


## REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case Number: 46109/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<b>13 MARCH 2023</b> DATE	
 SIGNATURE	

In the matter between:

**OSHO PROPERTY VENTURES (PTY) LIMITED**

Applicant

and

**BODY CORPORATE CONSTRUCTION PARK**

First Respondent

**AMBER FALCON PROPERTIES (PTY) LTD**

Second Respondent

**REGISTRAR OF DEEDS, PRETORIA**

Third Respondent

**Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 13 March 2025.

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**JUDGMENT**


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KUBUSHI, J

*Introduction*

[1] The applicant, OSHO Property Ventures (Pty) Limited, and the first respondent, Body Corporate Construction Park ("the Body Corporate"), are in dispute as to the amounts which are owed by the applicant to the Body Corporate for arrear levies and charges raised for the consumption of electricity relating to a unit situated in a sectional titles development scheme which is managed by the first respondent as the body corporate.

[2] Construction Park is a sectional titles scheme duly registered in terms of the Sectional Titles Act<sup>1</sup> ("the STA") with sectional titles scheme registration number SS703/2002.

[3] Pursuant to the said dispute, the applicant has instituted an application for a declaratory order coupled with a mandatory interdict, compelling the Body Corporate to issue a levies clearance certificate to enable the applicant to take transfer of the unit purchased by it on 6 February 2020.

[4] The relief set out in the applicant's notice of motion is for an order:

[4.1] Declaring that the applicant is only obliged to pay levies in respect of the unit purchased from 1 July 2018. The date was, during oral argument, amended to 6 February 2017.

[4.2] Directing the Body Corporate to provide the applicant with a statement of account. This prayer was not persisted with during oral argument.

[4.3] Against payment of the levies due, directing the Body Corporate to certify that all levies and other amounts legally due have been paid.

[5] The applicant refers to the amount due as legally or lawfully due because of its contention that part of the moneys due have prescribed.

[6] The Body Corporate is opposing the relief sought by the applicant on the premise that: the transfer of property is subject to payment of all the moneys due to

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<sup>1</sup> Act 95 of 1986.

the Body Corporate as provided for in section 15B(3) of the STA; and that the applicant contractually accepted liability for such moneys in favour of the Body Corporate.

[7] There is no relief sought against the second respondent and the third respondent, as such, those parties are not participating in these proceedings. The second respondent, Amber Falcon Properties (Pty) Ltd (in liquidation), is represented by the liquidators who have been appointed to it by the Master. The third respondent, the Registrar of Deeds, is generally a nominal respondent in matters of this nature because the requirement to issue a clearance certificate impacts on the registrar's entitlement to register the transfer of ownership. The third respondent is, thus, joined in these proceedings as a necessary and interested party.

### *Facts*

[8] The salient facts of this matter, which are common cause between the parties, are that the unit in question is owned by the second respondent. The second respondent is under liquidation and its liquidators sold the unit to the applicant pursuant to an agreement of sale concluded on 6 February 2020 ("the agreement"). The unit was sold to the applicant in terms of the afore stated agreement of sale for a purchase price of R 520 000, excluding VAT. The applicant paid the full purchase price against receipt of a tax invoice from the liquidators on 11 February 2020 and took possession and occupation of the unit on 13 February 2020, against an immovable asset handover document issued by the liquidators. As such, risk in and to the property passed to the applicant on 11 February 2020, and the applicant became liable for the payment of taxes and rates to the Municipality and for the body corporate levies,<sup>2</sup> as from that date.

[9] It became a material term of the sale agreement that the second respondent was, as at date of signature of the sale agreement, indebted to the Body Corporate in respect of arrear levies. As a result, it was recorded in the agreement of sale that the applicant would be liable for all amounts due and payable by the second respondent

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<sup>2</sup> Clause 3 of the Agreement of Sale provides that:

"Risk in and to the property shall pass to the purchaser on date of payment in 2 from which date the purchaser will be liable for the payment of rates and taxes to the Municipality and for the body corporate levy."



to the Body Corporate. On payment of all the moneys due to the Body Corporate, the applicant was to be issued a certificate required for transfer of the unit to it.<sup>3</sup>

[10] It was, furthermore, a term of the agreement that the liquidators will furnish the applicant with the resolution and power of attorney authorising the applicant to liaise directly with the Body Corporate to settle the quantum of the arrears due and payable to the Body Corporate in terms of which the Body Corporate agrees to accept an agreed sum for the purpose of issuing the necessary levy clearance certificate required for the transfer of the unit.<sup>4</sup>

[11] On enquiry from the Body Corporate, the applicant was informed that an amount of R 1 206 580.38 was outstanding in the account of the second respondent. The applicant refused to accept this amount claiming that any liability of the applicant to pay the Body Corporate arrear levies and electricity charges was limited to a period going back three years and that any older amounts have prescribed.

