ADJUDICATION ORDER IN TERMS OF SECTIONS 53 AND 54 OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO. 9 OF 2011

CASE NUMBER: CSOS694/WC/19

IN THE MATTER BETWEEN

PUMLA GODUKA

Applicant

And

THE BODY CORPORATE OF THE VIA FIRENZE SECTIONAL TITLE SCHEME

First Respondent

THE TRUSTEES OF THE BODY CORPORATE OF THE VIA FIRENZE TITLE SCHEME

Second Respondent

BLOUBERG PROPERTY MANAGEMENT (PROPRIETARY) LIMITED

Third Respondent

ADJUDICATION ORDER

EXECUTIVE SUMMARY

1. This dispute concerns the category of order of financial issues referred to in section 39(1)(e) of the Community Schemes Ombud Service Act, 9 of 2011 ("the CSOS Act").

2. The Applicant is seeking an order to compel the First Respondent to repay her for contributions[1] she had paid to the First Respondent during the period between 14 October 2016 and 30 June 2019 ("non-ownership period") during which she claimed she was unlawfully deprived of the ownership of her property, unit 72. Such an order is authorised in terms of section 39(1)(e) of the CSOS Act:

   Section 39(1)(e) In respect of financial issues – an order for the payment or re-payment of a contribution or any other amount.

3. The dispute arose between the parties pursuant to the Applicant's successful application in the High Court of South Africa (Western Cape Division, Cape Town) on 12 March 2018 setting aside the transfer of her property to Tumileng Trading CC ("the new owner") and mandating that ownership in her property be restored to her by registration in the Deeds Registry at Cape Town. This occurred on 1 July 2019.

4. The Applicant submits that she continued to pay the contributions levied by the First Respondent during the non-ownership period for compelling reasons at the time. She submitted bank statements and Internet banking notifications of payments ("bank records") to support her application. She maintains that as she was not the registered owner of her property during the non-ownership period she was not liable for the payment of the contributions levied against her property and that the First Respondent[2] is required to refund to her such contributions as she has paid. The First Respondent denies that the Applicant has the legal right supporting such a claim. They submit that the restoration of ownership of unit 72 as from the date of her deprivation thereof also had the effect that the usual consequences of ownership of units in sectional title schemes would be restored and that whatever contributions remained unpaid for the non-ownership period, she would become liable therefor as from such date that her ownership was restored. The First Respondent also submits that it cannot repay any contributions in such circumstances without a court order to that effect in the absence of such instruction by the court that ordered that ownership of her property be restored to the Applicant. It was found that the situation must be regulated in terms of the legal framework that applies, which is the STSMA. It requires the trustees of sectional title schemes to levy such contributions as may be owed, on the registered owner at the time that such contributions become due in terms of the STSMA[3]. This also deals with

[1] In this order the term contributions will be used throughout to describe the amounts levied on the owners of units in sectional title schemes. In familiar speech, the term "levies" is in constant use but the provisions of section 3(1)(c) of the Sectional Titles Schemes Management Act, 8 of 2011 ("the STSMA") refer to contributions.

[2] References to the respondents will be made interchangeably. However, only the Third Respondent is on record as claiming to represent the First and Second Respondents respectively, but an order will lie against the First Respondent. Hence, all submissions will be attributed to the First Respondent when in fact it was the Third Respondent making the submission.

[3] Section 3(2) of STSMA.

their second submission. No court order is required where legislation such as the STSMA regulates who is liable for the contributions. The Third Respondent also submitted that contributions could not be repaid because the ledger account for unit 72 was in arrears. As this state of affairs was due to the failure of managing the liability for contributions properly by the Third Respondent, it should not be considered in whether repayment is due to the Applicant.

5. The Applicant could not adduce sufficient evidence to verify the amount she claimed to be due to her in her application, namely, R41 217,53. An analysis of her bank records revealed that a total amount of R34 630,99 was paid by her into the bank account of the First Respondent. The respondents did not contest the total amount in dispute save for stating that all amounts paid and referenced to unit 72 were reflected on the ledger accounts. However, no explanation was given for amounts shown on the Applicant's bank records to have been paid to the bank account of the First Respondent, but which were not reflected on the ledger accounts of unit 72, while other payments were reflected.

6. The Applicant's claim for a refund of contributions when such contributions were not legally due could only be considered in terms of the action for unjustified enrichment. The requirements for this action were considered and it was found that enrichment of the First Respondent had taken place at the expense of the correlated impoverishment of the Applicant. However, the fourth requirement of payment *sine causa* was not immediately apparent. Certainly, the Applicant as long-standing owner of unit 72 and therefore fully apprised of her ownership responsibilities could not claim that she had operated under a misconception of her liability to pay contributions when she was no longer the registered owner. So, although she passed muster on the other requirements of the action, she would have failed on asserting that she misconceived the primary liability between owner and the body corporate regarding the payment of contributions. However, she did furnish a reason for her continued payment of the contributions in respect of unit 72, namely, that she instructed her tenant to remain in occupation while she was instituting litigation to recover her ownership of unit 72. She continued to pay the contributions "to ensure that my tenants (*sic*) interests were taken care of''. This statement, on the face of it, showed a misconception of her legal position after she was deprived of being the registered owner because such payment, in and of itself, could not facilitate her restoration of ownership. The question was whether such payments could be regarded as *sine causa*. It was concluded that it does but not for the whole non-ownership period.

7. The Applicant's claim for relief was granted for a lesser amount than claimed in the amount of R19 280,29. The First Respondent was ordered to furnish the Applicant with a statement of contributions due to the First Respondent by the Applicant as at 1 July 2019, adjusted by reducing the amount owing by all arrear contributions for the period 14 October 2016 to and inclusive of 30 June 2019 due by the new owner. The Applicant shall be entitled to have such statement reviewed by a qualified accountant of her choice for accuracy, at the cost of the First Respondent, before payment thereof.

INTRODUCTION

8. The Applicant is Pumla Goduka (formerly known as Pumla Mannya), the registered owner of unit 72 in the sectional title scheme, Via Firenze (SS607/2004), ("unit 72"), held under Deed of Transfer ST33775/ 2006. As such, she has standing in this matter by virtue of her ownership of unit 72, which vests in her a material interest in this scheme. Moreover, she is materially affected by this dispute.[4]

9. The First Respondent is a body corporate duly constituted in terms s36(2) of the Sectional Titles Act, 95 of 1986, (the STA) for the sectional title scheme known as Via Firenze Body Corporate (SS607/2004).[5] As such, it has standing in this dispute as a community scheme in terms of section 1 of the Community Schemes Ombud Service Act, 9 of 2011, ("the CSOSA"). Moreover, it is the party against whom the legal relief in terms of s 39 (1)(e) of the CSOSA is sought by the Applicant, hence it is materially affected by this application.

