

Managing property properly

Diving into the scheme's maintenance, repair and replacement fund when your back's against the wall

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One of the biggest challenges managing agents and trustees often face is how to deal with a significant expense that no one anticipated. The requirement for a 10 year maintenance, repair and replacement plan ("MR&R plan") has forced trustees to think and plan ahead, however some expenses remain quite simply unforeseeable. A practical example of such unforeseeable expenses is as follows:

After receiving huge water bills, a body corporate finds that it has a massive water leak. Following an investigation, it employs the services of a plumber who fixes the leak on the main communal water line. The cost for the repairs amounts to R15,000.00, while the debt to Council amounts to R75,000.00. Neither the body corporate administrative fund nor the money in its operational account provide for expenditure of this kind so the trustees pass a resolution to withdraw funds from the MR&R reserve fund. They intend to use the funds to cover the cost of the plumber and to settle the council debt.

It is not unusual for trustees to get creative with the body corporate's finances in an attempt to do what they believe is not only reasonable, but also to the benefit of the members of the body corporate. With that being said, I've heard that the pathway to hell is paved with good intentions and fear that the scenario set out above provides a perfect example of this age old saying.

Let's consider what powers the Sectional Title Schemes Management Act ("the Act") gives trustees when it comes to spending body corporate funds raised in accordance with the scheme's MR&R plan. Prescribed Management Rule ("PMR") 24(2), contained in Annexure 1 of the Regulations to the Act, limits the trustees' use of these funds as follows:

The reserve fund maintained in terms of section 3(1)(b) of the Act (which section requires the establishment and maintenance of a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property) must be used for the implementation of the maintenance, repair and replacement plan of the body corporate referred to in rule 22 (which requires the preparation of a detailed, written MR&R plan for the common property by the body corporate).

As neither the repair of the main communal line, nor the debt to council would have been included in the body corporate's MR&R plan, the trustees' hands would appear to be tied. Thankfully, the Act makes provision for some exceptional circumstances in which the trustees are given some slack with regards to the strict constraints mentioned above. PMR

24(5)(b) sets out the circumstances in which trustees may utilise funds from the reserve fund for expenses not included in the MR&R plan, namely:

If the trustees resolve that such a payment is necessary for the purpose of an urgent maintenance, repair or replacement expense, which purposes includes, without limitation-

- (i) to comply with an order of a court or an adjudicator;*

- (ii) to repair, maintain or replace any property for which the body corporate is responsible where there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage to persons or property;*

- (iii) to repair any property for which the body corporate is responsible where the need for the repairs could not have been reasonably foreseen in preparing the maintenance, repair and replacement plan; or*

- (iv) to enable the body corporate to obtain adequate insurance for property that the body corporate is required to insure;*

provided that the trustees must report to the members on any such expenditure as soon as possible after it is made.

The trustees are therefore within their rights to utilise funds from the reserve fund to settle the plumber's account for repairing the water line as this certainly qualifies as a repair of property for which the body corporate is responsible where there are reasonable grounds to believe that immediate expenditure is necessary to prevent significant financial loss to the members of the body corporate and the repair could not have been reasonably foreseen when the MR&R plan was being prepared.

It is important to note however, that the trustees can only utilise money from the reserve fund to pay the plumber if , as per PMR 24(6), the amount payable falls within the perimeters of any restrictions imposed or directions given by the members and further does not exceed:

- (i) the amount necessary for the purpose for which it is expended; or*

- (ii) any limitation imposed by the body corporate on expenditure.*

While the trustees are therefore authorised to use funds from the reserve fund to pay the plumber, they remain unauthorised to settle the body corporate's debt by diving into the reserve fund.

So what can the trustees to do in the circumstances?

Practically, there are 2 ways of recovering the cost of the council debt from the owners. The first is to incorporate the cost into the body corporate's administrative budget and therefore include same in the monthly contributions levied to owners. However, such budget can only be considered and approved at the body corporate's next Annual General Meeting ("AGM") and this method can therefore not be utilised immediately (unless the AGM is imminent).

The second possibility is for the trustees to raise a special contribution in terms of section 3(3) of the Act and PMR 21(3)(a) to cover this necessary expense that was not, and could not reasonably have been, budgeted for in the estimated expenditure approved at the last AGM. These special contributions may be payable in one lump sum or by such instalments as the trustees deem fit.

My recommendation to the trustees would be to pay the debt owing to the council as soon as reasonably possible in order to prevent having to pay interest on the overdue amount. As such, the trustees should ideally recover the cost by implementing special contributions payable by members in one lump sum. This would be reasonable if the scheme has a large number of members (for instance 50 members would only have to pay R1,500.00 each), but if the scheme has a small number of members it may be unreasonable not to give them the opportunity to make payment in numerous instalments. In the meantime, the trustees should withdraw money from the reserve fund to pay the plumber, report the expenditure to the members as soon as possible thereafter and amend the MR&R plan and proposed reserve fund budget, to be presented for approval at the next AGM, accordingly.