



PRESS

S C H E M E C O N T R A C T S

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A free digital newsletter published to educate and update the sectional title community.

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By Judith van der Walt

During the recent University of Cape Town Advanced Sectional Title Scheme Management Course held at the Idle Winds conference venue on the outskirts of Johannesburg, one of

the six topics that was discussed in detail was 'body corporate contracts' and we spent some time on the concept of contracts entered into on behalf of the body corporate prior to its establishment.

It is a well know principle of law that an entity or body which does not exist cannot enter into a contract. Over time, many exceptions to this principle have been established to cater for the commercial needs of the world that we live in, the most

notable being those exceptions applicable to companies. However, the Sectional Titles Act of 1986 ("the Act") clearly states that the Companies Act of 1973 does not apply to sectional title schemes at all. Therefore, the exceptions to the basic principle that allow somebody to enter into a contract on behalf of a company yet to be formed do not apply to sectional title bodies corporate that have not yet been formed. In fact, the Act makes it very clear in Section 47(2) that ...to page 2

BUILDING MAINTENANCE: CHOOSING AND USING A BUILDING CONTRACTOR

By Rob Paddock (Rob the Builder)

Building maintenance is an essential reality for anyone living in a sectional title scheme. All buildings suffer wear and tear due to the effects of wind, sun, rain and the activities of their occupants. Even buildings that have been built to the highest standard require regular maintenance work in order to maintain the building standard required by the owners and the Sectional Titles Act 95 of 1986 ("the Act").

Section 37(1)(j) of the Act obliges

the Body Corporate to properly maintain the common property, and keep it in a state of good and serviceable repair.

In this new feature of Paddocks Press we aim to provide owners and trustees of sectional title schemes with practical insight and advice on building maintenance issues. We will be offering advice on everything from spalling to landscaping, new products, company services, and will even investigate the cost effectiveness of "going green."

Our first article looks at choosing and using a maintenance contractor - what to look for in a contractor, essential provisions of a maintenance contract and what to expect in terms of the contractor's performance.

How should you go about choosing the best contractor for the job?

The trustees, as the elected representatives of the body corporate, are the persons empowered in ...to page 4



Rob Paddock

S C H E M E C O N T R A C T S . . . c o n t i n u e d

from page 1...a body corporate is not bound to debts or obligations arising from any contract entered into by the developer. This section of the Act confirms the legal principle set out above.

I have recently come across a number of contracts of sale of sectional title units which attempt to bind the body corporate prior to its establishment. In these contracts the developer and the buyer purport to agree that the purchaser will pay 'levies' from the date of occupation of the property purchased but that the developer will not pay any management expenses to the body corporate in respect of any unsold sections. Perhaps this reflects the current very harsh economic climate and the developer's concern that there may be no rental income to offset levy liabilities.

This type of agreement may not affect the body corporate too badly if the developer only has a few unsold units, but it could also apply in circumstances where the majority of the sections remain unsold and only a few owners are making levy contributions. The body corporate would continue to incur normal operating expenses but only receive a fraction of the required income, with the inevitable result that within a short period the body corporate would end up owing substantial amounts in unpaid municipal accounts as well as amounts due to security providers and other independent contractors because it is not receiving the steady stream of income it requires from all owners.

The Act does not distinguish between different kinds of owners, such as a developer and a purchaser. Section

37(2) states that all owners are liable to make levy contributions to the body corporate and a developer cannot contract out of this statutory obligation. The type of provisions described above is invalid and unenforceable. There is no exception to the obligation set out in Section 37(2) in the Act.

A further common example of a developer attempting to bind a body corporate prior to its establishment is when a developer contracts with a managing agent to provide initial setup and management services to the developer, at first, but also to provide normal management services to the body corporate after its establishment. If such a contract is correctly drafted the developer can make provision for the management services to continue beyond the establishment of the body corporate. This type of arrangement can also be made, for example, in regard to security and lift maintenance services and these contracts are not nearly as problematic as the previous example where the developer attempts to contract out of liability to pay levies.

Even though the developer may not bind a body corporate which does not yet exist, the developer is entitled to enter into a contract with a managing agent in his own name, which contract can provide that the rights and obligations under the contract will be ceded and assigned to the body corporate at the inaugural meeting of the body corporate, provided that the members of the body accept such cession and assignment. This process is dealt with in prescribed management rule 50(2)(iv). But because the Act specifically provides that the body corporate is not

bound by debts or obligations undertaken by the developer, the contract will not be automatically ceded and assigned to the body corporate even though the developer and managing agent have made provision for this process. The members of the body corporate must actually vote in favour of taking cession and assignment of the rights and obligations under the contract before the body corporate will become a party to the contract.

