

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

CASE NO: AR255/2020

In the matter between:

MDUDUZI RICHARD ZIKALALA

APPELLANT

and

THE BODY CORPORATE OF SELMA COURT

FIRST RESPONDENT

MAGISTRATE GONASEELAN MUNIEN N.O.

SECOND RESPONDENT

ORDER

The appeal is dismissed with costs.

JUDGMENT

Chetty J (Olsen J concurring)

[1] This is an appeal against the dismissal of a counter-application by the appellant, the owner of sectional title unit No. [...], Selma Court, Berea Road, Durban. The appeal

arises from an application brought by the first respondent, being the body corporate of a sectional title development, which raised levies against the individual unit owned by the appellant in terms of section 3(1)(f) of the Sectional Titles Schemes Management Act 8 of 2011 (referred to as the 'STSMA'). The appellant failed to pay the levies and contributions raised, resulting in the first respondent instituting action and taking judgment by default in the amount of R24 099.09 as at 1 February 2018.

[2] In the course of 2018 the appellant wrote to the first respondent's attorneys acknowledging his indebtedness and his inability to pay the amount due. Instead, he offered to pay off the debt by way of instalments in the sum of R1 000 per month, which amount would be inclusive of the existing monthly levies. The offer was rejected by the first respondent's attorneys. In an attempt to satisfy this claim, the first respondent issued a warrant of execution which was unsuccessful, resulting in a *nulla bona* return by the Sheriff.

[3] In light of the first respondent not obtaining any redress in respect of payment towards its judgment debt, it proceeded against the appellant in terms of section 65 of the Magistrates' Court Act 32 of 1944, which proceedings were set down on 29 March 2019. On 26 March 2019 the appellant made a written offer of settlement to the first respondent's attorneys on the basis that he had managed to obtain a loan from his family to secure a 'full and final settlement' of the debt in the sum of R30 000.

[4] On 29 March 2019 the appellant appeared in person at the section 65 enquiry, where the first respondent was represented by its attorney. He repeated his offer in full and final settlement of the claim, including costs. The first respondent's attorney undertook to take instructions regarding the offer. The matter was adjourned to 5 April 2019 on which date the first respondent's attorney confirmed that the appellant's offer was acceptable to the trustees. Shortly thereafter on 9 April 2019 the attorneys wrote to the appellant advising that his offer of R30 000 in full and final settlement was being revoked as it was erroneously accepted. The letter further indicated that the first respondent was nonetheless prepared to accept R30 000 as a lump sum payment towards the arrears.

[5] Prior to the appellant's offer having been made, the first respondent had instituted two further actions against the appellant for levies for the periods March to August 2018 and September 2018 to February 2019. These claims were for the amounts of R4 027.73 and R4 162.12 respectively, excluding interest and costs. It is necessary to point out that section 10 of the STSMA provides that the affairs of a body corporate must be regulated and managed in accordance with what is commonly referred to as the prescribed management rules. These rules ('the Management Rules'), are contained in annexure 1 of the Sectional Titles Schemes Management Regulations, GN R1231, GG 40335, 7 October 2016 ('the Regulations').

[6] Management rule 25 provides that once a budget has been approved, it is required to give notice to each owner of the contributions that will become due and payable. Where such contributions or levies have not been paid, the body corporate in pursuing any claims is entitled to receive from such owner any charges and interest due on any overdue contributions. Provision for this is contained in Management rule 25(2) which reads:

'(2) If money owing is not paid on the dates specified in the notice referred to in sub-rule (1), the body corporate must send a final notice to the member, which notice must state—

- (a) that the member has an obligation to pay the overdue contributions and charges and any applicable interest immediately; and
- (b) if applicable—
 - (i) the interest that is payable in respect of the overdue contributions and charges at the date of the final notice; and
 - (ii) the amount of interest that will accrue daily until the payment of the overdue contributions and charges; and
- (c) that the body corporate intends to take action to recover the amount due if the overdue contributions and charges and interest owing are not paid within 14 days after the date the final notice is given.'