10. The Second Respondents are the trustees for the time being of the First Respondent who are responsible for performing the functions and powers of the First Respondent.[6]

11. The Third Respondent is Blouberg Property Management (Proprietary) Limited (registration number 2017321995/07), who claimed to have been duly authorised as the Managing Agent and appointed by the Second Respondents to representing the Second and Third Respondent in this dispute. Despite direct requests by the Adjudicator for such written authorisation none was submitted. However, the Third Respondent engaged with the Adjudicator during the investigative phase of this adjudication by furnishing requested information and documentation which showed the intent of such representation. So, continued requests for such authorisation were abandoned in favour of reliance on conduct and for early resolution of the real issues.

12. This dispute has not been referred for conciliation by the Ombud in terms of s 47 of the CSOSA because the respondents objected thereto and consequently this matter was referred directly to the adjudicator for adjudication of the dispute[7] pursuant to the notice issued by the Ombud Service of such referral and service thereof on the parties.

HEARING

[4] The Trustees of the Avenues Body Corporate v A Shmaryahu 2018 (4) SA 566 (WCC). See par. 19 on p. 10, "Both requirements must be satisfied for standing as an applicant in terms of section 38 of the Community Schemes Ombud Service Act". Although the main ratio of this decision was overturned by Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another 2020 (1) SA 651 (GJ), this finding was not affected by the latter judgement.

[5] See section36(2) of the STA: *The effect of the registration referred to in subsection (1) (of a unit) is the establishment of a body corporate for the scheme, in terms of the STSMA.*
[6] Section 7 of the STSMA.
[7] Section 48(1) and (4) of the CSOS Act.

13. Since inception, the Ombud Service had instituted a practice of holding hearings where parties to a dispute were requested to attend such a hearing at the offices of the Ombud Service in Cape Town to state their respective cases to the Adjudicator in person. This practice was discontinued pursuant to the regulations promulgated in terms of the Disaster Management Act, 57 of 2002. No such hearings have been conducted since then even though partial lifting of the lock down requirements have taken place.

14. On 23 June 2020, the Ombud Service published a new directive in terms of which the practice of holding hearings of disputes was abandoned, except as in the discretion of the adjudicator concerned. Consequently, in this adjudication no hearing was conducted. Instead, in this matter, the Stenersen case[8] was followed regarding the "subsequent exchange of written submissions between the parties for the adjudication". The reference to the "written submissions between the parties for the adjudication" refers to the investigation required to be conducted by the Adjudicator in terms of section 51 to enable him to issue an order in terms of section 39 of the CSOS Act. Such an investigation was conducted by the Adjudicator herein and it yielded the further evidence on which this determination is based.

INVESTIGATIONS CONDUCTED IN TERMS OF SECTION 51 OF THE CSOS ACT

15. Section 51 of the CSOS Act confers extensive powers of investigation in respect of an application on the Adjudicator to enable him to comply with the provisions of section 50 of the CSOS Act.[9] Moreover, if the Association[10] or any other person is in possession of an association's records, such records as are required by the adjudicator must be released to him.[11]

16. The key to the Adjudicator's investigative powers is section 50 of the CSOS Act which directs him/her to use such powers to determine whether it is appropriate to make an order. The Adjudicator operates in a context often devoid of legal professionals involved in the preparation of the cases of the disputants concerned, consequently, the Adjudicator is often compelled to use the investigative powers in section 51 of the CSOS Act to guide the parties to the dispute, not represented by attorneys, to furnish further evidence than initially submitted to the Ombud Service. Such an approach was adopted in this matter.

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[8] See footnote 4.

[9] Section 50: *The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator – (a) must observe the principles of due process of law; and (b) must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.*

[10] Defined in section 1 of the CSOS Act as any structure that is responsible for the administration of a community scheme. In sectional title schemes this could mean the Body Corporate (see section 3 of the Sectional Title Schemes Management Act ("STSMA")) or the trustees of the Body Corporate (see section 7 of the STSMA), depending on the context. This is relevant when the appropriate order in terms of section 39 of the CSOS Act is considered.

[11] Section 51(3) of the CSOS Act.

FACTS[12]

17. The evidence submitted by the parties of which the facts giving rise to the dispute arose comprised the following:

17.1. The Applicant submitted her application and certain ancillary documents to support the relief she claimed, namely:

17.1.1. Application in the prescribed form attaching a statement of claim;

17.1.2. Copies of bank records recording the payments she had made during the non-ownership period to the First Respondent;

17.1.3. Copies of correspondence between her and the Third Respondent relating to her claim of repayment of her contributions paid to the First Respondent during the non-ownership period;

17.1.4. Copies of the ledger accounts of the Third Respondent relating to unit 72 reflecting some of the accounting transactions regarding unit 72. She claims that she was only furnished with these documents by the Third Respondent after she had informed the Third Respondent of the successful re-instatement of her ownership of unit 72 and demanding such accounting records;

17.1.5. Copy of the court order setting aside the sale and transfer of unit 72 to the new owner and authorising the restoration of the title to the Applicant through registration thereof in the Deeds Registry at Cape Town;

17.1.6. Copy of the judgement of Enger AJ giving rise to the court order;

17.1.7. Copy of Deed of Transfer No. ST33775/2006 evidencing her registered title to unit 72 and showing thereon an endorsement by the Deeds Registry of the transfer to the new owner on 14 October 2016;

17.1.8. Copy of a document bearing the title Revival of Title in terms of section 6(2) of Act 47 of 1937 issued by the Deeds Registry re-instating the Applicant's registered ownership of unit 72 on 1 July 2019;

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[12] In the Stenersen case (foot note 4), it was found that the right to appeal contained in section 57 of the CSOS Act was an appeal in the strict (middle) category of appeals. The court also decided that - *determination of the questions of fact is exclusively afforded to the adjudicator who conducts the proceedings inquisitorially and has powers to investigate, examine documents and persons, and to conduct inspections. For this reason, an appeal court should adopt a deferential attitude to the determination of the adjudicator on questions of fact.* Such a finding places an onerous obligation on the Adjudicator which requires a more extensive approach to such determination which approach was adopted in this matter.

17.1.9. Acknowledgement of receipt of her bank records by the Third Respondent when she first claimed repayment of the payments she had made to the First Respondent during the non-ownership period.

17.2. Emails exchanged between the Applicant and the Adjudicator during the investigative phase of the adjudication process in terms of section 51 of the CSOS Act during which clarification was sought on some of the aspects of the application.

