

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES

2.OF INTEREST TO OTHER JUDGES: YES

3.REVISED: NO

12 April 2024

Judge Dippenaar

CASE NO: 2023/061020

In the matter between:

BODY CORPORATE OF BALBOA PARK

APPLICANT

AND

SKEYI, PHUMEZA NOMAPHELO

FIRST RESPONDENT

BONTLE, KEAMOGETSE

SECOND RESPONDENT

CASE NO: 2023-061048

BODY CORPORATE OF BALBOA PARK

APPLICANT

AND

DESIREE DUDUZILE ZWANE

RESPONDENT

CASE NO: 2023-070930

BODY CORPORATE OF BALBOA PARK

APPLICANT

AND

ANIL M JESSA CC

RESPONDENT

CASE NO: 2023-124083

BODY CORPORATE OF PEPPERTREE LANE

APPLICANT

AND

BRENDON DENYS FAGREW

FIRST RESPONDENT

HEATHER KAREN VEENHUIS

SECOND RESPONDENT

MSIZI OSCAR NZIMANDE

THIRD RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 12th of APRIL 2024.

Summary: Practice - unopposed applications for disconnection of electricity supply and limitation of water supply to certain units in a two sectional title schemes- applicants relying on implied, ancillary or incidental power to do so as the Sectional Title Scheme Management Act, management rules and conduct rules of the relevant body corporates do not expressly provide for such power – no implied, ancillary or incidental power established - impact of relief on respondents' constitutional rights not considered or canvassed in application papers – no agreement with respondents sanctioning such coercive action – relief limiting constitutional rights incompetent if not authorised by law – no legal basis for relief established - applications dismissed.

Order: The applications are dismissed.

DIPPENAAR J:

[1] This judgment relates to four applications which were enrolled for hearing in the unopposed motion court. In each instance, the respective applicants, the body corporates respectively of Balboa Park ("Balboa") and Peppertree Lane ("Peppertree") sought similar relief against the respective respondents who are owners and/or occupiers of four units in the schemes who are in arrears with payment of certain amounts due to the respective body corporates. The body corporates were established under s 1 of the Sectional Titles Act ¹("the STA"), read with s 2(1) of the Sectional Titles Schemes Management Act ² ("the STSMA").

[2] The applications under 2023/070930 ('Jessa'), 2023/061020 ('Skeyi') and 2023/061048 ('Zwane'), concern the body corporate of Balboa.

¹ 95 of 1986

² 8 of 2011

[3] In Jessa, the respondent is the owner of unit 211, who as at 1 April 2023, was indebted to the body corporate in the sum of R55 042.05 in respect of levies, water and electricity consumption and other charges due as a result of ownership of the unit (“the various charges”). Default judgment was granted against the respondent for payment of R21 267.99 in respect of a portion of these charges on 21 October 2022.

[4] In Zwane, the respondent is the owner and resident of unit 181, who as at 1 April 2023, was indebted to the body corporate in the sum of R93 093.90 in respect of the various charges. Default judgment was granted against the respondent for payment of R14 707.46 on 19 August 2022.

[5] In Skeyi, the first respondent is the owner of unit 20, which is occupied by the second respondent. As at 1 April 2023, the first respondent was indebted to the body corporate in the sum of R307 072.69 in respect of the various charges. Two default judgments had been granted against the first respondent for payment of arrear charges. The first, on 23 December 2019 for payment of R10 087.98. The second, on 25 September 2020, for payment of R72 369.84.

[6] In the Balboa applications, reliance was placed on a resolution by the trustees at a meeting of the trustees of the body corporate held on 29 March 2023, whereat it was resolved by majority that the applicants’ attorney be appointed to “apply via the courts to obtain a (sic) court order to disconnect all owners in Balboa who are in arrears with their levy accounts with outstanding amounts of R40 000 or more”. The resolution is signed by three of the five trustees. At the time the application was heard, the arrear amounts owed by the respective respondents were in excess of the R40 000 threshold.