[7] To the extent that the first respondent also included as part of its claim the legal costs incurred in seeking to recover the outstanding contributions and levies from the appellant, Mr *Anderton*, who appeared on behalf of the first respondent, submitted that the recovery of costs is specifically catered for in Management rule 25(4) which provides that:

‘A member is liable for and must pay to the body corporate all reasonable legal costs and disbursements, as taxed or agreed by the member, incurred by the body corporate in the collection of arrear contributions or any other arrear amounts due and owing by such member to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.’

[8] Accordingly, the amount claimed from the appellant included compound interest prior to the institution of the litigation, the first respondent’s legal costs prior to judgment being granted, interest on the judgment debt after it had been secured as well as any costs associated with the recovery of the judgment debt. It is for this reason that the first respondent seeks costs on an attorney client scale in as much as the members of the body corporate should not have to share in the financial burden for the recovery of outstanding contributions and levies from an errant sectional title owner. It should be noted that the court a quo made the following concluding remarks in deciding to make no order of costs when dismissing the appellant’s counter-application:

‘Ordinarily costs are awarded in favour of the successful party, in this instance, the applicant. However, the court sees no basis to award the applicant costs as it has to a certain extent contributed to the problem caused by the trustees’ erroneous, ill-considered and hasty response to the offer. In addition, the applicant in opposing the matter did not go far enough to address the more pertinent and real legal issues of novation and unfulfilled suspensive conditions.’

[9] In response to the first respondent’s application, the appellant opposed the application to declare his property executable and filed a counter-application for an order declaring that the settlement agreement concluded on 4 April 2019 with the first respondent be held to be valid and enforceable. In support of his application the appellant contended that he had not breached the terms of the agreement and that the revocation by the first respondent was unilateral. He stated that he had communicated his offer of settlement not only to the first respondent’s attorney, but also emailed two of the trustees of the first respondent. Both trustees responded that the offer of settlement was acceptable.

[10] In explaining the context in which the offer was made and received, one of the two trustees who accepted the offer, Ms Ramsumer, confirmed that once the offer had been accepted, the first respondent’s attorneys realised that it had been done in error and immediately sought to revoke the acceptance. Ms Ramsumer states in her answering affidavit that as the appellant was significantly in arrears with his levies ‘it is

not fair to all the members of the [first respondent] to accept the appellant's "paltry amount to settle the arrear levies". While the appellant was liaising directly with the trustees, the first respondent's attorney conveyed to the managing agents the amount of the offer and the amount of the legal costs incurred in pursuing all three claims against the appellant. The total amount owing in respect of the arrear levies and the first respondent's legal costs as at 1 April 2019 far outstripped the amount tendered as a settlement of the first respondents claim. Unbeknown to the appellant (and it appears to the two trustees who accepted the offer) the managing agents informed the attorneys that while the trustees had accepted the appellant's offer, they 'had not looked at the bigger picture' in that the total owing to the first respondent including legal expenses was R58 619.85. Having regard to the offer made by the appellant, the first respondent would still have been left with a shortfall of R28 619.85,¹ which would take approximately five years to be paid off by the appellant based on his proposals. This eventually culminated in the first respondent's attorneys writing to the appellant informing him of the decision to revoke the offer of settlement on the basis that acceptance of the offer would prejudice the first respondent.

[11] When the matter came before the court a quo it considered the issue of the offer by the appellant in light of whether it was a conditional or an unequivocal offer, and whether there were any suspensive conditions attached thereto. It concluded that the appellant was 'testing the waters with an offer. . . subject to his own terms which are yet to be fulfilled'. As no payment had been made pursuant to the offer after almost a year, the court a quo concluded that he had not been *bona fide* in making the offer. It further accepted the contention on behalf of the first respondent that the offer had been erroneously accepted as no consideration had been given to the prejudice that would befall the remaining sectional title owners if the appellant were to have avoided paying the balance of almost R28 000 due in levies and charges. On those grounds the court

¹ The first respondent's closing written argument, paras 5-7, records that of the three actions instituted by the first respondent the total in respect of levies amounted to R20 240 for a period of 44 months. Over the same period the use by the appellant of a parking bay would have attracted an exclusive use levy totalling R8 580, resulting in a total amount due in respect of levies of R28 820. Management rule 25(1) and (2) (of the rules contained in annexure 1 of the Sectional Titles Schemes Management Regulations, GN R1231, GG 40335, 7 October 2016) permit the first respondent to charge interest, compounded monthly on overdue amounts together with all legal costs incurred in the recovery of arrears. None of the amounts claimed in the court a quo were disputed by the appellant. Accordingly, the total sum claimed as at 1 April 2019 in respect of all three actions was R68 932.14 in respect of which the appellant offered an amount of R30 000 in full and final settlement.

a quo dismissed the counter-application and found that the appellant had failed to prove the existence of a valid and binding settlement with the first respondent.

