NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 333/2014

In the matter between:

INTEGER MORTGAGE SPV (PTY) LIMITED	**APPLICANT**

and

THE BODY CORPORATE OF LE DOMAINE	**1ST RESPONDENT**
BICCARI BOLLO MARIANO INC.	**2ND RESPONDENT**
SEAN DARREN KEPKO N.O.	**3RD RESPONDENT**
SYLVIA DELYSE KEPKO N.O.	**4TH RESPONDENT**
PRADESH MISRA	**5TH RESPONDENT**
THE REGISTRAR OF DEEDS, KWAZULU-NATAL	**6TH RESPONDENT**

AND in the matter between:

CASE NO: 6634/2014

INTEGER MORTGAGE SPV (PTY) LIMITED	**APPLICANT**

and

THE BODY CORPORATE OF LE DOMAINE	**1ST RESPONDENT**
CATHRYN JANE KENNEDY	**2ND RESPONDENT**
BICCARI BOLLO MARIANO INC.	**3RD RESPONDENT**

J U D G M E N T

Delivered on : Thursday, 10 November 2016

OLSEN J

[1] There are two applications and one counter-application before me for decision. I will call the applicant in both applications "Integer". The first respondent in both applications is The Body Corporate of Le Domaine. I will call it "the Body Corporate". These two are the major protagonists. They are also the major protagonists in the counter application where the Body Corporate seeks relief contrary to the interests of Integer.

[2] There are also some minor players who have taken no part that matters in the proceedings. One of them is a trust, represented by its trustees. The trust used to own a sectional title unit in the development known as Le Domaine. Another is a Mr Misra who bought that sectional title unit at a sale in execution. I will refer to him as the "purchaser".

[3] The Body Corporate controls the sectional title scheme known as Le Domaine which is situate in Hillcrest, KwaZulu-Natal. It is a large residential estate consisting of over 600 residential units and extensive common property and facilities.

[4] Some years ago the trust purchased a unit in Le Domaine. The unit was mortgaged in favour of Integer. The trust fell into arrears both with regard to its mortgage repayments and its levies due to the Body Corporate. Integer instituted proceedings against the trust, obtained judgment, and eventually made arrangements to sell the trust's unit in execution on 26 June 2013.

[5] On 30 May 2013 the attorneys acting for Integer addressed an email to the Body Corporate's financial manager, asking after what was outstanding by way of levies in respect of the unit. In response the figure for levies (some R20 000,00) was furnished, but the financial manager asked the attorneys to please bear in mind that before a levy clearance certificate would be issued, a contribution to the Body Corporate's levy stabilisation fund had to be made, that being 20% of the difference between the price realised at the sale and the original purchase price paid by the trust for the unit. As it turned out, given

what the purchaser paid for the unit, 20% of the profit was some R92 000,00. That is the amount in issue in these proceedings. Both Integer and the Body Corporate want the money which is presently lodged in the trust account of the Body Corporate's attorney.

[6] For some reason, and apparently acting on legal advice, Integer, on its own version, took the view that the contribution to the levy stabilisation fund would not constitute an obligation which would have to be discharged in connection with its proposed sale in execution. One sees that the conditions of sale obliged the purchaser to pay the ordinary outstanding levies (as well as outstanding municipal rates) in respect of the unit, in addition to the purchase price, but said nothing at all about the contribution to the levy stabilisation fund which might be generated by the sale.

[7] The sale in execution took place on 26 June 2013. Although the price generated a considerable profit when measured against the price which the trust originally paid for the unit, it was not sufficient to discharge the mortgage obligation in full. There was no surplus with which to pay the Body Corporate's profit share. It appears to be undisputed that the trust was not able to meet the claim from other funds available to it, this being an inference I draw from the papers.

[8] The Body Corporate took a stand. It would not authorise the issue of a levy clearance certificate unless it received its 20% share of the profit as a payment into its levy stabilisation fund. (For the sake of convenience I call the certificate required by s15B(3)(a)(i)(aa) of the Sectional Titles Act, 95 of 1986 a "levy clearance certificate".) Integer (presumably through its attorneys) asked for a copy of the relevant management rule which provided for the contribution. On 5 August 2013 an employee of the Body Corporate, a Ms Angus, having been requested to attend to this, sent what she supposed to be a scanned copy of the relevant provision to the attorney representing Integer. She sent two pages reflecting the first four clauses of the rule, which had been added to the standard management rules at the time of the opening of the register for Le Domaine. A brief description of the four clauses will suffice

for present purposes, as they are not contentious. The first clause established the obligation to pay into the fund a share of any profit on the sale of any unit. The second clause sets out how the profit is to be calculated. The third clause deals with the particular cases of companies, close corporations and trusts (not relevant in this matter, despite the fact that a trust was the defaulting owner on this occasion). The fourth allowed for deferment of the profit contribution when a surviving spouse inherits a unit from a deceased spouse.

