THE NATURE OF INSURANCE COVER PROVIDED UNDER A COMMUNITY LIVING POLICY

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CHAPTER 1

INTRODUCTION

1.1 Background

It has been held that complex living, within a sectional title complex or ownership in a sectional title complex, is the fastest growing lifestyle choice in South Africa for various reasons including size, ease of maintenance and security of living. Units within sectional title complexes have also become popular, as investments and for the purposes of letting out for rental income. Furthermore, additional amenities, such as swimming pools, gyms and lifestyle centres which are included as part of the purchase, make this type of living an attractive option.

However, at the same time, there are other important considerations when living near others and sharing ownership of certain property with strangers in undivided shares, when a multitude of persons and their interests are involved. One of the most important of these considerations is property insurance.

As a starting point it is important to note that while the body corporate is generally noted as the insured, or at the very least, the lead insured in terms of these forms of insurance policy it does not in fact own any property. The body corporate is merely the legal entity made up of all owners within the scheme with the responsibility of enforcing the rules and managing the common property – for the benefit of all owners. As expanded in section 2 (a)-(e) of the Sectional Title Act (STA)[1] a scheme is divided into individual sections, which are fully owned by the unit owner concerned and common property, which is owned by all the owners within the scheme, in undivided shares, based on their participation quota in the scheme (that is the size of their unit). There are also exclusive use areas which, although part of the common property, are reserved exclusively for the use of certain owners.

[1] Sectional Titles Act 95 of 1986.

An example of this is a garage or parking bay which are often exclusive use areas and while many owners think they own these they, in fact, do not. References that follow to the body corporate should therefore be accepted as references to the collective of owners.

1.2 Problem Statement

It is apparent from the above, and indeed confirmed by legislation, that proper and appropriate insurance is a vital cog in the administration and functioning of a sectional title scheme. Constas and Bleijs state that while many people consider insurance to be necessary but irritating, sectional title insurance is more complicated than standard insurance given the number of investments insured under one policy.[2]

As with all short-term insurance, it is contended by Reinecke that the purpose of indemnity insurance, such as provided for in a sectional title contract of insurance, is to provide protection against losses arising from an event insured against,[3] and it seeks to indemnify the insured because of patrimonial loss from such event, by placing them back in the position they were prior to the loss occurring.
The potential complication arises in that generally the parties to an insurance contract are the insured on one hand, possibly represented by an intermediary, and the insurer on the other hand and the scope of cover relates to an asset or number of assets owned by that one insured.

In the case of a sectional title scheme there is still one insured, the body corporate, but the insured is made up of all the individuals who own units in a particular scheme, and as Constas and Bleijs elaborate all these parties' interests need to be protected as there are many different people's assets insured under the same policy.[4]

[2] Constas C and Bleijs K *Demystifying Sectional Title* (2009) 2nd ed 164.
[3] Reinecke MFB, van Niekerk JP, Nienaber PM (2013) 57.
[4] Constas, Bleijs 2nd ed 164.

In addition to this there are several different parties, other than unit owners who are involved or have interests in the sectional title scheme. Units are often bought as investments, and as such are occupied by tenants who have interests in their rights to occupy and their movable assets. Complexes today are often managed by managing agents. Elected trustees are the physical embodiment of the body corporate and represent its interests.

It is necessary to establish how this seemingly complicated form of policy comes into being once a sectional title scheme has been established and who is responsible for obtaining and maintaining same.

The aim of this paper is therefore to identify what needs to be covered in terms of this type of policy, who is responsible for obtaining the cover and ensuring it remains in force. Furthermore, I will break down the legal responsibilities of the individual unit owners and the body corporate as a collective, who is covered in terms of the policy, as well as potential claims and challenges or potential challenges in insurance claims.

1.3 Proposed Methodology

Information will be gathered by utilising legislation, textbooks, articles and, although it is currently a narrow field of study, available case law.

1.4 Proposed Structure

In chapter two the concept of insurable interest will be briefly considered. Insurable interest is a complicated concept, and warrants a paper of its own and, as such, consideration will be limited to its immediate applicability to sectional title insurance, and how it can be applied to the many different parties who have some form of interest in the sectional title scheme, either for living purposes or insofar as it relates to managing the scheme on a day-to-day basis.

Chapter 3 will consider the first legislation, for the purpose of this study, relevant to sectional title insurance, the Sectional Titles Act 95 of 1986. Although it is no longer in force, with regard

to the day to day running of a scheme, and in particular insurance, it will be shown that it is a vital forerunner to sectional title insurance as it is known today.

Chapter 4 will look at the current legislation relevant to sectional title insurance, the Sectional Title Schemes Management 8 of 2011, and related legislation and how, if at all, it has changed insurance requirements and how the required insurance for the scheme is obtained and operated.

Finally, in chapter 5 issues surrounding challenges which may, and do, arise in certain sectional title insurance claims will be considered in more detail.

Chapter 6 will consider the findings made during the research conducted.

1.5 Delimitations

While there are currently several different community type living schemes in operation, this paper will be limited to sectional title schemes only and will not include other forms of community living such as share blocks, timeshares, traditional community living and retirement home schemes, although in many of these instances similar cover will be required, and obtainable.

CHAPTER 2

INSURABLE INTEREST

2.1 General

Prior to considering the relevant legislation, however, it is submitted that regard should be given to the question of insurable interest. This is due to the number of parties involved in a sectional title complex, as alluded to in the introduction above.

In *Lake versus Reinsurance Corporation Limited*,[5] the courts defined a contract of insurance, and this definition confirmed that an insured must have some interest in a loss which occurs. This chapter is therefore included merely to illustrate who the parties with an interest in the contract of insurance are, within a sectional title complex, and who should be the only party or parties involved in the contract of insurance with the insurer.

In this regard it has been stated that Insurable interest is not an essential element of an insurance contract which are, as put by Millard, firstly an agreement to compensate a loss, secondly a premium having been paid and, finally, an uncertain event occurring at some, unknown, time in the future.[6] As explained by Reinecke, Insurable interest is rather the object of insurance and is an intangible interest that the insured party must have.[7] Furthermore, Reinecke advocates that the object of the risk is often incorrectly referred to as the object insured.[8] Therefore, referring to the building's themselves as being insured is incorrect, as it is rather the interests of affected parties that are insured, as opposed to the physical bricks and mortar.

Millard has submitted that insurable interest is only applicable at the time that an insurable event occurs and the insured turns to the insurer for compensation.[9] If there is no insurable interest at claims stage, then there is no loss, and no indemnity is payable.

[5] *Lake versus Reinsurance Corporation Ltd* 1967 (3) SA 124 (W).
[6] Millard 82.
[7] Reinecke et al 26.
[8] Reinecke et al 26.
[9] Millard 82.

As alluded to previously there are numerous parties involved in a sectional title scheme, all of whom stand to be affected, to a greater or lesser extent, by the occurrence of an insured event, which results in damage to the buildings. While many units in sectional title schemes are owner occupied, many are purchased as investment and thus let to tenants.

2.2 Unit Owners

Sections in a sectional title scheme are owned exclusively by the unit owners, and do not form part of the common property. It goes without saying that should the unit suffer damage the patrimonial interests of that unit owner will undoubtably be diminished and the insurable interest of a unit owner, like that of a freehold property owner, cannot be questioned.