### *Arguments*

[12] During argument in court, it was brought to my attention that a lot of issues raised in the applicant's heads of argument had fallen by the wayside because the Body Corporate had abandoned its defence based on interruption of prescription. The Body Corporate had initially, in its papers, based its defence on section 13 (1) (e) of the Prescription Act<sup>5</sup> which deals with prescription against a member of a governing body of a juristic entity, and the issue of the liquidation application against the second respondent that was instituted in 2016. These issues were raised by the Body Corporate aimed at arguing the defence of interruption of prescription.

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<sup>3</sup> Clause 4.5 of the Agreement of Sale provides that:

"The purchaser will be liable for and shall pay the body corporate the agreed sum in 4.4 and in order to obtain the certificate required from the body corporate for transfer."

<sup>4</sup> Clause 4.4 of the Agreement of Sale provides that:

"It is recorded that the seller is, at date of signature hereof indebted to the body corporate of the scheme in respect of arrear levies. The seller shall, on its written request furnish the purchaser with a resolution and power of attorney authorising the purchaser to liaise with the body corporate to settle the quantum of the arrears due and payable to the body corporate in terms of which the body corporate agrees to accept an agreed sum for purposes of the issue of the necessary levy clearance certificate required for purposes of transfer and, failing such settlement, authorising the purchaser to institute whatever litigation it may be advised is necessary to procure the issue of such a certificate provided all costs of such litigation will be borne by the purchaser."

<sup>5</sup> Act 68 of 1969.

[13] Having abandoned the aforementioned defences, what crystalises from the Body Corporate's heads of argument, is the issue of the embargo provision as contained in section 15B(3) of the STA. Although the embargo issue was not dealt with in the answering affidavit, it is a legal issue which could fairly be raised by the Body Corporate during argument in court.

*Applicant's case*

[14] Against this new defence, the applicant submits that the defence brings about the question of whether the embargo provision provides the Body Corporate with a real right that the Body Corporate can now hold up against the world and refuse to issue a levies clearance certificate until all amounts due have been paid, and since the section on which the Body Corporate relies for the embargo, refers to 'all the amounts due', the court has to ultimately decide what 'all the amounts due' means. The applicant has a quarrel with the notion that the embargo provision gives the Body Corporate the right to refuse to issue the certificate until all moneys due have been paid, as if it somehow trumps the ordinary laws of the land that says a debt prescribes after three (3) years.

[15] The applicant's proposition is that there is nothing in the STA that suggests that prescription does not apply. If it had been intended that prescription would not apply to section 15B(3) of the STA, it would have been written into the statute, which came into operation after the Prescription Act, or the Prescription Act would have been amended.

[16] According to the applicant, the embargo provision upon which the Body Corporate seeks to depend for its argument that the applicant must pay all the moneys due, does not amount to an extra entitlement on the part of the Body Corporate to claim against the prospective purchaser amounts that it could not sue the second respondent for if the second respondent had not sold the unit in the first place. That, the applicant submits, makes no commercial sense.

[17] The applicant concedes that the embargo provision is a real right but argues that the real right should not be conflated with the qualification or understanding of what 'all the moneys due' to the Body Corporate means. A distinction, according to the applicant, must be made between the right to refuse to issue the certificate, which is a



real right, and the notion of the debt. The fact that there is a real right enshrined in the embargo does not mean that the Body Corporate levies do not amount to a debt which, in the ordinary course of events, prescribes, so the applicant submits.

[18] In reinforcing its argument that the levy debt is a debt which prescribes, the applicant referred to section 3(2) of the Sectional Titles Scheme Management Act,<sup>6</sup> which provides that:

“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.”

According to the applicant, in terms of this subsection, there is no doubt that a levy is a debt which is recoverable by the trustees of a body corporate or the ombud.

