IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR461/2017
Case No: AR462/2017
Case No: AR463/2017

In the matters between:

THE BODY CORPORATE OF ELEKA ROAD NO 111 Appellant (461/2017)

THE BODY CORPORATE OF SAGEWOOD HOUSE Appellant (462/2017)

THE BODY CORPORATE OF MILKWOOD HOUSE Appellant (463/2017)

and

MBHEKENI QWABE Respondent (461/2017)

and

SKUMUZO PHILIP KUBHEKA & 8 OTHERS Respondents (462/2017)

and

BHEKOKWAKHE SHADRACH DLAMINI & 12 OTHERS Respondents (463/2017)

JUDGMENT

Vahed J (Kruger J concurring):

[1] This is a single judgment in the three appeals which were heard together because they deal with the identical issues and because they all have their origins in virtually identical summonses sued out of the Magistrates Court for the District of Inanda held at Verulam, each summons containing the identical cause of action.

[2] The appeal concerning the Body Corporate of Milkwood House ("the Milkwood House appeal") related to identical summonses issued against thirteen unit holders in the sectional title development known as Milkwood House. The Sagewood

House appeal relates to nine identical summonses issued against nine unit holders in the sectional title development known as Sagewood House and in the Eleka Road No 111 appeal there was one action issued against a unit holder in the sectional title development known as Eleka Road No 111.

[3] In all the actions in the Magistrates' Court spanning the three appeals summonses and particulars of claim were issued against the individual defendants (now respondents in the three appeals) and the matters were undefended. Ultimately each action came to serve before the magistrate during the course of a request for default judgment. A refusal of the request for default judgment has resulted in the appeals that serve before us. I deal below with the cause of action pleaded and the interaction between the appellant (through its attorneys) and the magistrate that culminated in the refusal of the request for default judgment.

[4] It is necessary however to provide some background.

[5] The individual units in each of the sectional title developments are modest residential accommodation units. At some point in time it appears that each of the bodies corporate fell into financial difficulty resulting in the build-up of a substantial arrear debt to the Ethekwini Municipality made up in large part of arrear rates due by each of the developments. Ultimately, at the instance of third parties, loans were procured by each of the bodies corporate to satisfy the debt due for arrear rates to the Ethekwini Municipality and when those loans were not repaid applications to the High Court were made resulting in an administrator being appointed to each of the bodies corporate. That appointment was sought from and made by the High Court in terms of section 46 of the Sectional Titles Act, 1986 ("the Act"). In the case of the Milkwood House appeal the appointment of the administrator occurred as a result of an order made on 25 March 2013. For Sagewood House that

appointment was made as a result of an order issued on 25 May 2015 and for Eleka Road No 111 the appointment was made as a result of a High Court order issued on 25 August 2015.

[6] All of the events relevant to these appeals occurred prior to 7 October 2016, which was the date the Sectional Titles Management Act, 2011 came into force. Accordingly, and where necessary, the provisions of the Act as it existed prior to 7 October 2016 apply to the determination of these appeals.

[7] In each case the administrator appointed was Tingaweb (Proprietary) Limited.

[8] In each of the actions instituted in the Magistrates Court, and which is now the subject of these appeals, those appointments were still extant, either in their original form, or having been extended by order of the High Court, as the case may be.

[9] In the case of each appointment the administrator (i.e. Tingaweb (Proprietary) Limited) was granted and vested, in terms of the relevant High Court order, with the following powers and functions:-

> "5. That the Administrator be and is hereby vested with such functions and powers of the Respondent as contained in Section 37 of the Sectional Titles Act 95 of 1986 to the extent that such powers are required to:-
>
> a. Raise levies and/or special levies for the repayment of the Respondent's creditors;
>
> b. Appoint legal and/or any other service provider required to facilitate the recovery of any levies and/or special levies implemented in terms of 4(a) (sic) above;

c. Appoint a managing agent with a valid fidelity Fund certificate to perform the functions as provided for in Management Rule 46 as contained in Annexure 8 to the Regulations of the Sectional Titles Act 95 of 1986 in order to give effect to 4(a) (sic);