[9] At this stage an impasse had been reached.

[10] Some seven weeks later, on 25 September 2013, the attorneys acting for Integer made a proposal to the Body Corporate that Integer pay the profit share into trust, where it would remain "until we have a declaratory order from the High Court as to whether that specific clause regarding the levy stabilisation fund is applicable where there is a forced sale of the property". The proposal was that the Body Corporate should issue the levy clearance certificate on those terms. This offer was referred by the Body Corporate to its attorneys who addressed the attorneys acting for Integer making a formal counter-proposal. It involved the Body Corporate issuing the required certificate, so that the property could be transferred to the purchaser, upon the basis that the amount due to the levy stabilisation fund would be paid into trust, and subsequently paid out, depending upon the outcome of litigation, the ambit of which was defined in the following three clauses of the proposed agreement.

> "d. The purchaser is to initiate an application for a declarator or such other appropriate relief in order to determine whether the Le Domaine LSF contribution is payable consequent upon a sale of a unit by way of execution proceedings, such proceeding to be initiated and served within 30 days of the registration of transfer of the property;

e. We are irrevocably authorised and instructed to release and pay to our client the LSF contribution held in trust, and all interest earned thereon, in the event of the aforementioned legal proceedings not being initiated and served within the period of 30 days;

f. The purchaser shall not be entitled to dispute or challenge liability to pay the LSF contribution on any basis other than that the contribution is not due and payable in the case of a sale in execution."

[11] The attorney for Integer replied saying that the conditions were acceptable, but pointing out that the dispute in question was not raised by the purchaser but by Integer which would, in the circumstances, pay the contribution into trust and initiate the proceedings for the declaratory order. That was acceptable to the Body Corporate and the money was paid into trust. (I will refer to the agreement thus reached as the "agreement".)

[12] Transfer of the property to the purchaser was effected on 29 November 2013.

[13] The first of the applications before me posed as the one required to be launched by Integer in terms of the agreement. The papers were only issued after the expiry of the 30 day period. (Service took place later.) In its answering affidavit the Body Corporate took the point that the application was barred for being late, and that it was accordingly entitled to receive the money from trust and keep it as its own. It also recorded that it had decided not immediately to take the money from trust, but that it reserved its right to do so. I will deal in due course with the issue as to whether the first application was barred, and other issues arising in the first application. It is convenient first to complete an account of what has happened.

[14] In its answering affidavit in the first application the Body Corporate made the observation that the version of the rule which establishes the levy

stabilisation fund which had been put up in the founding papers was incomplete. There is a third page. That page contains two more clauses. The full rule was put up with the answering affidavit. The two additional clauses read as follows.

> "1.5 The provisions of this rule shall not prejudice or affect the rights of any bondholder of any sectional unit in the scheme who shall be entitled to the full proceeds due from any sale in execution of a sectional unit.
>
> 1.6 Any action by a bondholder of a sectional unit in the scheme shall not prevent the Body Corporate from recovering from the owner thereof that owner's contribution or any portion thereof to the Body Corporate Levy Stabilisation Fund."

[15] Integer only came to have knowledge of these two additional clauses upon delivery of the answering affidavit. In its replying affidavit in the first application it complained that the position had been misrepresented to it, and recorded that it was considering the question as to whether it should rescind the agreement in terms of which it had paid the sum of some R92 000,00 into trust.

[16] Eventually, in about September 2014 the second application was launched. In that application Integer asserted that it had rescinded the agreement which had given rise to the first application on the basis of misrepresentation, asked the court to endorse that rescission as good, and claimed repayment of the money from trust on this basis, as opposed to the one it had relied on in the first application. In its answer the Body Corporate did not accept that a right to rescind had accrued. But it did not contend that it had accepted any repudiation of the contract evidenced by Integer's second application. The two applications (together with the counter application by the Body Corporate for an order directing the payment to it of the money still held in trust) were consolidated for the purpose of the hearing before me. Counsel for Integer took the stance that he was entitled to argue for rescission in the

second application, and fall back on the first application conditionally upon the second being refused. In my view this approach was permissible and, as I understood counsel for the Body Corporate, he raised no objection to it. I propose to deal with the second application before the first.