However, many of these properties are bonded, and therefore the bank in question can also be said to have suffered a loss. Often, in practice, to alleviate the challenges of a banking institution having to demonstrate an insurable interest, their interest is noted from the outset on the policy schedule, and this is also, it is submitted, why the management rules include a clause that the policy must remain valid and enforceable by the holder of a registered mortgage bond.[10]

2.3 Tenants

A tenant, although very often severely affected by damage occurring to the building which he occupies does, and will, not have an insurable interest in the property and can also therefore not be a party to the insurance contract. He suffers no loss from a patrimonial point of view as his relationship is governed by the lease agreement between the parties and if his discomfort becomes too great, he can simply enforce the contents of the lease agreement, if applicable, and move to another premises.

This often leads to great confusion, in the case of insurance policies which provide for loss of rent or alternative accommodation.

[10] Reg 23(1)(d).

The situation will often arise where a tenant will expect an insurance company to accommodate him elsewhere, or a unit owner will expect the insurance company to accommodate his tenant elsewhere, while the building is being repaired. The simple truth is that the tenant is not entitled to such benefits as he is not insured in terms of the policy, and never can be. Only a member of the body corporate is entitled in such instance to alternative accommodation, if he lives in the unit, or for compensation for the rental income he himself has lost by the tenant having cancelled the lease and moved out, since the unit is no longer habitable. It is thus important for the tenant to ensure that he has his own personal insurance, which contains cover including provision for alternative accommodation.

2.4 The Body Corporate Collective

The STSMA[11] seeks to confer an insurable interest on the body corporate insofar as it relates to implementing the prescribed insurances. It is submitted that this is not necessary, insofar as the common property is concerned, in that all owners of units similarly, in relation to the size of their participation quota, have automatic ownership of an undivided shares in the common property and thus all the owners, as a collective being the body corporate, have full insurable interest in respect of the common property.

This may, however, seek to overcome the challenge that the body corporate, as a collective, does not have an insurable interest in the individual units, other than that now conferred by legislation and to the limits as prescribed accordingly.

2.5 Tenants Fixtures and Fittings

As a tenant has no insurable interest in the policy of insurance, similarly their property, or rather their interests therein, cannot enjoy cover in terms of the policy. It may well happen that a tenant may bring significant improvements to a unit which they occupy, especially in terms of long-term occupancies.

[11] S 3(6).

It may also happen that they, at their own cost, install fixtures and fittings to the insured property, although this is more common in the case of commercial sectional title complexes. Should the unit suffer physical damage due to an insurable event, these items would be excluded from cover in terms of the policy, unless the policy provides an extension which specifically covers these items.

Even though these items, which may include items such as laminated flooring, alarm systems and so forth, may be permanently affixed to the property the unit owner suffers no financial loss in the event of their destruction, and therefore has no insurable interest in these items. It is submitted that even if the lease agreement between the parties provides that the fixtures and fittings become the property of the owner after the tenant moves out the unit owner only obtains an interest if an event occurs at that stage. This again holds true with Millard's views as expressed previously.[12]

2.6 Managing Agents

Sectional title schemes very often appoint professional managing agents or management companies to administer and manage the complex on a day-to-day basis, on behalf of the trustees. This very often includes managing the insurance requirements, but while the managing agent will, as the agent of the insured, often effect the insurance and manage the claims process, including the submission of claims, quantification of claims and assisting in bringing claims to finality they have no insurable interest in the policy, which remains strictly a contract between the body corporate and the insurer.

The fact remains though that numerous individuals, and numerous different assets and interests, remain insured under one policy, which has the effect that sectional title insurance remains complicated, with much potential for conflict, especially at the claims stage.

[12] Millard 82.

CHAPTER 3

THE SECTIONAL TITLES ACT

3.1 General

Previously sectional title schemes were regulated by the sectional title act (STA)[13]. Prescribed management rule 29 dealt with insurance requirements for the scheme. The rules followed on a broad level, a three-pronged approach in respect of insurance cover required for a sectional title scheme, being property damage (material damage) cover, liability cover and fidelity guarantee cover. Constas and Bleijs advocate that the importance ascribed to the need for insurance cover is detailed in the requirement that steps to obtain insurance for the buildings should be taken at the first meeting of trustees.[14]

3.2 Material Damage

The rule[15] prescribed a mandatory list of risks to be insured against, which for the sake of brevity is not repeated in full here as it will be referred to later. What should be noted however, is that the list was effectively a list of perils which can generally be expected to be encountered by any property owner in the ordinary course of events and which can generally result in damage to fixed property, such as fire, lightning, storm, earthquake, burst pipes (water damage) and housebreaking. The rule further prescribed, importantly, that the buildings and improvements should be insured to their full replacement value, this to negate the danger of average being applied. An average clause, as explained by Millard, causes the insured to carry a portion of the loss himself if the property is insured for less than its actual or replacement value.[16] The required insurance had to apply to the buildings and all improvements on the common property. In this regard, due consideration would have to be given to the items covered by the standard policy on offer.

[13] Sectional Titles Act 95 of 1986.
[14] Constas, Bleijs 2nd ed 164.
[15] Management rule 16, STA
[16] Millard 119

The trustees would have to ensure that the policy provides cover for all improvements on the common property, being a reference to roads, boundary walls, lamp posts and so forth permanently built or installed on the common property. Obtaining cover for only the buildings themselves, dependent on the policy definition, may well leave the body corporate short of cover.

Additional perils to those prescribed could also be insured against when the trustees or holders of mortgage bonds over a minimum of 25% in numbers of units in the scheme considered it necessary[17]. It is submitted that this clause was added to ensure cover if it became apparent that the legislator had omitted certain perils from its list of mandatory cover, or where it became obvious that the scheme was in an area where it may have required certain types of cover not specifically provided for. It is submitted that it has become relatively standard procedure for insurers to offer an accidental damage type of cover which would provide cover for scenarios not necessarily considered specifically. It is further submitted that an all-risk type of policy, where all damage caused to the property no matter how it occurs is covered, unless specifically otherwise excluded, would provide protection for the necessary, unforeseen gaps in cover, not provided for in a peril-based policy which lists only the prescribed perils.

Individual unit owners could increase the amounts for which their unit was insured, provided they were personally responsible for the additional premium. Increasing a sum insured, which is the amount a unit is insured for in the event of a total loss, would be a particularly important consideration if the unit were not finished with standard finishing's but rather upmarket finishing's or in instances where individual unit owners had upgraded the interior of the units.

3.3 Liability Cover

In respect of liability insurance, the rule[18] required the trustees to ensure that both the trustees and owners were insured, and cover maintained, against liability arising from loss or damage to person and property for a minimum amount of R 100 000.00.

[17] Management Rule 29 (1) (x), STA
[18] Management Rule 29 (2), STA.

Although this is the minimum allowed, and it was prescribed that same could be increased, this sum is woefully inadequate. For instance, in the case of *Feigner versus Body Corporate of the Lighthouse mall*,[19] the plaintiff sued the body corporate for an amount of approximately 11.7 million rand after he fell down an elevator shaft in the common property. Had he been successful in his claim, and the body corporate not adequately insured, the individual owners would have found themselves contributing personally to the settlement based on the size of their ownership of an undivided share of the common property. The ownership of an undivided share in the common property is calculated on the size of the unit owners' section, of which he has exclusive ownership.

This is since, as owners, they remain legally liable for the damage suffered and only a very small part of the risk would have been passed to insurer's, leaving them to settle the difference.

3.4 Fidelity Guarantee

Finally, although fidelity guarantee was specified as a requirement, against fraud or dishonesty of any person in the service of the body corporate, trustees and any person acting in the capacity of a managing agent, there was no specific requirement as to the extent of cover required other than same should be to the extent, if any, determined by the members of the scheme.