[7] The Balboa body corporate sought authorisation for it to terminate the electricity supply and restrict water supply “to a maximum of 6 kilolitres per 30 day cycle or such amount allowed by the City of Johannesburg as free water supply to a residential household from time to time to units 211, 181 and 20 until all arrear amounts owed,

pertaining to levies and all contributions payable to the body corporate, including water and electricity have been paid”, whereafter those services would be reinstated.

[8] In the application under 2023/124083 (‘Fagrew’), the applicant is the Peppertree body corporate. The first and second respondents are the joint owners of unit 56 in the Peppertree Lane scheme situate in Northwold, Johannesburg, whilst the third respondent resides at the unit. As at 1 October 2023, the respondents were indebted to the body corporate in an amount of R26 765.85. On 14 June 2022, default judgment was granted against the first and second respondents in an amount of R21 555.14.

[9] On 21 April 2022, the elected board of trustees authorised the institution of the application, in terms of a resolution signed by five trustees which authorised its attorneys to institute applications for disconnection of electricity against debtors exceeding R100 000 owing to the body corporate. At the time the application was heard, the arrear amounts owed by the respondents was in excess of the R100 000 threshold.

[10] The Peppertree body corporate did not seek any relief pertaining to the limitation of water supply to the unit. It further sought the disconnection of electricity to the unit of the defaulting respondent only pending payment of all arrear electricity amounts due to the body corporate and not payment of the full arrear amount outstanding.

[11] No mention was made in any of the applications of execution having been levied pursuant to the granting of the various default judgments.

[12] The same attorney and counsel were involved in all four applications. As the facts and principles in all the applications are the same or similar, it is convenient to deal with the applications in a single judgment.

[13] The applications concern the powers afforded to body corporates under the STSMA and whether the applicant body corporates are entitled to the relief sought. In

argument, the applicants' counsel submitted that various similar applications in this Division have been granted by the courts.

[14] In each instance, the case made out by the respective applicants in their founding papers was that the City of Johannesburg supplies electricity to the body corporate, which must be recovered from each of the owners. It apportions municipal service expenses, rates and taxes for the common property and other charges to the owner of each unit. The cost of water supply is billed pro rata to each unit as are the other municipal charges such as refuse removal, water and sanitation.

[15] As support for their entitlement to the termination of electricity and limitation of water supply³, the applicants contended that the other owners in the scheme were effectively paying for the water and electricity consumed by the occupiers of the defaulting units to their detriment, and that, if the reserves of the respective body corporates were to be insufficient to cover the costs of the charges due to the City of Johannesburg by the said body corporates, the owners would have to bear the cost of the credit in respect of loans taken up by them to comply with their financial obligations to creditors. Despite being in arrears, the respondents unlawfully continued enjoying the benefits of the municipal services and the benefits of facilities on the common property, the administration of the scheme generally and in the case of the owner respondents, insurance of their units.

[16] The applicants further averred:

“Although legal proceedings are proceedings, there is a substantial delay from the institution of an action until the Body Corporate is able to realise the proceeds of its claim from a sale in execution once judgment has been granted and execution against a unit is authorised, if at all”.

³ In respect of the Balboa applications

[17] Read in context, the founding papers contained no averments as to the legal basis on which the relief presently sought is based. The high water mark is the averment:

“In order to limit the detrimental impact of the respondent’s failure to pay for the unlimited water and electricity consumed at the unit, while legal proceedings against the first respondent is continuing, the body corporate seeks leave for the electricity to be terminated and the water supply to be allowed only up to the free allocation”.⁴

[18] In constructive and detailed heads in argument, the applicant sought to elaborate on the issues raised in the applications and respond to the queries raised by this court with the applicant’s counsel at the hearing. The heads of argument focused on two issues. First, the competency of the resolution by the applicants’ trustees authorising the institution of these applications for termination of electricity and water supply. Second, the impact of the relief sought on the constitutional rights of the respondents, particularly their rights of access to adequate housing, and the rights to equality and dignity. I return to these issues later.