[12] For the reasons set out below, little purpose is served by analysing whether the court *a quo* was correct in its approach to the issues before it. When the matter came before us, it was argued on a fundamentally different premise to that in the court *a quo*, at least from the perspective of the first respondent. Before us, counsel for the first respondent raised the issue as to whether it was competent in law for the first respondent to have accepted an offer less than what had been claimed against the appellant; put differently, whether it was competent for the first respondent's trustees to compromise its claim for levies, costs and interest due and payable by the appellant in as much as the actions of the trustees were *ultra vires* their powers in terms of the STSMA and the Regulations.

[13] Ms Gwele, on behalf of the appellant, submitted that having regard to the circumstances in which the offer was made by the appellant, in full and final settlement of the first respondent's claim, there was no uncertainty as to what the offer entailed and the compromise which it was intended to achieve. The attorney on behalf of the first respondent adjourned the section 65 proceedings to consider the offer. As such, there is no suggestion that it was accepted without proper reflection.

[14] At the same time, reliance was placed on Management rule 10 pertaining to the validity of acts performed by trustees. In this case, two trustees of the first respondent confirmed in writing that the offer was acceptable. As I understood the reliance on Management rule 10 for this argument, as two trustees had consented to the offer by the appellant, their acceptance was binding on the first respondent. On those grounds it was submitted that the appellant was reasonably entitled to assume that a valid and binding agreement had been concluded between the parties.

[15] I am not persuaded by this argument in as much as Management rule 10(1) refers to a 'document' signed on behalf of the body corporate being valid and binding where it is signed on '*the authority of a trustee resolution*' by two trustees, or one trustee and the managing agent. It is common cause that both trustees agreed to accept the offer of the appellant. However, there is nothing in the record to point to the trustees

acting pursuant to a resolution authorising them to accept such offer, assuming in law they were permitted to do so. The requirement for a resolution of owners was considered in *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and Another* 2020 (2) SA 61 (SCA) where the court was called upon to interpret the provisions of section 32(4) of the Sectional Titles Act 95 of 1986 ('the STA') which provided that the basis for the liability of owners for levy contributions cannot be modified without the written consent of any owner who is adversely affected by such modification. Mr *Anderton* for the first respondent submitted that acceptance of the appellant's offer would necessarily have entailed the remaining portion of the unpaid levies being paid by the remaining members of the body corporate, as a result of the compromise. To that extent, those members would be 'adversely affected' by a decision taken by two trustees to the exclusion of the managing agents and all of the remaining owners. There is no record of such written consent or resolution by the owners permitting the two trustees to encumber the body corporate with the unpaid portion of levies and contributions, amounting to R28 619.85. I am in agreement with Mr *Anderton* that even if the two trustees did give their consent and accepted the appellant's offer, such acceptance was invalid for want of compliance with their statutory duty under the STSMA. It appears to me however that the only manner in which the trustees could have been so authorised was by way of a unanimous resolution of all the members of the body corporate, giving their consent to compromise the claim.

[16] In dealing with the erroneous acceptance of the offer by the two trustees, the court *a quo* said the following in relation to contention that the two trustees may not have been aware of the 'bigger picture':

'4. It is equally probable that whilst the attorneys, Lomas and Walker and the agents, Acutts, were aware of the factual situation regarding the full extent of the Respondent's indebtedness, the trustees, A Ramsumar and K Naicker were unaware of the true situation and acted in haste believing the offer to be linked with the present judgment debt of R24 000.00 plus interest and costs. The Respondent is not in a position to dispute the situation described by the trustees but seeks to score a technical victory not supported by the law and the facts.'

