

29 NOVEMBER 2021

REAL ESTATE ALERT



IN THIS ISSUE

Body corporate, release the certificate!

You purchase a property in a sale in execution and to obtain a levy clearance certificate, you are requested to pay, among other things, all outstanding amounts owing by the transferor to the body corporate. If you dispute the amount claimed by the body corporate, are you permitted to tender a form of security for payment of the outstanding amount and must the body corporate issue a levy clearance certificate pending finalisation of the dispute after transfer?



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

[CLICK HERE](#) 

For more insight into
our expertise and
services

Body corporate, release the certificate!

In terms of the agreement, the purchaser was responsible to settle all amounts owing to the body corporate by the current registered owner.

You purchase a property in a sale in execution and to obtain a levy clearance certificate, you are requested to pay, among other things, all outstanding amounts owing by the transferor to the body corporate. If you dispute the amount claimed by the body corporate, are you permitted to tender a form of security for payment of the outstanding amount and must the body corporate issue a levy clearance certificate pending finalisation of the dispute after transfer?

This was one of the legal questions before the full bench of the High Court of South Africa, Gauteng Local Division, Johannesburg in *The Body Corporate Marsh Rose v Steinmuller and Others*. The court was tasked with deciding the correct interpretation of section 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 (Act).

Introduction

In terms of section 15B(3)(a)(i)(aa) of the Act:

“(3) The registrar shall not register a transfer of a unit or an undivided share therein, unless there is produced to him:

(a) a conveyancer’s certificate confirming that as at date of registration:

(i)(aa) If a body corporate is deemed to be established in terms of section 2(1) of the Sectional Titles Schemes Management Act, that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof.”

The Body Corporate of Marsh Rose (appellant) had argued before the court that section 15B(3)(a)(i)(aa) of the Act allowed it to claim all amounts outstanding, including legal costs and outstanding levies relating to the unit from the transferee (first respondent), before issuing a levy clearance certificate. The claim of these outstanding monies from the transferee was due to the sale having been one conducted as a sale in execution by the Sheriff of the High Court. In terms of the agreement, the purchaser was responsible to settle all amounts owing to the body corporate by the current registered owner.

CDH’s Real Estate practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.

Lucia Erasmus is ranked as a Leading Individual in Real Estate in THE LEGAL 500 EMEA 2021.

William Midgley is ranked as a Leading Individual in Real Estate in THE LEGAL 500 EMEA 2021.

John Webber is recommended in Real Estate in THE LEGAL 500 EMEA 2021.



Body corporate, release the certificate!...continued

The appellant refused to issue a levy clearance certificate until the outstanding amount of R312,903.21 owed by the current registered owner of the property was paid. The amount included not only judgment debt, but also un-taxed legal costs against the current owner in respect of the property.

If this was not a sale in execution, the seller would be responsible for payment of the outstanding amount due.

The appellant refused to issue a levy clearance certificate until the outstanding amount of R312,903.21 owed by the current registered owner of the property was paid. The amount included not only judgment debt, but also un-taxed legal costs against the current owner in respect of the property. The appellant argued that section 15B(3)(a)(i)(aa) of the Act intends to secure payment of all amounts owing in respect of the unit, which includes the legal costs as these are legitimately owing. The appellant then proceeded to provide the first respondent with an amended account for the sum of R295,044.81. The first respondent again disputed the amount claimed and tendered to give security to the appellant in the amount of R150,000 to obtain the levy clearance certificate and proceed with the transaction. This was less than the amount claimed by the appellant and as such the appellant refused to accept the security due to it being insufficient in form and amount.

The first respondent approached the court *a quo* for an order directing the appellant to issue the required levy clearance certificate in respect of the property against payment of an amount as security by the first respondent into his attorney's trust account pending the resolution of the dispute regarding the amount that was owed to the appellant. The amount was to be held in trust by the conveyancer as security for any amount which the appellant might recover in litigation action instituted within 10 days of the court order being granted.

In the court *a quo*

The honourable Judge Wanless AJ held in favour of the first respondent and ordered the appellant to issue the levy clearance certificate before the dispute between the parties was finalised. The first respondent was to provide an amount of R250,000 within 10 days of granting the order as security for any claim that the appellant may have had in respect of the property. The funds were to be held in trust by the first respondent's attorneys.

The appellant would then be entitled to, within the same period of 10 days, institute legal proceedings to recover any amount owing, failing which, the amount tendered by the first respondent would be refunded. The first respondent would then be able to proceed with registration of the immovable property accordingly.

The body corporate appealed against the judgment.

Before the High Court

Majority judgment

The court emphasised that when interpreting the language used in legislation, it should be read in its ordinary meaning in accordance with the context in which it is found. When interpreting the wording of section 15B(3)(a)(i)(aa) of the Act, it allows the transferor to, instead of making actual payment of the amount owing to the body corporate on date of registration, make provision for the debt, provided that it is to the satisfaction of the body corporate.

Body corporate, release the certificate!...continued

The court upheld the findings of the court *a quo* and concluded that the security provided by the first respondent was sufficient and that the body corporate had to issue the levy clearance certificate.

The court held that the legislature must have been aware that monies due to the body corporate could be disputed on *bona fide* grounds and that the intention of the legislature could not have been to cause lengthy delays to transfer where charges to an owner's accounts are in dispute.