d. Open and operate a banking account to manage funds recovered in terms of 4(a) (sic) and which bank account shall be opened and maintained by a managing agent or an attorney who is in possession of a valid fidelity fund certificate;

e. Procure an insurance policy for the benefit of the Respondent on such terms as may be deemed appropriate by the Administrator;

f. Issue or cause to issued (sic) certificates in terms of Section 15B(3) of the Sectional Titles Act 95 of 1986;

g. Procure loan finance and to hypothecate the unpaid contributions as security for the repayment of the moneys borrowed as envisaged in sections 38(e) and 38(f) of the Sectional Titles Act 95 of 1986;

h. To make amendments and/or additions to the Respondent's registered Management and/or Conduct Rules to the extent required to execute the Administrator's mandate under this order;

i. In general such other powers and functions as may be required to recover the debt due to the Respondent's Creditors, including but not limited to the powers and functions contained in:-

i. Section 37;

ii. Section 38;

iii. Section 39."

[10] It is clearly apparent that the errors that crept into that Order were as a result of the careless use, as a precedent, of one of the Orders in the other matters where the almost identical paragraph appears, but numbered as 4 and not 5.

[11] In each of the summonses the body corporate is the plaintiff and is described as such. From this point on I use one of the particulars of claim issued in the Milkwood House appeal as an example because all the summonses across all the appeals are virtually identical.

[12] The particulars of claim contain the following allegations:-

> "
>
> 5.
>
> On 25 March 2013, Tingaweb (Pty) Ltd was appointed as Administrator to the Plaintiff in terms of Section 46 of the Act and as a consequence of law and the provisions contained in the Order of its appointment, assumed the powers and duties of the Plaintiff to its exclusion. A copy of the Court Order appointing Tingaweb as administrator of the Plaintiff is annexed hereto marked "**B**".
>
> 6.
>
> The Defendants unit is situated within the Magisterial District of Verulam.
>
> 7.
>
> In terms of Section 37 of the Act, the Plaintiff is required to establish a fund for the purposes of maintaining and administering the building and to require owners of the units, whenever necessary, to make contributions to such fund for the purposes of satisfying any claim against the Plaintiff.
>
> 8.
>
> In terms of the aforesaid provisions of the Act, the Administrator on behalf of the Plaintiff established such fund to which the Defendants were and remain obliged to pay certain levies.

9.

In terms of Management Rule 31 (4), the Plaintiff may proclaim special levies, due, owing and payable by the owners in respect of all such expenses as are mentioned in Management Rule 31 (1) and which are not and have not been included in any estimates, made in terms of Management Rule 31 (2).

10.

Such special levies may be made payable in one sum or by instalments and as such times as the Plaintiff may deem fit.

11.

The Administrator on behalf of the Plaintiff raised a special levy of R1 235 479,62, of which the Defendants share is the sum of R92 063,00, payable over 12 months at a monthly instalment of R7 671,92.

12.

The Plaintiff has raised six instalments of the special levy thus far, totalling an amount of R46 031,52 due, owing and payable by the Defendant as at 01 August 2016. A copy of the levy account statement is annexed hereto "**C**".

13.

The Defendants proportionate share of the special levies was based on the Plaintiffs participation quota schedule and the resolutions of the Administrator on behalf of the Plaintiff.

14.

The Defendants have made no or insufficient payments in respect of the reduction of their levies. As at 01 August 2016, the Defendants had failed to pay any or the full amounts owing to the Plaintiff in respect of the said levies.

15.

In terms of Management Rule 31 (6) of the Act, the Plaintiff may charge interest in arrear amounts at such rates as may be determined from time to time.

16.

The Administrator on behalf of the Plaintiff resolved to charge interest at 2% per month compounded monthly on all arrear amounts. The resolution raising the special levies and resolving the interest to be charged on such arrears, as well as the financial budget of the Plaintiff, is annexed hereto marked “D” & “E”.

17.

In terms of Management Rule 31 (5) of the said Act, to which the Defendants are subject, the Defendants are liable for all expenses and charges incurred by the Plaintiff in recovery of arrear levies, including legal costs as between attorney and client and collection commission.

18.

Despite demand, the Defendants has failed to pay the said amount of R43 031,52.”