[19] The same type of relief⁵ was sought before Wilson AJ in *Lion Ridge*⁶. Wilson AJ held that neither the STA nor the STSMA and management rules promulgated under it empower a body corporate to interfere with a member’s utility supply⁷. The Lion Ridge body corporate did not allege any other common law or statutory power to do so. The applications were dismissed. I am in respectful agreement with the judgment. The findings are apposite to the present facts

[20] Wilson AJ further held:

“[12] Neither the Act nor the Regulations themselves set out whether and under what circumstances a body corporate may limit or discontinue the utilities supplied to one of its members. It follows either that

⁴ In respect of the Balboa applicants. In Fagrew, no allegation regarding the limitation of water was made.

⁵ There, payment of arrear levies was also sought, an issue which does not presently arise.

⁶ *Lion Ridge Body Corporate v Alexander and Others* (17074/2022; 18106/2022; 19220/2022) [2022] ZAGPJHC 666 (21 September 2022)

⁷ Para [7].

the “laws” of the body corporate makes by and for” itself must grant such a power before the body corporate exercises it, or that a disconnection must be authorised in terms of an agreement reached between the body corporate and a particular section owner or occupier”.

[21] *Lion Ridge* was also followed by Manoim J in *Ashwood Manor*⁸. *Ashwood Manor* was similarly an application brought in the unopposed motion court. Whilst orders for the payment of various arrear contributions and interest were granted, the relief pertaining to authorisation for the disconnection of electricity and ancillary relief was dismissed.

[22] In granting leave to appeal to the Full Court and seeking the appointment of an *amicus curiae* to argue the matter in the public interest, Manoim J held that whilst there was nothing in the application which suggested under what power the body corporate sought to act and a new argument was sought to be made out at the application for leave to appeal stage, he was persuaded by the argument that courts in this Division have sometimes granted the relief, as constituting a sufficiently compelling reason to grant leave to appeal so that clarity might be obtained.

[23] The same argument that other courts in this Division have granted similar applications, was also raised by counsel in *Lion Ridge* and again by counsel in these applications.

[24] In *Barcelona*⁹, a similar application was dismissed by this court on the basis that no legal entitlement to disconnection relief was made out on the papers. Although seeking the same relief, in *Barcelona*, reliance was placed on the judgment of Schippers J in *Anva Properties*¹⁰, in arguing that the body corporate was entitled to take lawful steps to mitigate its losses. Reference was also made to *Acasia Leasing*¹¹. *Anva Properties* and *Acasia Leasing* were held to be distinguishable on the facts as they pertained to defaulting

⁸ Body Corporate Ashwood Manor v MacGregor (027545/2023) ZAGPJHC 1153 (13 October 2023/30 November 2023). The appeal to a Full Court is currently pending.

⁹ The Body Corporate of Barcelona 1 v Dyanti and another (case no 2022/9206) Unreported judgment in the Gauteng Division, Johannesburg (30 June 2022)

¹⁰ Anva Properties CC v End Street Entertainment Enterprises CC WCC (22109/2014)

¹¹ Acasia Leasing (Pty) Ltd v JP Krugerrand Deals CC 2019 JDR 1056 GJ

corporate entities who were in unlawful occupation of the properties in issue. It was held that the applicant did not in its founding papers set out any proper factual or legal basis for the body corporate's entitlement to obtain disconnection relief. Leave to appeal was sought, *inter alia* on the basis that other courts in this Division have granted orders in similar matters. Leave to appeal was granted on 12 August 2022, on the basis that the conflicting orders in this Division constituted a compelling reason to do so, in order that legal certainty could be obtained. Pursuant thereto, a notice of appeal was duly lodged on 26 August 2022, but it does not appear that any further steps were taken by the applicant.

[25] I return to the arguments advanced in the present applications. The applicants sought to distinguish *Lion Ridge* on a factual basis. Although certain of the facts are different, I am not persuaded that it is distinguishable as the facts are similar and the same principles apply.

