

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D4319/2022**

In the matter between:

BODY CORPORATE OF BALUWATH

APPLICANT

and

MANYE RICHARD MOROKA

FIRST RESPONDENT

M C MOROKA

SECOND RESPONDENT

ARUAJO ATTORNEYS

THIRD RESPONDENT

Coram: Mossop J

Heard: 17 July 2023

Delivered: 17 July 2023

ORDER

The following order is granted:

1. It is declared that R143 201.88 of the amount of R151 212.12 presently being held by the third respondent in its trust account is owed by the first and second respondents to the applicant.

2. The third respondent is directed to pay the amount of R143 201.88 to the applicant within 48 hours of the granting of this order.

3. The first and second respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

JUDGMENT

Mossop J:

[1] This is an ex tempore judgment.

[2] Almost a year ago, on 27 July 2022, the applicant, a body corporate of a sectional title scheme, brought this application against the respondents. The relief claimed was in the form of a rule nisi with interim relief. What the applicant claimed was the following:

(a) That the third respondent was interdicted from making payment of the amount of R151 212.12 to the first and second respondents pending the finalisation of the application;

(b) A declaratory order that of the amount of R151 212.12 then being held in the third respondent's trust account, R143 201.88 is owed to the applicant;

(c) An order directing the third respondent to transfer the amount of R143 201.88 to the applicant within seven days of the granting of the order sought; and

(d) An order that the first and second respondents pay the costs of the application.

[3] When the matter was called this morning, Ms Paul appeared for the applicant and there was no appearance for the first and second respondents. Their attorney previously withdrew but the first and second respondents acknowledged that they were aware of the matter proceeding today and indicated in writing that they had diarised the date accordingly and would deliver their heads of argument in due

course. They did not, however, attend and no heads of argument were delivered by the first and second respondents.

[4] The first and second respondents are husband and wife and were previously members of the applicant by virtue of their ownership of a unit (the unit) within the body corporate. With such ownership comes the concomitant obligation to pay levies to the body corporate, something that the first and second respondents were less than devout in doing. Indeed, it appears that they were very bad payers and were constantly in arrears with their levy payments. The applicant was accordingly compelled to regularly institute legal proceedings against them to recover the levies that the first and second respondents were required to, but did not, pay. Four such actions were instituted against the first and second respondents by the applicant out of the KwaDukuza Magistrate's Court. Those four actions were ultimately all settled with the conclusion of a settlement agreement, with the first and second respondents agreeing to pay the applicant the not insubstantial amount of R175 000.00.

[5] It appears to be common cause that the amount of R175 000.00 was not paid in full by the first and second respondent: only an amount of R168 000.00 was paid. Why this part payment occurred will be considered shortly. The unpaid balance of R7 000.00 forms part of the amount in respect of which relief is claimed in the notice of motion.

[6] During November 2020, the first and second respondents resolved to sell their unit in the body corporate. They were again in arrears with their levies at that stage. The first and second respondents, however, disputed the amount that the applicant claimed was due to it. To effect transfer to the purchaser of the unit, the first and second respondents required a levy clearance certificate from the applicant which, understandably, the applicant was not inclined to give in the circumstances. To overcome this impasse, the parties agreed that an amount of R351 482.04 would be paid into the third respondent's trust account. On transfer, the amount of R200 269.92 would be paid to the applicant and the balance of R151 212.12 would be held by the third respondent pending determination of whether the first and second respondents owed the balance to the applicant. Once that was resolved, the applicant issued the requested levy clearance certificate.

[7] Thus, all that is required at this stage is to crunch the numbers to reveal which of the applicant or the first and second respondents' version is mathematically correct. This is not a particularly difficult thing to do, but it is a tedious exercise, and the parties ought to have been capable of attending to it without recourse to this court. Before getting to grips with the figures, it is necessary to briefly deal with two points in limine taken by the first and second respondents.

[8] The first point in limine is that there are disputes of fact that prevent this court from resolving the issues between the parties. In the oft quoted matter of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,¹ Murray AJP remarked as follows regarding how disputes of fact may arise:

‘...The clearest instance is, of course, (a) when the respondent denies all the material allegations made by the various deponents on the applicant’s behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed. There are however other cases to consider. The respondent may (b) admit the applicant’s affidavit evidence but allege other facts which the applicant disputes. Or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which applicant and his deponents rely to prove the main facts are untrue. The absence of any positive evidence possessed by a respondent directly contradicting applicant’s main allegations does not render a case such as this free of a real dispute of fact. Or (d) he may state that he can lead no evidence himself or by others to dispute the truth of applicant’s statements, which are peculiarly within applicant’s knowledge, but he puts applicant to the proof thereof by oral evidence subject to cross-examination.’