18. The respondents have not directly recorded with the Ombud Service their opposition to the application of the Applicant save as what is set out below in this paragraph:

18.1. The Third Respondent in a letter dated 20 November 2019 and written to the Applicant prior to her submitting her application to the Ombud Service, which she filed with her application, submitted that it represented the First Respondent in this matter. This letter also sets out the defence of the respondents to the claim by the Applicant. No documents were filed directly with the Ombud Service by the Third Respondent on its own behalf or on behalf of the First or Second Respondent. It is not clear whether a notice in terms of section 43 of the CSOS Act regarding details of the application was sent to the respondents. However, the Second and Third Respondents were notified that the matter was referred to conciliation in terms of section 47 of the CSOS Act. The Certificate of Non-resolution issued by the Ombud Service stated that the “respondent was adamant that the matter must be resolved at adjudication”.

18.2. During the investigative phase by the Adjudicator the Third Respondent did initially engage in an email exchange and indicated a willingness to furnish clarification on some issues raised with it as well as furnish documentation requested. The Third Respondent repeats their earlier position in the email exchange with the Adjudicator, namely, that the Applicant having been restored to unit 72 from the date of deprivation vests her with the obligation of paying the contributions. They also submitted that “her payments were made without error” and that a ‘’formal legal document or court order’’ is required before they can repay her contributions.

18.3. The Third Respondent failed to furnish clarification on –

18.3.1. whether the First Respondent acknowledged receipt of her payments, claiming lack of ‘’specificity’’, but then stated that ‘’I can confirm that she sent us POP (proof of payment) for levies which we verified’’. When specific clarification whether they acknowledged receipt of such payments, no response was forthcoming.

18.3.2. where payments, in their records, for the period 5 December 2016 to 30 April 2017 were captured in their accounting records, they replied ‘’I'm not aware of any payments that she sent us a POP for that was not found on the ledger. According to my knowledge they all reflect on the statement’’.

18.3.3. why certain payments were ascribed to CB1 on the ledger accounts.

18.3.4. Certain emails were furnished that were exchanged between the Applicant and the Third Respondent which revealed:

18.3.4.1. A novel requirement based on legal advice that a levy clearance certificate should have been issued for the transfer of the property back to the Applicant and also that parties be identified responsible for the payment of levies therefor;

18.3.4.2. Claiming that unless clear instructions by lawyers are received no payments to the Applicant will be made;

18.3.4.3. An analysis of arrear contributions was furnished; and that

18.3.4.4. They cannot refund the contributions because the account is in arrears.

Facts that are not in dispute

19. The following facts are not contested by either party:

19.1. The Applicant was the registered owner of unit 72 in the Via Firenze sectional title scheme prior to 14 October 2016;

19.2. She was deprived of such ownership on 14 October 2016 when unit 72 was transferred to the new owner;

19.3. She launched an application in the High Court of South Africa (Western Cape Division, Cape Town) and was successful in having the sale and transfer of unit 72 to the new owner cancelled and set aside and having her ownership of unit 72 restored to her on 1 July 2019 by virtue of registration thereof in terms of section 6(2) of the Deeds Registries Act, 47 of 1937. Such registration is known as revival of title with the effect that her registered ownership of unit 72 was restored as from 14 October 2016;

19.4. The Applicant continued to pay to the First Respondent contributions regarding unit 72 throughout the period of non-ownership, albeit not in respect of every month in that period. These payments were shown on her bank records. The respondents did not contest that such payments were not made by the Applicant and acknowledged that such payments were recorded on the ledger accounts for unit 72;

19.5. The new owner also paid the contributions levied on it as from 14 October 2016 until 2 May 2017 captured on the ledger accounts for unit 72 as payments received through First National Bank. Thereafter, no further payments were recorded from First National Bank. The ledger account was described as that of the new owner and payments were recorded for the first few months from First National Bank of the non-ownership period when the Applicant did not make any payments through her bank, Standard Bank;

19.6. The First Respondent caused a letter to be addressed to the new owner which referred to a statement that was attached indicating that an amount of R12 986,50 was due and payable. No such statement was contained in the file of the Ombud Service, but the amount claimed in terms of such letter accords with the amount due in terms of the ledger account regarding unit 72 as at the date of 2 July 2019;

19.7. The email dated 15 November 2019 from the Third Respondent to the Applicant alerting her that the contributions outstanding in respect of unit 72 as of 7 November 2019 amounted to R17 145,50. This amount included the R12 986,50 as no such amount was shown to have been received in terms of the ledger accounts.

Facts that are in dispute

20. An analysis of the ledger account relating to unit 72 for the non-ownership period is necessary to outline those facts on which the parties do not agree or were not acknowledged by the Third Respondent. The ledger account is titled Tumileng Trading CC but shows payments of contributions attributable to two sources. The first source is First National Bank and payments from this source start on the 1 October 2016, which month also contains the commencement date of the non-ownership period, namely, 14 October 2016. The payments from First National Bank continue until 2 May 2017. As from the 1 June 2017 contributions are paid from a different source indicated in the ledger account as CB1. As from this date no further payments are shown in the ledger accounts as having been paid by First National Bank for the remainder of the non-ownership period, namely, until 30 June 2019. The name of the ledger account remained as it was on 1 October 2016. The analysis of the ledger accounts and the conclusions drawn therefrom were not contested by the respondents. However, the respondents have not conceded the following aspects:

20.1. The respondents have not acknowledged that –

20.1.1. the payments made through First National Bank as shown on the ledger account were payments received from the new owner. The Third Respondent stated that they did not know who the payments were from. Such payments were recorded on the ledger accounts with reference to the unit number;

20.1.2. the payments attributed to CB1 as shown on the ledger account were payments received from the Applicant, save to say that they received the payments shown on the bank records and had ‘’verified’’ such payments;

20.1.3. the payments made from December 2016 to May 2017 by the Applicant to the First Respondent as shown on her bank records were received by the Third Respondent;

20.1.4. no invoices were sent to the Applicant regarding contributions due to the First Respondent for the non-ownership period until the email referred to in paragraph 23 (f) hereof;

20.1.5. the amount of R12 986,50 the respondents attempted to claim from the new owner was recovered or the attempt was abandoned;

20.1.6. the amount of R17 145,50 the respondents alleged was due regarding contributions owed to the First Respondent included the amount of R12 986,50;

20.2. The respondents have not explained why they failed to recover the contributions due by the new owner from 1 June 2017 to 2 July 2019. An email dated 18 July 2019 from

the Applicant to the Third Respondent was furnished to the Adjudicator by the Third Respondent on 14 May 2020. This email furnished the Third Respondent with a copy of the court order showing that she had won re-instatement of her ownership of unit 72 in the High Court of South Africa (Western Cape Division, Cape Town). She requests statements for the non-ownership period and also makes the following statement: ‘’The Body Corporate must have kept my funds in a separate interest-bearing account as there was a double payment of levies from two sources. The Body Corporate has to account for all the funds collected during this period and forward all the statements to me for my records’’. Then, (no other evidence was submitted) for the first time during the non-ownership period, the Third Respondent caused their attorneys to direct a letter of demand to the new owner on 2 August 2019 to recover the arrear contributions for the non-ownership period. The inference seems clear; they were facing a claim for a refund and there was no money available to meet such a claim because the ledger account was in arrears.