[13] In each of the three developments the special levy raised was different. As the example quoted above reflects the special levy raised in the Milkwood House

matter was the sum of R1 235 479, 62. In the Sagewood House matter the special levy raised was the sum of R1 319 923, 09 and in Elelka Road 111 the special levy raised was the sum of R935 087, 41.

[14] In each case, depending on how the participation quota was divided and apportioned, the amounts claimed from the individuals differed.

[15] Continuing with the Milkwood House example, annexure "E" to the particulars of claim in each matter contained a schedule demonstrating the make-up of the special levy. It shows:

"Total Special Levy		R1 235 479.62
Total		**R1 235 479.62**
Expenditure		
Loan Extension:		
Administrator fees	2 Year Provision	R 48 000.00
Managing Agent Fees	2 Year Provision	R 32 854.40
Insurance	2 Year Provision	R 8 793.36
Legal Fees	Disbursements	R 128 000.00
Creditor – BCBS	Loan Arrears	R 972 563.48
EVH Legal Fees	Costs order	R 45 268.38
Total		**R1 235 479.62**"

[16] Each summons was delivered to the respective defendant (i.e. each of the respondents), in the overwhelming majority of the cases, by pinning to the door of the unit allegedly owned and occupied by that defendant.

[17] In due course when no appearance to defend had been received from the respondents, applications for judgment by default were sent to the magistrate.

[18] The applications served before different magistrates who raised different queries and ultimately all of them served before the magistrate who refused

the application for default judgment. The magistrate was requested to provide detailed reasons for the refusal. I deal with this next.

[19] I am mindful of the fact that I have already quoted extensively from the record. It becomes necessary to do so once more. In the formulation of his reasons for judgment the learned magistrate *a quo* also said the following:

> "3.10 What follows is a summary of all the queries raised by different Magistrates on the request for default judgment in the matters of Body Corporate of Sagewood, Body Corporate of Milkwood, Body Corporate of Hawkstone Lodge and Body Corporate of Eleka Road no 111; as well as a summary of the replies received in respect of each query.
>
> Query 1: <u>The Court is concerned about *locus standi* of the Plaintiff – should the administrator not be cited as the plaintiff in its capacity as administrator"?</u>
>
> Reply: "We submit that although the administrator is appointed in terms of Section 46 and given powers to the exclusion of the plaintiff, this does not deprive the plaintiff of its capacity as a juristic person to sue and be sued in its own name in terms of Sectional Titles Act. Furthermore, the administrator is only appointed for 3 years, and therefore is the actions instituted against the owners are still ongoing or the owners decide to bring an application to remove the administrator, then the administrator would no longer have *locus standi* as plaintiff. This would be impractical and incur unnecessary legal costs in having to substitute plaintiffs in all matters.
>
> The *locus standi* of a body corporate to sue and be sued is enshrined in the Sectional Titles Management Act.
>
> An appointed administrator steps into the shoes of the owners of the body corporate in exercising its powers and functions, to

the exclusion of the body corporate only to the extent of the powers conferred upon the administrator by the magistrates (previously high) court order. This does not deprive the body corporate of its capacity as a juristic person to sue and be sued in its own name. It was held in the High Court in the matter of the Body Corporate of Albany Court 17 Others v Nedbank & 7 others 7480/2006 that the body corporate retains residual powers to sue and be sued. (A copy of the judgment was not attached and the full citation not given, as such I was not able to verify the submission).

Furthermore, given that administrators are temporarily appointed and an application may be brought by the owners within the body corporate to remove the administrator at any time, it simply wouldn't be practical for all recovery actions to be instituted by an administrator whose appointment would subsequently lapse. Our client submits that this is and could not have been the intention of the legislature."

Findings: The explanation given for not citing the administrator is not understood. The administrator steps into the shoes of the body corporate and as such should sue in its name "as administrator" of the body corporate.

Query 2: Service is not accepted; show the defendant has knowledge of the action (Proviso Rule 9 (3)). Who is the "occupant" he/she is not named in the return of service.

Reply: "In terms of the Sectional Titles Act …, the unit address is the *domicilium* address for service of legal process, and we accordingly submit that there has been valid service in terms of the rules. In addition, the sheriffs return of service indicates that the occupants refused to accept service and therefore they are aware of the court process."

