Levy collection, and the steps involved in the process.
(Estimated time-lines in which the various stages can be achieved, past case law and issues which trustees should look out for)

1. SO WHAT IS THE LEVY?

It is the amount that the Trustees determine to be necessary to cover the general costs of running the body corporate for the year that lies ahead. These costs include, to mention a few, rates, taxes, repairs, maintenance, insurance and admin costs. The Trustees are, in terms of recent amendments to the STA, to set the levy before the end of the financial year and implement it from the first month of the new financial year.

Collecting levies is a therefore imperative for the survival of the Complex and this responsibility cannot be underestimated.

2. NON LEVY VS NON RENTAL PAYMENT

It’s an interesting concept that attorneys such as myself are employed to collect levy contributions when these levies should, in truth, never have to come as far as being handed over to me.

A non-levy payment as opposed to a non-rental payment are worlds apart as a non-rental payment will potentially impact only the property owner and cause the foreclosing attorney to salivate, but a non-levy payment not only compromises each unit owner but the actual substratum of the Body Corporate complex, its liquidity, the capital appreciation of the units, the possibility of other owners wanting to buy in and heaven forbid the inability to pay the complex’s insurance premium.

It is simply unforgivable and this is why our courts are intolerant of non-levy payers unlike non rental payers who are treated like the victims they purport to be. (I will deal with the court’s indignation of non-levy payers later herein)

So, the debt has to be handed over because you just have been unable to collect that levy. What now?

3. THE COLLECTION ATTORNEY

This is the person that uses legal means based on the Sectional Title Act and the Magistrate or Supreme Court Act to nail non levy payers. What he or she does is use the below mentioned means of collecting the debt.
a) THE PHONE CALL/S

- Don't underestimate the power of an attorney phoning the owner.
- Constant communication is key
- Know your owner, their personality
- Owner occupied, tenanted
- Their job, work hours
- Soft or hard approach

b) THE LETTER OF DEMAND

- Letter of demand allows the debtor 7 days to pay settle the arrears.
- We always send such letters by both registered as well as normal post (fax and email).
- Although normal post is usually received within a day or two of postage, it is best to count at least 3 days registered postage before counting the 7 days demand period. This is due to certain courts (Kuilsriver, Simonstown, Goodwood) always taking such days into account if further legal action has been taken.

c) THE SUMMONS

- This is actually the commencement of the legal process
- The summons can be issued out of the jurisdiction where the debtor resides, is employed or carries on business.
- The summons can further be issued out of the jurisdiction where the unit is situate in terms of the Magistrate’s Court Act.
- It is always best to issue out of the court which has geographical jurisdiction over the unit as it prevents us from having to do a CCJ to attach the unit itself. The CCJ is a certified copy of a judgment from another jurisdiction which takes a little time to acquire

The summons briefly sets out:

- the details of the Body Corporate,
- the details of the defendant,
- the details of the unit,
- the different provisions of the Sectional Titles Act laying out the basis for the owner’s obligation to pay levies, utility charges, administration costs, interest and legal costs,
- Management Rule 31 (5) deals with the owners’ obligation to pay attorney and client costs and provides as follows:
“An owner shall be liable for and pay all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies, or any other arrear amounts due and owing by such owner to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.”

- This is particularly interesting as attorney client costs awarded in any court proceedings is usually a sign of the judicial officer's displeasure as a normal cost awards are on a party-party scale;

- the outstanding amount owing;

- details pertaining to the National Credit Act (if you believe it is applicable):

(see the Dlamini vs Frenoleen decision of the Supreme Court of Appeal – March 2010) where the court stated that levies do not constitute an account tendered for goods or services provided by the Body Corporate to the consumer and are therefore do not constitute an incidental credit agreement.

Furthermore that levies are not payable by members of a Body Corporate in terms of an agreement but rather in terms of the Sectional Titles Act and further the Mitchell vs Mansions decision of the North Gauteng High Court – June 2010 where the court ruled that levies are not payable in terms of an agreement and that the National Credit Act seemingly does not apply to the imposition of levies.

- As a levy summons is considered a combined summons and not a rent interdict summons, the courts do not issue them over the counter. This means at least a day is required between the time the summons is delivered to court and the time it is issued. It is subsequently delivered to the sheriff for service.

- The sheriff should be allowed at least 10 days to serve the summons.

- Once served the debtor is allowed 10 court days to defend the summons. This is a statutory time limit that we are bound to follow

- Should it not be defended we may apply for the default judgment as of the 11th day.