SUMMARY OF EVIDENCE

Applicant’s Submissions

21. The Applicant submits that she is entitled to be repaid such contributions as she had paid to the First Respondent during the period between 14 October 2016 and 30 June 2019 (“non-ownership period”) when she was unlawfully deprived of the ownership of her property, unit 72. She submitted bank records to support her application. She maintains that as she was not the registered owner of unit 72 during the non-ownership period she was not liable for the payment of the contributions levied against the registered owner of that unit and that the First Respondent is required to refund to her such contributions as she has paid.

22. The dispute arose between the parties pursuant to the Applicant’s successful application in the High Court of South Africa (Western Cape Division, Cape Town) on 12 March 2018 setting aside the transfer of unit 72 to the new owner and mandating that ownership of unit 72 be restored to her by registration in the Deeds Registry at Cape Town. Such registration took place on 1 July 2019 pursuant to the process prescribed in section 6(2) of the Deeds Registries Act, 47 of 1937, whereby she was reinstated as the registered owner of unit 72 as from the date on which she was unlawfully deprived thereof, namely, 14 October 2016, by the process of cancellation of the initial transfer to the new owner and revival of her title thereto.

23. Questions were posed to the Applicant during the investigative phase of the adjudication via emails to clarify the evidence she had submitted to the Ombud Service. Her submissions were:

23.1. She did not receive any invoices addressed to her from the Third Respondent during the non-ownership period;

23.2. The Applicant could not adduce sufficient evidence to verify the amount she claimed to be due to her in her application, namely R R41 217,53. An analysis of her bank

records however revealed that a total amount of R R34 630,00 was paid into the bank account of the First Respondent;

23.3. Her bank records show that she had made varying payments to the First Respondent such as:

23.3.1. From 5 December 2016 to 1 March 2017, R1 247,00 per month;

23.3.2. On 30 April 2017, the amount paid changed to R1 262,00;

23.3.3. On 30 May 2017, the amount paid changed to R1 523,39;

23.3.4. From 1 July 21017 to 31 October 2017, the monthly amount paid changed to R1 482,68;

23.3.5. From 1 December 2017 to 1 July 2019, the monthly amount paid changed to R1 023,68.

23.3.6. She maintains that the changes were aligned with statements sent to her by the Third Respondent but addressed to the new owner. She could not get the Third Respondent to send her invoices/statements addressed to her. She submits that she made the payments reflected on such invoices/statements received from the Third Respondent. When her payments are compared to the payments recorded on the ledger accounts the payments, she claimed to have paid seem to be reflected thereon but attributable to CB1. The inference is almost inevitable that unless the new owner had changed banks, that the payments attributable to CB1 on the ledger accounts would constitute payments from a different source. The only other source for which evidence was submitted was the Applicant. It was a simple inference for the Third Respondent to deny but it has not done so; moreover, it has failed to explain what CB1 denotes.

23.4. She initially claimed to have paid amounts of R1 247,00 in respect of the contributions for October 2016 and November 2016, respectively. When it was pointed out to her that she did not furnish any bank records to support her claim for these payments she abandoned the payment for October 2016 but maintained that the ledger accounts will show that her November 2016 was received by the First Respondent. However, that payment is attributed, in the ledger account, to First National Bank, whereas her bank is Standard Bank.

23.5. The Applicant submits that she made the following payments (Total = R6 250,00):

23.5.1. On 5 December 2016 – R1 247,00;

23.5.2. On 2 January 2017 – R 1 247,00;

23.5.3. On 2 February 2017 – R1 247,00;

23.5.4. On 1 March 2017 – R1 247,00;

23.5.5. On 30 April 2017 – R1 262,00.

23.5.6. Although her bank records show that such payments were made to the bank account of the First Respondent, such payments were not recorded on the ledger accounts for unit 72 for those dates. Payments were received in the same amounts and recorded on the ledger accounts for those dates but from First National Bank.

23.6. As from the 31 May 2017 the following payments indicated on her bank records were also shown on the ledger accounts relating to unit 72 but allocated to CB1 as the source of such payments. No further payments after 31 May 2017 were allocated to First National Bank. Below follows a table which compares the payments on her bank records (to the bank account of the First Respondent) to the entries (receipts) shown on the ledger accounts of the same amounts but some received on different dates. These payments were not allocated to the Applicant but to CB1. Below follows the table:

Date of payment on bank records	Amount	Payer	Bank	Ledger Account CB1 receipts
31 May 2017	R1 523,37	P Goduka	Std Bank	R1 523,37 rec. on 1/6/2017
1 July 2017	R1 482,68	P Goduka	Std Bank	R1 482,68 rec. on 3/7/2017
1 August 2017	R1 482,68	P Goduka	Std Bank	R1 482,68 rec. on 1/8/2017
28 August 2017	R1 482,68	P Goduka	Std Bank	R1 482,68 rec. on 29/8/2017
28 September 2017	R1 482,68	P Goduka	Std Bank	R1 482,68 rec. on 29/9/2017
31 October 2017	R1 482,68	P Goduka	Std Bank	R1 482,68 rec. on 31/8/2017
1 December 2017	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 2/12/2017
29 December 2017	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 30/12/2017
31 January 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on R1 023,68
26 February 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 27/2/2018
3 April 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 4/4/2018
1 May 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 2/5/2018

1 June 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 2/6/2018
2 July 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 2/7/2018
1 August 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 1/8/2018
2 September 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 3/9/2018
1 October 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 1/10/2018
5 November 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 5/11/2018
3 December 2018	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 3/12/2018
2 January 2019	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 2/1/2019
1 February 2019	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 2/2/2019
4 March 2019	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 4/3/2019
1 April 2019	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 2/4/2019
1 May 2019	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 2/5/2019
I June 2019	R1 023,38	P Goduka	Std Bank	R1 023,38 rec. on 3/6/2019
TOTAL	R28 380,99			R28 380,99

Applicant's prayers

24. The Applicant is seeking an order to compel the First Respondent to repay her for contributions she had paid to the First Respondent during the non-ownership period while she was unlawfully deprived of the ownership of her property, unit 72. Such an order for repayment is authorised in terms of section 39(1)(e) of the CSOS Act:

> *Section 39(1)(e) In respect of financial issues – an order for the payment or re-payment of a contribution or any other amount;*

Respondents' Submissions

25. The First Respondent denies that the Applicant has the legal right supporting such a claim. It submits that the restoration of ownership of unit 72 as from the date of her deprivation thereof also restored her liability to pay the contributions for unit 72 for the non-ownership period. The First Respondent also submits that it cannot repay any contributions in such circumstances without a court order. Finally, it submitted that because the contributions for unit 72 are in arrears, no repayments can be made to the Applicant until lawyers identify the parties from whom such arrear contributions can be recovered.