The rule,[20] finally, made reference to excesses, which as again explained by Millard is the first amount payable by the insured or uninsured portion of the loss[21] I mention this specifically due to the fact that, as noted by Constas and Bleijs[22] before a 2008 amendment to the rules, the question of whose responsibility it was to pay the excess was not clarified, and the amendment in question made the law clear.[23] Prior to this amendment the act was silent as to who was responsible for such excess, the amendment making it clear that the owner of the unit where the damage occurred should carry any such excess.

[19] *Feigner v Body Corporate of the Lighthouse Mall* (438/2010) [2011] ZAKZHC 20 (16 March 2011).
[20] STA.
[21] Millard 129.
[22] Constas, Bleijs 2nd ed 168.
[23] Constas, Bleijs 168.

CHAPTER 4

THE SECTIONAL TITLES SCHEMES MANAGEMENT ACT

4.1 General

The sectional title act is still very much in force, however only to the extent that it deals with the conveyancing aspects of a scheme. The day-to-day management aspects have subsequently been replaced by the Sectional Title Schemes Management Act (STSMA),[24] Management Regulations (Regulations)[25] and the Community Schemes Ombud Services Act (CSOS),[26] the regulations published in government gazette number 40335 on 7 October 2016.

The make-up, administration and management of a sectional title schemes falls outside the ambit of this paper. It should be noted though that Constas and Bleijs confirm that all individual owners in a complex automatically become members of the body corporate on registration of the unit in their name.[27] This remains the case irrespective of whether they reside permanently in the unit or not. In addition, Constas and Bleijs explain that a body corporate is formed the exact moment any unit is registered in the name of someone other than the developer.[28] The trustees are members of the body corporate who are appointed at annual general meetings to administer the scheme on behalf of the members, and in their best interests. The developer is required in terms of section 2(8) of the STSMA[29] to call the first meeting of the body corporate. Part of the agenda of the first meeting is the confirmation or variation of the insurance policies of the body corporate.

It is the view of Constas and Bleijs[30] that the new acts have significantly enhanced insurance, insofar as it relates to sectional titles. A closer look at the new legislation may provide an answer to this statement. Provision is still made for three broad categories of insurance cover to be provided. Damage to the buildings, liability cover and fidelity guarantee cover.

[24] Sectional Titles Schemes Management Act 8 of 2011.
[25] Sectional Titles Schemes Management regulations, 2016.
[26] Community Schemes Ombud Service Act 9 of 2011.
[27] Constas M and Bleijs K Demystifying Sectional Title (2019) 3rd ed 8.
[28] Constas, Bleijs 3rd ed 26.
[29] STSMA.
[30] Constas, Bleijs 3rd ed 197.

There are various sections in both the act[31] and regulations[32] which deal with insurance for the sectional title scheme.

Section 3[33] provides for the establishment of a fund, inter alia, for the payment of insurance premiums, to insure the building, and keep such insurance, against certain prescribed risks, to obtain further insurance as required by special resolution, and to pay insurance premiums. This section also provided for the body corporate to maintain the common property and to make provision for future maintenance. Again, the requirement remains to insure the building for the full replacement value.

It is submitted that the provision relating to maintenance is of vital importance and is inextricably linked to the insurance aspect. Failure or damage due to lack of maintenance is not an uncertain future event. Failure to maintain would result in eventual, inevitable failure and damage which follows such failure, would not be considered fortuitous and therefore not an insurable event. In fact, it is further submitted that most insurance policies specifically exclude maintenance issues from cover.

Section 13 of the STSMA[34] provides, inter alia, that owners must maintain and repair their own sections. Again, it is submitted, as in the case of the common property, that maintenance of the section is vital to the response of the insurance policy to a claim, and therefore directly related to sectional title insurance.

Section 14 of the STSMA provides for unit owners to affect their own insurance cover, but only insofar as it relates to damage which occurs from risks not covered by the policy. This makes it clear that the body corporate insurance must remain in place and is the overriding insurance policy which cannot be cancelled by the unit owner to obtain his own insurance cover separate from that of the body corporate.

[31] STSMA.
[32] Regulations to the Act.
[33] STSMA.
[34] Section 13 (1) (c)

4.2 Material Damage

Regulation 3 details the further risks to be insured against, other than fire, insofar as material damage is concerned, as follows;

> "(a) lightning, explosion and smoke;
> (b) riot, civil commotion, strikes, lock-outs, labour disturbances or malicious persons acting on behalf of or in connection with any political organisation;
> (c) storm, tempest, windstorm, hail and flood;
> (d) earthquake and subsidence;
> (e) water escape, including bursting or overflowing of water tanks, apparatus or pipes:
> (f) impact by aircraft and vehicles; and
> (g) housebreaking or any attempt thereat."

A review of the above would suggest that both a standard perils-based policy and a so-called all risk policy, where all sudden and unforeseen damage is covered, unless specifically otherwise excluded in terms of the policy, would provide the cover required. It should also be noted that this list is identical to the one proved under the STA, and it is apparent that the legislator was comfortable that this list of perils was, and remained, sufficient insofar as material damage cover is concerned.

4.3 Trustees Indemnity

Management regulation 8 (4)[35] provides that the body corporate must indemnify a trustee (if he is not a managing agent) against any losses which occur due to his actions while he is acting within the course and scope of his duties as a trustee, but if he has not breached his fiduciary obligations.

[35] Regulations to the Act.

This would suggest a negligent (but not grossly negligent) act on behalf of the trustee giving rise to any such loss, which in turn would suggest the need for some form of liability cover which would be in addition to the standard liability cover required to protect the members of the body corporate from claims by a third party, which are restricted specifically to bodily injury, illness and so forth and damage or loss to property.

It can happen, and often does, that a body corporate sues in its own name, for some form of relief. In such instances the body corporate must carry these costs, and if cover is sought for such cases the body corporate should consider a form of legal protection cover. It may well and does, however, happen that the trustees or the body corporate have legal proceedings instituted against them, alleging wrongful conduct. The trustees, and by extension to body corporate as they must indemnify the trustees, require some form of protection against such events.

In the case of *Lyons v Body Corporate of Skyways*[36] the applicant approached the court seeking to compel the body corporate to ensure that all the elevators of the insured were repaired and returned to an operational condition. The elevators had not been operational, in general, for at least two years. Despite the body corporate taking steps by appointing two separate service providers to attend to the elevators during this period, the repairs never took place due to various problems with the service providers concerned. In his application, the applicant alleged he had exhausted all other options for remedy, and he had no option but to approach the courts to force the body corporate to attend to their responsibilities as the failure of the lifts was causing prejudice to, particularly, elderly, and infirm occupants of the body corporate.

The courts agreed and ordered the body corporate to restore the lifts accordingly, within a fixed period of three months. Of particular interest in this matter, was that the court ordered the body corporate to pay costs on an attorney and own client scale.

[36] *Lyons v Body Corporate of Skyways* (3643/2016) [2016] ZAWCHC 94; 2016(6) SA 405 (WCC) (26 May 2016)

In *Wiechers and Another v Spruitsig Park Body Corporate*[37] the first applicant approached the courts, alleging that the body corporate had defamed him at the annual general meeting. He included the draft minutes of the annual general meeting, which contained the alleged defamatory statements in his application. The comments were alleged to have been made in front of 92 individual owners of the body corporate, although the first applicant himself was not at the meeting in question. The applicant had, however, legally obtained a copy of the draft minutes of the annual general meeting from the property manager and he alleged he had been accused of being dishonest, and that he bought a unit in the complex on auction, for a ridiculously low amount and by devious means.