To ensure that the purchasers, once they become members of the body corporate, do vote in favour of the contract becoming binding on the body corporate, developers often provide in their sale agreements that the purchaser gives the developer's nominee an irrevocable power of attorney to attend meetings of the body corporate and to exercise the owner's vote to bind the body corporate to the contract. So while the original contract between the developer and the managing agent is not automatically binding on the body corporate, the developer is able to use the purchaser's votes under the power of attorney to ensure that the body corporate itself takes a decision to be bound by this and other pre-negotiated service contracts. ■

Judith van der Walt together with Prof. Graham Paddock present the popular UCT Advanced Sectional Title Scheme Management Course which is presented twice per year in Cape Town and Johannesburg. Judith is also a consultant at Paddocks. Her hourly rate is R1 000 plus VAT.

STATE OF THE SECTIONAL TITLE NATION



Comments by
Prof. Graham
Paddock

Sectional Title, as a form of property ownership, has been around since 1973 when the 'first generation' Sectional Titles Act came into effect. Since then it has become an ever-increasingly popular form of title, to the point where some statistics show that almost 50% of all home ownership is now in the form of sectional title or some other form of 'community scheme'.

Increased security, private communities and shared maintenance obligations are just some of the factors that have led to sectional title becoming the preferred title of choice. However, little is known about the shape and size of this industry that has grown so quickly. Says Prof. Graham Paddock, the head of Paddocks which is a specialist sectional title firm, "There aren't any clear and publicly available statistics that describe the sectional title industry in definite terms". "For example, you may be able to find out how many sectional title schemes and units exist in South Africa, but nobody can break those figures

"Presently there are approximately 35,000 sectional title housing schemes in South Africa and about 680,000 sectional title housing units. "

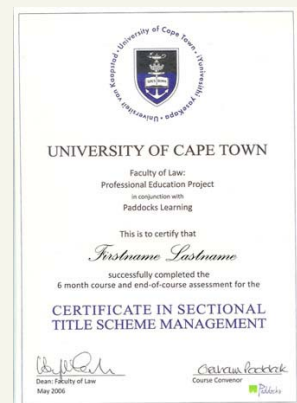
down into dwelling units, garages, store-rooms and so on. How many Managing Agents manage these properties? What is the value of the levies that fund the schemes managed by these Agents? Are there any professional associations?"

Prof. Paddock accepts that there is a lack of specific and dependable data, but on the basis of a number of assumptions he has come to the following conclusions. "Presently there are approximately 35,000 sectional title housing schemes in South Africa and about 680,000 sectional title housing units. This gives us an average of 20 units per sectional title scheme. We know that there are schemes with as few as 2 units and some with as many as 10,000 units. Our data shows that there are approximately 3,500 property managers throughout South Africa, which leads one to conclude that on average a property manager handles 10 sectional title schemes. In practice scheme sizes vary considerably, property managers tend to specialize in the property title they manage and although there are some that manage as many as 50 schemes, we believe that the average specialist sectional title property manager cares for about 30 sectional title schemes".

"The National Association of Managing Agents (NAMA) is the sectional title management industry's only professional organization. It currently has 274

member firms who together manage 13,000 sectional title schemes that account for approximately 400,000 sectional title units. As NAMA and its members place a strong focus on the

training of their Property Managers, we believe that a significant portion of sectional title schemes are managed by well-trained personnel." "This training is critical to the establishment of a professional industry that we estimate manages about R5.5 billion in annual property levy income". "It is our belief that sectional title will continue to be the preferred title of choice for home owners in South Africa for some time to come. Supported by well-trained property managers, we expect the industry to continue to dominate new housing initiatives and to become increasingly professional".



Paddocks, together with the University of Cape Town, presents a 6-month 'UCT Sectional Title Scheme Management Certificate' course.

For more information on the next course, which begins on the 5th of December 2008, please contact Christina on 021 674 7818 or christina@paddocks.co.za.