Respondents' Prayers

26. That the Applicant's claim be dismissed as no court order compelling such repayment has been furnished.

ANALYSIS OF EVIDENCE AND SUBMISSIONS

27. The analysis of the evidence submitted by the Applicant in the foregoing paragraphs need not be expanded and should stand in support of her case where such support is shown.

28. The conduct of the Third Respondent during the non-ownership period is not consistent with the defence of the First Respondent. Contrary to their submissions, contributions were levied on and collected from the new owner as from the date of the registration of the transfer of unit 72 in the name of the new owner. They also ceased furnishing the Applicant with invoices for such contributions on a monthly basis. Furthermore, the ledger accounts for the non-ownership period, recording all (aside from the payments by the Applicant for the period December 2016 to May 2017) accounting entries regarding unit 72, show the receipt of the contributions during such period from both the new owner as well as the Applicant. Clearly, accepting the contributions paid during the non-ownership period by the new owner does not support the defence of the First Respondent. The Third Respondent states that all payments referenced to unit 72 would have been recorded on the ledger accounts. Yet, some payments made by the Applicant referenced to unit 72 are not reflected on the ledger accounts. In addition, during the non-ownership period, the Third Respondent failed to ensure that contributions were collected from the registered new owner during that period to the extent that such contributions had fallen into arrears by 2 August 2019 (the date of the letter of demand to the new owner). On the 15 November 2019, the Third Respondent by email reminded the Applicant that contributions for unit 72 were due in the amount of R17 145,50, clearly including the arrears not having been recovered from the new owner. The picture that has emerged from the evidence adduced by both parties shows that the Third Respondent failed to –

28.1. comply consistently with the provisions of the STSMA in recovering on a monthly basis from the new owner contributions levied in respect of unit 72 and thereby preventing the ledger account from falling into arrears;

28.2. keeping proper accounting records for unit 72 during the non-ownership period by separating double payments made in respect of unit 72;

28.3. take steps to determine who were paying the second payments received for the period December 2016 to 1 July 2019 and to preserve such payments for the benefit of such payer;

28.4. institute action against the new owner for failing to pay contributions for two years from 1 June 2017 to 1 July 2019. It was only when the Third Respondent received an email from the Applicant on 18 July 2019 claiming a refund of all her payments that the Third

Respondent seem to realise that no funds are available in the ledger account for such refund and caused their attorneys to write a letter of demand on 2 August 2019 to the new owner.

29. Nevertheless, however inconsistent the conduct of the respondents was during the non-ownership period, the question as to the effect of a court-mandated process restoring ownership of sectional title property to an owner in such circumstances such as these has on the consequential obligations of property ownership such as property rates and contributions should be addressed. This will be done in the analysis that follows below.

ANALYSIS OF THE LAW

The STSMA

30. The First Respondent's contention is that the setting aside of the sale of unit 72 to the new owner, the cancellation of the transfer thereof to it and the revival of the title of the Applicant to unit 72 should automatically impose the normal consequences of ownership of a unit in a sectional title scheme on the Applicant. That would mean, so the argument goes, that she becomes liable for all outstanding contributions and other charges owing to the body corporate for the entire period of her ownership from 2006, when she received transfer thereof, including the non-ownership period. They claim that this is the legal position because of the provisions of the STSMA[13].

31. The following provisions of the STSMA deal with the contributions and other charges that a body corporate could levy on the registered owners of units in their sectional title scheme:

31.1. Section 3 (1) – *A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include –*

(a) to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs –

(i) for the repair, maintenance, management, and administration of the common property (including reasonable provision for future maintenance and repairs);

(ii) for the payment of rates and taxes and other local municipal charges for the supply of electricity, gas, water, fuel and sanitary or other services to the building or land; and

(iii) for the discharge of any duty or fulfilment of any other obligation of the body corporate;

[13] The STSMA commenced on 7 October 2016 and therefore applies to the non-ownership period.

(b) to establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister;

(c) to require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the cost of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs;

(2) Liability for contributions levied under any provision of subsection (1), save for special contributions contemplated by subsection (4), accrues from the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by an application to an ombud from the persons who were owners of the units at the time when such resolution was passed: Provided that upon the change of ownership of a unit, the successor in title becomes liable for the pro rata payment of such contribution from the date of change of such ownership.

32. Although section 3 sets out in broad terms all the operational financial obligations for which a body corporate is obliged to establish funds, and which also empowers the body corporate to levy such contributions from the owners to defray such operational expenses, it is really in subsection 2 of section 3 that clear instructions are given as to –

32.1. when these contributions become due and payable;

32.2. how these contributions can be recovered if not paid; and

32.3. the effect that change of ownership would have on the liability for its payment.

33. Applying the provisions of subsection (2) to the facts of this dispute implies that –

33.1. the date on which the trustees resolved to levy contributions which were relevant for the period 14 October 2016 (the date on which the property was transferred to the new owner) to 30 June 2019 (the date prior to the date on which the Applicant became registered owner again of the property for purposes of the STSMA) would mean that the new owner would be liable for those contributions. This much is clear from that portion of the wording of subsection (2), namely, *from the persons who were owners of*

the units at the time when such resolution was passed.[14] Moreover, the subsection also prescribes the relief should contributions so levied remain unpaid;

33.2. monthly invoices should have been sent to the new owner by the First Respondent for the duration of the non-ownership period to obtain payment of such contributions in accordance with the provisions of the STSMA. This is exactly what the First Respondent did because the ledger accounts for unit 72 reflects payments of contributions for the period 14 October 2016 to May 2017. Such payments were not made by the Applicant;

33.3. were the new owner to fall into arrears with payments of the contributions for unit 72, the First respondent would take steps to recover such arrears. Again, the First Respondent caused a letter of demand to be sent to the new owner on 2 August 2019 to recover the amount of R12 986,53 from the new owner, albeit too late in this instance.

