REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Case Title:	**Case No:**
Black Rock Body Corporate v Black Rock Properties Nine CC	HC-MD-CIV-MOT-GEN-2022/00341
	Division of Court: High Court High Court of Namibia (Main Division)
Heard before: Honourable Justice Maasdorp, Acting	**Delivered on:** 23 October 2023
Neutral citation: *Black Rock Body Corporate v Black Rock Properties Nine CC* (HC-MD-CIV-MOT-GEN-2022/00341) [2023] NAHCMD 673 (23 October 2023)	

The order:

1. As there are less drastic means available to settle the Magistrate's Court judgment debt, the application to declare Unit 9, Black Rock Court, Rocky Crest, in the Municipality of Windhoek, Registration Division "K", Khomas Region, is refused.
2. The respondent shall pay the applicant's costs of suit, on a party and party scale, not capped to N$20 000 under High Court rule 32(11).
3. The respondent shall settle the agreed capital amount of the debt of N$115 826,95 in five months from the date of the first instalment, in five equal instalments, with the first instalment due on 7 November 2023.
4. Once the agreed capital amount has been paid, this application will be regarded as finalised.
5. If the respondent should fail to pay any instalment on its due date, the entire balance of the capital amount still owing at that time, will become immediately due and payable.
6. Should the respondent fail to pay any instalment on its due date, the applicant is herewith authorised to approach the court on the same papers, duly amplified as the applicant

may deem necessary, and seek whatever relief that the facts prevailing at the time may justify, including but not limited to the relief sought in prayers 1 and 2 of the notice of motion.

MAASDORP AJ

[1] The applicant is Black Rock Body Corporate, established under s 38 of the Sectional Titles Act, 2 of 2009 ("the Act") to administer the affairs and perform the other functions set out in s 39 of the Act for the Black Rock complex located in Rocky Crest, Windhoek. The respondent is Black Rock Properties Nine CC, a Namibian close corporation that owns Unit 9 in the Black Rock complex.

[2] In March 2022, the applicant secured default judgment for unpaid levies and costs of N$79 370,38 against the respondent in the Magistrate's Court. The respondent did not settle the judgment. The applicant secured a warrant of execution against the respondent's movables. When the Messenger of Court attended to the respondent's premises to execute the warrant, the person presumably in charge of the premises did not identify any cash or disposable assets that could satisfy the judgment and the Messenger of Court did not find any movables on the property that could satisfy the judgment. The Messenger issued a *nulla bona* return.

[3] The applicant's legal representatives unsuccessfully tried to contact the respondent's sole member via email already in September 2021 about the outstanding levies, and again with telephone calls in July 2022. A body corporate such as the applicant is obliged to recover levies and other amounts due to the body corporate by its members. It needs the funds to pay for all services rendered and utilities supplied to the complex. It must use the funds to perform regular maintenance and perform other functions to avoid damage to the physical infrastructure and the value of the properties within the complex. In the absence of any response from the respondent, the applicant was compelled to first approach the Magistrate's Court and then the High Court with this application.

[4] In its notice of motion, the applicant requested the court to declare Unit 9 in the Black

Rock complex specially executable. It also requested the court to authorise the Deputy Sheriff to attach the immovable property, sell it by public auction and apply the proceeds towards the satisfaction of the unpaid Magistrate's Court judgment. The applicant also requested for costs on the scale as between attorney and client.

[5] The applicant has approached the High Court to enforce a judgment of another court. The applicant claimed that it had no other avenues to recover the judgment debt, because the Magistrate's Court had no power to authorise the sale in execution of the respondent's immovable property as a result of the High Court's judgment in *Hiskia*.[1] The applicant relied on the principle of process-in-aid for approaching the High Court.

[6] The respondent opposed the application on several grounds. The respondent did not deliver an opposing affidavit and argued its case on the applicant's papers. At first, it denied that the High Court had the power to come to the applicant's assistance at all. The respondent also challenged the lawfulness of the default judgment and warrant of execution obtained in the Magistrate's Court. The respondent argued that the judgment and warrant fell within the scope of conduct declared unconstitutional in *Hiskia*. The respondent also argued that the default judgment was a nullity as the claim amount exceeded N$25 000 and therefore fell outside of the Magistrate's Court's jurisdiction, with the result that the court should rescind the default judgment and dismiss the application with an adverse costs order.

[7] After the parties' first appearance to present oral submissions, the court addressed questions to the parties on two occasions. On each occasion, the court asked for a response to issues which the parties had not addressed adequately in their heads of argument or oral submissions. The parties responded to the court's queries with an additional affidavit by the magistrate who had issued the default judgment and the warrant of execution, two status reports, supplementary heads of argument, and further oral submissions.

[8] Following these exchanges, the main issues in dispute were ultimately resolved as follows.

