in a HOA are not charged in accordance with the MOI)

UNLAWFUL PRACTICES

1. Levies MUST be properly and accurately determined in terms of the community schemes governance documentation.

2. The correct procedure MUST be followed in terms of the scheme's governance documentation in order to validly charge the levies.
   Eg. The procedure set out in section 25(1) of the Sectional Titles Schemes Management Act – send out a notice within 14 days of the AGM notifying each owner of the levy that must be paid, state the due date for payment, state the interest rate payable etc.

3. In terms of Management Rule 25(5) to the STSMA:
   "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 judgment or order by a judge, adjudicator or arbitrator."

4. **IT IS UNLAWFUL TO TERMINATE THE WATER, ELECTRICITY OR GAS CONNECTION TO A SECTION OR AN ERF IN A HOA DUE TO NON OR LATE PAYMENT!**

5. **IT IS UNLAWFUL TO PREVENT ANY PERSON FROM ENTERING THE PREMISES THAT THEY OCCUPY!**

TO ITERATE, AND REITERATE:

Unlawful practices to recover levies

- **The community scheme must not:**
- **Disconnect or reduce electricity**
- **Terminate or reduce water supply**
- **Deny or limit access to the scheme due to outstanding levies**
- ***The act of disconnecting a person's electricity without a court order is unlawful, notwithstanding the fact that the unit-owner may be owing levies.***

- **Or load a prepaid electricity or water meter so that arrears must be paid before services can be bought!**

PAUSE FOR THOUGHT . . . *d*isconnection of services . . .

- **Our Law has never permitted the deprivation by an owner or an occupier of essential services, or the denial of access without a court order –** *in legal terms it is called "SPOLIATION" and . . .*

- The application to Court is called a 'spoliation application".

- In order to preserve order and peace in society the court will summarily grant an order for restoration of the status quo where such deprivation has occurred, and it will do so without going into the merits of the dispute.

- At the CSOS, the deprivation or restriction of essential services is given the urgency it deserves, and in line with clause 33.1 read with 33.3. of the Practice Directive No.1 of 2019, **an urgent application may be lodged**.

- The dispute is then adjudicated on an urgent basis – *the matter must really be urgent and the urgency must not be self-created*.

This relief falls under section 39(7)(b) of the CSOS ACT – one of the very few applications that fall under section 39(7)(b).

SPOLIATION

The Court in **Eskom Holdings SOC Limited v Masinda 2019(5) SA 386 SCA** held that: "[8] The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that ***persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent.***

Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute as to which of the parties is entitled to possession."

A number of High Court Cases have confirmed the above:

Queensgate Body Corporate v Claassen (A3076_98) [1998] ZAGPHC 1, the Judge stated that the act of disconnecting or tampering with the electricity supply to a person's electricity supply without a court order is unlawful, notwithstanding the fact that the unit-owner may be owing levies.

Claudia Niehaus v High Meadow Grove Body Corporate ZAGPHC 2018 40667/2018 (P20) (13 NOVEMBER 2018)

"In any number of cases it has been held that to deprive a person of electricity supply, is an example of the deprivation of quasi-possession, which is remediable by the mandament van spolie. A full bench decision in this Division, in Queensgate Body Corporate v Claesen (A3076/98) [1998] ZAGPHC 1(26 November 1999*) is one such case. There Blieden, J with whom Serobe, AJ agreed, dismissed with costs an appeal from a Magistrates' Court which granted a spoliation order against a body corporate."*

where the incorporeal right, such as a right to the supply of electricity, is as a matter of fact, an incident of the possession of immovable property, then the mandament van spolie will protect interference with such possession, as if it were interference with possession of the immovable property itself".

Denying Access to the scheme:

In the matter of **Fisher v Body Corporate Misty Bay 2012 (4) SA 215 (GNP) [2011] ZAGPPHC 23440667/2018 (P20) (13 NOVEMBER 2018),** the Judge confirmed: "[24] Access that is intended to retain possession or use of property should be found to be protected under the principle of mandament van spolie. Therefore, any limitation of access that would curtail the applicant's possession or use of the house and or motor vehicle should be found to amount to spoliation."

THANK YOU and HAVE A RESTFUL WEEKEND!