[19] The applicant contends further that the decision in *Bradley Scott Real Estate CC v Serengeti Exclusive Estate Home Owners Association NPC and Others* (“*Bradley Scott*”),<sup>7</sup> on which the Body Corporate relies for its contention that a levy debt does not prescribe, is not a definitive statement of law that prescription does not apply to levy debts. There is, actually, no authority for the proposition that a levy debt does not prescribe other than the one in *Bradley Scott*, where the judge therein, stops short of saying that levy debt does not prescribe. None of the cases referred to by the Body Corporate supports this proposition, so it was argued.

[20] A further argument is that, even though the Body Corporate had a right against the second respondent to claim for moneys which were due to it, it must still show that the moneys are due to it by the transferor, and if they are not due, it does not have a legitimate basis to refuse to issue the certificate. The arrear levies of more than three (3) years in the hands of the second respondent, do prescribe.

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<sup>6</sup> Act 8 of 2011.

<sup>7</sup> [2017] ZAGPJHC 11.

*The Body Corporate's case*

[21] The Body Corporate's point of departure is that the applicant seeks to afford itself rights, for example, that of prescription, that relates to a debt that accrues to the registered owner of the property, which the applicant is not. The registered owner of the property in this instance is the second respondent and not the applicant. It is the Body Corporate's contention that the party to whom the right of the defence of prescription speaks is not the applicant, but the applicant seeks to afford itself and accrue those rights to itself. As is trite, prescription cannot be raised *mero motu* by the court, and in this instance, it must be raised by the registered owner of the property, so the Body Corporate argues.

[22] According to the Body Corporate, this point has been dealt with and disposed of by the Supreme Court of Appeal in *Body Corporate of Marsh Rose v Steinmuller and Others* ("Rose Marsh").<sup>8</sup>

[23] The Body Corporate submits, further, that section 15B(3)(a)(i)(aa) of the STA provides that the Registrar of Deeds shall not register a transfer of a unit unless a body corporate has certified that all moneys due to it by the transferor in respect of the said unit have been paid. The contention is that in terms of the said section, a body corporate is the entity which must indicate whether moneys are due to it and how much. Only when all that money, as indicated by the body corporate to be due to it, has been paid, can the registration of transfer proceed. If not, the property transfer shall not be registered.

[24] The Body Corporate argues further that the relief sought by the applicant, by way of mandamus or mandatory interdict, is baseless in that section 15B(3)(a)(i)(aa) of the STA, which is an embargo provision, does not, as incorrectly averred by the applicant, place an obligation on the Body Corporate, and does not create any entitlement by the applicant to compel the Body Corporate to comply to issue a clearance certificate for the transfer of the unit. The statutory embargo provided by the section serves a vital and legitimate purpose as effective security for debt recovery in

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<sup>8</sup> 2024 (2) SA 270 (SCA).



respect of contributions to a Body Corporate for, *inter alia*, administration, security, insurance, water, electricity, rates and taxes. Thus, the section ensures the continued supply of such services and the economic viability and sustainability of a body corporate in the interest of all its members,<sup>9</sup> so it was argued.

[25] The Body Corporate highlights the fact that it is not a party to the agreement of sale entered into between the applicant and the second respondent's liquidators, and cannot be bound by any terms and conditions thereof as was clearly attempted in clause 4.4 thereof which reads:

"...authorising the purchaser to liaise with the body corporate to settle the quantum of the arrears due and payable to the body corporate in terms of which the body corporate agrees to accept an agreed sum for purposes of the issue of the necessary levy clearance certificate required for purposes of transfer..."

[26] Not being a party to the agreement and the seller not having the authority to bind the Body Corporate, the Body Corporate did not agree to anything, least of all to accept any sum other than the full amount due and payable to it. The terms and conditions contained in clause 4.5 of the agreement of sale, that the applicant will be liable for and shall pay the Body Corporate the agreed sum in clause 4.4 in order to obtain the certificate required from the Body Corporate for transfer, is an agreement between the second respondent's liquidators and the applicant only. The first respondent, as a non-party to the agreement, cannot be bound to have agreed to only part-payment of monies due and payable to it. The applicant is liable and must pay the full amount as determined by the Body Corporate and will not only be liable and have to pay "for an agreed sum", so it was argued.