33.4. at the time of such resolution by the trustees, there could have been no contemplation that another person would become liable in the future for such contributions. It would have been inconceivable for the First Respondent to defer collecting those contributions from the new owner when such contributions became due. They had bills to pay. They either held the current owner liable for the contributions levied while it was the owner, or they did not. There was no one else that they could claim the levies from at that time in terms of the clear provisions of the STSMA.

34. Were compliance with the provisions of the STSMA the only consideration in deciding the issue, the Applicant would have been successful in claiming such payments as she could prove as having paid to the First Respondent. However, further considerations apply.

Condictio Indebiti

35. For the Applicant to be successful in her application she would have to also meet the requirements of the condictio indebiti. The general requirements of this action are:

35.1. The First Respondent must be enriched by the payments the Applicant had made during the non-ownership period;

35.2. The Applicant must be impoverished thereby;

35.3. The enrichment of the First Respondent must come at the expense of the Applicant; and

35.4. The enrichment must be without cause, i.e., unjustified.[15]

[14] Clearly, if the resolution was passed during the earlier period of the Applicant's tenure as owner, the proviso obliges the trustees to pro-rate the contributions between the Applicant and the new owner.

[15] See Wille's Principles of South African Law (Eighth Edition) p. 631 and further.

36. In the circumstances of this case, compliance with the fourth requirement is critical for the Applicant, so it seems to be the prudent place to start consideration of this aspect. Wille deals with this aspect as follows: *The plaintiff can recover his or her money only if there was an error, i.e., if he or she thought that the money or property was owed to the other person, whereas actually it was not. An error may be of fact, i.e., a misapprehension as to the existence or non-existence of a fact or a set of facts; or an error may be one of law, i.e., a mistaken belief as to the existence of a rule of law; or a wrong legal conclusion drawn from a known set of facts. If the error is one of fact it is clear that the condictio indebiti is available. If the error is one of law, the action is in principle available.*[16] *It is further required that the error be reasonable and not supine or foolish. If a person makes an undue payment voluntarily, knowing it is not due, he cannot be labouring under a mistake, and his action is regarded as a donation, with the result that he cannot recover the amount.*

37. In this matter, it is common cause that –

37.1. the Applicant was deprived of her registered ownership of unit 72 on 14 October 2016 when unit 72 was transferred to the new owner;

37.2. she had been the registered owner of unit 72 as from 30 November 2006, when she took transfer of unit 72 by virtue of Deed of Transfer ST33775/2006, and remained registered owner thereof until she was deprived thereof on 14 October 2016; and

37.3. she had continued to pay the monthly contributions as from 5 December 2016 to the First Respondent for the remainder of the non-ownership period.

38. The legal context within which the Applicant had made payments of the contributions to the First Respondent in respect of unit 72 is framed by the STSMA as set out in foregoing paragraphs. There can be no contention that the Applicant had some misconception about a legal obligation to pay the contributions that would continue to burden her after she had been deprived of her ownership of unit 72. She does not claim such misconception in her application. Even if she had claimed it, such a claim would be untenable in the face of the surrounding circumstances:

38.1. She had owned unit 72 since 2006 and had faithfully paid the contributions to the First Respondent for almost 10 years;

38.2. She made this application to the Ombud Service for repayment of the contributions she had paid during the non-ownership period on the basis that she was not the registered owner during that period and therefore not liable therefor. She therefore understood the legal situation and as such she was not acting under a misconception that she had the same legal duty to pay the contributions during the non-ownership period.

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[16] The distinction between error of fact and law has been abolished in Willis Faber Enthoven (Pty) Limited v Receiver of Revenue & Another 1992(4) SA 202 (A) at 220H.

38.3. She had instructed her tenant to remain in unit 72 after the transfer to the new owner. She also decided to continue her payments to the First Respondent. She expressed her reason for doing so in her application as "to ensure that my tenants (*sic)* interests were taken care of''. At the same time, she embarked on a course of action to approach the High Court to set aside what she regarded as an illegal transfer of unit 72 that had deprived her of her ownership. It seems that she was of the opinion that if she continued to pay her contributions her tenant would be safe from eviction. That is clearly a misconception of the law applicable to her situation. It may be that her possession of unit 72 would make it more difficult for the new owner to succeed with eviction of her tenant because she can plead that an unlawful transaction had deprived her of her property and that she is in the process of taking steps to have such transaction set aside. In that context, maintaining possession of unit 72 would have been important. However, the continued payment of contributions to the First Respondent will not in law safeguard her tenant from being evicted. Such a position ignores the fact that the new owner is now the registered owner of unit 72 and in that context has assumed the legal obligation to pay the contributions to the First Respondent as indicated in paragraph 32. She was therefore released from that statutory obligation and pleading payment as a bar to an application for eviction is a misconception.

39. In Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme[17], Rogers AJA said, that if such payments were said to be made in the reasonable and mistaken belief that they were owing, it might entitle the mistaken party to recover such payments. He also refers to old authorities[18] to the effect that the mistake should have been 'neither heedless nor far-fetched', that it should not have been based on 'gross ignorance'; that it should have been neither 'neither slack nor studied'. In Willis Faber Enthoven (Pty) Ltd[19] Hefer JA said the following: *it is not possible nor would it be prudent to define the circumstances in which an error can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need to be said is that, if the payer's conduct is so slack that he does not in the Court's view deserve the protection of the law, he should as a matter of policy, not receive it….Much will depend on …the plaintiff's state of mind and the culpability of his ignorance in making the payment.*

40. The circumstances in which the Applicant made the decision to continue to pay the contributions to the First Respondents were dire. She was locked in a battle with what turned out to be fifteen respondents, of which her ex-husband was one,[20] to recover her property of which she was irregularly deprived of following on the back of tough divorce proceedings. She was clearly determined to take all possible steps to be successful. Her decision to instruct her tenant to remain in occupation was therefore

[17] 2018(1) SA 513 (SCA) par. 23.
[18] Union Government v National Bank of South Africa Ltd 1921 AD 121 at 126; Rahim v Minister of Justice 1964(4) SA 630 (A) at 630-C; Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another 1992(4) SA 202 (A) at 2231-224B.
[19] See footnote 16.
[20] See the fifteen respondents cited on the court order.

not taken lightly. So, in such circumstances, her decision to pay the contributions must have been taken with a serious mindset aimed at doing whatever may be necessary to get her property back. Such a mindset could therefore not be blithely associated with the nature of the errors described in the previous paragraph.