[26] In argument, the applicants sought to overcome the issues pointed out in *Lion Ridge*. In sum, the applicants case was that they relied on implied, ancillary or incidental powers to terminate municipal services to units of non-paying members who are in arrears with the payment of levy charges, given that neither the STA, STSMA or the management rules afford express authorisation to a body corporate to do so. It was argued that the powers conferred on a body corporate in terms of the STSMA and the rules include the power to do all things reasonably necessary for the enforcement of the rules and the management and administration of the common property under s 4(i) of the STSMA. Reliance was further placed on s 5(1)(i) of that act in arguing that in addition to its main functions and powers as set out in ss 3 and 4, a body corporate may generally exercise any power and perform any function conferred or imposed on the body corporate in terms of the STSMA or the STA.

[27] It was argued that the exercise of an implied, inferred or ancillary power to disconnect electricity and limit water consumption¹², was reasonably necessary to achieve the purpose of the express power to collect levies as the prejudicial impact on the common interests of the owners in the schemes were paramount and communal interests must override the interests of the respondents. It was argued that accordingly, the power to terminate and restrict municipal services absent receipt of payment could not be dispensed with, without defeating the obligations of the body corporate to compliant owners. On this basis it was argued that the resolutions authorising the institution of the applications were not incompetent.

[28] Ultimately, the nub of the applicants' case amounted to whether there was any merit in their contention that the power to terminate electricity and water supply was an implied, inferred or ancillary power afforded to a body corporate and whether the resolutions adopted by the trustees of the respective body corporates were competent.

[29] These issues must be considered against the backdrop of the applicable legislative framework, being the STSMA, the management rules and the conduct rules promulgated in terms thereof as prescribed or substituted, added to or amended as contemplated in s 10 of the STSMA.

[30] Both body corporates are subject to the management rules in Annexure 1 of the Sectional Titles Schemes Management Regulations¹³. In the case of the Balboa body corporate, the conduct rules in annexure 2 apply. In the case of the Peppertree body corporate, conduct rules were adopted under s 10 of the STMA, which in relevant part provide:

“28. LEVIES, WATER & ELECTRICITY ACCOUNTS

28.1 Accounts for levies and utilities will be submitted directly to the owner of each unit by

¹² In the case of the Balboa applications

¹³ Published under GNR1231 in GG 40335 of 7 October 2016

the Managing Agent.

28.2 *Payment in full of levies (including additional levies), and utilities must be received by the managing agents by no later than the stated payment due date on the levy statement.*

28.3 *The interest charged by the Body Corporate on all arrear amounts shall be charged at 2% per month, compounded monthly and capitalized. The rate will be reviewed at each AGM.*

30.3 *“The Trustees shall have the right to take any action deemed fit to prevent any infringement of these rules.”*

[31] Section 7(1) of the STSMA provides:

“The functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules.”

[32] As held in *Zikalala*¹⁴:

“Section 7(1) of the STSMA likewise provides that : the functions of the body corporate must subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of section, be performed and exercised by the trustees of the body corporate holding office in terms of the rules” It follows therefor that, absent any express or implied power that is accorded to a body corporate in the STSMA, the trustees may not conclude an agreement outside the ambit of the powers given in terms of the STSMA. To the extent that an action is outside the powers given in the STSMA, the body corporate, as a creature of statute, will be construed to have acted ultra vires. Likewise, it would not be competent for the body corporate to sanction an act which is ultra vires by way of a special resolution.”

¹⁴ *Zikalala v Body Corporate, Selma Court and Another* 2022 (2) SA 305 (KZP) para [19]

[33] In *Prag*¹⁵, the obligatory functions of a body corporate were summarised thus:

“[11] In terms of the STSMA the body corporate of a sectional title scheme is responsible for the control, administration and management of the common property of the scheme, ie the land on which the scheme is located, together with such parts of the buildings in the scheme which are not included in individual sections, for the benefit of all owners”¹⁶.