[27] The agreement is between the second respondent's liquidators and the applicant, and any damages the applicant may suffer, having to pay the Body Corporate more than what was agreed on between the second respondent's liquidators and the applicant, must be recovered by the applicant from the second respondent and its liquidators. It is only when the dispute has been dealt with and the amount so determined has been paid in full, that the Body Corporate can issue a clearance certificate and can the property be transferred at the Deeds Office, so it was argued by

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<sup>9</sup> *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* ("Willow Waters Homeowners Association") 2015 (5) SA 304 (SCA) at para 25.



the Body Corporate. In this instance, as well, the Body Corporate found support for its proposition that an agreement entered into by the liquidators of the second respondent and the applicant cannot bind it, in *Rose Marsh*.

### *Applicable law*

[28] In terms of section 15B(3)(a)(i)(aa) of the STA, the Registrar of Deeds is prohibited from registering the transfer of a unit in a sectional title scheme unless there is a conveyancer certificate confirming that a body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof.

[29] As a general proposition, a body corporate, like the first respondent, is permitted to prevent transfer of a unit in a sectional title development from one owner to another in the absence of it issuing a certificate confirming that all levies and other amounts due by the owner who intends selling a unit in the development, have been paid. In essence, a body corporate will not issue a levy clearance certificate unless all the amounts due are fully paid.

[30] Section 15B(3)(a)(i)(aa) of the STA contemplates and creates an embargo or veto provision as general security for the payment of debt to the body corporates. The practical effect of the section is that a body corporate will be paid all amounts due to it before a clearance certificate can be issued and transfer of immovable property is effected. The effect of the section is merely to secure payment of the claim. The embargo in this section has been held to be akin to the embargo contained in section 118(2) of the Local Government: Municipal Systems Act, 32 Of 2000.<sup>10</sup>

### *Discussion*

[31] The application is about the interpretation of section 15B(3)(a)(i)(aa) of the STA in the context of liquidation. For a property in a sectional title scheme to be transferred into the name of a purchaser, the body corporate must issue a levies clearance

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<sup>10</sup> Id at para 24.

certificate. The provisions of section 15B(3)(a)(i)(aa) of the STA, however, entitle a body corporate to refuse to issue such certificate until all moneys owed to it in respect of the property have been paid, or provision has been made, to the satisfaction of the body corporate, for the payment thereof.<sup>11</sup>

[32] As concluded by the court in *Willow Waters Homeowners Association*,<sup>12</sup> there are two separate rights, one, a personal right for the arrear levies, the second, a real right in respect of the embargo. The personal right for the claim of moneys against the second respondent must be separated from the real right embargo to refuse the issuing of a levies clearance certificate as set out in section 15B(3)(a)(i)(aa) of the STA.

[33] There is actually, correctly so, no dispute between the parties that the Prescription Act does not apply to the embargo provided for in section 15B(3)(a)(i)(aa) of the STA, which, as already stated, has been held to be a real right. The section, as it has been held, only affords protection to the body corporate in that it serves a vital and legitimate purpose as effective security for debt recovery in respect of contributions to a body corporate for, *inter alia*, administration, security, insurance, water, electricity, rates and taxes. Thus, ensuring the continued supply of such services and the economic viability and sustainability of a body corporate in the interest of all its members.<sup>13</sup>

[34] The Body Corporate has steadfastly maintained that it is entitled to withhold the levy clearance certificate on the basis that the applicant is liable to it in respect of all arrear levies and other charges from 2016, whilst the applicant maintains that its obligation corresponds only to the period of three (3) years predating its application to court. The applicant tenders to make payment of all amounts legally due to the Body Corporate in respect of all arrear levies and electricity charges since 6 February 2017. In its case, the applicant denies its indebtedness for the full sum of the arrears, alleging its liability for arrear levies is limited by prescription. Relying on *Bradley Scott*, it was argued on behalf of the Body Corporate that there is no authority that levies prescribe.

[35] The question, in my understanding, is whether the applicant, as a prospective purchaser of a unit in a sectional titles scheme, can avail itself of the right of a defence

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<sup>11</sup> See *Marsh Rose* above n 8 at para 36.

<sup>12</sup> Above n 9 at para 23.

<sup>13</sup> *Willow Waters Homeowners Association* above n 9 at para 25.



of prescription that relates to a debt that accrues to the registered owner of the said unit. The applicant's argument is that a prospective purchaser can avail itself of a defence of prescription that relates to a debt that accrues to the registered owner, whereas the Body Corporate's view is that the prospective purchaser cannot avail itself of such a defence. In my opinion, the judgment in *Bradley Scott*, to which the applicant referred to in oral argument, confirms the Body Corporate's view.