[1] *Hiskia and Another v Body Corporate of Urban Space and Others* 2018 (4) NR 1067 (HC).

[9] Firstly, the respondent accepted that the principle of process-in-aid is applicable in Namibia, with reference to, amongst others, the Namibian High Court judgment by Justice Prinsloo in *The Hills Body Corporate v Grove*.[2] In broad terms, the principle of process-in-aid ensures that a litigant with a valid court order who cannot enforce the order through the rules of the court that issued the order has an avenue to enforce that order.

[10] Secondly, the respondent accepted that the allegation that the default judgment and the warrant of execution had been issued by a clerk of the Magistrate's Court, instead of a magistrate, was factually incorrect. The magistrate who had issued both documents deposed to an affidavit in which she confirmed having done so.

[11] Thirdly, the respondent accepted that it could not rely on the absence of an application for the admission of a supplementary affidavit by the magistrate, because the respondent had agreed to the admission of the affidavit in the parties' final joint status report.

[12] Fourthly, since a judicial officer had issued the default judgment and warrant of execution, the respondent could not rely on the argument that the judgment and warrant fell within the conduct prohibited under the *Hiskia*[3] judgment. In *Hiskia*, the court had declared unconstitutional the statutory provisions that authorised the granting of default judgments and warrant of execution without judicial oversight, in other words by clerks of court instead of magistrates.

[13] I digress to highlight that the order in *Hiskia* was varied in important respects on 5 September 2023.[4] Under the varied order, this application for process-in-aid would have floundered at the first hurdle. The applicant would have been entitled to approach the Magistrate's Court for a warrant in respect of the immovable property, thus, would not have

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[2] *The Hills Body Corporate v Grove* (HC-MD-CIV-MOT-GEN- 2022/00197) [2022] NAHCMD 457 (2 September 2022).

[3] *Hiskia and Another v Body Corporate of Urban Space and Others* 2018 (4) NR 1067 (HC).

[4] *Messenger of Court Windhoek v Glenda Martha Hiskia and 10 others* (HC-MD-CIV-GEN-2023/00162), varied court order released on 5 September 2023.

been entitled to approach the High Court. The High court can only entertain an application like this one if there is no other effective remedy available in another court.[5]

[14] Fifthly, the respondent had to concede that its reliance on the N$25 000 jurisdiction of the Magistrate's Court was misplaced because of s 39(3) of the Act, that reads as follows:

'Despite anything to the contrary in any other law, a magistrate's court has jurisdiction to hear any action instituted under subsection (2)(*b*) irrespective of the amount of the claim.'

[15] During oral argument on 31 August 2023, the respondent's legal practitioner effectively accepted that the respondent could not succeed on any of its defences raised until then. The legal practitioner who argued the respondent's case is also the sole member of the respondent. In court, he submitted that the respondent indeed owned sufficient movable property to satisfy the debt and would satisfy the debt. He argued that this confirmation meant that the applicant had less drastic measures available to it, and that its application for permission to sell Unit 9 to recover the debt had to fail.

[16] The respondent's representative had relayed this information to the applicant's representative during a break in the proceedings. The applicant instructed that the application for the primary relief should proceed.

[17] The respondent's representative and sole member then tendered payment of the respondent's indebtedness to the applicant over a period of five months, in five equal instalments. He again argued that this tender, albeit very late in the day, meant that the applicant had an alternative, less drastic measure by which it could recover its judgment debt, compared to the sale in execution of an immovable property clearly worth several hundred thousand Namibia Dollars to recover a debt of less than N$100 000.[6]

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[5] *The Hills Body Corporate v Grove* (HC-MD-CIV-MOT-GEN- 2022/00197) [2022] NAHCMD 457 (2 September 2022) paras 17–19.

[6] See *The Hills Body Corporate v Grove* (HC-MD-CIV-MOT-GEN- 2022/00197) [2022] NAHCMD 457 (2 September 2022) para 29.

[18] Although the tender was made very late in the day, the nature of the relief, the disproportionality between the value of the property and the judgment debt, and the status of the person making the tender – an officer of court who is also subject to strict regulation under the Legal Practitioners Act, 15 of 1995, meant that I could not simply ignore the tender. However, the lateness of the tender meant the respondent could not escape an order for costs even if the primary relief sought by the applicant – declaring the immovable property specially executable – was no longer immediately available to the applicant. Furthermore, to reduce the possibility of prejudice to the applicant by the belated offer, certain additional orders were discussed and effectively agreed to in court, as will appear at the end of this judgment.

Costs

[19] The final dispute was on costs. The applicant sought costs on an attorney and client scale. It relied on rule 73 of the default sectional titles rules.[7] The applicant argued that it tried to avoid litigation but ultimately had no choice than to proceed first to the Magistrates Court and then to the High Court with this application. It argued that the respondent's unexplained and unjustifiable failure to pay what was due to the applicant was catastrophic for the applicant and its members. The members ought not be out of pocket because of the respondent's conduct.