[12] To this end, a body corporate must establish and maintain an administrative and reserve fund which is reasonably sufficient to cover the estimated annual running and future operational costs of the repair, maintenance, management and administration of the common property and for the payment of rates and taxes and municipal charges, as well as for the payment of insurance premiums relating to buildings and land; and for this purpose it must raise the necessary amounts required by levying contributions on owners in proportion to their participation quota in the scheme. In terms of the STMA, the body corporate has an obligation to maintain and keep all common property and plant, machinery, fixtures and fittings which are used in connection with it, in a state of good and serviceable repair.

[13] Similarly, there are a number of other provisions in the STSMA which make it abundantly clear that a body corporate’s duty in relation to the sectional title scheme it administers primarily relates to the scheme’s common property, ie to the common interests of members of the scheme, and not to the interests of an individual member....”

[34] A body corporate can thus only exercise any powers conferred on them under the STSMA, the management rules¹⁷ and the conduct rules.

¹⁵ *Prag NO and Another v Trustees, Mitchell’s Plain Industrial Enterprises Sectional Title Scheme Body Corporate and Others* 2021 (5) SA 623 (WCC) para [12]

¹⁶ Sections 2(5) and 3(1)(t) read with the definition of common property in s1

¹⁷ *Zikalala* para [20]

[35] It is further well established that the relationship between the body corporate and its individual members, is based in contract. The rules constitute an agreement between on the one hand, the owners *inter se* and, on the other, between the owners and their body corporate, resembling an arrangement between joint owners under the common law in respect of the use and enjoyment of their joint property¹⁸.

[36] On a grammatical, contextual and purposive interpretation of the STSMA¹⁹, the STA, and the management rules and conduct rules applicable to the Balboa and Peppertree body corporates, they do not expressly grant powers authorising the body corporates to seek or obtain the termination of municipal services. There is also no express authority authorising trustees at a meeting of trustees to resolve to do so.

[37] The test for considering whether the powers contended for can be implied, are set out thus in *Lekhari* ²⁰.

“It should be emphasised, I think, that in order that such a power may be implied, it is not sufficient that its existence would be reasonably ancillary or incidental to the exercise of any express power, in the sense that it would be useful in giving effect to that power. It must be reasonably necessary for that purpose. The test is not mere usefulness or convenience, but necessity. There must be a need of sufficient cogency to rebut the presumption that the Legislature, in conferring the power relied upon, intended to authorise legislation affecting the subjects of the State and not the State itself in its judicial organs. Nor must the implied power be extended beyond the requirement of the occasion. What can be dispensed with without defeating the object of the express power or preventing its exercise in a reasonably effective way, is not to be implied”.

[38] In applying this test, it cannot in my view be concluded that the applicants have illustrated any basis to infer that such implied power is reasonably necessary. The high water mark of their case is that legal proceedings cause substantial delays before the proceeds of any claim against a recalcitrant member can be recovered. Moreover, the

¹⁸ Wiljay Investments (Pty) Ltd v Body Corporate, Bryanston Crescent and Another 1984 (2) SA 711 (T) at 728D-G

¹⁹ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18]

²⁰ Lekhari v Johannesburg City Council 1956 (1) SA 552 (A) at 567A-C as applied in Zikalala para [35]

risks referred to in the applicants' founding papers and in argument are based on speculation and supposition, rather than primary facts.

[39] A coercive action such as the withholding of certain vital municipal services such as electricity and water to effectively force payment of levies or other arrear amounts, may be convenient to a body corporate but cannot be interpreted to be reasonably necessary.

[40] Similarly, such a power cannot be construed as ancillary to the express powers to collect levies and contributions, nor can it be concluded that such power exists as a reasonable consequence of exercise of the express powers²¹ afforded to the trustees.

[41] Any interpretation which allows for an alteration of the statutory powers rather than an interpretation thereof cannot be supported. In interpreting the provisions, the meaning must be ascertained in the context of the STSMA as a whole²².