The applicant sought an order that the body corporate be directed to remove certain words from the draft minutes.
The applicant was ultimately unable to prove his claim, which was dismissed with costs, but undoubtedly the body corporate suffered a financial loss in respect of costs incurred, over and above those it was able to claim from the applicant.

In *Graham v Park Mews Body Corporate*[38] the applicant, who was also one of the trustees, approached the court following earlier arbitration, which had found substantially in his favour, relating to maintenance the body corporate was required to carry out on the common property. The body corporate had failed to perform certain maintenance and repair work, as was its duty in terms of legislation. The failure to attend to this work resulted in water ingress, and subsequently damages, to the applicant's property. The applicant had subsequently approached the court, successfully, to have the arbitrators finding declared an order of court and, in the current proceedings sought an order that the body corporate, and the chairman of the body corporate, be held in contempt for not complying with the order. In the alternative an order was sought that they be directed to comply with the court order. It is noteworthy, in this instance, that the chairman was also cited in his personal capacity, and thus would have required indemnification by the body corporate. The applicant also sought to have the body corporate placed under administration for a certain period.

[37] *Wiechers and Another v Spruitsig Park Body Corporate* (15747/19)[2019] ZAGPPHC 1036(18 December 2019)
[38] Graham v Park Mews Body Corporate and Another (20371/2010)[2011] ZAWCHC 370 2012(1) SA 355(WCC)

Insofar as the contempt order was concerned, the respondents were able to demonstrate that they had substantially complied with their obligations in so far as the required maintenance was concerned and were in the process of obtaining the necessary quotes to complete the remainder of the work. The court further found that the appointment of an administrator was a drastic step, and that the onus was on the applicant to demonstrate that there are special circumstances or good cause to justify such an appointment and further to convince the court that it would be not only to his exclusive benefit – but to the benefit of all interested parties including other owners. He failed to do so.

The application was dismissed, with costs.

In *De La Harpe v Body Corporate of Bella Toscana*[39] the body corporate became involved in a dispute with a unit owner within the complex as to who held the financial responsibility of maintenance insofar as it related to a specific wall in the complex, surrounding the unit owner's unit. The applicant held the view that the wall formed part of the common property, and thus was the responsibility of the body corporate. The body corporate held the view that the wall formed part of the exclusive use area of the unit owner, meaning that the unit owner was responsible for the upkeep.

The unit owner, once again, also sought an order that the body corporate be placed under administration for six months, to enable an administrator to attend to the issue which she viewed as the body corporate's responsibility and which they refused to attend to.
The court ultimately found that the applicant was responsible for the wall, as it surrounds her exclusive use area, and it is not equitable to expect other occupants, or the body corporate, to contribute to the upkeep and repair of a structure they obtain no benefit from. The applicant was ordered to remediate or demolish the wall, as sought in a counter application brought by the body corporate.

[39] De La Harpe v Body Corporate of Bella Toscana (10088/2013) [2014] ZAKZDHC 63 (28 October 2014)

As far as the application for the appointment of an administrator was concerned, the court referred with approval to the case of Graham v Park Mews Body corporate[40] and the application was dismissed with costs.

The above-mentioned matters demonstrate the value and importance of the body corporate obtaining cover as it relates to the defence of legal proceedings which may be served upon it and or the trustees.

Finally, and perhaps most importantly, management regulation 23[41] speaks to insurance requirements for the body corporate, and reads as follows:

"23. Insurance

(1) The insurance policies of the body corporate in terms of sections 3(1)(h) and (i) of the Act-

(a) Must provide cover against – (my emphasis)

(i) Risks referred to in regulation 3;

(ii) Risks that members resolve must be covered by insurance; and

(iii) Risks that holders of registered first mortgage bonds over not less than 25 per cent in number of the primary sections by written notice to the body corporate may require to be covered by insurance;"

Regulation 3 here refers to the material damage aspect of cover in respect of the buildings and improvements as has previously been listed above. It is the same list as provided under the STA and, as has been noted previously would appear to be a standard list of property insurance related perils. It still provides the opportunity for the members to obtain additional cover, if deemed necessary, such as accidental cover or as provided under an all-risk policy. It is submitted that this cover is more than adequate insofar as damage to the buildings is concerned, if adequately specified.

[40] Graham v Park Mews Body Corporate and Another (20371/2010) [2011] ZAWCHC 370 2012(1) SA 355(WCC)
[41] Regulations to the Act.

Assuming the insured understands the scope of the contract of insurance, incorporating certain exclusions, terms, and conditions, this is reasonably uncomplicated.

All sectional title insurance policies will define the term "building", and the term will not necessarily be given its ordinary meaning but, in general, the building will include all buildings and outbuildings on the property to be insured and anything else permanently built on or affixed to the property, such as boundary walls, paving, air-conditioners and so forth.

The management regulations,[42] as noted above, also provide for risks that members decide should be covered by insurance. Constas and Bleijs[43] cite the examples of sprinkler systems and CCTV cameras. This is not necessarily correct, in my view. It may be, depending on the specific policy, that these items are included under the definition of buildings and are thus covered in the ordinary course if damaged by an insured event. Some policies also include these items, but limit the cover provided if damage is caused by certain events. It thus remains vital that trustees consider the cover provided by various policies before committing the body corporate to an insurance policy, to ensure that certain items are, inadvertently, not covered or that the body corporate does not take-out additional cover, which is in fact not necessary.

4.4 Underinsurance

Regulation 23 goes on to state:

> (b) "Must specify a replacement value for each unit and exclusive use area, excluding the member's interest in the land included in the scheme; provided that any member may at any time by written notice to the body corporate require that the replacement value specified for that member's unit or exclusive use area be increased;
>
> (c) Must restrict the application of any "average" clause to individual units and exclusive use areas, so that no such clause applies to the buildings as a whole;"

[42] Reg 23 (1)(a)(ii).
[43] Constas, Bleijs 3rd ed 199.

The requirement placing the onus on the body corporate to insure the property to its full replacement value is one that warrants further discussion. Unlike, for instance, motor vehicle insurance where a vehicle is insured for its market or retail value which is easily quantifiable the situation relating to building reinstatement is somewhat different. As property valuation expert Bjorn Laubscher points out, one cannot simply add the market values of all the units in complex to arrive at a replacement value.[44]

The trustees are responsible for ensuring that the individual units and the common property are insured to their full replacement value. Not only does the above not consider the separate, but equally important value of the common property, but full replacement value presupposes destruction of the entire complex. In other words, calculation of the replacement cost of the complex must consider the cost of building the complex from scratch, with new materials even if same has not been destroyed entirely, including the common property and insured items thereon. As noted by Laubscher this would include costs such as demolition of partially damaged structures, professional fees such as engineers and architects, rubble removal and VAT.[45]

Other items which may incur additional costs include, but would not necessarily be limited to, the costs of setting up the building site, security for the building site, the area in which the complex is located considering that building costs may differ to an extent from area to area, and the finishing's of the complex such as standard versus upmarket.
In addition, some complexes are constructed as simplexes, some as duplexes and some with multiple floors. The cost of building a multiple story building would, likely, exceed the cost of building single story units, given the need for cranes, scaffolding and so forth. Similarly, units on upper floors would cost more to construct than those on the ground floor for the same reasons.

If the complex is underinsured and average is applicable an insurer would not pay the whole claim.

[44] Paddocks Press: Volume 10, Issue 6, 1 (4 January 2021).
[45] Laubscher vol 10 (4 January 2021).