[20] The respondent argued that it ought not to pay any costs because the majority of the exchanges between the parties and court appearances had resulted from the court's questions, and because the applicant had to remedy some of the shortcomings in its case during these exchanges.

[21] According to applicant, rule 73 stated that the applicant is entitled to costs on the attorney and client scale. From the applicant's submissions during argument, it appeared to me that a court must retain its overall discretion on costs despite rule 73. Since the court's

[7] The Minister of Lands and Resettlement caused the publication of the default rules under s 37(2) of the Act on 31 October 2014.

discretion on costs has always been a crucial feature of litigation, it appeared to follow that the rule would have had to be cast in clearer language to deprive the court of its discretion on costs. Additionally, it seemed absurd that a body corporate could behave however it wanted to during litigation and still be entitled to costs on the punitive scale normally reserved for litigants guilty of dishonesty of fraud or reckless, frivolous, or vexatious behaviour in the course of litigation.

[22] During oral argument, I asked the applicant's attorney if he had any authority that supported a contrary argument – in other words, authority that stated that rule 73 makes it obligatory for the court to award costs on this scale. The applicant's attorney did not have such authority at hand and did not argue that the court had no discretion. He agreed that the court retained its discretion.

[23] The respondent's argument that the court's engagements with the parties gave rise to the bulk of the costs may have been a good point if the issues raised and resolved had been irrelevant to the case or had been caused solely by the applicant's conduct. The issues raised by the court were relevant and the majority of the issues could have been addressed much earlier, if the respondent had filed an opposing affidavit or a notice of issues of law, instead of the approach it ultimately adopted. In addition, it appears from the record that the majority of the costs were incurred prior to the court's engagements with the parties.

[24] As a result, I found on the day of the final hearing that the court should award costs to the applicant, but not on a higher scale, since the respondent had not misbehaved in the sense required by our courts to grant a punitive costs order.[8]

[25] On further reflection, it appears arguable that there may be another interpretation of rule 73. If this interpretation had been advanced on the day, the costs order might have been different. Although this part of the judgment is *obiter*, I set out the results of my research in case it may be of assistance in future matters.

[8] *Helios Oryx Ltd v Trustco Group Holdings Ltd* (HC-MD- CIV-MOT-GEN-2022/00505) [2023] NAHCMD 415 (20 July 2023) para 43.

[26] According to rule 73 of the default sectional title rules:

'An owner of a section is liable for and must pay all legal costs, including costs between attorney and client and collection commission, expenses and charges incurred by a body corporate in obtaining compliance with any of the owner's obligations in terms of the Act, these rules or any house rules.'

[27] Rule 73 appears to be aimed at ensuring that a body corporate does not incur unnecessary costs for the rest of the members of the body it represents when the body corporate wants to enforce its rights and perform its duties under the Act. This follows from a reading of the Act, regulations and the rules made under the Act, as well as from the South African judgment in *Body Corporate of Kleber v Obakeng*[9]*.*

[28] In *Obakeng*, the Gauteng Local Division dealt with an appeal from a Magistrate's Court decision. The appellant had unsuccessfully sought default judgment against the respondents (coincidentally also the owners of Unit 9 in the relevant complex) for unpaid levies and other special costs. The Magistrate had dismissed the default judgment application because he held[10] that the appellant ought to have pleaded and proven but failed to plead or prove that it had given notice of liability for contributions and charges to the owners as prescribed in the regulations published under the Sectional Titles Schemes Management Act[11].

[29] The outcome on the merits of the appeal is irrelevant to the present discussion. Only the passages dealing with costs are relevant. They appear at paras 16 to 20 of the judgment.

[30] The appellant in *Obakeng* sought costs on the attorney and client scale. In South Africa, costs in such cases is governed by regulation 25(4):

'A member is liable for and must pay to the body corporate <u>all reasonable legal costs and disbursements</u>, as taxed or agreed by the member, incurred by the body corporate in the collection of

[9] *Body Corporate of Kleber v Obakeng* 2021 JDR 2838 (GJ).

[10] Id para 4.

[11] Sectional Titles Schemes Management Act 8 of 2011.

arrear contributions or any other arrear amounts due and owing by such member to the body corporate, or in enforcing compliance with these rules and the Act.' (emphasis in original)

[31] In para 17, the court held:

'A body corporate is in a special fiduciary relationship to all its members. When a body corporate spends money, it is spending the money of its members. Where one member conducts himself in an inappropriate manner that causes the community of members to have bear additional costs and disbursements, it is fair that as much as possible of this burden be borne by the delinquent member.'