The court further held that section 15B(3)(a)(i)(aa) of the Act did not prescribe the required form of security that had to be tendered and accepted as sufficient by the appellant. However, the appellant was obliged to exercise its discretion to accept the security in good faith and not in a manner that is detrimental to the interests of the owner of the unit. The form of security that was accepted by the court *a quo* was objective and reasonable as it took into consideration the total amount that might be due to the appellant.

The court held that the amount of R43,380.09 (which forms part of the R250,000 which the court ordered to be paid into the attorney's trust account), being legal costs owing

by the current registered owner, were not a burden on the property but remained the responsibility of the current owner in his personal capacity and therefore such debt could not be claimed from the first respondent. The appellant not only levied the legal costs, but also charged 24% interest compounded monthly over four years on the un-taxed legal fees when the court ordered a 9% simple interest rate on the judgment debt amount in favour of the appellant against the current registered owner. The appellant could also not provide the required authorising resolution to charge the inflated interest rate as stipulated in section 3(2) of the Sectional Titles Schemes Management Act 8 of 2011, read with management rule 21(3), and therefore failed to prove that it was entitled to the additional interest amount.

The court upheld the findings of the court *a quo* and concluded that the security provided by the first respondent was sufficient and that the body corporate had to issue the levy clearance certificate.



Body corporate, release the certificate!...*continued*

We advise purchasers to conduct a thorough due diligence investigation prior to purchasing a property at a sale in execution (Sheriff's auction).

Minority judgment

In the dissenting judgment, Adams J advanced that the protection afforded to the appellant by the provisions of the section entitled it to withhold the levy certificate until all amounts outstanding in relation to the property had either been paid for or sufficient security provided for the full amount claimed by the appellant, including the legal fees incurred to recover debt

Adams J was of the opinion that the first respondent could have paid the full amount claimed by the appellant under protest or could have obtained a declaratory order to ascertain whether the full amount claimed by the appellant was legally owing to it.

Conclusion

The judgment caused uncertainty regarding the interpretation of section 15B(3)(a)(i)(aa) of the Act and whether a body corporate can be compelled to issue a levy clearance certificate pending the resolution of a dispute regarding the amounts owing to a body corporate. The judgment now also burdens transferring attorneys to withhold these amounts in trust pending the outcome of disputes between a transferee and body corporate regarding the levy accounts. We advise purchasers to conduct a thorough due diligence investigation prior to purchasing a property at a sale in execution (Sheriff's auction). This investigation must include a review of the latest municipal accounts and levy statements. We anticipate that this decision will be taken on appeal to the Supreme Court of Appeal for clarity on the interpretation going forward.

Sune Kruger and Akhona Mdunge

OUR TEAM

For more information about our Real Estate practice and services in South Africa and Kenya, please contact:



Muhammad Gattoo
Practice Head
Director
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com



Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com



Bronwyn Brown
Director
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



Nayna Cara
Director
T +27 (0)11 562 1701
E nayna.cara@cdhlegal.com



Mike Collins
Director
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com



Werner de Waal
Director
T +27 (0)21 481 6435
E werner.dewaal@cdhlegal.com



Lucia Erasmus
Director
T +27 (0)11 562 1082
E lucia.erasmus@cdhlegal.com



Simone Franks
Director
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Fatima Gattoo
Director
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Andrew Heiberg
Director
T +27 (0)21 481 6317
E andrew.heiberg@cdhlegal.com



Simone Immelman
Director
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



William Midgley
Director
T +27 (0)11 562 1390
E william.midgley@cdhlegal.com



Muriel Serfontein
Director
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com



John Webber
Director
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



Natasha Fletcher
Senior Associate
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



Marlene Heppes
Senior Associate
T +27 (0)11 562 1580
E marlene.heppes@cdhlegal.com



Samantha Kelly
Senior Associate
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com



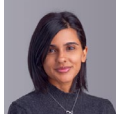
Janke Strydom
Senior Associate
T +27 (0)11 562 1613
E janke.strydom@cdhlegal.com

OUR TEAM

For more information about our Real Estate practice and services in South Africa and Kenya, please contact:



Joloudi Badenhorst
Associate
T +27 (0)11 562 1272
E joloudi.badenhorst@cdhlegal.com



Lutfiyya Kara
Associate
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com



Brian Muchiri
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E brian.muchiri@cdhlegal.com



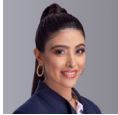
Kirsty de Sousa
Associate
Professional Support Lawyer
T +27 (0)11 562 1747
E kirsty.desousa@cdhlegal.com



Sune Kruger
Associate
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com



Peter Mutema
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E peter.mutema@cdhlegal.com



Fatima Essa
Associate
T +27 (0)11 562 1754
E fatima.essa@cdhlegal.com



Lulama Lobola
Associate
T +27 (0)21 481 6443
E lulama.lobola@cdhlegal.com



Bridget Witts-Hewinson
Associate
T +27 (0)21 481 6447
E bridget.witts-hewinson@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2021 10651/NOV



INCORPORATING
KIETI LAW LLP, KENYA



REAL ESTATE | cliffedekkerhofmeyr.com