[17] In the second application Integer alleged that the Body Corporate's employee had negligent misrepresented to it that the rule dealing with the Body Corporate's profit share comprised only the first four clauses. (It hinted at an allegation of fraud, something for which it had no evidence at all, and I shall ignore it.) In answering these allegations the Body Corporate asserted (correctly in my view) that, whether it is classified as negligent or not, the misrepresentation was innocently made. Ms Angus cannot recall how it came about that the scanned copy of the rule which she had sent to Integer's attorneys at the beginning of August 2013 only comprised the first two pages, and omitted the third. It was an error of some sort. The misrepresentation was innocent, not because its content was thought to be true, but because it was accidentally and unwittingly made. The possible implications of that were not raised before me, and I shall ignore that piece of detail.

[18] The requirements to be satisfied by a party seeking to avoid a contract on the ground of misrepresentation were set out in *Novick and Another v Comair Holdings Limited and Others* 1979 (2) SA 116 (W), at 149 – 150. (One of them listed there, that the misrepresentation must be material in the sense that it was such as would have influenced a reasonable person to enter into the contract, is controversial, and I will ignore it despite the fact that I think it was not satisfied in this case.) The two requirements that are material to the decision in the second application are that

(a) the misrepresentation must have been intended to induce the person to whom it was made to conclude the contract; and
(b) the misrepresentation must have in fact induced the contract.

[19] It will be recalled that when Integer asked for a copy of the relevant rule on or shortly before 5 August 2013 there was no question of any agreement

being reached. A stalemate was in place. The Body Corporate would not issue the levy clearance certificate because it was some R92 000,00 short of what was due to it. The trust could not pay it. Nobody was offering to pay it in order to allow the transfer to go through. There is no evidence at all before me upon which to reach a conclusion that the delivery of a copy of only the first four clauses of the rule was intended to induce any contract at all, let alone the one ultimately concluded. On the papers before me

(a) the omission of the last two clauses of the rule was unintended and inadvertent; and

(b) the Body Corporate did not know that Integer had only put up the first four clauses of the rule in its founding papers in the first application because that was all Integer had, until that fact was revealed upon delivery of Integer's replying affidavit.

[20] There having been no intention to induce the conclusion of the contract by misrepresentation, the claim to rescission must fail. I would add, however, that I do not understand Integer's contention that it was in fact induced to enter into the contract by the omission of the last two clauses of the rule. The Body Corporate knew what those provisions were and decided, with knowledge of them, that it was entitled to withhold a levy clearance certificate until its profit share was paid. One can see from the way in which the Body Corporate's attorney formulated the sole issue upon which it was willing to litigate (whether the profit share was payable upon the sale of the unit in execution) that it is those two clauses which the Body Corporate had in mind. If anything, in my view knowledge of those two clauses on the part of Integer would have caused it to agree with even more alacrity to the proposal made by the Body Corporate's attorneys. After all the clauses record that the bondholder is entitled to the full proceeds due from the sale in execution. On the face of it the only issue remaining would be whether, reading the two missing clauses together, it must be implied that, even if the Body Corporate was unable to recover the profit contribution from the trust, it would have to produce a levy clearance certificate so that the transfer could go through, and Integer could receive its entitlement; that is the full proceeds of the sale in

execution. I find that Integer has also failed to prove that it was actually induced to conclude the contract by reason of being deprived of knowledge of those two clauses. In its founding papers it indulges in what might be called wishful thinking, postulating that the Body Corporate would have issued the levy clearance certificate without any payment into trust if Integer had knowledge of the content of the two missing clauses. The history of this litigation shows otherwise conclusively.

[21] For these reasons the second application must fail, and I must deal with the first.

[22] In my view the first application was not only issued out of time, but was misconceived, given the provisions of the agreement which governed it. The agreement required Integer to initiate proceedings in which it would seek a declaratory order to the effect that the profit contribution is not payable following a sale of a unit in execution. Instead it launched proceedings in which it sought three declaratory orders, the one that Integer is not liable to pay the contribution; the second that the purchaser is not liable to pay the contribution; and the third, declaring that the trust is liable to pay the contribution. (The fourth substantive order sought was that the sum in question therefore be paid over to Integer out of trust.)

[23] Unsurprisingly, as counsel for the Body Corporate pointed out in argument, his client's answer is that there has never been an issue about the facts that neither Integer nor the purchaser is obliged to pay the contribution, nor one over the proposition that the only person against whom the Body Corporate could legitimately make a claim for payment of the profit contribution is the trust. As counsel for the Body Corporate pointed out in argument, the issue over which the parties were to litigate is whether a profit contribution was payable at all in the case of a sale in execution; because if it was not then his client had wrongfully withheld a levy clearance certificate for want of payment of such a contribution.

