Body Corporate Rule Contravention: Can the Levy Clearance Certificate be withheld?

It has become common practice for body corporates to withhold levy clearance certificates in instances where there is an alleged, or actual, contravention of the body corporates' rules by an owner who desires to sell the unit. This often creates unhappiness as the owner usually does not have the privilege of time to dispute the body corporate's contentions. The owner may be pressured by the purchaser to comply with the body corporate's demands so that the transaction can proceed. Alternatively, the owner might be cash-strapped and eager to receive the proceeds of the sale. Effectively, the body corporate holds the transaction 'hostage' until the owner complies with the body corporate's demands.

The transfer of a unit in a sectional title scheme cannot be registered without the levy clearance certificate. This is as a result of section 15B(3) of the *Sectional Titles Act, 95 of 1986* which prohibits the registrar of deeds from registering a transfer of a unit unless provided with a conveyancer's certificate confirming that as at date of registration, the body corporate has certified that all moneys due to the body corporate by the seller has been paid in respect of the unit being sold.

In practice, a conveyancer obtains the levy clearance certificate from the body corporate and signs the conveyancer's certificate, referred to in Section 15B(3), on the strength of the levy clearance certificate. It is this conveyancer's certificate which is then lodged in the Deeds Office, and not the levy clearance certificate as such.

Unfortunately, as mentioned in the introduction to this article, body corporates have adopted a practice of refusing to issue levy clearance certificates where there is an alleged contravention of its rules, despite the fact that all monies due to the body corporate have been paid. This practice has frustrated the legal sector to such an extent that the *Law Society of South Africa* was forced to step in on 8 April 2011 and address a letter to the *National Association of Managing Agents*. The relevant paragraph of the letter read:

“A common occurrence too is that the trustees or the managing agents often attempt to withhold the issue of a levy clearance certificate with a view to forcing the registered owner of the property to comply with one or other obligation unrelated to the issue of outstanding levies … Any such purported withholding of a levy certificate is clearly irregular and contrary to law.”

Despite this letter, body corporates persisted with the practice of withholding levy clearance certificates. However, and perhaps fortunately, the Gauteng Division of the High Court has now put is proverbial foot down in the matter of *Tapuch v The Trustees For The Time Being of S H Body Corporate 3 and Others.* The relevant facts of the judgement can be summarized as follows: the owner of a unit in a sectional title scheme paid all moneys due to the body corporate, but did the body corporate refuse to issue the levy clearance certificate because the owner failed to provide approved building plans.

The question before court was whether the body corporate was entitled to withhold the levy clearance certificate. The court held that the purpose of section 15B(3) has been confirmed by the *Supreme Court of Appeal* to be to assure the economic viability and sustainability of a body corporate. Using the section as leverage to enforce compliance with rules or any applicable law, so the Court said, would be to unilaterally extend the purpose of section 15B(3).

In this regard the court held that “A body corporate cannot, if it is convinced that a specific rule or law was contravened, sit back and wait for the day that the recalcitrant unit owner wants to sell the unit, and then use the levy clearance certificate as a mechanism to compel compliance”

Consequently, the court found that the body corporate was obliged to issue the levy clearance certificate because all moneys due to it has been paid. The judgement confirms that levy clearance certificates should be restricted to moneys due to the body corporate. A body corporate may not withhold a levy clearance certificate if there was an alleged, or actual, transgression of the rules in instances where all the monies due to the body corporate has been paid.

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