According to reports the provisions of the National Credit Act 34 of 2005 (NCA) are increasingly being applied in respect of sectional title levies, including suspension of levy recovery actions by magistrates, presumably in terms of s 130(4)(b) or (c), or even in terms of the invasive provisions of s 85 of the NCA. There seems to be a growing acceptance of a view that the NCA does apply to sectional title levy obligations and that these constitute incidental credit agreements.

The question whether or not the NCA applies to levies is not specifically stated or unequivocally implied in the NCA. Reportedly, the National Credit Regulator, through a legal adviser, has issued an opinion that the NCA does apply. The question has not yet been decided by any of the High Courts. As will be demonstrated, the answer has far-reaching, even devastating, consequences for bodies corporate. There are cogent arguments why the provisions of the NCA do not apply, and these will be discussed later in this article. But, assuming that the NCA does apply, how sectional title bodies corporate are affected and what they should and should not be doing must be examined.

Limited application of NCA

A levy obligation could only fall within the parameters of a credit agreement as described in s 8 to a limited extent, namely as an incidental credit agreement in respect of which only certain parts of the NCA apply.

It should also be understood that a levy obligation does not qualify even as an incidental credit agreement, unless interest has been determined in respect of the arrears. The following provisions are relevant:

- The Standard Management Rule (SMR) 31(6) in terms of the Sectional Titles Act 95 of 1986:

The trustees shall be entitled to charge interest on arrear amounts at such rate as they may from time to time determine.

- The definition of incidental credit agreement in s 1 of the NCA:

'"[I]ncidental credit agreement" means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

(a) [A] fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or

(b) ... .'

Accordingly a levy obligation constitutes an incidental credit agreement only if arrears attract interest determined in terms of SMR 31(6) and, if this is not the case, levy obligations are exempt from the provisions of the NCA.

Trustees therefore have the option to avoid the punitive measures of the NCA by simply not raising interest on arrears. In this regard it should be noted that the prescribed rate of interest may automatically be claimed in any summons for arrear levies by the body corporate, arguably without attracting the provisions of the NCA. The prescribed rate of interest is 15,5% at present. Despite the possible relief provided by the prescribed rate of interest, the fact that trustees are unable to raise interest in respect of arrears must still be regarded as a serious impediment, particularly in instances where a summons is not issued, which represent a considerable proportion of cases. Trustees would, for example not be able to arrange an amicable settlement, which includes payment of interest. A second situation in which the inability to raise interest presents an obstacle to a body corporate, is where it has contracted or intends to contract with a levies financier. The ability to raise interest is usually an essential component of such arrangement. Thirdly, although the prescribed rate of interest exceeds the current prime bank overdraft rate, this is not a normal situation and is not likely to be a permanent feature of the credit market. Lastly, there will be many instances where trustees, unaware of the implications of the NCA, have already raised and charged interest in terms of SMR 31(6), which would have triggered the provisions of the NCA.

What the situation would be (assuming that the NCA does apply to levies) if interest is raised in respect of arrears should accordingly be examined. The NCA provisions would automatically become applicable, the levy obligation would qualify as an incidental credit agreement, the body corporate would become a credit provider and the indebted owner a consumer.

In terms of s 5 only specified parts of the NCA apply to incidental credit agreements. Chapter 3 (part A), dealing with registration of credit providers, does not apply. It may therefore be assumed that bodies corporate, in the normal course of their affairs, are exempt from the duty to register.

In terms of s 5(2) an incidental credit agreement would come into being on a date 20 days after the body corporate first charges interest in respect of arrears. Accordingly a normal situation would be that interest is charged on arrears, being the previous month's levies, and this will constitute an 'incidental credit agreement' in respect of which specified provisions of the NCA will apply. Each month's levies could therefore constitute a new incidental credit agreement.

If it is sought to enforce payment of that claim by means of magistrates' court procedures, s 129(1)(a) and (b) require that, before a summons is issued, the credit provider must first

'... draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor ... with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date'.

The s 129(1)(a) notice puts the onus on the consumer to consult with a debt counsellor, etc. The appointment of a debt counsellor should be followed by negotiations to resolve any disputes or

'develop and agree on a plan to bring the payments under the (credit) agreement up to date'.

It appears that a magistrate must regard the provisions of s 129 as having been complied with and the action may be proceeded with, if the procedures prescribed by s 129(1)(a) have been followed and the consumer is in default under the arrangement.

The 'protection' granted the creditor by issuing a s 129(1)(a) notice may be a Pyrrhic victory, in view of the provisions of s 85, which in any event allow a court to refer a matter to a debt counsellor or to declare a consumer to be over-indebted and to relieve such over-indebtedness at any stage of the proceedings.

Should debt review proceedings have been initiated before the body corporate has issued a s 129(1)(a) notice, the credit provider (body corporate) may, in terms of s 86(10), give notice to terminate such debt review if the debtor is already in arrear with levy payments. This apparent capability is misleading, because it is clearly intended only to ensure that the debt review procedures are pursued expeditiously and to allow the credit provider, after expiry of 60 days, to proceed with its action to recover the arrears.

