THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 759/2022

In the matter between:

HENQUE 1838 CC	**APPELLANT**
and	
MAXPROP HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
THE BODY CORPORATE OF KIRTLINGTON PARK	**SECOND RESPONDENT**
THE BODY CORPORATE OF KIRTLINGTON GREEN	**THIRD RESPONDENT**
THE BODY CORPORATE OF KIRTLINGTON PARK 2	**FOURTH RESPONDENT**
THE BODY CORPORATE OF KIRTLINGTON PARK 3	**FIFTH RESPONDENT**
KIRTLINGTON PARK HOME OWNERS ASSOCIATION	**SIXTH RESPONDENT**
LINDSAY SHAUN TRAGOTT VORWERG	**SEVENTH RESPONDENT**
ENID HELENA AYLWARD N O	**EIGHTH RESPONDENT**
ADELE JONES N O	**NINTH RESPONDENT**
NEVILLE AYLWARD N O	**TENTH RESPONDENT**
RENEE KENWOOD N O	**ELEVENTH RESPONDENT**
MARCO RUI ALVES	**TWELFTH RESPONDENT**
KEVIN ARTHUR WRIGHT	**THIRTEENTH RESPONDENT**
ALYSON JANE WRIGHT	**FOURTEENTH RESPONDENT**
GARY MICHAEL WEBSTER	**FIFTEENTH RESPONDENT**
ALISON VICKI WEBSTER	**SIXTEENTH RESPONDENT**

ROBERT ANTHONY OSTLER **SEVENTEENTH RESPONDENT**

Neutral citation: *Henque 1838 CC v Maxprop Holdings (Pty) Ltd and Others* (759/2022) [2023] ZASCA 131 (12 October 2023)

Coram: PONNAN, MEYER, GOOSEN and MOLEFE JJA and MALI AJA

Heard: 11 September 2023

Delivered: 12 October 2023

Summary: Sectional Title Schemes Management Act 8 of 2011 – s 9 read with s 2(7) – *locus standi* of sectional title owner to litigate in own name for repayment to the body corporate of funds allegedly unlawfully paid from the body corporate's bank account.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Moodley J, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Meyer JA (Ponnan, Goosen and Molefe JJA and Mali AJA concurring):

[1] At issue in this appeal is the standing of a sectional title owner to litigate in its own name for the repayment to the body corporate of funds that were allegedly paid unlawfully from the body corporate's bank account to the recipient thereof. On 7 July 2022, the KwaZulu-Natal Local Division of the High Court, Durban (the high court), presided over by Moodley J, dismissed, with costs, the application of the appellant, Henque 1838 CC (Henque), for lack of standing. The appeal is with the leave of the high court.

[2] Kirtlington Park is a residential estate in Hillcrest, Kwazulu-Natal (the estate). It comprises four sectional title development schemes. Each scheme is controlled by a body corporate. The four schemes and bodies corporate are the second respondent, Kirtlington Park (KP1), the fourth respondent, Kirtlington Park 2 (KP2), the fifth respondent, Kirtlington Park 3 (KP3), and the third respondent, Kirtlington Green (KG). KP1 consists of 27.7692 hectares of land with 42 homes, KP2 consists of 22.8033 hectares with 39 homes, KP3 consists of 18,0925 hectares with 31 homes, and KG consists of 1.4502 hectares with 8 homes. Each residence is a sectional title unit. The common property of KP1 includes a dam, a communal bin area, expansive paddocks, and roads that lead to KP2, KP3 and KG and that of KP2, stables for horses, a clubhouse, tennis courts, paddocks, and roads leading from KP1 across KP2 to portions of KP3 and KG. Included in KP3's common property are roads, paddocks,

and a portion of a dam. These facilities were intended for and have historically been utilised by all estate residents, despite the fact that they form part of the exclusive common property of the respective sectional title development schemes, which are owned in undivided shares by the sectional title unit owners in each scheme (the shared facilities). The estate is surrounded by a wall that is electrified and monitored by surveillance cameras. Residents of KG can only access their homes through the main entrance gate and across the KP1 and KP2 roads. The common property of KG does not include any shared facilities.