[17] The conclusion by the court *a quo* appears to be entirely consistent with the contents of an email addressed by the managing agents to the first respondent's attorneys, who drew to the latter's attention that while the trustees may have accepted

the offer of the appellant, they appeared to be oblivious of the overall level of indebtedness of the appellant and the potential prejudice for the remaining members of the body corporate if the acceptance of the appellant's offer was allowed to stand. On this basis the first respondent submits that the court *a quo* correctly found that the offer from the appellant was erroneously accepted due to a reasonable error on the part of the two trustees. Allowing the acceptance of the offer to stand would entail burdening the remaining sectional title owners with a liability for levies and contributions which is exclusively that of the appellant.

[18] Even if the court *a quo* was wrong in concluding that the acceptance of the appellant's offer could be set aside on the grounds of *justus error*, a further issue arises whether the conduct of the two trustees was consistent with the ambit of their powers in terms of the STSMA. Management rule 9(b) provides that the trustees must 'exercise the body corporate's powers and functions assigned and delegated to them in terms of section 7 (1) of the Act in accordance with resolutions taken at general meetings and at meetings of trustees'.

[19] Section 7(1) of the STSMA likewise provides that:

'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'. (emphasis added.)

It follows therefore 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 act 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.

[20] Management rule 25 expressly grants to the body corporate the power to impose levies and contributions from owners. Where an owner fails in the obligation to pay such amounts, the body corporate is empowered to take action to recover such amounts, including interest and costs. I am unable to find any power in the Management rules or the STSMA that permits the body corporate to compromise on its obligation to

collect levies or contributions. To the extent that such amounts are owing, it is worth noting that the language employed in Management rule 21(2)(b) precludes a body corporate from 'refund[ing] to any member a contribution lawfully levied and paid'. Although the rule speaks to the prohibition against excusing any owner from the obligation to pay levies, it may by implication be interpreted to prohibit a compromise on any sum lawfully due to the body corporate in terms of levies and contributions.

[21] Malan J in *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) ('*Fish Eagle*') was seized with an application for the winding up of a respondent who was sued by the body corporate for various amounts stemming from levies and electricity charges. The respondent disputed liability for payment of the amount claimed, tendering in settlement only what it considered it was liable for. Pertinent to the present matter is that the body corporate in *Fish Eagle* held a special general meeting at which a resolution was passed to the effect that 'the body corporate will not continue with any litigation and previous litigation will now be cancelled. The matter will be settled by way of a discussion, at a meeting, on an amicable basis' (*Fish Eagle*, para 6).

[22] In considering the resolution not to proceed with litigation, Malan J said the following in paragraph 9 as to the power (or rather the absence thereof) of a body corporate to compromise on an amount due in respect of levies:

'The resolution allegedly passed at the special general meeting of the applicant held on 26 January 2002: The respondent alleges that a resolution was passed at the special general meeting of the applicant held on 26 January 2002, *to the effect that the applicant would not continue with any litigation against the respondent, and that "previous litigation" would be cancelled. The resolution was that the dispute between the parties would be settled by way of discussion, at a meeting, on an amicable basis.*

Any such resolution is ultra vires the applicant. In terms of s 37(1)(d), one of the functions of the applicant body corporate is to raise amounts by the levying of contributions on the owners in proportion to the quotas of their respective sections. In terms of s 39(1) of the Sectional Titles Act, the trustees of the applicant were obliged to perform this function. *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 Sectional Titles Act.*

Moreover, any such resolution is invalid because it is said to have embodied an agreement between the parties that a resolution of the dispute between them would be agreed upon at a later meeting.’ (emphasis added.)

[23] It must therefore follow that whatever the motive of the two trustees in accepting the offer of the appellant, whether rooted in sympathy for his plight due to him being unemployed and the sole breadwinner in his family, absent any express or implied provision in the STSMA, they were not empowered to accept a settlement offer of a lesser amount than what was owing to the first respondent. At a practical level, one could understand why the trustees accepted the offer as the alternative would be to wait for several years before the debt of the appellant would have been liquidated in terms of the offer made at the section 65 enquiry.