Findings: The proviso to Rule 9 (3) reads as follows:

"*If there is reason to doubt that process served in terms of this subrule (Rule (9) (3) (d)) has come to the knowledge if the person to be served, and in the absence of satisfactory evidence, the court may, in terms of the first proviso to Rule 9(3), treat such service as invalid"*

Service was effected by "affixing" to the door of the defendants *domicilium citandi ex executandi*. It is noted on the return of service that the "Occupants" declined to accept service. This is the same manner of service in each matter.

It is noted that in the request for reasons in terms of Rule 51 (8) the plaintiff now submits that it should have been afforded time to confirm the residence of the defendant and effect personal service. The plaintiff was given at least two opportunities to attend to this but elected to rely on the Sectional Titles Act for the *domicilium* address. At no stage during the numerous queries was this request noted. In any event the balance of the queries as unanswered would have resulted in the same outcome.

Query 3: <u>Copies of all High Court pleadings underlying this matter are requested including the Judgment granted in favour of Lema Investments (Pty) Ltd against the plaintiff.</u>

Reply: "A copy of the following pleadings are enclosed as requested:

a) Copy of the high Court administrator application appointing TINGAWEB as administrator of the body corporate, and High Court Order.
b) A Copy of the application for default judgment against the body corporate, and a copy of the High Court Order."

It is recorded that <u>none</u> of these documents were attached to the reply.

Query 4: <u>Why is the entire special levy claimed over one year when the administrator's fees are claimed for 2 years and the court order</u>

provides for a collection period of three years or more? Why do you have provision for two years administrator's fees?

Reply: "We submit that the special levy was raised validly by the administrator and in compliance with the Sectional Titles Act. The administrator was entitled to claim their fees in terms of Paragraph 7 of the High Court Order, and we further submit that it benefits the owners that 2 years are included within one claim, instead of the administrator raising further claims and legal costs for each years fees."

Findings: This explanation is not understood. No default judgment out of the High Court was attached; as such I am not able to confirm the amount of the initial "debt" for which default judgment was granted. I am not able ascertain whether costs were awarded, and if so on what scale. I have not been furnished with a taxed bill of costs to substantial the "Costs order" claimed. I am also not able to confirm the identity of the initial creditor in whose favour the Judgment was granted.

The explanation given with respect to the charging of fees and costs over two years and claiming same over one year is also not understood. How this can be "in the interest of the owners" is anyone's guess.

Query 5: Explain the claim for legal fees. Claim for costs is not supported by a taxed Bill of Costs. Why are legal fees included in the special levy?

Reply: "We submit that the Plaintiff is lawfully entitled to make provision for expenditure incurred in recovering the special levy from the owners within the plaintiff's scheme, as well as paying EVH as a creditor of the body corporate in terms of the legal costs order enclosed under paragraph 3 above. (Being the court order)
The debt to be recovered from the owners of the body corporate was historical rates debt owing by the body

corporate to the Ethekwini Municipality. The monies were loaned by **our client** to the body corporate to pay off the rates debt owed by them. (underlining my emphasis)

In order to recover these debts, it was deemed necessary by the High Court that an administrator be appointed to raise special levies and rehabilitate the body corporate. Given that legal action is necessary to recover the various portions of rates debt, this incurs legal costs and administrators fees. Provision has therefore been made for these costs as part of the special levy. Without provision for these costs, the administrator and the attorneys handling the collection matters cannot be paid, and cannot fulfil the terms of the High Court Order."

Findings: This is respectfully legally unsupported by any legislation that I am aware of. The costs associated in recovery of a debt and in instituting action and obtaining default Judgment etc. are claimed in terms of the Magistrates Court Act.

The unsubstantiated fees of the administrator are not qualified or substantiated. Further to this the fees are not those of the body corporate as submitted, they are those of the administrator. To suggest that the body corporate will benefit from recovery of these fees is disingenuous. The only entity that will benefit is the administrator. This toing and froing between the administrator and the body corporate is of no assistance to the administrator. The attempt to persuade the court that the body corporate will benefit is creates concern that the administrator is acting solely for its benefit and not for the benefit of the body corporate.