[42] The interpretation contended for by the applicants in my view amounts to an alteration of the statutory powers and cannot be supported. The termination of municipal services as a coercive sanction for non-payment is not a necessary corollary to an obligation on the part of members to pay, and body corporate to collect levies and other charges due, nor can it reasonably be inferred to be a reasonable consequence of the exercise of the express powers or the debt collection remedy envisaged in the relevant governing instruments.

[43] Whilst ancillary and incidental powers may be inferred from express powers and powers may be conferred by implication, as argued by the applicants, and whilst common interests of owners may in certain instances override the interests of individual owners²³,

²¹ Zikalala par [36]

²² Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and Another 2020 (2) SA 61 (SCA) para [17]

²³ Marine Sands supra

community ownership does not in all instances enjoy paramountcy. More so, where it would infringe on individual owners' constitutional rights, as it would in the present circumstances. The applicants' reliance on *Fish Eagle* ²⁴ thus does not avail them.

[44] The very fact that legal proceedings may be instituted by a body corporate against a recalcitrant member, in which both interest and costs can be recovered, and debt collection is available as a remedy to a body corporate, militates against the notion that the power to seek termination of municipal services is an ancillary or incidental power to those afforded body corporates under the STSMA and the management and conduct rules of the respective body corporates. The fact that the legal process may take time to be completed is an inevitable commercial reality all creditors face in seeking to enforce payment from their debtors.

[45] The ultimate sanction that a body corporate can resort to in the collection of a debt is to obtain judgment and pursue the attachment and sale in execution of the unit. A precondition for any sale in execution would be a settlement of the outstanding levies owing to the body corporate from the proceeds of the sale. Failing that, transfer of the property would not take place without a levy clearance certificate being issued ²⁵. The fact that that would take time to achieve, is not a sound basis to effectively read in, as the applicants seek to do, powers which the Legislature elected not to afford a body corporate.

[46] The entire structure, context and ambit of the STSMA, the STA, the management rules and the conduct rules are aimed at arming body corporates and their trustees with the well-established procedure of debt collection by utilising due legal process. The Legislature saw fit not to afford powers such as those currently sought to body

²⁴ Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 (W) paras [19]-[20]

²⁵ Zikalala para [31]

corporates²⁶, whilst different statutory powers are afforded by statute to entities such as Municipalities in relation to debt collection.

[47] Moreover, the power afforded to trustees to act on resolutions passed at a general meeting is also not unfettered. As held by Malan J in *Fish Eagle*²⁷, in law, a body corporate has no power to pass a resolution to the effect that it will not carry out one or more of the duties imposed upon it by s 37 read with s 39 of the STA.

[48] The same principles apply by analogy to the passing of a resolution purporting to authorise the exercise of powers which a body corporate does not have. In both instances the passing of such resolution would be *ultra vires*.

[49] What exacerbates matters in the present instance is that the resolutions in question were not even taken at a general meeting of members of the respective body corporates, but by the trustees thereof in trustees' meetings. That of itself casts doubt upon the validity of the resolutions.

[50] The significant impact on the constitutional rights of a recalcitrant member by the exercise of a termination power, further militates against the construction of such power as being necessary. It is self-evident that no management rules or conduct rules may conflict with the Bill of Rights and the Constitution²⁸. It follows that the powers which a body corporate may exercise, must also pass Constitutional muster.

[51] As held in *Lion Ridge*:

[15]....the relief that Lion Ridge claims implicates a delicate web of constitutional rights. These are the right against arbitrary deprivation of property (section 25(1) of the Constitution, 1996), the right to

²⁶ In contrast to other, broader statutory powers afforded to municipalities.