The above is, naturally, not exhaustive of the potential pitfalls surrounding the aspect of full replacement value and it is for this reason that Laubscher recommends, correctly in my view, the appointment of a professional to attend to this very complicated aspect of the insurance requirements on behalf of the body corporate and their representatives.[46]

It is submitted that the clause that average should only be applicable to an individual unit and not the entire building is of vital assistance to owners in the scheme. Should an event occur, resulting in damage to several units (and perhaps also the common property) then the remaining owners are protected if one of the unit owners underinsured (whether deliberately or not) their unit, as only that owner will be subject to underinsurance. The remaining unit owners will be insured for full value and will not suffer due to the actions of one owner. Of course, should all units be underinsured then this clause will offer no protection, even if the replacement value of each unit is considered separately.

Regulation 23 further reads:

> (d) "Must include a clause in terms of which the policy is valid and enforceable by any holder of a registered mortgage bond over a section or exclusive use area against the insurer notwithstanding any circumstances whatsoever which would otherwise entitle the insurer to refuse to make payment of the amount insured, unless and until the insurer terminates the insurance on at least 30 days' notice to the bondholder; and
> (e) May include provision for "excess" amounts."

The clause that the policy must be valid and enforceable by the holder of a registered mortgage holder against the insurer is again of vital importance to a unit owner. It is submitted that this is to be interpreted that should the owner do something to render the policy unenforceable or voidable, then the mortgage holder, such as a bank, can still enforce

[46] Laubscher vol 10 (4 January 2021).

the claim for the value of their investment, although any amount over and above this would not be claimable.

Regulation 23 further goes on to state:

(2) "A member is responsible-

(a) For payment of any additional premium payable on account of an increase in the replacement value referred to in sub-rule (1)(b);

(b) For any excess amount that relates to damage to any part of the buildings that member is obliged to repair and maintain in terms of the Act or these rules,

And must furnish the body corporate with written proof from the insurer of payment of that amount within seven days of written request."

Although the aspect of the payment of the excess was clarified as mentioned above, this simply reinforces responsibility for excess payment, and avoids any argument as to the responsibility for these payments.

(3) "A body corporate must obtain a replacement valuation of all buildings and improvements that it must insure at least every three years and present such replacement valuation to the annual general meeting

(4) A body corporate must prepare for each annual general meeting schedules showing estimates of -

(a) the replacement value of the buildings and all improvements to the common property; and

(b) the replacement value of each unit, excluding the member's interest in the land included in the scheme, the total of such values of all units being equal to the value referred to in sub-rule 4(a).

(5) On written request by any registered bondholder and the furnishing of satisfactory proof, the body corporate must record the cession to that bondholder of that member's interest in any of the proceeds of the insurance policies of the body corporate."

It is submitted that the above simply serves to reiterate, as mentioned previously, that the function of outsourcing replacement values to an external professional is vital to enable the body corporate to obtain correct and accurate values, while the references to the bondholder serve as protection both to the unit owner and that bondholder, by ensuring that adequate insurance is maintained on an ongoing basis.

4.5 Liability Insurance

Regulation 23 goes on:

> (6) "A body corporate must take out public liability insurance to cover the risk of any liability it may incur to pay compensation in respect of-
>
> (a) any bodily injury to or death or illness of a person on or in connection with the common property; and
>
> (b) any damage to or loss of property that is sustained as a result of an occurrence or happening in connection with the common property, for an amount determined by members in general meeting, but not less than 10 million rand or any such higher amount as may be prescribed by the Minister in any one claim and in total for any one period of insurance."

It is heartening to note that the legislature has significantly increased the minimum liability cover required, although it remains doubtful whether this is sufficient.
Liability insurance, as explained further by Millard, is cover obtained by an insured, against amounts which may become due in the event of legal liability towards a third party.[47] It is apparent from the wording of the management rule[48] that the required cover relates to legal liability from a delictual, and not a contractual, standpoint.
Liability insurance is perhaps the most misunderstood form of sectional title insurance cover.

[47] Millard D *Modern Insurance Law in South Africa* (2013) 45.
[48] Regulation 23 (6)(a).

It is often believed that the mere fact that damage occurs on the insured premises, and arises from the insured property, such as the complex gate closing on a vehicle, should automatically lead to the reimbursement of the damages suffered simply since the complex has a liability policy in place. The simple fact of the matter is that these items, such as the vehicle referred to in the example above, are not insured in terms of the policy. As mentioned in the material damage section above, the section provides cover for the buildings and permanent fixtures and fittings belonging to the body corporate and unit owners. Therefore, the only way to consider a claim for damage to something not covered in terms of the policy is under another section of the policy, in this claim the liability section.

As alluded to above, the wording makes it clear that the required cover relates to a delictual action. In other words, all the elements of a delict must be present before the third party can succeed with a claim against the body corporate.

As Reinecke[49] points out, this cover is vital for the protection of the body corporate as well as the individual owners, as the consequences of incurred legal liability can potentially be crippling from a financial point of view and it would not be an exaggeration to note that failure to have sufficient legal liability could result in the insolvency of the entire body corporate. As with first party insurance, Reinecke declares that a liability insurance policy is one of indemnity[50] and thus the policy may be incorporated as part of the material damage policy, as it most often is. It is argued however, that it can also take the shape of a separate, stand-alone policy.

It should be noted that, although the policy is one of indemnification, in instances where a third party suffers some form of loss it is the insured themselves who stand to be indemnified, according to Reinecke, in terms of the policy and not the third party[51]. The third party is not a party to the contract of insurance itself and has no benefits in terms of the policy.

[49] Reinecke et al 541.
[50] Reinecke et al 541.
[51] Reinecke et al 541.

In practice the insurer would most often intervene early in the process, for instance immediately the insured advises them of a potential liability claim which has arisen. For this reason, it is often an obligation in terms of the policy to immediately notify the insurer once a letter of demand or intention to institute action has been served upon the insured. Again, this is also dependent on the wording of the policy, which would contain an operative clause as to when an insurable event is deemed to have occurred. This enables the insurer to manage the process throughout and settle the claim early, if necessary, in terms of the subrogation clause, even if the insured does not wish to do so. This serves to ensure that the insured does not recklessly spend the insurer's money, although often the policy will contain a provision that the insured cannot simply incur legal costs unless specifically agreed to in writing by the insurer.

Liability policies may be issued on either a claim made or a claim occurring basis. A claim made policy provides cover for claims first made against the insured during the period of insurance, while a claim occurring policy provides cover for claims occurring within the period of insurance, irrespective of when a claim is first made. Thus, if a body corporate moves from a claim made policy to a claim occurring policy, without a retroactive date, it may inadvertently find itself with a gap in its cover as any subsequent claim would have occurred during the previous policy's lifetime, yet only be made while the current policy was in force, thus excluding it from cover under either policy. The trustees should be cognisant of this fact.

It is also so that a member of the body corporate, or even a trustee, can attempt to hold the body corporate legally liable for bodily injuries suffered. This was confirmed in the case of *Du Plooy versus The Cascades Body Corporate and another*.[52] Mr Du Plooy was both a unit owner, and a trustee of the defendant body corporate, and yet brought an action against the defendant body corporate, for allegedly failing to discharge its statutory duty of keeping the property well maintained and in a good and serviceable state.

[52] *Du Plooy v The Cascades Body Corporate and Another* (275/10) [2013] ZAWCHC 62 (12 March 2013).

It is also worth noting that the court appears to have agreed with the view expressed that the body corporate has a higher duty of care than an ordinary homeowner, more like a landlord, hotel owner or shopkeeper who invites members of the public onto their property.
It is quite likely that, had the plaintiff not previously taken the responsibility of maintaining the common property upon himself, the body corporate may well have been liable for his injuries. In any event, a significant amount of legal fees would have been incurred in establishing whether the body corporate was legally liable or not, cementing the importance of proper and adequate liability cover. The claim of the plaintiff against the body corporate was ultimately dismissed.