The issue if the identity of the "creditor" as "EVH" is of concern. It is noted that the entity which applied for the administrator to be appointed is Lema Investments (Pty) Ltd and not EVH. The fees claimed are for the benefit of EVH. The administrator submits that the fees are legally charged as they are contained in paragraph 3 of the High Court Order, respectfully those fees

are for the benefit of the applicant Lema Investments (Pty) Ltd, not EVH. The claim is not substantiated by a taxed bill of costs and is in favour of another entity.

The balance of the "legal fees" claimed of R 136 000.00 is obscure, there is no basis whatsoever for this claim. Further the claims for "contingency", "administrator's fees", and "insurance" are similarly obscure and unsubstantiated, yet they are included in the capital claim for the purposes of this Judgment.

Note should be made of the reference to "our client" as being the entity who loaned the money to the body corporate when the issue of the "underlying debt" is considered below. It seems that the attorney acting for the creditor is now acting for the administrator and the body corporate. I will deal with this issue later.

Query 6: Was the defendant made aware of the special levy?

Reply: No response was received to this query.

Query 7: Court is not satisfied with the calculation and division of the plaintiff's claim.

Reply: There was no reply received to this query other than that noted above.

Findings: In essence I am not able to confirm whether the administrator was entitles to raise the special levy at all or to charge the extra costs in its capital claim.

3.11 The plaintiff was given many opportunities to properly respond to the queries raised, but failed to do so despite being advised by more than one Magistrate that if the queries were not properly addressed the applications would be refused. They were not properly addressed.

I dismissed the applications for default judgment."

[20] Before dealing with certain specific issues, and by way of general observation, I regard the appellants' responses (where responses were furnished) to the various queries as unhelpful, somewhat overbearing, haughty, and at times didactic in tone and dismissive.

[21] I intend dealing with certain of those queries and the responses thereto, but before doing so must dispose of one preliminary issue. When the records in these appeals first served before us we were concerned that it might be arguable that the refusal of default judgment, in the specific context of these appeals, might not constitute an appealable ruling or order. That concern was raised because of what this Court said in the unreported judgment delivered in *Parak NO v Muslim* (KZP Case No AR508/2017 – 22 June 2018). There an appeal against a refusal of default judgment by a magistrate was also at issue. We called for additional argument and are grateful to Mr *Shapiro* (who appeared for the appellants) for his comprehensive supplementary heads of argument. We are in agreement with his submissions that on the facts here the rulings were finally determinative of the issues. Nothing more need be said on this score.

[22] Turing to the appeals I deal firstly with the issue relating to the standing of the appellants. This formed the basis of for first query outlined by the learned magistrate *a quo*.

[23] Sections 36(6) and 46 of the Act are relevant here. They provide as follows:

> "**Section 36 (6)**
> The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of-

(a) any contract made by it;

(b) any damage to the common property;

(c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;

(d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; and

(e) any claim against the developer in respect of the scheme if so determined by special resolution.

…

Section 46 - Appointment of administrators

(1) A body corporate, a local authority, a judgment creditor of the body corporate for an amount of not less than R500, or any owner or any person having a registered real right in or over a unit, may apply to the Court for the appointment of an administrator.

(2) *(a)* The Court may in its discretion appoint an administrator for an indefinite or a fixed period on such terms and conditions as to remuneration as it deems fit.

(b) The remuneration and expenses of the administrator shall be administrative expenses within the meaning of section 37 (1) *(a)*.

(3) The administrator shall, to the exclusion of the body corporate, have the powers and duties of the body corporate or such of those powers and duties as the Court may direct.

(4) The Court may, in its discretion and on the application of any person or body referred to in subsection (1) remove from office or replace the administrator or, on the application of the administrator, replace the administrator.

(5) The Court may, with regard to any application under this section, make such order for the payment of costs as it deems fit."