[3] According to the original developer, sale agreements and the management rules of each body corporate, the four bodies corporate were supposed to be united by a single Home Owners Association to operate as 'Associated Developments', following the formation of the four bodies corporate, when the sectional title registers were opened between 2001 and 2003. However, for unknown reasons, the developer did not register this single association. Consequently, since their inception in 2001, the four bodies corporate have collaborated informally to manage and administer the shared facilities that are accessible to all estate residents.

[4] To formalise the informal cooperation, the four bodies corporate formed the sixth respondent, the Kirtlington Park Home Owners Association (KPHOA) in 2008, initially named the Kirtlington Park Association. It is a voluntary association that facilitates the joint administration and management by the four associated bodies corporate of the shared facilities, including: security (the largest expense); road maintenance; gardening services; access control; biometrics; refuge storage and collection; sporting facilities; maintenance of the electrified and security monitored boundary wall; employment of an estate manager and administrative assistant; and payment of the management fee (the shared expenses). In terms of its constitution, each member of the associated bodies corporate within the estate became a member of the KPHOA. From 2008 until December 2017, the first respondent, Maxprop Holdings (Pty) Ltd (Maxprop), managed each associated body corporate and the KPHOA.

[5] At a meeting held on 27 July 2016, the members of each associated body corporate adopted amendments to their management rules, including provisions

requiring all KPHOA members, regardless of individual participation quota, to pay equal contributions to defray shared expenses. The KPHOA members also approved a budget that required each member to contribute R4 500 per month. In addition to the monthly levies paid by members to defray their own body corporate's internal expenses, such as landscaping, accounting, etc., all members pay these contributions. Each body corporate maintains its own bank account and accounting records. The contributions collected to defray shared expenses are transferred from each body corporate's bank account to KP1's for the benefit of the KPHOA. The shared expenses have always been paid from KP1's bank account, then recovered from the KPHOA members' contributions. Financial statements are prepared for each body corporate. Additionally, a set of consolidated financial statements known as the 'Body Corporate of Kirtlington Consolidated Accounts' is prepared, even though no such body corporate has ever existed. As a tool for management, they are merely the consolidated financial statements of the associated bodies corporate. Except for Henque, all other estate owners supported the KPHOA and had no objections to contributing to the upkeep of the shared facilities available to all estate residents for their enjoyment and safety.

[6] Henque acquired KG unit 4 on 15 April 2015. Since then, its sole member, Ms Jean Gillespie Thomson (Ms Thomson), has lived there. On 19 April 2017, the then-chairperson, Ms Adele Jones (Ms Jones), appointed her as a trustee of KG to meet the required minimum number of trustees. Ms Thomson was dissatisfied with the administration and management of the shared facilities in three significant ways: First, that the KPHOA unlawfully assumed, and the individual bodies corporate unlawfully assigned to it, all their functions and powers. She argued that this assignment of functions was unlawful because regulation 30(2) of the Sectional Title Schemes Management Act 8 of 2011 (the Act) only permits assignment if this condition was recorded when the body corporate was initially registered, which was not the case in this instance. Second, that the compulsory membership of all estate owners in the KPHOA was unlawful because, according to her, compulsory membership could only be imposed if a condition to this effect was included in the schedule referred to in s 11(3)(b) of the Act at the time the scheme was registered. Third, she argued that the imposition of equal levies regardless of individual participation quotas was unlawful because the modification of the calculation of levies from the prescribed rules (based

on individual participation quotas) was not conducted in accordance with the requirements of s 32(4) of the Act.

[7] On 28 February 2017, Henque, in an application in which KG and KPHOA were cited as the respondents, obtained an order by default from the high court (Steyn J), which declared that: Henque was not to be a member of the KPHOA and therefore not required to comply with its directives, rules, or guidelines; KG was not permitted to assign its functions and powers to the KPHOA; and KG's management rules that enabled the imposition of equal levies regardless of participation quotas to be unlawful and void. In addition, the order required the substitution of two of KG's management rules with rules from schedule 8 of the Sectional Titles Act 95 of 1986, which permitted KG to amend its management rules without KPHOA's approval or veto, and required KG to allocate expenses proportionally to floor square meterage (the first order).