41. It has already been pointed out that the contributions which she had paid were not owing. She had been released from the statutorily imposed relationship with the First Respondent when she was the registered owner. After 14 October 2016 there was no longer any relationship with the First Respondent, legal or otherwise. In McCarthy Retail Ltd v Shortdistance Carriers CC[21], the appellant was going to repair the respondent's truck should the loss-adjuster of the insurer give consent for the repairs. The appellant repaired the truck under the impression that the insurer had given its consent and delivered the truck to the respondent. At the time of delivery, the insurer had not yet given its consent but after delivery it rejected the claim. The appellant appealed from the court a quo to the Supreme Court of Appeal. Harmse JA, who agreed with the order by Schultz JA but, in a minority judgement for different reasons said: ''Since the owner (respondent) had no right against the garage (appellant) and because the garage (respondent) had no right against either of them, the shift of assets was without any legal ground and therefore *sine causa*". In this matter, the Applicant had no legal right against the First Respondent and the First Respondent had no legal right against the Applicant, but the payments were made in any event for other reasons and without any legal ground and therefore was made *sine causa*.

42. In the Yarona Healthcare case, Rogers AJA deals with error and excusability where payments were made over a period of time but the agreement in terms of which such payments were due was discovered much later not to have been signed. Although the appellant was a registered company and Rogers AJA found that the main issues were whether recovery was barred because of inexcusable slackness on Medshield's part, Rogers AJA however said: *In deciding whether to extend the protection recognised in Bowman, I do not think it matters that a medical scheme is a juristic person. The important feature is that the scheme exists for the benefit of its members, often vulnerable people, and is administered by persons who owe a fiduciary duty to them. In that sense the persons charged with the administration of the scheme can be viewed as representatives standing in a similar position to executors, trustees, and liquidators. Indeed, in the case of a company in liquidation its assets and liabilities do not vest in the liquidator. The liquidator succeeds to the administration of the company in the place of its directors.**[22]** A similar view was taken by a full court in Grant Thornton Capital Umbrella Fund v Da Silva**[23]** where the condictio was brought by a provident fund (also a juristic person). While it is unnecessary to decide whether the requirement of excusability should be relaxed in the case of provident funds, the full court was right not to regard the juristic personality of the fund as a bar to extending Bowman by analogy to other situations.*[22] Finally, Rogers AJA refers to the Bowman case as follows: *In Bowman Harms JA appears to have been swayed not so much by the need to protect executors and insolvency practitioners but by authority*

[21] [2001] 3 All SA (A) (16 March 2001) at p. 29.
[22] 2018(1) SA 513 (SCA) par. 44.

supporting the view that where an heir or creditor proceeds directly against the recipient of an unowed payment, the heir or creditor need not prove that the executor's mistake was excusable. It would be illogical in those circumstances to say that if the claim was instituted by the executor or liquidator rather than heir or creditor, the executor or liquidator has to prove excusable error.[23] Then at, he finds: *I thus conclude that although Medshield has failed, in respect of all but one of the payments, to prove that such payments were made as a result of excusable error, Medshield's right to recover them by way of the condictio indebiti is not barred.*[24]

43. In this matter, the Applicant can certainly not be accused of inexcusable slackness. She had done nothing wrong in her mind and yet she had just lost her property in a transaction where her interest was undermined to such an extent that a High Court had little difficulty to set it aside once it was seized of the matter. She was certainly in a vulnerable situation heading into litigation after a tough divorce case. Her decision to instruct her tenant to remain in occupation must also be distinguished from the decision to continue paying the contributions. As to the former, she knew that the sale of unit 72 by the receiver and liquidator of her accrued estate was irregular because unit 72 did not form part of that accrued estate. As to the latter, she formed the opinion that her tenant would be protected were she to continue such payments. She clearly wanted to do everything possible from her side to correct the situation and as such that was a reasonable approach for her to adopt in the circumstances. So, her error in making the payments stands to be excused in the qualified manner set out in the paragraphs below.

44. The non-ownership period, however, cannot be regarded as uniform with regard to the imputed intention of the Applicant in respect of the payments made throughout. There are a number of distinct periods within it, namely, the period from –

44.1. October 2016 to 4 December 2016. During this period, no evidence was adduced by the Applicant supporting her claim that she made payments of any contributions. So, no payments were made in support of the occupation rights of her tenant for these two months;

44.2. December 2016 to 11 March 2018. This period comprises the first payments she made for which evidence was furnished and the date on which the judgement restoring her property to her was delivered in court. She could during this period harbour the misconception that paying the contributions may operate to protect the interests of her tenant, but that misconception was dispelled by the court mandating that she be restored to registered ownership through registration thereof in the relevant Deeds Registry;

44.3. March 2018 to 1 July 2019. Although it would take until 1 July 2019 for unit 72 to be registered in her name again, on the day of the judgement she could no longer be under any misconception as to the payment of contributions to the First Respondent to

[23] Id. par. 42.
[24] Id. par. 46.

secure the interests of her tenant. She could henceforth legally protect those rights based on her rights having been restored by the court pending registration. Although she continued the payment of contributions to the First Respondent during this period she could no longer claim to labour under any misapprehension as to the effect of such payments. Her possession of unit 72 and therefore her tenant's rights could be defended against any legal attack whether she paid the contributions or not. The payments made in this period is therefore not recoverable under the condictio indebiti. However, an advantage should still accrue to her in that these payments should not decrease the liability of the new owner for arrear contributions for the non-ownership period, including for this period;

44.4. October 2016 to 31 May 2017. This period was the only period during the non-ownership period during which the ledger accounts for unit 72 shows payments received through First National Bank, concluded to be the bank of the new owner. This conclusion is based on the fact that the Applicant's bank is Standard Bank and that according to the Third Respondent payments referenced for unit 72 were recorded on the ledger accounts for that unit. The only other person or entity that would want to pay contributions regarding unit 72 is the new owner. This is also the period for which no entries show on the ledger accounts as having been received from the Applicant although her bank records show such payments. The Third Respondent failed to explain where such payments were recorded but also did not deny that the Applicant's bank records showed such payments to the First Respondent. Payments from the Applicant for this period could therefore qualify for a refund.