It is suggested that, for the purposes of insurance cover, the challenge of an insured effectively suing himself, that is as a member of the body corporate suing the body corporate, can be overcome by the inclusion of a cross liability clause in the contract of insurance. A cross liability clause effectively responds as if a separate policy has been issued to each party to the action and the plaintiff, for all intents and purposes, is not an insured in terms of the defendant's liability policy for the purposes of the specific action although remains an insured in terms of the policy for all other rights and interests.
It has also been argued by Constas and Bleijs that the property owner's liability as envisioned in management rule 23 (6) may not be wide enough to adequately protect the body corporate.[53] This view can be fully supported, and I agree with same.

It is submitted that the cover envisioned, as with the material damage insurance cover, relates to legal liability which may arise in connection with the body corporate's ownership of the building. In other words, in instances where the ownership of the building itself, including the failure to adequately maintain the building as described in the relevant policy, results in loss, damage or injury. For instance, if a third party, which as noted previously could include a member of the body corporate, is on the common property by invitation and trips over uneven paving or is struck on the head by a falling roof tile, or the complex gate closes on a vehicle, then it may be that the potential liability which arises falls within the ambit of the liability cover provided, subject to the insurance policy terms and conditions.

[53] Constas, Bleijs 3rd ed 200.

However, it often happens that a body corporate offers additional amenities, as part of an enticement to invest in the scheme, or it may have wild animals on the property, or manage a restaurant which is open to the members of the public. It is submitted that any potential liability arising from these actions would not elicit a response from a standard liability policy as envisioned.

Similarly, Constas and Bleijs elaborate that the policy relates only to fixed property and, generally but subject to certain policy exceptions, does not cover movable items[54] and any legal liability arising from the use of such items, like gym equipment, from visitors to the property would fall wide of the ambit of the cover envisioned. Wider cover may need to be considered.

4.6 Fidelity Guarantee

Regulation 23 further provides:

> (7)" A body corporate must take out insurance for an amount determined by members in general meeting to cover the risk of loss of funds belonging to the body corporate or for which it is responsible, sustained as a result of any act of fraud or dishonesty committed by a trustee, managing agent, employee or other agent of the body corporate."

Fidelity guarantee cover needs to be considered in conjunction with CSOS[55] regulations and will be considered further below. Unlike before, the fidelity guarantee section now refers to outside agents of the body corporate as insurable persons. This was not included in the STA and it is submitted that wider cover is therefore now required, with additional parties capable of being considered insurable persons.

[54] Constas, Bleijs 3rd ed 200.
[55] CSOS.

Fidelity Guarantee cover provides cover to the insured for the loss of funds of the body corporate or for which they are responsible due to fraud or other dishonest conduct by a listed number of insurable persons. Management regulation 23(7) provides that members of the body corporate must determine the amount of such cover in a general meeting; however, this discretion is somewhat limited by CSOS[56] regulation 15(3) which prescribes the minimum amount of cover required. Presumably then, the discretion lies with the members to select a level of cover for an amount more than the prescribed minimum, should they deem it necessary, as elaborated on by Constas and Bleijs.[57]

The minimum amount of cover prescribed is the scheme's investments and reserves at the end of its previous financial year, together with 25% of the operational budget for the new year[58]. This again constitutes increased and better cover than that prescribed under the STA as it constitutes a quantifiable number and does not leave the discretion to the body corporate to decide they may not be qualified to make, simply by virtue of the fact that they may underestimate the actual, potential dangers and associated costs involved when this sort of loss occurs.

Prior to the commencement of the current acts[59] many policies specifically excluded professional managing agents from Fidelity guarantee policies. The risk, for insurer's, relating to the current prescribed cover for managing agents is that, while a loss relating to a single body corporate may not be insurmountable there are managing agents which manage multiple complexes. This could lead to potentially huge losses, and it remains to be seen whether insurers will have and or will continue to have a risk appetite to underwrite such policies, or at the very least to underwrite such policies without substantial limitations which could see body corporates ultimately insured for less than what they should be or think they are.

[56] CSOS.
[57] Constas, Bleijs 3rd ed 201.
[58] CSOS regulation 15(3)(a) and (b).
[59] CSOS, STSMA.

A further question arises as to the insurable interest of managing agents in such policies and whether they, or the body corporates in question, should be insured in terms of these policies. A sectional title scheme may be best served by insisting on written confirmation of other or sufficient insurance from insurable parties in terms of sub-regulation 5 (a),[60] thereby releasing them from their obligations.

Regulation 23 concludes:

(8) "A body corporate, authorised by a special resolution of members, may insure any additional insurable interest the body corporate has –

(a) in the land and buildings included in the scheme; and
(b) relating to the performance of its functions, for an amount determined in that resolution."

It is noted from the above that the material damage sections of the insurance requirements have remained substantially the same, for liability cover the minimum requirements have been substantially increased to a more acceptable level while fidelity guarantee requirements have been substantially enhanced.

It is also worth noting that, in practise, the excess amount is often not paid to the insurer, as provided for in the act. The excess amount would, in general, either be collected directly from the party who is responsible for the payment thereof by the repairer prior to the commencement of repairs or, in the case of a cash value settlement, would be deducted from the settlement paid to the insured party.

[60] CSOS Regulation 15(5)(a).

CHAPTER 5

CHALLENGES IN SECTIONAL TITLE INSURANCE CLAIMS

5.1 General

It is common cause, and as Reinecke elaborates, that in indemnity insurance the onus is on the insured to bring his claim within the ambit of the policy[61] , while Millard goes further to explain that this is done by demonstrating physical loss or damage, caused by an insured event, an insurable interest at the time of the loss or damage and the extent of the loss or damage[62]. The principle was again confirmed in the Ombudsman for short-term insurance (OSTI) briefcase case study entitled "the case of Mr S and the burst pipe"[63]. The insured approached OSTI for assistance after his insurer rejected his claim. It was the insured's assertion that the damage to his property occurred as the result of subsidence following a burst pipe. The insurer did not agree, and rejected his claim since the damage was, in its view, caused by movement of clay type soil which was a specific exclusion in terms of the policy. The OSTI confirmed in its finding's that the onus was on the insured to bring his claim within the ambit of the policy, and on the insurer to prove an exclusion once they have relied on same. Although both parties presented expert opinions in support of their finding's, the OSTI found the opinion of the insured's expert to be the more probable cause of the damage and were therefore of the view that the insured had discharged the onus placed on him to bring his claim within the ambit of the policy. The insurer agreed to settle the claim.

In the Ombudsman Briefcase case study entitled "the case of Mr F and the collapsed pool"[64], the insured approached the OSTI for assistance after his insurer rejected his claim for a collapsed pool. The insurer concerned was of the view that the claim fell outside the ambit of the policy and rejected the claim accordingly. The insured's initial contention was that the damage was due to the prolonged drought that had afflicted the Western Cape.

[61] Reinecke 322
[62] Millard 128
[63] The Ombudsman's Briefcase Issue No. 2 of 2020
[64] The Ombudsman's Briefcase Issue No. 2 of 2020

This on the insured's own version would have meant that the damage must have occurred over a period – an exclusion in terms of the policy. Mr F did not agree with the insurer's findings and subsequently approached a further contractor to provide a new report, suggesting a different cause of damage. The policy appears from the case study to have been a peril's-based policy, however, and the new cause of damage suggested by this contractor did not constitute an insured peril in terms of the policy. Ultimately, Mr F was not able to bring his claim within the ambit of the policy, and the OSTI found in favour of the insurer. The rejection of the claim was upheld.