[24] Integer's replying affidavit in the first application was drafted with knowledge of the content of the two clauses of which Integer was unaware when the application was launched. Not even that knowledge caused Integer to reflect on the difference between the relief it had claimed, and the relief that was supposed to have been claimed in terms of the agreement, and modify its stance. Instead one sees this in the replying affidavit.

> "76.
>
> The issue in this application is not whether [the Body Corporate] had the right to prevent transfer of the sectional unit. The issue is who is obliged to pay the LSF contribution.
>
> 77.
>
> If the above Honourable Court determines that [Integer] is liable to pay the LSF contribution, then the money held in trust by [the attorneys] must be paid to [the Body Corporate].
>
> 78.
>
> If the above Honourable Court makes any other determination regarding who is obliged to pay the LSF contribution, the money held in trust by [the attorneys] must be refunded, together with the interest thereon, to [Integer]."

[25] It is therefore clear that the first application is not the one contemplated by the agreement between the parties, and furthermore it is indisputable that it was launched after the expiry of the time allowed by the agreement. As mentioned earlier in this judgment it is one of the principal contentions of the Body Corporate that both these failures have the consequences that it is entitled to the money in trust, and that Integer has lost any right to reclaim the money, whether out of trust or after it has been paid over to the Body Corporate.

[26] Whether these contentions are correct depends on the proper construction of the agreement. The legal context within which the agreement

was struck should be considered. In relevant part s15B(3)(a)(i)(aa) of the Sectional Titles Act, 95 of 1986 provides as follows.

> "The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him –
>
> (a) a conveyancer's certificate confirming that as at date of registration
>
> (i) (aa) …[the] Body Corporate has certified that all monies 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".

[27] The term "all monies due to the Body Corporate" is wide. In *Barnard NO v Regspersoon van Aminie en 'n Ander* 2001 (3) SA 973 (A) the court considered an argument that the monies referred to in the provision included only arrear contributions or levies, and interest thereon, and not any other obligation which the transferor owed to the body corporate. In that case the question was whether legal costs owing to the body corporate as a result of attempts to recover contributions fell within the section. It was held that the intention of the provision was to give effective protection to the body corporate and that if it had been intended that only contributions due to the body corporate by the transferor were covered, that would have been said; instead of which the section speaks to "all monies due".

[28] The profit share claimed by the Body Corporate in terms of its rules was certainly a money claim, and a purpose of the rule was to establish a fund in order to stabilise ordinary levy contributions. It seems self-evident that in an inflationary environment levy increases can be "smoothed" to the advantage of all unit holders if there is a fund to dip into when required. And of course such a fund might also assist in avoiding having to raise special levies in exceptional circumstances. The Body Corporate took the view, on its construction of the rule, that it could not issue a clearance certificate required

by the section unless the amount was paid, or unless provision was made to its satisfaction for the payment thereof. As already mentioned an impasse resulted. As pointed by Navsa JA in *Firstrand Bank Limited v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA), para 26, in such circumstances

> "(a) reasonable mortgagee and Body Corporate might arrive at an accommodation where there are insufficient funds available to cover the total of the debts owing to both parties – **but neither is obliged in law to do so**."
>
> (My emphasis.)

[29] It is plain that the Body Corporate was aware of the fact that it had no right to claim payment of the profit share from anyone but the trust. But on its interpretation of the rule which created its claim to the profit share (and on its interpretation of the Act) it did have the right to place an embargo on the transfer. That was the right upon which it was being asked to compromise, and it was entitled to stipulate the terms on which it would do so. These matters had to have been known also by Integer when it concluded the agreement.

[30] It is in that context that the agreement was concluded, it having been Integer's initial proposal that the only condition should be its right to assert that the profit share is not payable to the Body Corporate in the case of a forced sale. The Body Corporate imposed a 30 day time limit and Integer accepted it. It had to have been implied that if the application was not launched within that time limit then it would never be launched. Where the agreement provided that if the application was not launched in time the money would be paid by the attorneys to the Body Corporate, what was clearly meant was that the money would be the Body Corporate's to keep. The time limit would otherwise have been meaningless. The fact that Integer agreed also to confine its challenge to one issue supports the proposition that finality, efficiently achieved, was the goal.