Enrichment of First Respondent and Impoverishment of Applicant[25]

45. In terms of section 3 of the STSMA as set out above, the First Respondent was entitled to claim such contributions in respect of unit 72 as has been levied by the trustees on its registered owner for the non-ownership period. Payments received for each relevant month exceeding the amount levied are not owed and as such constitute enrichment of the First Respondent. Where the enrichment consists of money, as in this instance, in Wille the authors argue, with reference to De Vos as authority, that the receiver of the un-owed "money must be regarded as being permanently enriched since the value of the received money is added to his or her estate and, unless the whole estate is lost, the money remains a value in that estate".[26] The First Respondent made an attempt to plead non-enrichment when it stated that it could not repay the money claimed by the Applicant because the ledger account of unit 72 was in arrears. In Wille the authors state that such a plea is subject to the qualification that "where the defendant knew, or ought to have known, that he or she had been unjustifiably enriched, he or she was under a duty to preserve the enrichment and can, therefore, plead non-enrichment only if it can be shown that the loss of the enrichment was not culpable".[27] Certainly, it has been shown that the First Respondent knew that a different source paid the contributions received after May 2017 and it would be

[25] See Wille's Principles of South African Law (Eighth Edition) p. 631 and further.

[26] Id., p. 633.
[27] Id., p. 633.

surprising if an experienced managing agent could not determine what was taking place. No effort was made to contact the Applicant to ascertain from her if these payments were made by her, especially as they have been processing her levy payments for some time before the new owner took transfer of unit 72. It also is not credible in the circumstances that they did not realise that two payments for the same account were made by different sources. The Applicant's bank records referenced unit 72 for all payments recorded thereon. What should have happened, was when the new owner stopped paying, they should have taken steps to recover the arrear contributions from the new owner. What they did instead was to credit the ledger account with payments from a source that is not responsible for such payments. Those payments should have been received and held in a separate account until they could determine who the payer was and how the money could be returned to her. None of that happened so the culpability of the First Respondent is clear.

46. The Applicant is required not only to prove that the First Respondent had been enriched but also that such enrichment came at the expense of the Applicant, i.e., that she was impoverished by the amounts claimed. In the Yarona Healthcare case Rogers AJA sums up the relationship between enrichment and impoverishment in the following passage: *Yarona contends that Medshield was required to prove not only that Yarona was enriched by the amounts claimed but also that such enrichment occurred at Medshield's expense, ie that Medshield was impoverished by the amounts claimed.*[25] *Since Yarona received un-owed moneys, its enrichment was presumed and it bore the onus to plead and prove loss of enrichment which it did not do.*[26] *Yarona argued, however, that Medshield failed to prove its impoverishment.*[28]

47. In this case the First Respondent did attempt to plead loss of enrichment but because that was due to their own culpability it can be discounted. However, the clearest proof of enrichment of the First Respondent on the one hand and the consequent impoverishment by the Applicant on the other hand is when the bank records of the Applicant show the payments to the bank account of the First Respondent and the corresponding receipt of such payments recorded in the ledger account of unit 72. Such proof should be sufficient to prove such impoverishment and so it is concluded thus.

48. Although the First Respondent did not plead that in the circumstances the ledger account for unit 72 will show that the new owner was the true beneficiary of the un-owed payments by the Applicant because it reduced its liability to the First Respondent by the corresponding amounts paid every month. Such an argument ignores the statutory relationship which is created in terms of the STSMA. As set out before, the registered owner of each unit in a community scheme incurs a liability to pay the contributions levied on such owner from the time and date on which the trustees of the body corporate resolve that such levies are to be paid. To the extent that the accounting records of such payments may create a record

[28] See footnote 22 for citation, here par. 47, p. 19.

where un-owed payments are recorded on the ledger account of a unit which would reduce the amount owing to the First Respondent, that would not detract from the statutory relationship between the First Respondent and the registered owner of the relevant unit. Were the First Respondent to decide to recover, through legal action, the arrear contributions shown on the ledger account without adjusting it to determine the true amount owing by the registered owner at any given time, it would still be liable to a party who can prove a claim based on unjustified enrichment and it would not be able to claim non-enrichment because of its own culpability of inaccurate accounting.

49. In the final analysis Rogers AJA stated in the Yarona Medhealth case: *To return to Yarona's contention that Medshield failed to prove its impoverishment, the requirement of impoverishment in the condictio indebiti is concerned with whether the plaintiff suffered a loss in the act of making the payment or performance giving rise to the condictio. In the present case there were no circumstances prevailing at the time of each payment which would justify a conclusion that Yarona's enrichment did not occur at Medshield's expense and cause an immediate corresponding impoverishment. Medshield did not have a contractual arrangement with a third party which shielded it from the impoverishment.*[29]

50. To the extent that the First Respondent is inclined to plead non-enrichment because the Applicant was restored to her ownership of unit 72 as of the date of deprivation thereof, the money they received from her did not constitute enrichment because it was due. Such a plea was not raised, but if raised, would militate against the applicable provisions of the STSMA as set out under that heading earlier.

Prescription

51. The onus rests on the First Respondent to establish the date by which the Applicant acquired, or could by reasonable care have acquired, knowledge of the facts giving rise to the claim.[30] No such evidence was submitted on behalf of the First Respondent.

52. The Applicant has not demonstrated throughout this matter any awareness that the payments that she had made were made in error of the law. So, even if the First Respondent were to have attempted to adduce such evidence, prescription would not have been applicable in the circumstances.

Costs and Interest

53. The Applicant also claimed all the legal costs she had incurred in recovering her property, such trauma and personal stress she has endured and 24% interest to be calculated on the amount she has claimed. Clearly, the first two items cannot be claimed against the First Respondent because it was not involved in the dealings

[29] See footnote 22 for citation, here at par. 52, p. 21
[30] See footnote 19 as at p. 20.

which led to the loss of her property. Moreover, the CSOS Act do not authorised claims of that nature to be granted.

54. No order regarding interest on the refund of the money's claimed by the Applicant can be made as such and such an order does not fall within the jurisdiction of any orders to be issued in terms of section 39 of the CSOS Act. Normally such orders are issued by courts of law on orders made but as the adjudication process in terms of the CSOS Act is not a court of law such powers under the Prescribed rate of Interest Act 55 of 1975 cannot be used in this instance.

ADJUDICATION ORDER

55. The First respondent is ordered to –

55.1. pay the amount of R19 280,29 to the Applicant within 30 days of the Third Respondent receiving this order from the Ombud Service; and

55.2. furnish the Applicant with a statement of contributions due to the First Respondent by the Applicant as of 1 July 2019, adjusted by reducing the amount owing by all arrear contributions for the period 14 October 2016 to and inclusive of 30 June 2019 due by the new owner. The Applicant shall be entitled to have such statement reviewed by a qualified accountant of her choice for accuracy, at the cost of the First Respondent, before payment thereof.

RIGHT OF APPEAL

Section 57(1) of the CSOS Act provides –

An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.

William du Toit

ADJUDICATOR
Community Scheme
Ombud Service
Date: