Introduction

This article considers whether or not (and if so, to what extent) sectional title unit owners are liable to firstly the body corporate, and secondly the municipality, for municipal debt incurred by the body corporate prior to their becoming owners, and if so, in what proportions.

The problem

Imagine that you are an owner in a sectional title scheme. You suddenly receive a monthly levy statement from the body corporate for R 100,000 for electricity. You are in shock. This cannot be correct, so you query it. You are told that the municipality made some sort of billing error in the past, and in correcting that error billed the body corporate R 1 million. You, as one in ten of the owners, with a participation quota of 10%, are liable for 10% of the bill in the sum of R 100,000.

Now imagine further that you discover that the R 1 million bill relates to a period of time before you became the owner. You’re furious. How can you be held liable for R 100,000 that is owing for a period of time that pre-dates your ownership in the scheme?

Your levies are all paid up. Notwithstanding, the municipality is threatening to disconnect the electricity or water to the scheme if not paid. The municipality is also threatening to sue the body corporate if it doesn’t pay. You are being threatened with legal action by the body corporate (who wants to cut off your electricity and water supply and sue you) and sell your unit to pay your bill because you refuse to pay the R 100,000 that related to a period prior to you becoming owner.

But it gets worse. You can’t even sell your unit because now that the most recent audited financials are available, you can see the R 1 million owing to the municipality and as a result the body corporate is now insolvent, and no one is able to get a bond for a unit in an insolvent body corporate. Who in their right mind would even be willing to buy into an insolvent body corporate?
Even if you are lucky enough to find a cash buyer, who isn't concerned about the historical debt for whatever reason, you can't afford to pay the levy clearance figures to obtain a levy clearance certificate because the managing agents for the body corporate have ‘loaded’ the figures with the R 100,000 historical debt and won’t issue the levy clearance certificate until you have paid. This situation is almost impossible to conceive for the average sectional title unit owner. A million urgent questions spring to mind: surely the municipal charge is incorrect, surely the body corporate put funds aside on a monthly basis to cover the bill, surely the managing agent should have detected the problem sooner and done something to fix it, surely I am not going to lose my home as a result of the incompetence of the municipality and managing agents, surely something can be done because it is not fair for me to have to pay R 100,000 of someone else’s debt?

The purpose of this article

This scenario is more common than you would think in South Africa. The authors (being experts in municipal property law) are constantly assisting body corporates and owners in the distressing situation above, and have been doing so for some years now. Although the situation is alarmingly common, because people tend to panic when faced with the situation above they often overlook basic legal principles and make silly mistakes in the way that the matter should be handled from a legal perspective. The purpose of this article is to explain the relevant legal principles and shed some light on the rights and obligations of the various parties involved in the messy factual matrix set out above.

The legal issues at play

- Firstly, is an owner of a unit in a body corporate liable for historical debt charged by the municipality to the body corporate, if that owner was not an owner at the time that the historical debt was incurred? Does the answer to this question depend on whether ordinary levies or special levies have been raised or not? Is the position any different
historically as a result of the recent changes to the legislation?

- Secondly, what legal recourse does the body corporate have against owners who are being held liable for municipal debt?
- Thirdly, what legal recourse does a municipality have against a body corporate being held liable for historical municipal debt?
- Fourthly, what legal recourse does a municipality have against an owner in a sectional title scheme for amounts owing by the body corporate?
- Lastly, what recourse does an owner have against a body corporate, or managing agents, or municipality, if they find themselves in the above situation as a result of incompetence?

**The Default Position**

- The ‘default’ position in our law is that no one can be held liable for another person’s debt unless they have agreed to be liable, or there is a law making them liable. And as far as the authors are aware, there is no law in relation to municipal debt billed to bodies corporate that changes this principle. Simply put, owners cannot be held liable by a body corporate for any portion of municipal debt incurred by another person, unless they have agreed to be liable. This is the first ‘golden rule’ of sectional title municipal debt.

- Common examples of where a person has agreed to be held liable for someone else’s debt would include a parent signing surety for their child’s student loans or a purchaser of a property at auction agreeing to pay the rates and taxes necessary to get a rates clearance certificate to transfer the property. Common examples of where the law makes another person liable for another person’s debt would be where the owner of a property is made liable for the unpaid municipal debts of a tenant, and in some municipalities in some cases the tenants of a property can even be held liable for a portion of the owner’s unpaid municipal bills.

- Remember that a purchaser buying into a sectional title scheme does not ‘inherit’ the seller’s debt – the seller needs to obtain a levy clearance certificate from the body corporate before the seller will be allowed to pass transfer of the unit in the Deeds Office to the purchaser, and so the purchaser starts its relationship with the body
corporate with a ‘clean slate’. However, as we explain more fully below, the purchaser might be held liable for special levies owing after transfer in connection with the unit (which might relate to liability incurred before the purchaser took transfer). This is a significant example of where the law provides that a person can be held liable for another debt. In order to understand how this might happen, we need to take a quick detour into how body corporate’s are charged for, and they charge owners for, municipal consumption charges.

The same principles apply when an owner is charged levies for a large municipal bill that relates to consumption charges levied prior to his or her becoming an owner. It is not only where there is a change of ownership that it might happen that an owner is levied with charges incurred by other person’s...How municipal charges are billed to owners by the body corporate

In practice, (where there are no pre-paid meters) a body corporate is billed by the municipality for the supply of electricity and water supplied to all of the units. This is known as a ‘bulk’ supply. The body corporate is liable in law to the municipality for the cost of the bulk supply. The body corporate then bills each owner for their own consumption (where consumption is measured by sub-meters). In the great majority of cases consumption is measured.

Where consumption is not measured, the body corporate splits the consumption between all of the units on a pro-rata basis based on the participation quota of the unit owners. [Note that there are ways in which this formula for calculating how much each unit owner pays can be amended, and in such cases what is set out herein will not apply and you will have to look at the rules of the body corporate in question to see how liability would be apportioned between the owners.] In the case where the consumption is allocated to the owners pro-rata to their participation quota in the scheme the owners may very well be paying for the consumption of other owners and cross subsidising each other to a certain degree. But it is important to understand that this cross-subsidisation is limited to any given billing period (namely each month there is a ‘fresh’ bill with a ‘fresh’ cross-subsidisation that covers only
the present owners’, and not prior owners’, municipal charges). This form of cross-subsidisation is a case where the owners are agreeing to be held liable for the municipal debts of others (in a certain sense).

The billing method for municipal charges is a matter of choice by the body corporate concerned. There is case law which states that when an owner buys into a sectional title scheme, he or she is bound by the provisions of the rules in that scheme (as they were when they bought in, and as they are lawfully amended in the future) even in some cases where that owner is against the change. This is because the rules are semi-statutory and semi-contractual and the owner agreed when buying in that whatever the rules lawfully required, they would comply with. So even an owner who doesn’t like the fact (and has objected to the fact) that the body corporate has chosen to split the municipal services bill amongst the owners based on their participation quota has no recourse and must accept this, or sell their unit and exit the body corporate.

From this we can glean the second ‘golden rule’, which is that where services are sub-metered the owners in the scheme have agreed (as between themselves) that they will only pay for their own consumption and a portion of the common consumption based on their participation quota, but where services are not sub-metered they have agreed to split the consumption based on their participation quota only, and not based on their actual consumption. They are essentially agreeing to cross-subsidise each other for each billing period.

**Reserve and slush funds and the raising of levies**

The next important thing to understand about the relationship between a body corporate and an owner in relation to municipal charges, is that there are two different ways in which municipal charges could be raised by a body corporate against an owner.

A normal levy is raised based upon the body corporate’s annual budget, which is compiled based on an estimate of the future year’s income and expenses. In the past sectional title
schemes were not lawfully obliged to make provision in their annual budget and normal monthly levies for a “slush fund”, which is a fund that caters for emergency or significantly expensive repairs/maintenance. However, since the coming into operation of the Sectional Titles Schemes Management Act (hereinafter referred to as “STMA”) bodies corporate are now legally obliged to have a “Reserve Fund” that provides for long term capital maintenance and repair. Although the legal obligation to provide for a Reserve Fund is a step in the right direction, the Reserve Fund may not cater for the kind of emergency that this article contemplates – namely the sudden liability for hundreds of thousands or even millions of rands worth of historical municipal charges.

Of course any body corporate that already has a slush fund or has made some provision for the raising of a large municipal bill will then be able to settle the whole or at least part of that municipal bill from the funds it has on hand in its emergency/slush fund, meaning that it will not be as hard hit as other bodies corporate that have made no provision at all or have no emergency or slush fund to fall back on.

Sadly, however, in our experience most body corporates do not have adequate slush funds for such emergencies. In such a situation the municipal bill can only be recovered from the owners by the body corporate raising special levies. Special levies are only raised where there has been an unexpected expense not budgeted for and which is not covered by normal monthly levies, and where there is no emergency or slush or Reserve Fund to fall back on. In cases like these special levies are raised (normally on a pro-rata basis according to the participation quota of the units in the scheme). The larger the special levy, the longer the period that it is raised over, usually in an equal number of monthly instalments.

Why does the difference between normal and special levies matter? It matters because the law deviates from the general rule that a person cannot be held liable for another’s portion of the debt when special levies are raised and a property is transferred.

**Liability for special levies is an exception of the first ‘golden rule’**
The STMA provides in section 3(2) - (4) that:

“(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 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 contributions from the date of change of such ownership.

(3) Any special contribution becomes due on the passing of a resolution in this regard by the trustees of the body corporate levying such contribution and may be recovered by the body corporate by an application to an ombud, from the persons who were owners of 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 contributions from the date of change of such ownership.

(4) “Special contribution”, for the purposes of this section, means any contribution levied under subsection (1) other than contributions which arise from the approval of the estimate of income and expenditure at an annual general meeting of a body corporate, determined to be a contribution to be levied upon the owners during the current financial year.”

The above sections make it abundantly clear that once a levy or special levy has been imposed by the trustees (assuming that same was properly raised), the current owner is liable for payment of same. In regard to normal levies, once a levy has been raised it can only be recovered by the body corporate from the person who was the owner at the time that the levy was raised. We need to remember here that the levy raised could include only the owner’s own consumption charges and his pro-rata portion of common property consumption, or if there are no sub-meters it could be a simple pro-rata participation quota charge. The owner would become liable for these charges on a month by month basis.
However, special levies are different. They are usually raised not only in one month but over a series of months, meaning that although the decision to raise the special levy over a number of months (say 12) is taken today, the levy will be billed in twelve monthly instalments in the future. In essence, the purchaser steps into the shoes of the seller and the seller is absolved of the responsibility of paying these levies to the body corporate after transfer, and this will apply even in cases where the special levy was imposed because of liability that accrued to the body corporate before transfer, which the purchaser had absolutely no hand in incurring. Again, remember here that the special levy raised could include only the owner’s own metered consumption charges and his pro-rata portion of common property consumption, or if there are no sub-meters, it could be a simple pro-rata participation quota charge which is cross-subsidised.

This may seem unfair to the purchaser at first glance, but consider that a seller should be disclosing the existence of any special levies that will be imposed after transfer to the purchaser. If the purchaser still chooses to buy, then the purchaser has agreed to accept this liability. If the purchaser is not willing to accept this liability, he doesn’t purchase. Where there is no voetstoots clause, and the seller does not disclose the special levy to the purchaser, the seller may be held liable by the purchaser for the amount of the special levies that the seller failed to disclose because it arguably constitutes a latent defect in the property. Even where there is a voetstoots clause, if the seller intentionally and fraudulently fails to disclose the existence of the special levies that will be payable after transfer, then the purchaser may have a claim against the seller in terms of our common law for the amount of the special levy. So an aggrieved purchaser who did not know about the special levy is not without a remedy.

The body corporate needs to invoice you before you can be held liable

Lastly, before raising a dispute, or arbitrating, or litigating about whether an owner should be liable for municipal charges, take a step backwards and return to the basics. It is very important to understand that liability for a portion of any municipal bill can only arise as
Liability for ‘Historic’ Municipal Debt in Sectional Title Schemes

between the body corporate and the owner when the body corporate levies the owner with a portion of the historic charge. This may be done in the ordinary course (for budgeted levies based on the administrative fund and/or reserve fund) or by way of special levies for unbudgeted expenses. Until a body corporate has levied an owner for a portion of the historical municipal charge, the body corporate cannot legally call upon the owner to make payment of same, or take any steps against that owner to prejudice that owner for non-payment of same. This is the third of the ‘golden rule’.

Collecting Debt From Those Who Incurred It

There is nothing preventing the body corporate from collecting outstanding amounts from prior owners, and nothing making a new owner liable for an old owner’s debt. In the situation where a body corporate receives a large bill post a particular owner exiting the scheme, that body corporate should track down and hold such owner liable, if indeed it can be shown that the consumption in question was incurred by that owner (i.e. based on the sub-meters supplying that property) or where that amount should be allocated to the seller of the unit for the period of time in respect of which that seller was the owner of the property.

The body corporate must collect from the person who consumed the services or is otherwise liable as a result of consensual cross-subsidisation. This is the fourth golden rule.

Application of the four golden rules

In summary, they are:

- You can’t be held liable for someone else’s consumption charges, unless you have agreed to be held liable or there is a law making you liable. An example of a law that does this is where there STMA makes a purchaser liable for special levies for consumption charges incurred in relation to the period before that purchaser took transfer of the unit.
- Where there are sub-meters, the owners are being held liable only for their own
consumption (and potentially their pro-rata portion of the common property consumption). Where there are no sub-meters, the owners have agreed to cross-subsidize each other, on the understanding that they will pay a fixed portion of the bill even if they did not personally incur those charges.

- The body corporate must collect from the person who consumed the services or is otherwise liable as a result of consensual cross-subsidisation. It cannot lawfully refuse to issue you with a levy clearance certificate or take any other steps against an owner if it has not invoiced that owner for those charges.

- The body corporate must collect from the person who consumed the services or is otherwise liable as a result of consensual cross-subsidisation.

We now turn to the application of the four golden rules in relation to different factual scenarios based on the manner in which the body corporate or managing agents did (or did not) keep records of the actual consumption.

1. **Where sub-meters measure consumption and the body corporate keeps accurate records of same**

A body corporate can only hold a sectional title owner liable for his or her own metered consumption and ancillary charges thereon, and a pro-rata share of the common consumption (metered or unmetered) and only where the body corporate has invoiced the owner for same. The only exceptions to this rule are where another person (for example, a subsequent owner) has agreed to be liable for same, or has been made liable (as happens in the case of special levies raised before transfer).

Because a body corporate is calculating the amounts billed to the owners based on sub-meters, if this exercise is done correctly the body corporate should be recovering the amount that is truly due and payable to the municipality each month in relation to all of the owners and the common property. In cases like these, it is rather rare for a body corporate to be out of pocket when a large municipal bill is raised because it is quite common for bodies
corporate to be taking their own readings and charging their owners based on their own consumption calculations. However, there could be millions owing (and unprovided for) for one of the following reasons.

- If a body corporate makes a mistake and under-bills the unit owners, but seeks to recover the amounts by which it under-billed at a later stage, it must seek payment from the persons who were the owners in respect of each billing period that the services were rendered in. For example, if the true consumption charges that should have been billed by a body corporate to the owners were R 5,000 for the first six months when owner A was around, and R 3,000 for the last six months when owner B was around, then the body corporate must recover R 5,000 from owner A and R 3,000 from owner B. The body corporate cannot simply lump owner B with owner A’s bill.

- If a municipality makes a mistake and under-bills the body corporate for any extended period of time, this should not make any difference to the owner’s liability to the body corporate for municipal charges, because the body corporate is using readings of its sub-meters to calculate the monthly municipal charges billed to the owner. The owner pays them and the body corporate either pays those amounts over to the municipality or puts it into a savings account, so that when the municipal bill is adjusted and the municipality eventually ‘claws back’ the amount by which it undercharged, the body corporate will have the funds to settle the bill.

- If the body corporate mismanages its funds and uses the amounts collected from the owners to pay other expenses rather than settling or saving for the municipal bill, and the municipality then whacks the body corporate with a huge bill that it does not have the resources to pay, there has been mismanagement of the body corporate funds and either the managing agent or trustees should be called to account for same. There may be a claim against these persons for damages. Leaving a potential damages claim aside for the moment, remember that the body corporate still needs to pay the municipality to keep the lights on. The money has to come from somewhere, and that ‘somewhere’ can only be from the pockets of the present owners (not the past owners). This is because it is the present owners that are essentially being lumped with the cost
of mismanagement by the managing agent/trustees, and are going to have to dig into their pockets to pay to keep the lights on. It is not appropriate to think of this payment as being for municipal charges, however, as the municipal charges have already been paid by the owners to the body corporate (which spent the money elsewhere). It is better to think of this kind of contribution as a “mismanagement cost” which the current owners are forced to bankroll.

2. **Consumption is not measured by sub-meters but the body corporate keeps accurate records of the municipality’s meter readings**

Where there are no sub-meters, a body corporate can cross-subsidise in any particular billing period, meaning that it can jointly hold all owners liable for the total bill in any given billing period, by dividing the total charge up amongst the various owners pro-rata to their PQ (unless its rules provide otherwise).

Where the body corporate is using its own bulk meter readings each month to determine the monthly cost, or it is basing its calculations on a functioning bulk municipal meter, it will be rare that the body corporate will be out of pocket when faced with a large municipal bill because the body corporate will (as above, in the case of metered consumption) be charging and collecting from the owners the true amount lawfully due and payable to the municipality for services in any given billing period. Again, there could be mistakes that disrupt this system. The same three bullet points as set out directly above under scenario #1 relating to metered consumption apply here, with a very slight variation on the first one.

- If a body corporate makes a mistake and under-bills the unit owners, and then later seeks to recover the amounts by which it under-billed at a later stage, it must seek payment from the persons who were the owners in respect of each billing period that the services were rendered in. For example, a body corporate accidentally under-bills everyone for 3 months. In the first month, owner A was around. He sold to owner B, who was the registered owner for months 2 and 3. The body corporate then needs to work out how much was under-billed in each month and divide that up between all of
the unit owners who were owners in that billing period. So in the scenario above, unit owner A would get a bill demanding payment of a portion of the under-billing for the first month, and owner B would get a bill for the same charge for the 2nd and 3rd months. How much the bill would be in each case would depend on the extent of the under-bill in each month, and the participation quota of the owner concerned for that month.

3. Consumption is not measured by meters and bulk readings are not taken or checked - the municipal bill is relied on exclusively as being definitive of the true municipal charge

This is where things start to go pear-shaped. It is quite possible (likely even, in certain municipal jurisdictions where municipal billing is very unreliable) that a body corporate would under-bill the owners and under-recover from the owners for extended periods of time. The result of this would be that when the municipality discovers the problem and corrects it by presenting the body corporate with an enormous bill for large consumption measured over an extended period of time, the body corporate has not billed the owners for the whole or a significant portion of this bill nor has it recovered any significant portion of this liability from the owners. If the body corporate has no records of how much each unit was consuming over the billing period in question because there weren’t sub-meters, then the body corporate has no choice other than to pro-rate the charges based on the owner’s PQ (or any other method of allocation determined by the body corporate’s rules).