It is also so that many short-term insurers, as correctly noted by Reinecke retain the right to choose to indemnify the insured not by the payment of a sum of money, although they may, but rather by replacement, reinstatement, or repair of the damaged property[65].

As sectional title insurance expert, Mike Addison, states in his article, insurance claims are very often among the most misunderstood areas within sectional title, and a recipe for conflict.[66] In this regard he goes on to suggest that all body corporates should establish a claims procedure of its own which addresses its own specific needs.[67] I concur with this view, and also that this policy should be clearly communicated to all relevant parties within the scheme to adequately manage expectations and reduce potential conflict.

Addison further goes on to note that only in the last 20 or so years have sectional title specific policies been available, with more of these policies becoming available in that time.[68] This has had the effect that sectional title insurance is much easier to manage, however it remains his view that there are still gaps in cover.[69] Although no specific policies were consulted for this paper, these concerns relate mainly to what is actually covered under these policies given the definition of the property and whether certain types of construction are automatically covered or whether it should be specified on the policy concerned.

[65] Reinecke 534
[66] Press Vol 6, Issue 1, page2 (4 January 2021).
[67] Paddocks, vol 6 (4 January 2021).
[68] Paddocks press: vol 9, Issue 8, 2 (4 January 2021).
[69] Paddocks vol 9 (4 January 2021).

Naturally, this would be a concern as, should the item not be correctly described or insured, a potential claim may stand to fail before it is even properly lodged.

All insurance policies have both exclusions, relating to causes of damage that insurer's do not want to accept the risk in respect of, or relating to events that are not insurable, and terms and conditions that an insured must comply with in terms of the policy. As mentioned previously, no individual policies were considered for this paper, but Mike Addison further points out that insurable events, and "uninsurable" events are similar across all policies.[70] The point made is that not all physical loss or damage to either a unit or the common property is covered in terms of the policy, even if the item itself is correctly insured, and so it is important to understand the contents of each individual policy.

Then too, failure to comply with any of the terms and conditions of the insurance policy could lead to problems when attempting to claim.

5.2 The Parties

The first, and most obvious, problem which presents when it comes to a sectional title insurance claim, and a common theme throughout this paper is the number of different parties involved in the process.

At its most complicated, the submission of an insurance claim, both accurately and on time, relies on the tenant informing the unit owner of the occurrence of an event, the unit owner in turn advising the trustee or trustees of the body corporate, the trustees advising the managing agent and the managing agent advising the broker and or the insurer accordingly.

Most, if not all, sectional title insurance policies contain time limit clauses, within which claims must be lodged. These will either be specific time periods or will make provision for the submission of claims within a reasonable time.

[70] Paddocks vol 9 (4 January 2021).

It is perhaps easier in the case of sectional title insurance, for the reasons mentioned above, for claims to get lost within the systems and processes – and late submission could result in a claim being declined, potentially through no fault of the insured himself. The same applies to time barring clauses, following the rejection of a claim.

In the supreme court of appeal case of Napier v Barkhuizen[71]the court was asked to rule whether time barring clauses were unconstitutional after the court of first instance had ruled that they were. The court found that there was nothing to suggest that the plaintiff did not enter the contract freely and in line with his constitutional rights and that, subject to fairness and reasonableness a time barring clause is not unconstitutional and is both permissible and enforceable. It is interesting to note that the OSTI however, does not seem to be bound by prescription insofar as it relates to policy prescription – as opposed that imposed by the prescription act, act 68 of 1969. In their Ombudsman Briefcase article "back to basics: time barring clauses and prescription"[72]OSTI refers to clause 4.1.7 of the OSTI terms of reference which notes that OSTI has jurisdiction to condone any noncompliance with policy prescription clauses, if the policy holder can show good cause as to why they failed to comply. In the absence of good cause, they cannot consider the matter.

The onus is furthermore on the insured to prove his claim by, as noted by Millard,[73] demonstrating an insurable interest, diminution of such interest, the extent thereof and that the loss is in fact covered by the policy. In practise it is not always the case that the insured is left to prove the above, especially in the case of larger losses. It is often much easier for the insurer to involve themselves from the beginning of the claims process. It often happens that, unlike in the case of a personal insurance policy, the individual unit owner is not even aware of the identity of the insurer, as the insurance has been affected by the trustees (or managing agent) in terms of their mandate.

[71] Napier v Barkhuizen (569/2004) [2005] ZASCA 119 [2006] 2 ALL SA 469 (SCA) 2006 (9) BCLR 1011 (SCA) (30 November 2005)
[72] The Ombudsman Briefcase Issue No. 2 of 2018
[73] Millard 128.

It would be almost impossible to coordinate all parties without some form of intervention. It is also so that, to manage costs, many insurers maintain a panel of service providers to attend to repairs on behalf of the insured, whom they need to involve.

5.3 Maintenance Issues

As Millard has noted all insurance policies have exclusions to the cover provided, or instances where the parties have agreed to limit the scope of cover.[74] Often unit owners are not aware of these limitations or exclusions or have not been provided (or perhaps read) the policy documents, and only become aware of these limitations or exclusions when attempting to claim for damage to their property.

The body corporate is mandated to keep the common property – which would include the exterior walls and roofs, inter alia, of individual units maintained and in a good state of repair. The unit owners must maintain the interior of their units to the same standard.

Sectional title policies exclude damage which occurs as the result of a lack of maintenance (although not a topic of discussion for this paper, damage due to lack of maintenance can never be an insurable event). If this duty is not complied with and damage occurs any claim resulting from the lack of maintenance may well stand to be declined. The members of the body corporate are thus often reliant on others and have limited powers of intervention, when it comes to ensuring that they comply with insurance requirements.

5.4 Loss Ratios

Similarly, members of body corporates have little or no control individually when it comes to their policy loss ratios, which is the ratio of claims paid versus premium received. They must rely on the honesty and integrity of their neighbours. In instances where there may be multiple claimants within a scheme, the loss ratio can quickly escalate, especially considering the size of some schemes.

[74] Millard 128.

The result of this is, in all likelihood, an increase in the scheme's premium which will in turn have a knock-on effect on the levies payable, with an individual who has never claimed or claimed minimally having to pay higher insurance premiums.

5.5 Increased Excesses

Members of schemes claiming repeatedly, and sometimes without cause, for damage which could have been prevented by taking due care and caution can also lead to, eventually, increased excesses being charged for certain type of claims. For example, repeatedly leaving taps open accidentally and suffering water damage can lead to the whole policy being subjected to an additional water claim excess. Again, the innocent members who do take proper care and caution invariably suffer at the time they really do have to claim – as they are also subject to these excesses even if it is their first claim for their unit.

5.6 Policy Exclusions

Most sectional title policies provide that the body corporate has the responsibility of ensuring that the scheme complies with all National Building Regulations, and related legislation. Should the scheme not comply, and should a loss occur because of the noncompliance then again, the claim would stand to be declined. The responsibility falls onto the trustees, perhaps represented by a managing agent, and therefore a unit owner may not even be involved in this process, yet he stands at risk of having to substantially contribute to a special levy, should the loss not be covered in terms of the policy and the scheme must attend to the repairs themselves.

Similarly, most, if not all, sectional title insurance policies exclude damage which has occurred over a period or damage due to gradually operating causes.