Please note that registrations close on the **28th November 2008**. ■

BUILDING MAINTENANCE: CHOOSING AND USING A BUILDING CONTRACTOR...continued

from page 1 ...terms of the Act and the prescribed rules to choose a maintenance contractor for the scheme on the body corporate's behalf. It is possible that the owners may give the trustees a specific direction at a general meeting, but more usually a majority vote of the trustees will determine which contractor is chosen. But the rules do exclude a trustee from voting in certain circumstances. Prescribed Management Rule 23 disqualifies a trustee from voting in respect of any contract or proposed contract in which s/he has a personal interest. This does not mean that a contractor in which a trustee has a personal interest cannot be used to do the scheme's maintenance. It simply means that the trustee with the personal interest is excluded when it comes down to the vote.

It may sound obvious, but your trustees' first step should be to ask other owners and acquaintances if they can recommend anyone for the job. Having trusted individuals recommend a contractor who has successfully completed similar work increases the chances that the body corporate will receive similar service.

Ensure that at least 3 written quotes, based on the same specifications, are obtained for the job. It may be sensible to get more quotes, but getting at least 3 will ensure that the trustees have a good basis for comparison.

Once the trustees have an acceptable quote, they should ask the prospective contractor for references, ranging from work done when they started their business to projects they have just com-

pleted or are still working on. With smaller contractors the trustees should try to obtain some indication of financial stability, perhaps in the form of a reference from a bank manager. Contractors' financial situations can change very quickly and financial difficulties will almost certainly impact negatively on the level of service the scheme receives.

The trustees should try to obtain as much information about the business as possible. It is not good enough if the contractor is only prepared to give the trustees a cell phone number. If possible, the trustees should go and visit the contractor's premises to see where it is operating and how professional it appears. The bottom line – you are about to spend all owners' money, so try to get as much information about the proposed contractor as possible.

Once the trustees have decided on a contractor, they should insist on a signed contract. This contract should be very specific:

- Explaining in detail what the job entails, no detail is too small!
- Tool and material storage, ablution facilities, rubble removal
- Commencement and completion dates, daily working hours.
- Penalties if terms and conditions are not met.
- Breakdown of how the money will be paid.

The proposed contract should be tabled at a trustee meeting and two trustees

should be specifically authorised to sign it as well as to authorise payments. If there are any clauses in the contract that the trustees do not agree with, they should put a line through them, and all persons signing the contract must initial these and any other alterations.

It is advisable to stick as close as possible to the work quoted for. But during the course of the maintenance work, the trustees may find they need to request that the contractor complete extra tasks. Always ensure that these extras are quoted for and put in writing, as this will avoid conflict down the line.

In most cases, deposits are required. Although there is not a hard and fast rule, the following is a guideline:

1. 20 % of the full contract price on signing of the contract
2. 30 % on delivery of material to the site
3. 30 % can be used as "progress payments", and
4. 20 % should only be paid after completion and when the trustees are completely satisfied with the work done.
5. In larger jobs that involve building from the ground up, a retention fund for defective work should be kept for at least 6 months after the job has been completed, this amount will normally be 10% of all payments made.

Maintenance contractors should ideally be registered with ...to page 5

BUILDING MAINTENANCE: CHOOSING AND USING A BUILDING CONTRACTOR...continued

from page 4... some form of regulatory body, these boards serve to regulate their respective industries and usually offer some form of compensation for defective work done by its members. For example, if your scheme is having electrical work done, the trustees should ensure that the contractor is a member of the Electrical Contractors Association of SA. The Association regulates the

electrical industry and guarantees to rectify defective work or materials on contracts by its members of up to R15 000.

This may sound like a lot of work, but it is far preferable to do the investigative work upfront, closely monitor the carrying out of the maintenance and be left with a good finished product, rather than rush through the planning stages

and then spend a lot of time tracking down and fighting with contractors. ■

Rob is the head of Paddocks Development Division, which leverages the firm's sectional title expertise to complete niche sectional title property developments in the Western Cape.

WHERE AM I?

A hot air balloonist was lost, so he shouted to a man on the ground, "Hey! Where am I?" "You're in a hot air balloon," replied the man on the ground.

"You must be a manager," the balloonist said. "That's right. How did you know?" "Because what you said is technically correct, but of no use to me whatsoever."

"You must be a trustee of a sectional title scheme," countered the man on the ground. "Amazing!" said the balloonist, "How did you know that?"

"You don't know where you are or where you're going, but you expect me to be able to help. Nothing has changed since we met, but now it's my fault."

Knowing where you are and where you're going is basic common sense. The compulsory agenda for each Annual General Meeting ('AGM') includes Financial Statements and a Trustees Report (which should tell owners where the

scheme is) and a Budget (which indicates where the scheme is going).