²⁷ *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) para [9], quoted with approval in Zikalala supra para [22]

²⁸ LAWSA, 2nd Ed Vol 24, Sectional Titles para 424

sufficient water (section 27(1)(b) of the Constitution, 1996, the public law right to receive electricity from a municipality, even where the electricity is transmitted through an intermediary such as a landlord or a body corporate (see Joseph v City of Johannesburg 2010 (4) SA 55 (CC), para 47), and the right of access to adequate housing (section 26 of the Constitution, 1996).

[16] Relief limiting these constitutional rights is plainly incompetent if it is not authorised by law. The form that law might take depends on the facts of a particular case. In this matter, the very least that would have to be established is a provision of the Sectional Titles Act, a rule of the body corporate, or a term in an agreement that authorises the relief Lion Ridge now claims.....The instrument authorising the relief, where it exists, may itself have to conform to constitutional requirements designed to protect the rights implicated”.

[52] Thus, even if members in a general meeting were to seek the adoption of management rules or conduct rules which agree to the termination of municipal services such as electricity or water supply in the event of non-payment, any such instrument would have to conform to constitutional requirements to protect the implicated rights referred to. Absent adequate protection, any such management or conduct rules may well not bear constitutional scrutiny and be *ultra vires*.

[53] Whilst recognising that the proposed relief would impact on the constitutional rights of the respondents, the applicants relied on the limitation clause in s 36 of the Constitution²⁹ in arguing that any infringement of the respondents’ constitutional rights would be justified in exercising the balancing act which must be performed where fundamental rights compete.

[54] No such case had however been made out in the applicants’ founding papers for any such limitation. What is clear from the founding papers, is that the respondents’ constitutional rights and the impact of the termination relief sought on those rights, were simply ignored and have not been addressed, despite the cautions expressed in *Lion Ridge*. The bald argument that the communal interests of the members must override the

²⁹ 1996

interests of recalcitrant members is an over simplification and does not address the true issues at play.

[55] The applicants have in my view not illustrated any cogent factual or legal basis for trustees of a body corporate to arrogate to themselves a power, which, but for the court sanction which the applicants seek, would amount to impermissible self-help and unlawful deprivation of important constitutional rights.

[56] The fact that leave was sought from the court to terminate the electricity supply³⁰, of itself implies that the applicants are aware that a disconnection of electricity and limitation of water supply, absent such leave, would amount to self-help.

[57] As held in *Queensgate*³¹ and *Niehaus*³², it is well established 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*.

[58] In *Queensgate*, by which I am bound, Blieden J and Serobe AJ further held that a clause in terms of house rules promulgated in terms of Act 95 of 1986 giving the body corporate the right to cut off the electricity of any owner unit who was in arrears with his or her levies, was clearly contrary to the common law.³³ Under our current Constitutional dispensation, this is even more so.

[59] I conclude that the applicants have not established the powers contended for. It follows that the resolutions authorising the institution of the applications are *ultra vires*.

[60] It is trite that a litigant must make out its case in its founding papers. The applicants must thus stand or fall by the case made out in their founding affidavit. Having regard to

³⁰ And the limitation of water in the case of the Balboa respondents

³¹ *Queensgate Body Corporate v Claesen* [1998] ZAGPHC 1 (26 November 1999)

³² *Niehaus v High Meadow Grove Body Corporate* 2020 (5) SA 197 (GJ)

³³ As quoted in para [10] and [11] of *Niehaus*

the paucity of the averments in the founding papers, it cannot be concluded that the applicants made out any proper case for relief. For the reasons already advanced, the applicant's arguments in any event do not pass muster.

[61] It follows that the applications must fail. As the applications were unopposed it is not appropriate to grant any costs orders.

[62] I grant the following orders:

CASE NO: 2023/061020

The application is dismissed.

CASE NO: 2023-061048

The application is dismissed.

CASE NO: 2023-070930

The application is dismissed.

CASE NO: 2023-124083

The application is dismissed.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 28 FEBRUARY 2024
DATE OF JUDGMENT	: 12 APRIL 2024
APPLICANTS' COUNSEL	: Adv. E. Venter
APPLICANTS' ATTORNEYS	: Kramer Attorneys