[36] In *Bradly Scott*, the applicant, through a declaratory relief, wanted the court to declare that a certain amount stated in the notice of motion is owed to the second and third respondents as joint liquidators of the owner of the properties in question. The applicant sought such a relief on the basis that any moneys owed to the respondents for a period of longer than three years had become prescribed and could therefore no longer be due and payable. Clause C3 of the title deeds of the properties in question imposed a condition on the owner of the properties that:<sup>14</sup>

"The owner of the erf, or any subdivision thereof, or of any sectional title unit erected thereon shall not be entitled to transfer the erf, or any portion thereof, or any unit, without prior written confirmation of the association that all amounts due to the association by the owner have been paid."

[37] The court, when dismissing the application, made the following finding:

"[21] I am therefore not persuaded that Applicant's approach in calculating the amount of levies by it to First Respondent is correct. The right that First Respondent has in terms of the embargo provision is a right to veto in terms of the embargo which restricts the owners *ius disponendi*. It is this right of the First Respondent that is at stake here, which is a real right, and Applicant has no right to curtail First Respondent's real right by means of a declaratory order wherein the method of calculation of the levies due, as applied by Applicant, should prevail."

[38] From this finding, it is clear that the court was in agreement with the Body Corporate that "*all amounts due*" do not prescribe, and that a defence of prescription cannot be used to curtail the real right that has been created in terms of section 15B(3)(a)(i)(aa) of the STA.

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<sup>14</sup> *Bradly Scott* above n 7 at para 6.

[39] Fundamentally, what should be noted in *Bradley Scott* is that the applicant is a prospective purchaser. This is in contrast to the cases where the applicant is the registered owner like in *Ashu and Another v Body Corporate, London Place and Others* (“*London Place*”),<sup>15</sup> and *Body Corporate of the Santa Fe Sectional Title Scheme No 61/1994 v Bassonia Four Zero Seven CC* (“*Santa Fe*”).<sup>16</sup> In both these cases, the applicant, as a registered owner of the property, relied on the issue of prescription. The court made a finding that historic arrear levies prescribe. Noteworthy is that the applicants in both these cases are registered owners and not prospective purchasers like in *Bradley Scott*.

[40] In *London Place*, the court held that historic arrear levies do prescribe. In arriving at such a decision, the court took into consideration the provisions of section 13(1)(e) of the Prescription Act, which provides for a delay of prescription in a situation where a debtor could influence the decision of a juristic person to sue him or her. Section 13(1)(e) provides that prescription is delayed until one year after the unit owner ceases to be a member of the body corporate.

[41] The court dealt with the question of who is “a member of the governing body” for the purposes of sections 13(1)(e) and (i) of the Prescription Act in relation to its application to body corporates. The question being whether a member of the governing body refers only to the trustees of a body corporate or to the unit owners themselves who are members of the body corporate. That court made a finding that the unit owners are not members of the governing body in that context, but the trustees are. The court, in this regard, fortified its reasoning by relying on the decision taken in *Body Corporate of 22 West Road South v Ergold Property Number 8 CC*,<sup>17</sup> which court was of the view that only trustees, and not unit owners, constitute the governing body of a body corporate. As a result, the court in *London Place* ruled that levy debts owing by the unit owners to the body corporate had already prescribed as the unit owners were not trustees.

[42] In *Santa Fe*, the body corporate applied for liquidation of the respondent unit owner (a close corporation), based on outstanding arrear levies due to it in respect of

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<sup>15</sup> 2025 (1) SA 147 (WCC).

<sup>16</sup> [2019] ZAGPJHC 54.

<sup>17</sup> 2014 JDR 2258 (GJ).



two units owned by the respondent in the *Santa Fe* Sectional Title Scheme. The unit owner argued that the outstanding levies had prescribed in terms of section 11(d) of the Prescription Act, which provides that '*the period of prescription of debts shall be, save where an Act of Parliament provides otherwise, three years in respect of any other debt*'. In dismissing the application, the court found, amongst others, that the underlying debt had prescribed.

[43] From the above authorities, it is clear that a levy debt in the circumstances where the applicant is the prospective purchaser is not limited by prescription. The prospective purchaser cannot avail itself of the right of a defence of prescription that relates to a debt that accrues to the registered owner. It is on that basis that this point of the applicant should fail.