¹ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) 1155 (T) at 1163.

[9] In my view, there are no irresolvable disputes of fact in this matter. The issues are crisp and are easily capable of resolution on the papers. It is important to bear in mind that vague and insubstantial averments are not sufficient to give rise to a genuine dispute of fact.²

[10] The second point in limine has to do with the content of the order sought in the notice of motion. The first and second respondents contend that it is both confusing and impermissible. They complain both that the applicant seeks a final order without an interim order but then complain that the applicant seeks an interim order with immediate effect without any basis for seeking such an order. The objection itself accordingly appears to be confusing. The objection also includes a further objection that the first and second respondents are unaware of any previous proceedings in which a money claim is pursued by way of a declarator where liability therefore is disputed. I am aware of such instances.

[11] The points in limine are frivolous, and both are dismissed.

[12] I now consider the figures that are disputed. On 12 August 2021, the applicant's managing agents, Wakefield's Property Management (Wakefield's), wrote to the third respondent and set out the amounts that were outstanding as at that date. This letter specifically refers to the levy clearance certificate required by the first and second respondents. It was therefore prepared with that in mind. I mention the figures that appear in that letter:

'Outstanding balance	R330 587.04
Estimate water until end August 2021	R1800.00
Estimate electricity	R5000.00
Estimate interest and admin fee	R7500.00

² *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E), 156I-J.

Estimate legal cost	R5000.00
Levy clearance fee	R1595.00
<u>Total due</u>	<u>R351 482.04'</u>

[13] The figure of R330 587.04 is the only potentially contentious figure in the panoply of figures mentioned above. How it is calculated is revealed in a detailed debtor transaction schedule prepared by Wakefield's. The schedule commences on 1 April 2018 with an opening balance of R304 698.05. Each month thereafter Wakefield's added amounts due by the first and second respondents in respect of the monthly levies, utilities, sewage, a reserve or maintenance fund and a special levy that was charged from time to time. To these amounts were added administrative fees and legal fees occasioned by the first and second respondent's failure to pay what they were billed each month.

[14] For the first and second respondents were not persons who simply from time to time forgot to pay. They never made a monthly payment at all. From 1 April 2018 to the conclusion of the debtor transaction schedule on 1 May 2022, they paid not a cent on a monthly basis. Any credits that were applied to their levy account, and there were credits applied, were lump sum payments made by them or debits added to their levy account that were subsequently reversed. Thus, on 7 April 2021, an amount of R162 360.74 was credited to the first and second respondent's levy account. This was a lump sum payment made by the first and second respondents. On 12 August 2021, a debit in the amount of R217 015.91 was reversed by order of the Community Schemes Ombud.³ After the reversal of the aforementioned debit, and a further credit of R196 472.02, the first and second respondent's levy account stood at a balance of R131 912.12. Because they did not pay anything on a monthly

³ This came about after the first and second respondents laid a complaint with the Ombud that a contribution levied on members of the body corporate was incorrectly determined or was unreasonable. The Ombud ultimately ordered that the applicant must adjust the first and second respondent's levy account in line with the settlement agreement concluded between the parties arising out of the KwaDukuza Magistrate's Court litigation and thereafter furnish the first respondent with the reconciled levy statement within 14 days. The first and second respondents deny that this was done within 14 days, which the applicant, in turn, submits was done. I need not resolve this skirmish as it is not relevant to the issues before me.

basis, that balance immediately began to increase again and by 1 May 2022 it had reached the amount of R143 201.88, the precise amount referred to in the notice of motion.

[15] What do the first and second respondents say about this? They deny that any of the money held by the third respondent is due to the applicant. Their calculation was compiled by the first respondent and bears the date of 18 August 2021. It accordingly does not deal with the same period that Wakefield's debtor transaction schedule covers. Ironically, it commences with the following statement:

'The KwaDukuza Magistrate Court provided a Court Order Settlement of R175 000 on 27 November 2018.'