- The time required for the judgment to be granted can range between 1 & 8 weeks.

d) JUDGEMENT

- Judgment is what we need to truly put the pressure on the owner as once granted allows us to have the owner blacklisted and more importantly, it allows us to execute against his assets

- The judgment can only be rescinded upon payment of the entire amount owing or an agreed amount.

- Besides execution, creditworthiness is vulnerable.
e) EXECUTION

- The first step is to execute against moveable property of the owner.
- Depending upon which court the matter has been launched in; one must first take between one and several steps in regards to the execution against moveable property and Section 65 proceedings, whereafter immovable property can be executed against.
- Cape Town court for example is reluctant to grant an attachment of immovable property unless there is a substantial amount in arrears.
- Goodwood court however will grant such orders provided all other means to recover the amount have been exhausted.
- This disparity is a cause for concern but is being experienced more and more in the magisterial courts for property related matters, evictions, the Consumer Protection Act etc.
- The process for executing against immovable property is to launch a Section 66 application, have the application granted, issue the warrant against immovable property, have the sheriff of the court attach the immovable property and thereafter obtain a date from the sheriff to sell the immovable property by way of a sheriff’s auction and to attend at the auction and supervise the sale of the property.
- It must be ensured that when one attaches the immovable property that one also attaches any applicable Exclusive Use Areas. These Exclusive Use Areas must be mentioned in the Section 66 application and it is recommendable to mention same also in the summons commencing action.

From a time line perspective:

1. The s 66 application is set down between 4 to 6 weeks ahead
2. The application must be served on the Owner’s domicile or traced address. Cape Town Court requires personal service or an affidavit stating attempts made to serve
3. Proof of service to be provided 10 days before date of hearing
4. If in order, application granted and property declared executable
5. Warrant of attachment of immovable property needs to be drafted issued and served on
6. BC /Municip/ Owner/ tenant/ mortgagee / Registrar of Deeds – approx 8 weeks
7. Once done, sale date to be organised and advertising as well as conditions of sale to be prepared 20 days before agreed sale date
8. Sale
f) AUCTION

Scenarios

- Property sells and BC paid
- Does not sell because bank declines as Bond exceeds value of property
- If Bank is not at Auction still can object on presentation of offer
- We attend sale on behalf of Body Corporate
- If sale falls through – sequestration or liquidation of person or commercial entity
- Sale through this process by private auction or negotiations between all parties involved

g) GARNISHEE

- A Garnishee order against the owner’s salary or an application to attach rental that the owner may be receiving from a tenant are also possibilities to recover the outstanding judgment debt from the owner.

- Once the judgment granted we are in a position to apply for a garnishee order.

- Courts are reluctant to grant same unless we have already attempted to attach movable property.

- This application also has to be brought in terms of R55 (amended).

- As such the parties served (respondent or garnishee) is allowed 5 days after service to enter a notice of intention to oppose

- Should no opposition be entered applicant can set the matter down at least 10 days from the date of service.

- What we do is ensure the time between the sheriff being handed the application and the first appearance was 1 month. As such our time limits are always correct.

- At the first appearance the court would grant a provisional order which would have to be served on all parties.

- This would usually be a two week postponement.

- On the return day the court would grant the final order and payment should begin the beginning of the following month

- As such all in all the time period is about 6 weeks
h) ARBITRATION

The relevant clause in the Management Rules is Clause 71.

- It is important to note that way of Government Gazette No. 34639 dated 28 September 2011, which comes into effect on 28 October 2011. The Management Rules have been amended and more specifically Management Rule 71 (4) has been substituted.

- Management Rule 71 (1) provides that when there is a dispute between the Body Corporate and an owner in regards to the Act or the Rules that this must be determined in terms of Rule 71 being by way of arbitration.

- The amended Rule 71 (4) now provides that the chief registrar of deeds will appoint an arbitrator, in the event of the parties not being able to agree to one and that he shall appoint same in writing within 7 days of being required to.

- In regards to the Greenacres case 2008 Supreme Court of Appeal held that there was no reason why dispute as to the liability of an owner to pay levies should be excluded from the operation of Rule 71.

PSYCHOLOGY

Garnishee orders have limited psychological effect as the owner does not personally feel it until payments are being made which is weeks from the date of judgment.

S66 also has a limited effect as owners often know they have too little equity in the property (they have a “get in line” attitude towards their creditors)

But the sheriff physically removing their necessary items (fridge) and their luxury items (dstv) often causes that money appears from out of nowhere.