[24] In *Fish Eagle* the court took into account the duty to collect levies as contained in sections 37(2) and 39(1) of the STA read together with management rule 31(4) of Annexure 8 to the Sectional Titles Regulations, GN R664, GG 11245, 8 April 1988,² as constituting the legislative framework against which the powers and functions of the body corporate must be measured.³ As noted in Van der Merwe *Sectional Titles, Shareblock and Timesharing*, section 37(1)(d) of the STA (re-enacted under section 3(1)(f) of the STSMA) requires as one of the functions of the body corporate to raise money by levying owners, in proportion to their respective participation quotas.⁴ Section 39 of the STA (re-enacted in s 7(1) of the STSMA) requires this function to be performed by the trustees. The following is stated in Van der Merwe *Sectional Titles, Shareblock and Timesharing*:⁵

‘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 on it by section 37 of the Sectional Titles Act (STSMA s 3) read with section 39. In short, collection of levies is a statutory duty, which cannot be circumvented by the making of a resolution.’

² *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) para 7.

³ Section 37 and 38 of the Sectional Titles Act have been repealed. The powers and functions of the body corporate referred to in those sections are now largely encompassed in sections 2 to 5 of the STSMA. It is worth noting that the functions of the body corporate under s 3 contains the word ‘must’ suggesting that they are mandatory whereas s 4 contains the word ‘may’ suggesting that they are discretionary. See Van der Merwe *Sectional Titles, Share Blocks and Timesharing* Vol 1 at 14-38, and 14-53.

⁴ *Ibid* at 14-65.

⁵ *Ibid*.

[25] It was submitted by Mr *Anderton* that similarly to the trustees having no discretion to compromise on the collection of levies and contributions, there is no provision in the STA (or the re-acted provisions of the STSMA) which permits a body corporate not to collect interest and legal costs incurred on outstanding amounts due. As set out earlier, Management rule 25(2)(c) provides for the body corporate to take action to recover the amount due if the overdue contributions and charges and interest owing are not paid after notice has been given. The sub-section again employs use of the word ‘*must*’, suggesting that the obligation imposed on the body corporate cannot be compromised. In Van der Merwe *Sectional Titles, Share Blocks And Time-sharing* it is pointed out that:⁶

‘The body corporate is a juristic person created by statute. . . . being an artificially created legal entity, it can only have the legal status and powers conferred by it by the Sectional Titles Act and the Sectional Titles Schemes Management Act and nothing more. It can only operate within the legal framework of the legislation in question. If the legislation clearly and exhaustively deals with the matter concerned, anything done outside the framework of the statute is void *ab initio* and is likened to driving a coach and horses through the statute.’

The author further states the following regarding the power of trustees:⁷

‘A person seeking to enforce a contract against the body corporate which he contends was entered into by the trustees on its behalf, must first establish that the contract was within the capacity of the body corporate itself, because an act performed by the trustees in excess of the capacity of the body corporate is *ultra vires* and void. Secondly, he or she will have to establish that the act was not one reserved by the Act or the rules for the owners in general meeting.’

[26] As held in *Fish Eagle*, a resolution that a dispute about levies would be settled is *ultra vires* the powers of the body corporate, whose obligation is to raise amounts by levying contributions on owners. While the appellant may be feel aggrieved that his offer of a settlement was unilaterally revoked by the first respondent as a result of an error on the part of its attorney and two trustees who accepted his offer (before the opinion of the managing agents was obtained), the fact of the matter is that neither the attorney nor the trustees had authority in law to compromise the amount due. The statutory obligation imposed on the body corporate is to collect the full amount of levies

⁶ Ibid at 14-17 –14-18

⁷ Ibid at 14-202(1) – 14-203.

and contributions due, together with interest and legal costs. No latitude is afforded to trustees to deviate from this obligation. The fact that the trustees or their attorney may have ‘failed to do their homework’ before accepting the offer does not come to the assistance of the appellant in having his offer declared valid and enforceable. To do otherwise would be to foist an agreement on the body corporate in circumstances where an errant or non-compliant owner is allowed a reduction or compromise on the amount of his levies in circumstances where this is plainly not permitted or contemplated by the legislative framework governing the affairs of sectional title developments. It would undermine the uniformity for the common burden that must be shared by all sectional owners to pay their levies, based on their participation quota. This is an intrinsic component of communal living envisaged in the STA and the STSMA.