[8] Ms Thomson insisted that the first order was not properly implemented. So, Henque brought a second application in the high court. This time, the respondents were KG and two of its three trustees, Ms Jones and Mr Arthur Limbouris (Mr Limbouris). As a result of this application, these two trustees resigned, leaving Ms Thomson as the sole trustee, a circumstance that persists to this day. On 14 March 2018, Henque obtained an order (per Maharaj J), which had the practical effect of preventing KG from contributing to the shared expenses. The appointment of Mr Limbouris as trustee of KG was also declared invalid and set aside. After July 2017, KG made no payments to the other three associated body corporates, KP1, KP2, and KP3, for the shared expenses, and Mr Limbouris had already resigned as a trustee, rendering the relief granted moot.

[9] KG, according to all eight of its members, has become dysfunctional. Since Ms Thomson became a trustee, the body corporate has not held an annual general meeting. In these circumstances, none of the other seven KG members are willing to become trustees. KG has stopped contributing formally and proportionally after July 2017. All KG members, except for Henque, wish to maintain their voluntary membership in the KPHOA and continue contributing to the shared expenses. They recognise the injustice and unfairness of this situation, in which KG members use the shared facilities without paying for them. According to them, Henque's conduct has

impeded any meaningful communication with the other three associated bodies corporate to determine an equitable contribution to the estate's common expenses. Consequently, each has agreed, in their individual capacities, to pay R2 200.00 per month towards the shared expenses incurred by the other three associated bodies corporate until an agreement is reached between KG and those bodies corporate regarding the administration and management of the shared facilities.

[10] This appeal stems from a third application launched by Henque in the high court on 2 July 2018. Initially Maxprop, KP1 and KG, were cited as the respondents. KP2, KP3, the KPHOA, and the remaining seven KG property owners were subsequently added as respondents. The remaining KG members are respondents numbered seven through to seventeen. Henque demanded repayment to KG of funds allegedly misappropriated by Maxprop from KG's bank account and transferred to KP1's bank account for the benefit of the KPHOA (the main relief). It also sought various ancillary orders (the ancillary relief), which is not necessary to detail because if the main relief could not succeed, the ancillary relief had to suffer a similar fate. The application was resisted by Maxprop, KP1, KP2, KP3, the KPHOA and all the KG owners and members.

[11] According to Ms Thomson, she discovered that unlawful appropriations had been made from KG's bank account, and that its draft financial statements for the fiscal year ending 30 June 2017 had been drafted on the strength of these transactions. Maxprop and KP1 denied that unlawful transfers were made from KG's bank account to KP1's and that its financial statements for that fiscal year contain incorrect entries, as claimed by Ms Thomson. Maxprop stated that all payments it had made were in accordance with KG's former trustees' instructions or were made in the ordinary course of KG's management.

[12] The high court *mero motu* separated the challenge to Henque’s standing from the other issues in the application. A body corporate is constituted by law, and it is charged with responsibility for the enforcement of the rules and the control, administration, and management of the common property for the benefit of the

owners.[1] It has perpetual succession and is capable of suing and of being sued in its corporate name in respect of the matter listed in s 2(7) of the Act. They are:

'*(a)* any contract entered into by the body corporate;

(b) any damage to the common property;

(c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;

(d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; and

(e) any claim against the developer in respect of the scheme if so determined by special resolution.'

[13] The powers referred to in s 2(7)*(b)*, and in some circumstances s 2(7)*(c)*, as well as s 2(7)*(e)*, give the body corporate an entitlement it would otherwise not have had. The owners of the sectional title units own the common property in undivided shares. But the body corporate is statutorily enjoined to control, administer, and manage the common property for the benefit of the owners. There is also no contractual *nexus* between the developer and the body corporate that would otherwise have given the body corporate standing in respect of the claims referred to in s 2(7)*(e)*.[2]

[14] Section 9[3] provides 'a comprehensive statutory right to an owner of a sectional title unit aggrieved at the failure of the body corporate to act in respect of a matter

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[1] Sections 2(1) and 2(5).