[44] The argument by the applicant that the STA does not state that prescription does not apply has no merit. There was no need, in the first place, for the STA to mention that prescription does not apply because if the legislature had intended it to be so, it would have mentioned it. The interpretation that the applicant wants to accord to the STA fails to align with the *Endumeni* principles as to the proper interpretation of legislation.<sup>18</sup> The applicant's interpretation makes no business sense.

[45] Even if I have come to a wrong decision in respect of the prescription of arrear levy debt, the applicant still has not made out a proper case for the relief it seeks in this matter. It has, in my view, failed to show that the Body Corporate is bound by the agreement of sale that was concluded by it (the applicant) and the liquidators of the second respondent.

[46] It is common cause that the applicant purchased the unit that is owned by the second respondent from the liquidators of the second respondent. An agreement of sale for such a purchase was concluded on 6 February 2020. It is also not in dispute that at the time of the conclusion of the sale agreement, the second respondent was indebted to the Body Corporate for arrear levies and consumption of electricity. This became a term of the agreement of sale. The applicant, in signing the agreement of sale, bound itself as liable to settle the quantum of the arrear levies due and payable

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<sup>18</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* ("Endumeni") 2012 (4) SA 593 (SCA) at para 18.

to the Body Corporate in terms of which the Body Corporate agrees to accept an agreed sum for purposes of transfer.

[47] It is not disputed that there was no specific amount that was declared by the liquidators of the second respondent when the agreement of sale was concluded. The applicant was to enter into an agreement with the Body Corporate as to the amount that was due and payable for purposes of transfer. However, no such agreement has been concluded. The Body Corporate is enforcing the embargo provision in terms of section 15B(3)(a)(i)(aa) of the STA and wants all the moneys due and payable to it to be paid before it can provide the applicant with the certificate required for purposes of transfer.

[48] The Supreme Court of Appeal in *Rose Marsh*, dealing with a similar situation, although in that case the seller was the Sheriff, held as follows:

"[25] Mr Steinmuller's right to take transfer of the property arises from contract. He only acquires an enforceable right upon fulfilment of the conditions of sale. His right operates against the sheriff, and not the body corporate. It is the sheriff who must determine whether Mr Steinmuller has fulfilled his obligations. And if he has not fulfilled his obligations, then it is for the sheriff to enforce the contractual obligations or cancel the sale.

[26] The body corporate is not a party to the agreement of sale. The fact that clause 4.4.2 of the conditions of sale refers to 'levies' and not, as in the language of s 15B(3)(a)(i)(aa), to 'all moneys' due to the body corporate, can have no legal bearing upon the rights of the body corporate. The embargo confers upon the body corporate a statutory right to resist transfer of a unit in the scheme until all monies due to it have been paid or it is satisfied that arrangements for their payment have been made.

[27] In *Barnard NO v Regspersoon van Aminie en 'n ander*, the question arose whether the embargo covered not only arrear levies and interest, but legal costs incurred by a body corporate in seeking to recover amounts due to it by the owner of a unit. This court held that the legislature intended to give to a body corporate effective protection. It reasoned that a body corporate was merely a collective of owners of units who shared expenses. If one owner fails to meet their obligations, the burden fell on others, hence the need for an effective remedy. This court concluded that legal costs incurred in



recovery of amounts due to the body corporate fell within the ambit of the protection afforded by s 15B(3)(a) of the Act.

[28] Assuming, therefore, that the conditions of sale limit what Mr Steinmuller is contractually bound to pay (as was contended by him in disputing the account of the body corporate), his payment of that limited amount might entitle him to demand that the sheriff give transfer. He cannot, however, demand that the *body corporate* should accept his limited payment and therefore provide a clearance certificate upon which transfer could occur. That is so, for the simple reason that unless the contract of sale binds the body corporate, its statutory right remains unaltered. Mr Steinmuller's contractual right to transfer cannot limit the body corporate's statutory right to refuse to issue a clearance certificate until all moneys due to it are paid.