What is ironic about this is that the first and second respondents did not honour that order. At paragraph 19 of the answering affidavit, the following is stated:

'An amount of R175 000,00, being the settlement amount, was paid by me to Zimbali Estates (the estate on which the property is situated) in error in November 2020. A full refund of R175 000,00 was received and paid into one of my bank accounts a few months later pursuant to my refund request to Zimbali Estates. My bank deducted approximately R7 000,00 for an existing overdraft on the account and the net amount of R168 000,00 was paid to the applicant's attorneys on 19 March 2021.'

There is no suggestion at all in the answering affidavit that the balance owing of R7 000.00 was ever paid by the first and second respondents. Indeed, the applicant states that it was not. The first and second respondents therefore rely on an amount that they knowingly did not pay.

[16] The first respondent's calculations are broken down into calculations for irregular periods. The first two periods cover two complete years whilst the third and fourth calculations cover periods of 4 months and 5 months respectively. They seem to reveal the following:

(a) The first period commences on 1 December 2018 and ends on 30 November 2019. The factors that the first respondent has ascribed a value to are electricity, water, the monthly levy and maintenance. It appears that he ought to have paid, on his reckoning, R242 015.91;

(b) The second period commences on 1 December 2019 and ends on 30 November 2020. The same factors referred to above are again mentioned. On the first respondent's calculations, he ought to have paid R315 565.88;

(c) The third period commences on 1 December 2020 and ends on 31 March 2021. With reference to the same factors again, the first respondent calculates that he ought to have paid R173 486.72; and

(d) The fourth and final period commences on 1 April 2021 and ends on 31 August 2021. The same factors are again valued, and the first respondent concludes that he ought to have paid R200 269.92. This is the amount that was paid over to the applicant to secure the levy clearance certificate.

[17] The difficulty that I have with the first respondent's calculation is that it utilises assumed values. Thus, electricity is assumed to have a value of R600 per month for the entire period covered by the calculation. The same applies to all the other factors that the first respondent has valued: they have an assumed value, and that value never changes. That cannot be accepted. The values that Wakefield have put up, save for the last month of August 2021, are not static and reflect actual amounts consumed at then prevailing rates, and are not assumed amounts.

[18] The factors that the first respondent has valued, moreover, do not include all the factors that the applicant has valued. No amount is valued by the first respondent in respect of sewage on a monthly basis. Ever. Nor are any special levies included in the first respondent's calculations. In August 2018, for example, a special levy pertaining to electricity commenced. Then there was a special levy pertaining to painting that commenced in December 2018, and which was charged for several months. The first respondent's calculation thus appears to be inaccurate and may

well be more of an indication of what he and the second respondent wished they were required to pay, not what they were actually required to pay.

[19] The further difficulty that I have with the first respondent's theory of what he owes, is that while he has calculated what he says he ought to have paid, he makes no mention at all of any amounts that he has paid. This, as previously indicated, is not surprising as Wakefield's debtor transaction schedule demonstrates that no payments were ever received from the first and second respondents that originated from their own pocket save for lump sum payments. The first respondent's calculation is therefore worthless in determining what his and the second respondent's liability to the applicant was at the moment that they exited the scheme.

[20] In the circumstances, I am satisfied that the Wakefield's debtor transaction schedule is a reliable, all-inclusive recordal of the amounts owed to the applicant by the first and second respondents. The balance of funds held by the third respondent must be paid over to the applicant. I can see no reason why the third respondent should be granted 7 days to make payment of the amount of R143 201.88 to the applicant. I accordingly intend granting an order that it be paid within 48 hours.

[21] I accordingly grant the following order

1. It is declared that R143 201.88 of the amount of R151 212.12 presently being held by the third respondent in its trust account is owed by the first and second respondents to the applicant.
2. The third respondent is directed to pay the amount of R143 201.88 to the applicant within 48 hours of the granting of this order.
3. The first and second respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

MOSSOP J

APPEARANCES

Counsel for the applicants	:	Ms T Paul
Instructed by:	:	Livingston Leandy Incorporated
		Ground Floor
		Building 5
		Glass House Office Park
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		La Lucia Ridge
Counsel for the respondents	:	No appearance
Instructed by	:	Not applicable
Date of Hearing	:	17 July 2023
Date of Judgment	:	17 July 2023