[27] The restriction against a statutory body compromising claims to it is not unique to the STA or the STSMA. The limited powers of the South African Revenue Service (‘SARS’) to agree to waive or compromise tax claims⁸ is arguably analogous to the limited powers of bodies corporate. In this regard, it is a principle of taxation that it is impermissible for SARS to waive any payment of tax, unless it is authorised to do so. The rationale appears to be the protection of the *fiscus*. There is an exception, however which is where SARS would not stand to harm the *fiscus*, a claim for taxes may be waived. This would apply where it was apparent that the debt was otherwise not recoverable.

[28] In *Namex (Edms) Bpk v Kommissaris Van Binnelandse Inkomste* 1994 (2) SA 265 (A), the following summary of the court’s findings in the headnote are noteworthy: ‘The Court conceded that it was not as a rule competent for a tax collector to waive, settle or cede a claim for taxes, but referred to the decision in *City of Cape Town v Claremont Union College* 1934 AD 414 at 452 where it was held that in the event of a thorny dispute a receiver of revenue was entitled to conclude a binding settlement for an amount less than that of his claim. The logical basis for this exception was the rule that the State should not be prejudiced by a renunciation of its claims. There was accordingly no reason why a tax collector such as the respondent could not, in order to prevent harm to the *fiscus*, waive part of his claim where

⁸ See section 4(1) of the South African Revenue Service Act 34 of 1997 and sections 143(1) and 193(1) and 193(2) of the Tax Administration Act 28 of 2011. See also F Moosa ‘Tax Administration Act: Fulfilling human rights through efficient and effective tax administration (2018) *De Jure* 1-16 at 14-15.

it was certain that he would not otherwise be able to recover the remaining portion thereof. The respondent was accordingly entitled at common law to agree to a s 311 arrangement provided that he did not stand to receive less in terms thereof than he would have received in the event of a final liquidation.'

[29] Referring to the above decision, the court in *Commissioner for the South African Revenue Service v Logikal Consulting (Pty) Ltd and others* [2019] JOL 42736 (GP), ('*Logikal Consulting*') stated the following in para 16:

'The court [in *Namex*] held that, provided it was clear that the CIR would in any event not receive a greater dividend in liquidation of the tax payer, nothing prevented a such claim being compromised to the recoverable extent, whether by the creditor's actual consent or by sanction of the scheme by the court.'

[30] The Supreme Court of Appeal in *A M Moola Group Ltd and Others v Commissioner, South African Revenue Service, and Others* 2003 (6) SA 244 (SCA), para 18-19, considered the principle that a tax claim may not be waived, and stated the following:

'[18] In *Collector of Customs v Cape Central Railways* (1888-89) 6 SC 402 it was argued for the respondent that when a senior government official had allowed the importation of cement free of duty, the appellant was precluded from claiming the duty that should have been levied. That proposition was termed "untenable" by De Villiers CJ (at 404). Declining to apply any doctrine of estoppel (a term "used in a very vague sense in the English law", said the court, at 405), the court characterized the issue as follows at 405:

"The question to be determined, therefore, is not the limited one of estoppel, but the far wider one whether the Government can legally abandon its right to any particular source of revenue provided by Parliament, and having abandoned it, in any particular instance, it is debarred from recovering it from the person in whose favour it has been abandoned."

[19] The court, after an examination of both English and Roman-Dutch authorities, held that the Government was not precluded from claiming the duty. De Villiers CJ was of the view that while it might be considered an injustice that government should be permitted to enforce a right it had purported to abandon, "the rights of Government exist for the public good and not for the personal advantage or convenience of members of the Government". . . '

[31] A point of similarity between the collection of revenue by SARS and the function of a body corporate to collect levies is that neither entity is permitted to deviate from this duty, except in the case of a 'thorny dispute' where SARS believes that it would

be better off entering into a settlement for a lesser amount, particularly where there is no prospect of it receiving the full amount it claims. See *Logikal Consulting* above. To that end, an exception is expressly catered for in the case of SARS.⁹ However, in the case of a body corporate, no such latitude exists in the STA and the STSMA or the Regulations. The fact that a body corporate is a private body and SARS is a public body is immaterial. The underlining rational is that neither the *fiscus* in the context of SARS, nor the members of the body corporate, should be prejudiced by the acceptance of a settlement. Moreover, it would lie in the powers of the revenue collector to raise taxes to make good a shortfall in collection, whereas that power is not available to the body corporate as a result of non-collection. As an aside, there is a further reason why the “thorny dispute” does not arise in relation to sectional title properties where an owner is in arrears with the payment of levies. Bearing in mind that sectional title ownership is premised on the notion of a collective or community ownership, the ultimate sanction that the 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.