CASES

BODY CORPORATE OF GREENACRES v GREENACRES UNIT 17 CC

The Supreme Court of Appeal decided that all disputes between a body corporate of a sectional title scheme and an owner, and between owners amongst themselves, which arise out of the Sectional Titles Act, the management rules and the conduct rules, must be submitted to arbitration — unless the arbitrator is not competent to grant the relief sought (such as an interdict).

The body corporate brought arbitration proceedings against an owner for payment of arrear levies. The owner’s defence was that he had paid for the completion of certain parts of the common property at request of the body corporate and that the amount owing to him in consequence exceeded the amount due to the body corporate.
The owner argued that the Act permitted the body corporate to recover unpaid levies in a court and that this is the procedure it should have followed. The SCA held that court procedure was apposite only where there was no dispute to be arbitrated upon, but where there was a dispute, an arbitrator had to be appointed to resolve it unless the relief sought could not be granted in arbitration proceedings.

**BODY CORPORATE OF FISH EAGLE v GROUP TWELVE INVESTMENTS**

The High Court of the Witwatersrand had the opportunity to adjudicate upon the withholding of contributions by aggrieved owners.

In this case the body corporate applied for the final liquidation of a company, the registered owner of 22 units in the scheme, which owed the body corporate more than R400 000 in arrear levies and other charges.

The company opposed the application on several grounds.

The chief grounds were, firstly, that the respondent company had had to carry out certain maintenance work, which the trustees had omitted to do, and, secondly, that the increased and special levies were due to the trustees’ mismanagement and were anyway superfluous because the body corporate had sufficient funds.

The court decided that a member of the body corporate is not entitled to withhold payment of levies (including special levies and increased levies) on the ground that he or she disputes the necessity or financial wisdom of the decision to impose such levies.

In terms of section 39(1) of the Act, read with management rule 30 of Annexure 8, it is the function of the trustees to determine and collect such levies.

The trustees and not the individual owners have the power to decide whether it is necessary (as contemplated by section 37(1) (b) and (c) of the Act and management rule 31(4)) to impose the special or increased levy.

Ample authority supports the proposition that no member of the body corporate is entitled to dispute liability for the payment of levies on the ground that those levies are considered excessive.

The court further dealt with a resolution allegedly passed at the meeting of the body corporate. This resolution was to the effect that the body corporate would not continue litigation against a member regarding arrear levies and electricity charges and that the dispute would be settled by way of discussion at the general meeting on an amicable basis.

The court held that such resolution was *ultra vires* the body corporate.

In terms of section 37(1) (d) of the Sectional Titles Act, one of the functions of the body corporate is to raise money by the levying of contributions on the owners in proportion to their respective participation quotas. Section 39(1) of the Act obliges trustees 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 its duties imposed on it by section 37 read with section 39.
In short, collection of levies is a statutory duty, which cannot be circumvented by the making of a resolution.

Another reason why such a resolution is invalid is because it purports to embody an agreement between the parties that a resolution of the dispute between them would be agreed upon at a later meeting.

Such a so-called agreement does not create an enforceable contract and is void for vagueness and unenforceable, even where the parties have bound themselves to further negotiations in respect of “gaps” in their agreement.

**INTERESTING INFORMATION**

Section 15B(3)(a) of the Sectional Titles Act 95 of 1986 provides that the registrar of deeds shall not register the transfer of a unit unless a conveyancer has certified that specified moneys have been paid, provision has been made for payment thereof, or no moneys are payable.

The effect of this provision is that upon insolvency a preference is enjoyed by the body corporate of the sectional title scheme in respect of pre-liquidation levies. (*Nel v Body Corporate of the Seaways Building 1995 (1) SA 130 (C) and 1996 (1) SA 131 (A).*

If the owner of a unit in a sectional title development is sequestrated or liquidated the statute in effect creates as against the insolvent estate a preference in favour of a body corporate and the payment of outstanding levies is treated as being part of the ‘cost of realisation’ envisaged by s 89(1) of the Insolvency Act 24 of 1936. The fact that the debt to the body corporate is satisfied as part of the process of realisation produces the same result as if the rights conferred by an embargo provision were preferential in the strict sense. See CG van der Merwe *supra* at 385.

Owners aggrieved by the body corporate’s failure to take action against levy defaulters may invoke the provisions of section 41(1) which empowers an owner to apply to court for an order appointing a curator for the body corporate to institute and conduct proceedings on the body corporate’s behalf. In extreme cases application may also be made to the court for the appointment of an administrator (s 46(1); Bouraimis v Body Corporate of the Towers 1995 4 SA 106 (D)).

Yours faithfully

**MARLON SHEVELEW & ASSOCIATES**

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