[32] And further:

'The regulation [25(4)] invites an equitable discretion to be exercised by the court. Similarly, a body corporate that is extravagant in pursuing a member might incur more costs and disbursements than 'reasonably' necessary. A court could, in such circumstances award less than all costs, using the criterion of 'reasonableness'. Axiomatically, in this context 'reasonableness' is wholly fact-specific.' [12]

[33] Paragraphs 18 and 19 are quoted in full because of their particular relevance to this matter:

'18. A further reason why an attorney and client costs order could not be the default injunction is to be found in the history of the legislation about sectional titles property regulation. The *Sectional Titles Act 95 of 1986* regulated matters until repealed to make way for the Sectional Titles Management Act. under the repealed statute, the regulations addressed the question of costs. In annexure 8 of those regulations, paragraph 31 (5) provided:

> "An owner shall be liable for and pay all legal costs, <u>including costs as between attorney and client</u>, 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." (Emphasis in original)

[12] Para 17.

19. Plainly, the omission of attorney and client costs in the current statute is a powerful indication that the policy choice was made not to be so rigid as formerly was the case and furthermore, to simply open the question to the exercise of a discretion in relation to what is 'reasonable'.' (my emphasis)

[34] Namibia did not make the same policy choice. On the application of the ordinary principles of interpretation of documents, the court must respect the plain language of rule 73 and this policy choice in its interpretation, unless the results would be contrary to the drafter's intention or otherwise lead to absurd results.

[35] The practical application of Management Rule 31(5), which is the former South African equivalent of Namibia's rule 73, was discussed in *The recovery of body corporates' legal costs,*[13] an article that appeared in the December 2014 edition of De Rebus, by the Alfred Reinicke, the author of *The Legal Practitioner's Handbook on Costs*, 2nd ed (2011).

[36] In summary, the relevant part of *Reinicke*'s argument is that Management Rules are not peremptory statutory provisions as they can be changed by agreement. If they had been peremptory statutory provisions, the court would not have had a discretion on costs.[14] Since Management Rule 31(5) dealing with costs is effectively a contractual consent to costs,

'… the court (both the presiding officer and taxing official) retains a residual discretion to enforce the agreement, and the parties cannot by agreement deprive the court of the discretion it has in regard to costs because (according to *Intercontinental Exports (Pty) Ltd v Fowles* [1999] All SA 304 (A) para 26) - "… a court … would normally be bound to recognise the parties' freedom to contract and to give effect to any agreement reached in relation to costs. But good grounds may exist ... in a party being deprived of agreed costs, or being awarded something less … than that agreed upon."' [15]

[37] On this interpretation, a court must order costs in favour of the applicant on an attorney

[13] A Reinicke, *The recovery of body corporates' legal costs* (http://www.derebus.org.za/recovery-body-corporates-legal-costs/), last accessed 18 October 2023.

[14] Id p1, para 6

[15] Id p2, paras 4 and 5

and client scale, unless good grounds exist to make a different order.

Conclusion

[38] On my understanding of the proceedings on 31 August 2023, the applicant agreed that the respondent could settle the judgment debt in five equal monthly instalments, agreed on the quantum of the outstanding capital that had to be settled, and only sought additional protections in the event the respondent should miss a payment. The applicant's representative proposed an acceleration clause and an express order that would authorise the applicant to return to court for appropriate relief on the same papers, duly amplified. The respondent did not object. As a result of the engagements leading up to and including the oral submissions on 31 August 2023, I indicated which orders I believed should be issued. However, the orders were not issued on the day because the applicant requested the court to prepare a judgment that would give the reasons for the orders. The applicant accepted that the orders would operate only from the date of the judgment.

[39] In the result the following orders are made:

1. As there are less drastic means available to settle the judgment debt, the application to declare Unit 9, Black Rock Court, Rocky Crest, in the Municipality of Windhoek, Registration Division "K", Khomas Region, is refused.
2. The respondent shall pay the applicant's costs of suit, on a party and party scale, not capped to N$20 000 under High Court rule 32(11).
3. The respondent shall settle the agreed capital amount of the debt N$115 826,95 in five months from the date of the first instalment, in five equal instalments, with the first instalment due on 7 November 2023.
4. Once the agreed capital amount has been paid, the matter will be regarded as finalised.
5. If the respondent should fail to pay any instalment on its due date, the entire balance of the capital amount owing at that time, will become immediately due and payable.

6. Should the respondent fail to pay any instalment on its due date, the applicant is herewith authorised to approach the court on the same papers, duly amplified as the applicant may deem necessary, and seek whatever relief that the facts prevailing at the time may justify, including but not limited to the relief sought in prayers 1 and 2 of the notice of motion.	
Judge's signature	**Note to the parties:**
	Not applicable.
Counsel:	
Applicant	**Respondent**
W VILJOEN Of Phillip Swanepoel Legal Practitioners Windhoek	PS ELAGO Of Tjombe-Elago Inc Windhoek