[24] Mr *Shapiro* submitted that because the body corporate enjoys perpetual succession and because the administrator in effect stepped into the shoes of the body corporate, the natural consequence was that the administrator became

entitled to sue in the all actions in the court *a quo* in the name of the body corporate. For that submission he relied upon the authority of *Body Corporate of Albany Court v Nedbank* 2008 JDR 0392 (W) where, at para 7, *Gautschi* AJ said the following:

> "Mr Georgiades sought to persuade me that, since section 46(3) provides that the administrator shall have powers and duties to the exclusion of the body corporate, the body corporate has no locus standi to seek a rescission of an order appointing an administrator. I do not agree. In my view, the body corporate would retain a residual power to rescind an order appointing the administrator. The position is in my view akin to the residual powers retained by the board of directors where a company has been wound-up, to oppose the confirmation of a provisional winding-up order or to seek to rescind or appeal the order. However, even if I am wrong in this, the other applicants are owners of units in the scheme, who undoubtedly have the required legal interest to allow them to seek a rescission of the order."

[25] I have difficulty with understanding why the learned acting judge's reasoning with regard to a residual power retained by a body corporate to challenge the appointment of an administrator is sufficient authority for the proposition that Mr Shapiro contended for. In fact there seems to be authority in this division suggesting the exact opposite. See in this regard *Grundler NO v Rambadursing* [2011] 3 AllSA 556 KZD.

[26] In any event it seems to me that upon a proper construction of both the Act and the Order appointing the administrator, together and separately, Tingaweb (Pty) Ltd did not "step into the body corporate's shoes" entitling it to litigate in the name of the body corporate.

[27] Section 46(3) of the Act must allow for a consistent interpretation across all instances where an administrator has been appointed. The section does not envisage that for every appointment ***all*** of the powers and duties of the body

corporate become exercisable by the administrator. In fact the section envisages that in certain instances only certain of "…those powers and duties as the Court may direct…" become exercisable by the appointed administrator. In situations where a Court, in the exercise of its discretion, leaves a body corporate with some of its substantive powers and duties and allows others, to the exclusion of the body corporate, to be exercisable by the appointed administrator, it would be unthinkable that both could litigate at the same time (admittedly for different things) in the name of the body corporate. To avoid that absurd situation the section can only be interpreted to mean that while an administrator can exercise the powers and duties of a body corporate (be they some or all) they must be exercised in the administrator's representative capacity and not in the name of the body corporate. When the administrator, in the exercise of one or more of those powers and/or duties, choses to litigate, he, she or it must do so *nomine officio*.

[28] The High Court Order appointing Tingaweb (Pty) Ltd also envisaged it and the body corporate enjoying separate existence. The administrator was empowered to, *inter alia*, raise levies and/or special levies for purposes of generating sufficient funds to repay the body corporate's creditors. To administer the funds so collected by the administrator, in terms of paragraph 5(d) of the Order, a separate bank account was authorised. If it was intended that there be a seamless "stepping into the shoes" the administrator could simply have used the body corporate's existing bank account. That too, to my mind, is an indicator that administrator was not empowered to function in the name of the body corporate, but instead separately in a representative capacity.

[29] In the result I am of the view that the learned magistrate *a quo* was perfectly entitled to and correctly raised the query concerning standing and I too, like

the magistrate, am unable to understand the response. On that ground alone default judgment was appropriately refused.

[30] I turn now to deal with the question of service of the summonses on each of the respondents. In terms of the Rules of the Magistrates' Court the magistrate was clearly empowered to question the adequacy of the service. The provisions of Magistrates' Court Rule 9(3)(d) were referred to in the query and will not be repeated here. In the exercise of his discretion the learned magistrate *a quo* was entitled to treat the service as invalid. The response that delivery to the "*domicilium*" address of each of the respondents was not an answer to the query raised. It must be remembered that in terms of the Act and the management Rules the addresses are deemed to be the "*domicilium*" address of each of the respondents. The allegations in the particulars of claim to the effect that the address were ***chosen*** by the individual respondents is simply erroneous. It was a provision imposed by law. It might be a different matter if the addresses had been deliberately chosen by each respondent. Against that backdrop, in my view, the query was validly raised.

[31] The query relating to knowledge on the part of the respondents of the raising of the special levy was not addressed by the appellants. In this regard the magistrate was plainly addressing paragraphs 11, 12, 14 and 18 of the particulars of claim and was enquiring after evidence to sustain those allegations. In the absence of a response the refusal of default judgment was the inevitable consequence.