Don't skimp on these items. Make sure the Trustees Report is comprehensive. If it seems inadequate, ask questions at the AGM when the Report is tabled so as to get the full picture. Make sure that you understand the Financial Statements and the Budget. If things are unclear, don't assume that your lack of financial experience is the cause. If you don't understand anything, it has probably not been set out clearly enough!

Sectional title owners need to analyse the past, learn from their scheme's mistakes and plan for the future. This takes time and effort, but it is vital to good governance. Decide where you

want to go and then hire competent managers, accountants, attorneys and builders to execute your plans. Let the professionals do what they were trained to do, once you have decided what you want done.

(Adapted by Prof. Graham Paddock, acknowledgements to R L Thompson)



SECTIONAL TITLE TRAINING COURSES

Paddocks presents various sectional title training courses throughout South Africa, which have proven to be extremely popular to unit owners; trustees; managing agents; attorneys; estate agents; property developers; property valuers; property investors; land surveyors and other property professionals. Please contact Christina on **021 674 7818** or christina@paddocks.co.za for information on the courses below. The Paddocks Team comprises 14 dedicated staff pictured below.



Sectional Title Bookkeeping Course

NEW!

Delivery: Face-to-face workshops in Cape Town and Johannesburg

Duration: 2 full days

Frequency: Twice per annum

Start date: March 2009

CLINT RIDDIN & ASSOCIATES



Back Row: Sam Paddock; Graham Paddock; Anton Kelly; Willem van Zyl; Rob Paddock; Karl Petro; George Holt

Seated: Jennifer Paddock; Robyn Allan; Mandy Paddock; Christina Maxwell; Amy Roseveare; Judith van der Walt; Candice Jooste

UCT Sectional Title Development Course

NEW!

Delivery: Face-to-face workshops in Cape Town and Johannesburg

Duration: 3 full days

Frequency: Twice per annum

Start Date: April 2009



UCT Sectional Title Scheme Management Certificate Course

Delivery: Part-time distance learning via the internet combined with face-to-face workshops in Cape Town, Durban and Johannesburg

Duration: 6 months part-time

Frequency: Twice per annum

Start Date: December 2008



UCT Sectional Title Specialist Realtor Certificate Course

Delivery: Part-time distance learning via the internet combined with face-to-face workshops in Cape Town, Durban and Johannesburg

Duration: 10 weeks part-time

Frequency: Once per annum

Start date: May 2009



UCT Advanced Sectional Title Scheme Management Course

Delivery: Part-time distance learning via the internet combined with face-to-face workshops in Cape Town and Johannesburg

Duration: 5 weeks part-time

Frequency: Twice per annum

Start Date: To be confirmed



GETSMARTER TRAINING COURSES

At Paddocks, we have been running sectional title training courses together with the University of Cape Town for the past 3 years. We believe that we have developed great training models for the delivery of education via the Internet and through the presentation of short courses. More recently we have started running training courses outside the sphere of sectional title and as a result we needed to make use of a brand that could run training courses in any industry. So, at the beginning of 2008 we launched the Getsmarter brand and operate this business from the same premises as Paddocks and with a similar staff compliment. Please see www.getsmarter.co.za for more information or contact Robyn on 021 683 3633 or robyn@getsmarter.co.za.

**What is Getsmarter?**

We work together with South Africa's top universities and industry experts to bring first-class education to anyone who is willing to learn. While our short courses are structured to allow for a high volume knowledge transfer between teacher and student in a workshop environment, our online distance-learning courses cater for flexible study timetables that enables even the busiest of people to continue learning while they work.

Stellenbosch University Certificate in Wine Evaluation

Delivery: Part-time distance learning via the internet combined with face-to-face workshops in Cape Town, Durban and Johannesburg

Duration: 10 weeks part-time

Frequency: Twice per annum

Start Date: April 2009



Back Row: Sam Paddock; Graham Paddock; Anton Kelly; Willem van Zyl; Rob Paddock; Karl Petro; George Holt **Seated:** Robyn Allan; Mandy Paddock; Christina Maxwell; Amy Roseveare; Candice Jooste