A consumer may, in terms of s 86, apply to a debt counsellor to be declared over-indebted. Such procedures will not apply to any claim in respect of which a s 129(1)(a) notice has already been issued. If the parties do not reach agreement, the debt counsellor may, in terms of s 86(7)(c), issue a proposal recommending that one or more of the consumer's obligations be re-arranged by

'(*aa*) extending the period of the agreement and reducing the amount of each payment due accordingly;

(*bb*) postponing during a specified period the dates on which payments are due under the agreement;

(*cc*) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) … .'

Such proposal may then be converted to a court order. If a debtor defaults on any obligation in terms of such debt re-arrangement, the credit provider may, in terms of s 88(3) proceed with litigation to recover its claim.

If a debtor whose debts have been re-arranged enters into any further credit agreement, s 88(5) determines that debt review or re-arrangement cannot be effected in respect of such further credit agreement. However, the re-arrangement remains in place for the other obligations.

Assessing the consequences

It is useful to identify and assess the effects of debt re-arrangement on both owner and body corporate in the sectional title context.

Supposing that an owner's arrears consisting of three months' levies are rescheduled for payment over 12 months, what would the effects of such re-arrangement be from an owner's point of view and how would he be able to cope financially during later months when new levies become payable?

It should also be remembered that the new levies raised for later months would constitute an illegal credit agreement under s 88(1), if he should fall in arrear and interest is raised. Apart from the fact that the situation is quite illogical, it remains clear from s 88(5) that such levies may never be re-arranged in terms of the NCA and payment will be enforceable. The same applies to any special levies that may be raised during a financial year, which could convert to an illegal 'credit agreement' and the owner concerned may be compelled to pay, despite the existing debt re-arrangement. The debtor may find himself firmly back to square one.

The rescheduling of an owner's levies could have severe consequences for the body corporate, of which that owner is a member, as proper functioning of a body corporate is wholly dependent on the prompt payment of levies. It would mean that the body corporate will have to make do without receiving full contributions from the NCA-assisted owner. For this purpose it may be compelled to raise a special levy. What would the situation be if a number of the owners, or even all owners apply for debt review in respect of a large portion of the year's levies? At this point it should not be necessary to pursue the argument any further.

Applicability of NCA

All of the above is relevant only if the NCA is found to apply to obligations to pay levies imposed on owners by the Sectional Titles Act.

Various arguments militate against an interpretation that the NCA applies to levy obligations. In terms of s 2(7) the NCA must, except as expressly stated in the Act, not be construed as

'(a) limiting, amending, repealing or otherwise altering any provision of any other Act;

(b) exempting any person from any duty or obligation imposed by any other Act; or

(c) prohibiting any person from complying with any provision of another Act'.

The NCA would do all three

- it would amend s 37 of the Sectional Titles Act by inserting a proviso;
- it would exempt an owner from paying levies as scheduled; and
- it would prohibit the body corporate from determining further levies and raising interest in respect of the assisted owner.

The language of the NCA strongly suggests an arrangement between a 'credit provider' being a business entity or person, of some sophistication in business affairs, on the one hand, and a less sophisticated 'consumer' of limited resources on the other. This is not the case in the sectional title environment. The owners and the body corporate are one and the same and in general sectional title owners are somewhat lacking in business acumen, which is reflected in the management of their body corporate affairs. The terms 'credit provider' and 'consumer' are foreign to the relationship between a sectional title body corporate and its members as owners of units.

The provisions of the NCA in general imply that a credit agreement must be an agreement in the true sense. In this regard s 1293(a), for example, refers to cancellation of a credit agreement. A levy obligation cannot be cancelled, whether by the 'credit provider' or the 'consumer.'

The arrangement between a body corporate and an owner is not an agreement between a credit provider and a consumer, but at best a constructive 'agreement' between various consumers to defray their joint expenses with their contributions on a predetermined basis.

But in fact, an obligation to pay levies arises not from an agreement at all, but from the mandatory provisions of the Sectional Titles Act, which are not negotiable, as the terms of a true agreement normally are.

Nor can the determination of instalments really be regarded as 'credit'. Most expenses of a body corporate do not arise all at once and the directive in SMR 37(3) that levies must be made payable in instalments is not meant to extend credit to the owners, but to synchronise levies raised as much as possible with the requirements of the joint expenses.

Once it is accepted that an obligation to pay levies is not based on an agreement, the mere fact that interest is raised in respect of arrears cannot elevate the arrangement into an incidental credit agreement.

Perhaps the strongest argument against levies as a credit agreement is found in s 4:

'(1) … this Act applies to every credit agreement between parties dealing at arm's length and …

(2) *(a)* …

(b) in any of the following arrangements, the parties are not dealing at arm's length: …

(iv) in any other arrangement –

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction.'

I submit that the facts that the relationship between a body corporate and its own members is not

- one in which the parties are independent of each other; and
- in which each party strives to obtain the utmost possible advantage, is beyond argument.

Approval of a budget by the very 'consumers' who may benefit from debt re-arrangement is an integral part of the determination of levies. In doing so, the owners strive to strike a fine balance between what they (as consumers) can afford and what the body corporate (as credit provider) needs. Neither 'party' strives to obtain the utmost possible advantage from the transaction. In fact, when the budget is approved, it would be unrealistic to draw any distinction between the body corporate and the owners as separate parties.

In view of the above it appears to be evident that the NCA does not apply to levy obligations, whether as incidental credit agreements or otherwise and whether interest is raised on arrears or not.

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