[32] It seems to me also that the other queries were validly raised and dealt with by the learned magistrate *a quo*. No purpose would be served by a further review of each query and response. That purpose has already been served by the detailed extract from the reasons furnished as set out earlier in this judgment.

[33] It is by now plainly apparent that the appeal must fail.

[34] However, the question of costs requires a more careful treatment.

[35] Prior to the hearing of the appeal we extended an invitation to the appellants to deliver additional argument on a question raised in the following terms:

> "In the event that, for any reason, the Appeal Court dismisses the appeals why should the Appeal Court not also order that the Administrator, Tingaweb (Pty) Ltd, bear the costs of the appeal and the costs of the actions in the court *a quo*, and that no costs whatsoever shall be recoverable from the respective Bodies Corporate or from the individual members thereof?"

[36] Again, Mr *Shapiro*, responded promptly and comprehensively, for which we record our appreciation.

[37] The main thrust of Mr *Shapiro's* argument was that having been appointed by judges of this Division the Administrators' principal duty was the repayment of the debts incurred by the Bodies Corporate. That was a duty considered to be significant by the judges who made the appointments. The Administrators were thus going about a legitimate purpose. Thus, contended Mr *Shapiro*, they ought not to be burdened with the costs.

[38] Firstly, in the light of the finding relating to standing it is plain to me that the appellants either themselves misconstrued their status or were ill-advised in that regard. When challenged in that regard their response made no sense and the single authority relied upon did not support their assertions. To burden the Bodies Corporate and the individual members with the wasted costs incurred as a result of that doomed process is unfair in the extreme.

[39] I am influenced also by the manner in which the magistrates' queries were dealt with. As I observed earlier in this judgment, the responses did not assist but instead appeared to obfuscate matters.

[40] The query relating to the legal fees and the appellant's treatment thereof is particularly instructive.

[41] I pause to mention that in the magistrate's reasons quoted earlier there is a reference, as part of the special levy raised, to the sum R136 000,00. This provision emanates from the Eleka Road No 111 matters. In the Milkwood House appeals the provision is the sum of R128 000,00. The treatments are otherwise identical.

[42] The appellants' response to the magistrate's query demonstrates that the anticipated legal costs associated with the recovery of the special levy were included in the special levy itself. In other words, the Administrator, as part of the special levy, has already made provision for the recovery of the costs of the actions. Over and above this provision each of the actions nevertheless made provision for the recovery of the costs on the scale as between attorney and client from each individual respondent. Nowhere was any allowance made for the amount already included in the special levy. For example, the particulars of claim could have alerted the particular defendant to the potential for over-recovery and included a formula for reduction of set-off or something of similar effect. The claim for costs was persisted in even after the learned magistrate raised the query!

[43] This plain duplication was unconscionable and underscores again my observations made earlier regarding overall tenor of the responses to the magistrates' queries.

[44] In my view the Administrator is on any basis obliged to bear its own costs in each of the appeals and in all of the actions.

[45] In each of the appeals under Case Nos. AR461/2017, AR462/2017 and AR463/2017 I make the following Order:

a. **The appeal or appeals are dismissed.**

b. **The costs incurred in the appeal or appeals shall be borne by Tingaweb (Pty) Ltd.**

c. **Tingaweb (Pty) Ltd and/or its attorneys shall not be entitled to recover those costs from the appellant or from the individual members of the appellant.**

d. **The costs incurred in each of the actions with which the appeal or appeals are concerned, instituted in the Magistrates' Court for the District of Inanda, shall be borne by Tingaweb (Pty) Ltd and it and/or its attorneys shall not be entitled to recover those costs from the appellant or from the individual members of the appellant**

_____

Vahed J

_____

Kruger J

Case Information:

Date of Hearing:	9 November 2018	
Date of Judgment:	7 December 2018	
Appellants' Counsel:	W N Shapiro	
Instructed By:	FOURIE STOTT ATTORNEYS Westville, Durban	
	Locally Represented by:	STOWELL & COMPANY 295 Pietermaritz Street PIETERMARITZBURG
	Reference:	Ms S Myhill
	Telephone:	033 845-0550