In cases like these the owners in the scheme can only be held liable for their pro-rata portion (based on their participation quota) as calculated over any billing period that they were the owner for. They cannot be held liable for the pro-rata portion of any other person, including prior owners. The body corporate must recover amounts owed by prior owners, from prior owners. Where it is impossible to calculate the precise charge for each billing period (because there is no record of the metered consumption), the fairest way to split the charge is to do it equally between all billing periods, allowing for a small seasonal fluctuation.
To the extent that the body corporate is unable to recover any amounts from prior owners, the current owners will be called upon to make a contribution to be used to “keep the lights on”, which is not actually a contribution for service charges (because the current owners are not liable for the debts of prior owners) but is rather a “mismanagement cost”.

The same applies if the body corporate has been mistakenly under-billing the unit owners for any protracted period of time. The body corporate must recover from each owner his pro-rata share of the total charge for each billing period that said owner was registered as owner.

Where a municipality bills a body corporate for an extended period of time, the body corporate may need to raise prescription against the municipality in respect of charges that have not been paid or acknowledged, were incurred more than three years prior, and that they have not been summonsed for. This is important because where the charges have prescribed as against the municipality, they have most likely prescribed as against the owners as well. It is conceivable that there would be cases where charges prescribe as against the one but not the other (i.e. against the municipality but not against the owner, or vice versa) but that would most likely result from mismanagement by the managing agent/trustees.

As above, if the body corporate has mismanaged its funds and collected the amounts owed for services but spent them on something else, then a claim may lie against the managing agent/trustees, but ultimately the present owners will bear the “mismanagement cost” amongst themselves.

**Conclusion: Responsibilities of Bodies Corporates When Managing Municipal Charges**

1. The body corporate must collect amounts owing by prior owners, from prior owners, regardless of the fact that they are no longer owners.
2. A body corporate shouldn’t find itself in the position where it is presented with a
large (correct) bill by the municipality and doesn’t have the funds to pay, if it is using either sub-meters to bill and recover charges from owners (which will equate to the ‘true’ monthly charge) or it should be using bulk meter readings (which will also equate in the recovery of the ‘true’ monthly charge). This is because the ‘true’ amount owed (which is eventually billed in one big invoice) should equal the amount collected on a month to month basis.

3. If a body corporate is using only the municipal readings on the bill to collect municipal charges from owners, it may run into serious problems (if it has not already). Where the body corporate under-recoers over an extended period of time, and does not have the money to settle a large municipal bill when presented with one, when the municipality adjusts the account to claw-back the under-billing, the body corporate will have a serious problem. It will need to recover the charges from those who were owners at the time that the charges were incurred (even where some of those persons are no longer owners).

4. To the extent that a body corporate is faced with a large municipal bill that it cannot pay, this may (but have not necessarily) have resulted from mismanagement, and the managing agent/trustees may be liable for damages suffered by the present owners who are called to foot the shortfall to keep the lights on.

Disclaimer

This is a complex issue and not every legal facet can be canvassed in full herein, but the authors do attempt to cover the most fundamental aspects in sufficient detail to provide a convenient guide to sectional title owners, managing agents, conveyancers and municipalities in respect of the issue.

Note, however, that because every case must be treated on the basis of its own unique merits, not everything set out herein-above may apply to every case. You should accordingly seek independent legal advice from your attorney and not rely on the contents hereof as legal advice. whether or not (and if so, to what extent) sectional title unit owners are liable to
firstly the body corporate, and secondly the municipality, for municipal debt incurred by the body corporate prior to their becoming owners, and if so, in what proportions.

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