[29] To give transfer, the sheriff must obtain a conveyancer's certificate that all moneys due to the body corporate have been paid. The body corporate would, as a matter of law, remain entitled to refuse to provide the certificate until the conditions of the embargo are met. There could be no suggestion that it was acting unreasonably or unlawfully. The only question that could then arise is whether the conditions of sale, stipulated by Standard Bank and published prior to the sale in execution, bind the body corporate. That was not, however, what this case was about. The effect is that, whatever dispute there may notionally be regarding what is due to the body corporate, it is not a dispute to which Mr Steinmuller is a party. He has no legal interest in that dispute.

[30] His right to compel transfer of the property lay against the sheriff. To obtain it he was required to establish that he had met the conditions stipulated by the contracting party. Mr Steinmuller, however, sought no relief against the sheriff. . . " (footnotes omitted)

[49] From the above passages, it is clear that the applicant approached the wrong party for relief. As has been held in *Rose Marsh*, the applicant's right to take transfer of the property arises from contract. It only acquires an enforceable right upon fulfilment of the conditions of sale. Its right, therefore, operates against the liquidators and not the Body Corporate.

[50] That court held further that the body corporate is not a party to the agreement of sale. In the circumstances of the current matter, the fact that clause 4.4. of the terms of the agreement of sale appears to bind the Body Corporate to agree to accept an agreed sum for purposes of the transfer, the Body Corporate, as a nonparty to the

agreement, is not bound by any term of that agreement and is entitled to refuse to agree to any amount suggested by the applicant. The embargo provision confers upon it a statutory right to resist transfer of a unit in the scheme until all moneys due to it have been paid or it is satisfied that arrangements for their payment have been made.

[51] The limited amount that the applicant wants to pay might entitle it to demand transfer of the unit from the liquidators. It cannot, however, demand that the Body Corporate should accept its limited payment and therefore provide a clearance certificate upon which transfer could occur. The simple reason for this has been held to be that unless the agreement of sale binds the Body Corporate, its statutory right remains unaltered. The applicant's contractual right to transfer cannot limit the Body Corporate's statutory right to refuse to issue a clearance certificate until all moneys due to it are paid. The applicant's right to compel transfer of the property lay against the liquidators and not the Body Corporate.

[52] The question that should be asked is whether the Body Corporate is a party to the agreement of sale, and if the answer is in the negative, as it should be, then the application stands to be dismissed.

[53] Furthermore, this being interdictory relief, the applicant is not before the court hamstrung, without an alternative remedy. It has other remedies. It could have, and should have, sued the joint liquidators for specific performance for delivery of the unit. This, it could have done, for instance, by requesting the liquidators of the second respondent to provide it with the certificate required to register the transfer. It could have, as well, cancelled the agreement and sought restitution. In essence, the applicant should look to the seller, that is, the second respondent's liquidators for relief for any damages that it may suffer having to pay the Body Corporate more than what was agreed between them.

[54] A liquidator has, in the ordinary course of winding up, a duty to sell the company's property and to ensure delivery of such property to the purchaser. In terms of section 386(4)(h) of the Companies Act,<sup>19</sup> a liquidator has the power to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof. In *Stern, NO v Standard Trading Co (Pty)*

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<sup>19</sup> Act 61 of 1973.



*Ltd*,<sup>20</sup> it was held that where assets sold by a liquidator are in the possession of third parties, the liquidator ordinarily would be obliged to deliver them to the purchaser and to that end, to procure their release from the third party.

[55] The interdictory relief the applicant seeks does not pass muster.

### *Costs*

[56] As is trite, the issue of costs lies within the discretion of the court. The successful party should be awarded its costs of litigation. In this case, the successful party is the Body Corporate. The parties agree, at least on one issue, that is, the costs of litigation should be on scale C, which the Body Corporate is praying for.


[57] Rule 67A(3)(b) of the Uniform Rules of Court provides that in considering the factors to award an appropriate scale of costs, the court may have regard to: the complexity of the matter and the value of the claim or importance of the relief sought.

[58] I am in agreement with the parties that scale C should be allowed in this matter. This is a complex matter that is of importance, and in-depth preparation and research was required.

### *Order*

[59] In the premises I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application on scale C.

  
E M KUBUSHI  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

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<sup>20</sup> 1955 (3) SA 423 (A) at 428G.

**APPEARANCES:**

For the Applicant:	P Strathern SC
Instructed by:	Strauss Scher Incorporation
For the First Respondent:	P A Venter
Instructed by:	Carel Van Der Merwe Attorneys
Date of the hearing:	07 August 2024
Date of judgment:	13 March 2025