[32] A further comparison can be found in the obligation of a municipality to collect rates on property within its area.¹⁰ In *City of Cape Town v Claremont Union College* 1934 AD 414 the court considered whether the Council could exempt certain properties from assessment and levying of rates. The Council argued that it was *ultra vires* to exempt the properties, and thus the exemption was a nullity and it could accordingly claim the rates. The court disagreed and found that it was *intra vires* to exempt the properties, and the rates could not be claimed. Wessels CJ reasoned as follows at 421:

‘We must therefore consider the scope of the Cape Municipal Ordinance and of the Valuation Ordinance and see whether these Ordinances necessarily imply a power in the Council to determine each year what properties are to be exempted from paying the rate fixed for the year.’

⁹ Section 193(2) of the Tax Administration Act 28 of 2011.

¹⁰ In terms of the Local Government: Municipal Property Rates Act, No. 6 of 2004.

And at 426-427:

'In determining whether the Council has an implied power to exempt a property for each financial year, the *consequences which follow from not holding that the Council has such power* have always been considered by the Courts as an important factor. The only argument advanced by Mr. Davis against this view is that the municipality is a creature of statute and is bound by the terms of the statute. . . . The municipality cannot forego its statutory claim to the revenue which the statute provides for it. In general terms this proposition may be true, but when we take the whole statute into consideration and we find how difficult it is to carry on the work of the municipality unless the Council is given the power to determine, for the purpose of raising its revenue for the year, into what category a particular property is to be placed; and if we find how far-reaching the consequences are of not giving to the Council that power, then the Court is justified in coming to the conclusion that although the power to separate property each year for revenue purposes is not specially given, the Legislature intended the Council to have such a power and to exercise it.' (emphasis added)

[33] Wessels CJ reasoned further by distinguishing the matter before the court from that in *Collector of Customs v Cape Central Railway* (1888-89) 6 SC 402, on the basis that in the latter decision there was no implied power:

'Decisions like that of the *Collector of Customs v Cape Central Railway* (6 SC 402) do not apply to a case like the present. In that case the Government of the day agreed with the Cape Central Railway not to exact customs duty on certain articles which the Legislature had declared to be liable to duty. This, the Court declared, the Government had no right or power to do. There was no question there of a necessary discrimination and no room for any implied power. Here *of necessity* there must be someone who has the power to divide the immovable property into rateable and non-rateable, for unless this is done a proper voters' roll which conforms with the law cannot be framed and municipal revenue cannot be effectively raised for the year, even though by the erroneous exercise of that power some rates for that year may be forfeited.' (emphasis added)

[34] What is of particular interest are the further comments by De Villiers JA in the above matter (the learned judge agreed with the judgment by Wessels CJ) at 452-453: 'I take it to be an elementary general proposition of law that when any dispute or question of liability arises between two persons, they are competent to settle the matter between themselves by agreement, without being compelled to have recourse to a court of law, and I see no cogent reason why a legal *persona* in the position of a municipality should not have the power, for the purpose of carrying out its statutory functions, of settling disputes and