[2] *Oribel Properties 13 (Pty) Ltd and Another v Blue Dot Properties 271 (Pty) Ltd and Others* [2010] ZASCA 78; [2010] 4 All SA 282 (SCA) para 24 (*Oribel*).

[3] Section 9 reads:

(1) An owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section—
   (a) when such owner is of the opinion that he or she and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 2(7), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit; or
   (b) when the body corporate does not take steps against an owner who does not comply with the rules.

(2) *(a)* Any such owner must serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made.
   (b) If the body corporate fails to institute the proceedings within the period referred to in paragraph (a), the owner may make application to the Court for an order appointing a *curator ad litem* for

mentioned in s [2(7)]'.[4] The sectional title owner then has the right to initiate proceedings, provided such an owner is of the opinion that he or she and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter listed in s 2(7), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefits. In such a case, the affected owner must serve written notice on the body corporate requesting that it initiates proceedings within one month, failing which the owner may apply to the court for an order appointing a *curator ad litem* for the body corporate for the purposes of initiating and conducting proceedings on behalf of the body corporate. Section 9, however, is not intended to detract from the powers enjoyed by the sectional title owner to institute proceedings in his or her own name where his or her rights, whether ownership in his or her unit or otherwise, are infringed.[5]

[15] The jurisdictional facts that an owner must establish in order to entitle the owner to apply for the appointment of a curator are: (a) the owner must hold an opinion; (b) the opinion must be either (i) that the owner and the body corporate have suffered

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the body corporate for the purpose of instituting and conducting proceedings on behalf of the body corporate.

(3) The Court may on such application, if it is satisfied—
(a) that the body corporate has not instituted such proceedings;
(b) that there are prima facie grounds for such proceedings; and
(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,
appoint a provisional *curator ad litem* and direct him or her to conduct an investigation into the matter and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of the *curator ad litem* for the body corporate, and issue such directions as it may consider necessary to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the curator ad litem.

(5) A provisional *curator* ad litem appointed by the Court under subsection (3) or a *curator ad litem* whose appointment is confirmed by the Court under subsection (4), has such powers as may be prescribed, in addition to the powers expressly granted by the Court in connection with the investigation, proceedings and enforcement of a judgment.

(6) If the disclosure of any information about the affairs of a body corporate to a provisional *curator ad litem* or a *curator ad litem* would in the opinion of the body corporate be harmful to the interests of the body corporate, the Court may on an application for relief by that body corporate, and if it is satisfied that the said information is not relevant to the investigation, grant such relief.

(7) The Court may, if it appears that there is reason to believe that an applicant in respect of an application under subsection (2) will be unable to pay the costs of the respondent body corporate if successful in its opposition, require sufficient security to be given for those costs and the costs of the provisional *curator ad litem* before a provisional order is made.'

[4] *Cassim and Another v Voyager Property Management (Pty) Ltd and Others; Cassim and Another v St Moritz Body Corporate (Pty) Ltd and Others* [2011] ZASCA 143; 2011 (6) SA 544 (SCA); [2011] 4 All SA 587 (SCA) para 16 (*Cassim*).

[5] *Oribel* para 24.

damages or loss or (ii) that the owner and the body corporate have been deprived of a benefit in respect of a matter mentioned in s 2(7); and (c) the body corporate has not instituted proceedings for recovery. The adverse events forming the subject of the second requirement 'must be suffered not only by the applicant for the appointment of a curator but by the body corporate as well'. As Schutz JA put it in *Wimbledon Lodge*, the third requirement is a 'necessary counterpart to the sections of the Act divesting individual owners of control and vesting it in the body corporate. If the body corporate is seen not to do its duty, then an individual's power may, to an extent, be restored.'[6] In *Cassim*,[7] Ponnan JA explained that what Schutz JA intended to convey with this statement in *Wimbledon Lodge* was this:

'… an individual's powers may to the extent provided for in s [9] be restored. Indeed, as Schutz JA pointed out (para 18), that accords with the general principle at common law that where a wrong is done to it, only the company (in this case the body corporate) and not the individual members may take proceedings against the wrongdoers (*Foss v Harbottle* (1843) 2 Hare 461 (67 ER 189)).'