[31] I conclude, accordingly, that the first application must fail not only because it was not an application of the kind contemplated by the agreement, but also because it was not instituted in the time permitted by the agreement.

[32] During the course of argument it was suggested that, if I should come to the conclusions which I have, it might be helpful if I expressed my views about the proper construction of the last two clauses of the rule which creates the Body Corporate's claim to a profit contribution to its levy stabilisation fund. The request was reasonable, given that if I found that the proceedings were not time-barred, and that the first application just qualified as one contemplated by the agreement, the proper construction of the clauses would arguably have been decisive. I am nevertheless reluctant to express such views for three reasons.

(a) It is not necessary to do so, given the conclusions I have reached.

(b) In fact the issue of the meaning of the two clauses received scant attention in argument, which dealt principally with the issues upon which I have decided this case.

(c) An issue not raised at all is as to whether in the first place the profit contribution falls under s15B(3)(a)(i)(aa) of the Sectional Titles Act. It is in the nature of a tax on the sale of a unit. The section allows an embargo on transfer until monies due in respect of a unit are paid or secured. Do monies due in respect of the sale of a unit fall within the class contemplated by the section? If not, the proper construction of the two clauses, which were obviously drawn on the assumption that the profit share falls within the section, would not be decisive.

[33] Despite the aforegoing I deal with the issue briefly.

[34] The fifth clause of the rule (clause 1.5) states expressly that the provisions of the rule will not prejudice or affect the rights of a bondholder "who shall be entitled to the full proceeds due from any sale in execution of a

sectional unit". Given that the clause is dealing with circumstances in which the unit holder is in financial distress of such severity that a home is to be lost, the provision which allows the bondholder an entitlement to the full proceeds of the sale would be meaningless unless it was intended to convey that the transfer necessary to allow the bond holder to access its entitlement could not be blocked by the Body Corporate. It seems to me that the right to a profit share was created upon terms which put the claim beyond the operation of s15B(3)(a)(i)(aa) of the Sectional Titles Act in circumstances where a bondholder is executing upon hypothecated property. I see nothing wrong in that, given that the profit share scheme is not one dealt with in the Sectional Titles Act.

[35] In my view the sixth clause (clause 1.6) reinforces this. It says in effect that despite the fact that the bondholder is going to take the full proceeds of the sale, which can only happen if the transfer is registered despite non-payment of the profit share, the claim still lies against the owner. That clause appears to be designed to ensure the survival of the claim against the owner (even if it is a poor one, given the owner's distress) despite the fact that, because transfer takes place, the owner ceases to be a member of the Body Corporate.

[36] I am disinclined to grant attorney and client costs as requested by the Body Corporate. The clause in the agreement providing for them said that they would be payable "as is provided for in the Management Rules". Integer is not subject to those rules. (The clause was put into the Body Corporate's counter-offer, which contemplated the litigation being instituted by the purchaser who would have become a member at the time.) Furthermore, the Body Corporate contends, correctly as I have found, that the first application is not in fact one contemplated by the agreement. It is therefore not one automatically subject to the submission to attorney and client costs set out in the agreement.

I make the following orders.

1. The applications under each of case numbers 333/2014 and 6634/2014 are dismissed with costs.

2. The counter-application made under case number 6634/2014 is granted as follows.

(a) Biccari Bollo Mariano Inc is directed to pay to the Body Corporate of Le Domaine the sum of Ninety Two Thousand Five Hundred and Thirteen Rand and Nine Cents (R92 513,09) held in trust by the said firm of attorneys, together with interest which has accrued thereon.

(b) Integer Mortgage SPV (Pty) Limited is directed to pay the costs of the counter application.

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OLSEN J

Date of Hearing:	MONDAY, 17 OCTOBER 2016
Date of Judgment:	THURSDAY, 10 NOVEMBER 2016
For the Applicant :	MR C B EDY
Instructed by:	KATANYA CHETTY ATTORNEYS APPLICANT'S ATTORNEYS DOCEX 412, DURBAN **c/o MESSENGER KING** SUITE 801, 8TH FLOOR ESPLANADE GARAGE 127 MARGARET MNCADI AVENUE (TEL.: 031 4022 288) (REF.: K Chetty/197)
For the Respondents :	MR ME STEWART
Instructed by:	BICCARI BOLLO MARIANO INC RESPONDENTS' ATTORNEYS **c/o MESSENGER KING** SUITE 801, 8TH FLOOR ESPLANADE GARAGE 127 MARGARET MNCADI AVENUE DURBAN (TEL.: 031 – 566 6769) (REF.: R Botha / sp/ DLI 278)