questions of liability without being compelled to have recourse to a court of law. On the contrary, as is pointed out by the Chief Justice in his judgment, such a power may fairly be held to be incidental to, or consequential upon, its statutory power of levying municipal rates. It is interesting to find that Voet lays down (Comm. 2.15.2), that "agreements concerning doubtful things (i.e. compromises) may be entered into by all persons who are not prohibited. Therefore tutors, syndics, administrators of communities (*administratores civitatum*) and other similar persons, may enter into compromises on behalf of their wards or on behalf of such communities, provided that they do not extravagantly (*ambitiose*) remit a clear right. . . For although a *defensor* of a municipality, or of any corporate body, is not allowed to refer a matter to the oath of the opposing party, yet he does not seem to be thereby impeded in his liberty of compromising in a doubtful matter." The quotation may not be strictly in point, for the municipalities spoken of may have possessed powers at common law, and may not have been mere "creatures of statute," but it illustrates the general proposition of law which I have stated. The only argument to the contrary, of any substance, seems to me to be the argument that a municipal council being under our law a creature of statute, cannot possess any such power of deciding questions of rateability even with the consent of the owner, in the absence of any express statutory provision conferring such power. Now the answer to that argument seems to me to be (as is pointed out by the Chief Justice) that such a power may be, and is in the present instance, implied. *The mere fact that a body is a creature of statute does not restrict it, in all the minutiae of its daily functions, to the express powers expressly conferred by the Statute.* Something must sometimes be left to implication as appears from the English decisions quoted in the judgment of the Chief Justice herein.' (emphasis added).

[35] On the issue of implied powers, the court in *Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A) at 567A-C ('*Lekhari*') commented as follows:

'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.' (emphasis)

[36] It was not argued by either of the counsel before us that the body corporate or the trustees had the implied power to compromise a claim for levies and contributions which were outstanding. Applying the test in *Lekhari*, I am unable to find any basis to infer the existence of an implied power given to the body corporate to compromise a claim for levies due, or that such power to compromise could be construed as ancillary to the express powers to collect levies and contributions, or that this exists as a reasonable consequence of the express powers (see *Road Accident Appeal Tribunal and Others v Gouws and Another* 2018 (3) SA 413 (SCA), para 27). On the contrary, the language used in section 3(1)(c) of the STSMA imposes a positive obligation on the body corporate to collect levies and contributions – the legislature sought through the use of the word ‘*must*’ in the section, to couch these functions in mandatory terms. Admittedly section (4)(i) appears to be couched in permissive language through the use of the word ‘*may*’, but a distinction between the two sections is that the obligation for collection of levies as a function and not a power, only appears in section 3.

[37] In the result, the contention of the appellant that a valid and binding compromise was reached in respect of the first respondent’s claims cannot be sustained. Whatever the conduct of the attorney and the two trustees in conveying the impression that an agreement had been reached, in law neither had the authority to compromise the claim, as to do so would be *ultra vires* the provisions of the STSMA and the Regulations. While we reach the same conclusion as the court a quo, we do so for reasons entirely different. In the result, the appeal must fail.

[38] In so far as costs are concerned, the court a quo dismissed the appellant’s application but made no order as to costs. As set out earlier, the court took into account that the first respondent’s trustees and attorney were partly responsible in bringing the appellant under the impression that a valid and enforceable settlement had been reached. The appellant persisted in the appeal despite the authority of *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) relied on by the first respondent that any such settlement was *ultra vires* the STSMA. The members of the body corporate were suitably admonished by the court a quo not making any order of costs against the appellant. As a result, the costs of their litigation in the court a quo would have to be borne by the members of the first respondent, despite the litigation having as its genesis in the failure of the appellant to pay what is

lawfully due to the first respondent. While I see no reason to interfere with the court a *quo's* determination as to costs, I see no reason why the appellant should not be liable for the costs of the appeal. The first respondent has been successful on a point of law. To do otherwise would be to unduly prejudice the first respondent with legal costs for no reason justifiable in law. Accordingly, the general rule that costs must follow the result should apply.

[39] In the result, the appeal is dismissed with costs.



M R Chetty

Appearances

For the appellant:	B.G Gwele
Instructed by:	Garlicke & Bousfield Inc 7 Torsvale Crescent La Lucia Ridge
Tel:	031 570 5415
Ref:	S Khanyile
Email:	advgwelwbg@gmail.com
Tel:	031 109 2460
For the respondent:	SP Anderton
Instructed by:	Lomas-Walker Attorneys 2 Derby Place Westville
Email:	simonanderton@yahoo.com
Cell:	072 384 0961
Date of hearing:	7 th May 2021
Date of submissions:	5 th July 2021
Date of reserved:	5 th July 2021
Date of delivery:	23th September 2021