In the Ombudsman Briefcase case study entitled "wear and tear are not covered"[75], Ms M approached OSTI for assistance following the rejection of her claim for damage purportedly caused by a burst pipe. The insurer had rejected the claim since the pipe had burst because of wear and tear, which was excluded from cover in terms of the policy. The claim for resultant damage was also rejected since, in the appointed loss adjusters view, damage to a wall, and kitchen cupboards had occurred gradually over a period, and not due to the flood. Furthermore, there were delaminating tiles that were rejected. The loss adjuster was of the view that the tiles had lifted due to defective workmanship, as tiles are designed to withstand water. One of the delaminated tiles also showed evidence that the tile cement had not been correctly applied. Defective workmanship was also specifically excluded from cover in terms of the policy. After consideration of all the facts presented to it, OSTI found in favour of the insured and the rejection was upheld – due to policy exclusions.

Many units in a sectional title scheme are built either next to, and attached to, each other or on top of each other. Should one of the units develop, for instance, a leaking pipe which saturates the wall and slowly cause damage to the unit next door, there will likely be no cover in terms of the insurance policy for this loss, even though the affected owner could do nothing about the occurrence and the damage did not even emanate from his own unit. He has no recourse but to conduct the repairs for his own account. This is, unfortunately, a risk inherent in choosing to purchase a unit in a sectional title development – and something potential owners should consider as part of their own personal risk management processes, before proceeding with a purchase.

It is however submitted that some of the damage which occurs following the excluded events described above may be considered as valid claims as the damage could be considered a new cause of loss, such as internal water damage following the lack of maintenance to the roof. The resultant damage could thus be covered in terms of the policy despite the exclusion of the roof repairs from cover – but this is very much dependant on the policy involved, and the wording and interpretation thereof. It is always advisable to ensure compliance to avoid argument.

[75] The Ombudsman's Briefcase Issue no. 2 of 2019

5.7 Hidden Issues

The lifting or tenting of tiles in sectional title complexes is often a big issue. It often happens that floor tiles in these complexes lift for no apparent reason, or seemingly upon exposure to water or some other external event. Properly laid tiles should not lift on exposure to water, as they are designed to withstand water. It most often on further investigation becomes apparent that, given the speed with which the complex was constructed, due care was not given to properly preparing surfaces or ensuring proper expansion gaps between tiles and eventually, with or without exposure to an external event, these tiles inevitably delaminate from the floor surface, with the concomitant replacement costs being substantial[76].

Notwithstanding that the above constitutes defective workmanship, which most if not all policies exclude from cover, it is submitted that this can never be an insurable event as the eventual delamination would be considered inevitable, as opposed to an uncertain future event.

The comment is often further made that a unit owner was not aware of the damage occurring, or that it is not possible to maintain a pipe, especially one that is embedded in a wall.

It is submitted that this again arises as the result of a misunderstanding of the insurance policy, and what it is designed to or intended to cover. It is correct that a pipe within a wall, for instance, cannot be maintained nor do sectional title insurance policies expect you to do so. It would be ludicrous to expect a unit owner within a sectional title complex to chop open his walls every three years and replace the pipes. The fact of the matter is that all items, such as pipes, have a lifespan and once the lifespan has been exceeded the item will inevitably fail and require replacement.

Again, this is not an uncertain future event, in my view, and is therefore similarly not an insurable event. It thus forms part of routine maintenance required of a sectional title unit owner – or the body corporate in the case of the common property – and constitutes a risk inherent in being a property owner.

[76] Ezee Tile Adhesive causes of tenting

It should be noted that some insurance policies may offer cover for the repair of leaking pipes as an extension to the policy, or as an added extra, although it remains firmly my view that this is not, and can never be, an insurable event.

In all instances of valid claims, though, it should be noted that the body corporate, as the lead insured, must ensure that all monies received from valid claim payments are, in fact, directed towards the necessary repairs,[77] thus ensuring the scheme maintains value, considering that the failure to carry out repairs following the acceptance and settlement of a valid claim can seriously devalue the scheme as a whole.

5.8 Extended Cover

It is perhaps also worth pointing out that sectional title policies were perhaps the first, although other property insurance policies are following suit, to offer extended cover in terms of the policy, in that many of them pay for the cost of replacing geysers which have failed, not due to an insured event, but merely due to having reached the end of their lifespan. Often unit owners are not aware of this, which can lead to delays in submitting claims once they become aware, that they enjoy cover for an item that is not damaged by an insured, or rather insurable, event.

[77] Management rule 24 3 (6).

CHAPTER 6

CONCLUSION

As becomes apparent a sectional title insurance policy is very much a standard indemnity policy, which, on close inspection, contains all the usual terms and conditions associated therewith but presents significant complications in the effective implementation thereof, in the day-to-day application of insurance cover, especially insofar as claims are concerned.
Like any insurance policy there are differences between different sectional title policies, and care should be taken to ensure that the policy on offer complies, at the very least, with the requirements put forward by the legislature. Failure to do so could result in losses that can never be recovered from.

Notwithstanding this, the legislature has made every attempt to prescribe the cover required as widely as possible to provide the best possible protection to all parties with an interest in the sectional title complex.

It is furthermore apparent that the legislature is of the view that the insurance cover provided for in terms of the STA was largely sufficient and fit for purpose as they did not see the need to incorporate large-scale changes, although changes to liability and fidelity guarantee cover have been mentioned, when incorporating the insurance cover into the STSMA. In general, assuming this is their view I concur with same.

That said, the new legislation is not necessarily easier to read, interpret or understand than the old legislation was, despite best efforts, and it is submitted that this is attempted without guidance, at the body corporates peril.

Help is most certainly required. It is submitted that one way of doing this is through proper education as to the intent and purpose behind the insurance contract, insurance cover and various insurance policies on offer. This is possibly true of all insurance policies, which are very often misunderstood but more so in instances such as sectional title insurance where, as mentioned previously, there are many different individuals involved.

Members of body corporates should be encouraged to attend meetings. If they do not do so they cannot really be entertained when problems arise which could have been addressed at the outset.

An example is the policy excess. Policies are issued with the applicable excesses already in place, although as seen in chapter 5 above these are subject to change. It does not help a member to complain that they do not agree with the excess, once a loss has occurred, if they were not involved in understanding how the excesses applied at inception. Similarly, it does not help to complain about a policy exclusion being unreasonable at the time of the loss, where the exclusion had been included in the policy from the outset.

The fact remains that trustees in general are not always qualified to act as such, and do not receive remuneration. They have not had trustee specific instruction. They often accept the job as trustees to try and ensure that their complexes are well looked after, and that the investments of their property, and those of the residents around them is protected. Even managing agents, who are professionally qualified and take extreme pride in what they do, are not experts in insurance and it remains vital that they obtain sound professional advice surrounding the requirements of sectional title insurance.

It has been noted above that there are property valuation experts who can assist with proper valuations. In addition, there are many insurance brokers who specialise in sectional title insurance and are experts in their field. Finally, once body corporates start appointing professional contractors to attend to their legislated maintenance plans these contractors will be only too happy to assess the properties to confirm that they comply with all building requirements in order to enjoy proper and complete insurance cover. The challenges are not as severe as they may appear at first glance to the uninitiated.

In addition to all the above, while there may, potentially, be other ways yet to be promoted of advocating the obtaining and maintaining insurance cover insofar as sectional title complexes are concerned, it is submitted that the current system in place remains the most effective in ensuring that the entire scheme remains insured to the benefit of all. It serves to prevent the cancellation of policies to the detriment of the interests of others, in the most

comprehensive manner possible and it ensures that the interests of all owners are protected equally, provided that the scheme in question is well run and well maintained within the boundaries prescribed and in the best interests of each member of the body corporate.

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