

Is purchaser or seller responsible for special levies?

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The legal issue of whether the purchaser or seller of an immovable property is responsible for the payment of special levies raised by the body corporate or the homeowners association concerned before transfer occurs is one that can be ratified by a tripartite agreement.



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When a property is located within a sectional title scheme or within an estate governed by a home owners association, there are levies payable to either the body corporate (if it is a sectional title scheme) or home owners association (if it is an estate, also known as a home owners association area). These levies are utilised by the entity concerned to pay for expenses common to all of the owners in the scheme or estate concerned. These levies are in addition to amounts payable to the municipality each month for rates and taxes,

Special levy

A special levy is a levy raised by the governing body when there are no funds available from the ordinary levies raised according to the annual budget, which is determined in advance for each coming year. Special levies are raised only to cover extraordinary or unusual expenses that are not budgeted for in the ordinary course. Common examples would include covering emergency maintenance events, such as repairing collapsed or damaged walls or security features, or for paying large, unanticipated and unbudgeted for municipal bills. These might occur where a municipality levies a huge amount of money against a sectional title scheme or homeowners association in one month, which includes billing for the prior three-year period.

Tripartite agreement

The best way to ensure that a dispute does not arise in relation to whom is liable for special levies, is to ensure that a tripartite agreement is signed by the purchaser, seller and managing agent or, if there is no managing agent, directly by the trustees of the body corporate concerned.

This tripartite agreement usually stipulates that the seller is liable for any special levy billed to the levy account before

transfer and that the purchaser will be liable for any special levy billed to the levy account after transfer. This very clearly sets out the rights and obligation of all the parties concerned and usually with such an agreement in place there is very little scope for a dispute to arise in relation to special levies.

Disclosure of future special levies

If a seller is aware that future special levies will be billed to the levy account after transfer, and the seller does not advise the purchaser of this before the signature of the offer to purchase, the existence of the special levy raised after transfer may constitute what is commonly known as a 'latent defect', in terms of law. Generally, the seller will be liable to the purchaser for latent defects discovered after transfer unless seller has disclaimed liability in respect thereof offer to purchase itself, usually by way of a voetstoots clause.

A voetstoots clause is a clause that states that the item sold is sold in its current condition and that the purchaser accepts the state of that item in that condition and that the seller will accept no responsibility for any faults or defects that are subsequently found to exist in relation to that item.

However, a voetstoots sale will still result in liability to the seller in respect of the latent defect if the seller fraudulently misrepresented to the purchaser the state of affairs in respect of the item sold.

The courts have looked at this issue several times and have set a relatively high bar in relation to what constitutes fraudulent misrepresentation in this context. If a seller knew about the existence of the latent defect but did not disclose this to the purchaser, this alone will not constitute fraudulent misrepresentation. The seller would need to have actively taken measures to hide the existence of the default from the purchaser (upon the purchaser investigating same) or would have had to have taken active measures or specifically had remained silent in the face of questions about the issue, in order for this to constitute fraudulent misrepresentation and negate the effect of a voetstoots clause.

Returning to the issue of special levies, this means that if a seller does not disclose the existence of future special levies that it is known will be raised in relation to the property, that seller has failed to disclose the existence of latent defects in relation to the property. However, this does not render the seller liable to the purchaser in respect of same, unless the actions of the seller in the situation constituted a fraudulent misrepresentation in relation to those special levies. For example if the purchaser had inquired whether there were any future special levies that were to be passed and the seller had responded in the negative or had not responded at all, this would arguably constitute fraudulent misrepresentation.

However if the purchaser had not made this enquiry and the seller had not volunteered the information, this would not constitute fraudulent misrepresentation and the seller would not be liable to the purchaser in respect to same, as there is no legal obligation on a seller to disclose this to a purchaser.

Conclusion

Accordingly, it is imperative for a purchaser of any property in a sectional title scheme or an estate to investigate actively

whether there are any future special levies planned in respect of the property, which the purchaser may become liable for after transfer – this must be done before signature of the offer to purchase. It is imperative when buying or selling immovable property that you get the right advice from a knowledgeable and experienced attorney. Do not get caught out by an issue as important as special levies, regardless of which side of the fence you are on.

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