[16] The function or purpose of s 9, according to Ponnan JA (*Cassim*), is this:[8]

'The substance of the matter according to Schutz JA *(Wimbledon Lodge* para 21) is that the "body corporate is little more than the aggregation of all the individual owners. Their good is its good. Their ill is its ill. The body corporate is not an island, whatever the law of persons may say." Section [9] is an important component of that structural scheme. On the one hand it filters out unmeritorious claims by overzealous individuals. On the other it ensures that individuals complaining should have the advantage of the information and the funds of their corporation in pursuing legitimate claims.'

[17] On the facts here present, s 9, read with s 2(7), encompasses within its scope the main claims sounding in money in respect of which Henque came to be non-suited by the high court. Nevertheless, argues Henque, KG is dysfunctional, and it could, therefore, hardly have been expected of it to call upon that body corporate to institute proceedings. But, as was observed by Ponnan JA (*Cassim*)[9],

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[6] *Wimbledon Lodge (Pty) Ltd v Gore NO and Others* (39/2002) [2003] ZASCA 33; [2003] 2 All SA 179 (SCA) paras 13-14 and 20 (*Wimbledon Lodge*).
[7] *Cassim* para 15.
[8] *Cassim* para 17.
[9] *Cassim* paras 13-14.

'. . . it appears to me that the section finds application precisely when there is disharmony and disunity in the body corporate. The more dysfunctional the body corporate, the greater, I dare say, the need for a curator. On the view that I take of the matter, the argument advanced by and on behalf of the appellants misconstrues the section. The section does not require an owner to cause the body corporate to act in a particular way if the latter is unwilling to do so. All that is envisaged is for an owner to effect service of a notice on the body corporate calling upon it within the stated period to institute the contemplated proceedings. Should it fail to do so the envisaged remedy available to the owner is not to compel compliance with the notice but rather to approach the court for the appointment of a *curator ad litem* for the purposes of instituting and conducting the proceedings on behalf of the body corporate.'

[18] In argument before us, and also before the high court, Henque attempted to avoid the inevitable by steering away from its pleaded case in contending that it instituted the proceedings as an own interest litigant, rendering s 9 of no application. It relied on *Spilhaus Property Holdings (Pty) Ltd and Others v MTN and Another*,[10] in which judgment the Constitutional Court held that the purpose of s 9 is to protect the body corporate from unmeritorious legal proceedings by owners and not to determine the legal standing of individual owners.[11] But, there the claim did not arise from s 2(7). Instead, the applicants in that matter sought to enforce a zoning scheme that was passed in their interests as owners of properties where that scheme applied.[12]

[19] On the facts here present, Henque did not establish its own direct and substantial interest in the relief claimed. The genesis of those claims is s 2(7), and not the common law. They were not for payment to Henque itself, or for the correction of its own financial statements. Quite the opposite, the claims asserted by it were for repayment to KG, the correction of KG's financial statements, and declarators relating to KG's liabilities and funds. This is a clear indicator that those are claims in the hands of KG alone. The alleged loss was suffered directly by KG.

[20] The nature of the rights and claims asserted by Henque derive from s 2(7) of the Act. A sectional title owner, such as Henque, is enjoined to follow the steps

[10] *Spilhaus Property Holdings (Pty) Ltd and Others v MTN and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC) (*Spilhaus*).
[11] Ibid paras 32-33.
[12] Ibid para 34.

prescribed by s 9 if it wishes to assert a right and claim in terms of s 2(7). Henque did not do so. It follows that the conclusion of the high court cannot be faulted and in the result the appeal must fail.

[21] In the result the following order is made:

The appeal is dismissed with costs, including those of two counsel where so employed.

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P A MEYER
JUDGE OF APPEAL

Appearances

For appellant:	A M Annandale SC with S Hoar
Instructed by:	Warrick De Wet Redman Attorneys, Umhlanga Rocks, Honey Attorneys, Bloemfontein
For second, fourth, fifth and sixth respondents:	W N Shapiro SC
Instructed by:	Cox Yeats Attorneys, Umhlanga Rocks, Symington & De Kok, Bloemfontein