NEW!**UCT Certificate in Business Writing and Legal Documents**

Delivery: Part-time distance learning via the internet

Duration: 10 weeks part time

Frequency: Twice per annum

Start Date: March 2009

**NEW!****UCT Residential Property Letting Workshop**

Delivery: Face-to-face workshops in Cape Town and Johannesburg

Duration: 1 full day

Frequency: Twice per annum

Start Date: February 2009

**NEW!****UCT Property Tax Workshop**

Delivery: Face-to-face workshops in Cape Town and Johannesburg

Duration: 1 full day

Frequency: Twice per annum

Start date: March 2009

**Short Course in Home Cheese-Making**

Delivery: Face-to-face workshops in Cape Town

Duration: 2 full days

Frequency: Twice per annum

Start Date: *To be confirmed*

Q & A WITH THE PROFESSOR



By Prof.
Graham Paddock

wants copies to go to a trustee's home or workplace or to the offices of the managing agent.

A1.2. An owner is not entitled to give the body corporate's employees instructions

Bear in mind that the management rules already provide for a 'penalty' in this regard, so one cannot effectively change this by way of a conduct rule. And certainly the trustees or owners cannot make a decision that is not in line with the current management rules.

Right to have records e-mailed

Q1.1 If a member of the Body Corporate has specifically requested copies of the minutes and all communication is done via email, are the trustees able to make this resident specifically go to a trustee's house in order to read the minutes?

Q1.2. If a worker is on the common property, or in a resident's garden, and the worker is employed by a service provider. Is the resident permitted to instruct this worker as the worker is on their property?

Q1.3. If owners are behind on their levies, are they still permitted to vote at an AGM? Is this not their constitutional right?

A1.1. The body corporate's obligation is to make its records available for inspection. And this includes making copies available, at a reasonable cost.

But an owner is not entitled to insist that the trustees scan documents and send them by e-mail. And it would be reasonable to require the owner who

A1.3. If owners are behind in their levy payments the prescribed rules provide that they have no vote except for special or unanimous resolutions. This does not infringe any constitutional right.

R50 Late Payment Admin Fee

Q2. The Trustees decided in meeting, and minuted, that in addition to interest, a Late Payment Admin Fee of R50 per occurrence would be charged to debtors that were in default for 30 days or more. This decision has been challenged by a defaulting owner - who has subsequently made good the default less Late Payment Admin Fees charged - stating that the act of charging the R50 is illegal in that neither the Management or Conduct rules allow for such a charge, that the opportunity for the charge was not tabled at the AGM, and that the trustees are not entitled nor empowered to agree to or implement such a charge in a trustee meeting.

A2. If the body corporate thinks a penalty for late payments is a good idea (in addition to or instead of interest payable) they should amend the management rules to deal with this.

Building alterations in a HOA

Q3. In our development the developer formed a Section 21 Company which owns the Entrance gate, Recreational Hall and all the roads and sewerage system. Can the directors undertake building alterations or additions without the permission of all the owners?

A3. The answer will lie in the Memorandum of Association and Articles of Association of the Section 21 Company. There is no Act of parliament which governs homeowners associations, so the powers accorded to directors can vary substantially from one HOA to another. But if the company has the power to make these alterations or additions, which I expect that it will have, the Articles will almost certainly not give any one owner the right to veto such expenditure. The nature of a company is to operate by majority vote for most decisions and by special resolution for very important decisions.

Common property improvement without permission

Q4. What are the owners' options if the trustees have carried out a non-luxurious improvement, without following the procedures as ...to page 9

Q & A WITH THE PROFESSOR ...continued

from page 8... required in management rule 33? Could the trustees be held personally liable for the cost of the improvement?

A4. The law expects people to be "open wakker" and to take active steps to protect their interests when necessary. In the circumstances you describe it seems that the work is done, the irregular expenditure of body corporate funds is completed. It is very unlikely that the situation can be recovered at this stage.

As for actions against the trustees, look at section 40 of the Sectional Titles Act (available in full in the Library part of this site). The body corporate can only recover money from a trustee where it can prove: (a) that the trustee acted in bad faith or grossly negligently and breached a specific duty to the body corporate, and (b) the body corporate has suffered a provable loss OR the trustee has derived an economic benefit.

Holiday Letting

Q5. Our complex of 30 units is 12 years old. Unfortunately, holiday letting is allowed and these holiday makers are extremely disrespectful of the few owners in the complex. They destroy signs on the premises, overcrowd the units, swear at the guard when told to park in allocated bays only ... the list goes on. Over the "silly season" we have to spend unnecessary funds to repair the damage they leave behind.

Is it possible to change the rules so that only a six-month or longer lease is permitted?

A5. The basic requirements for scheme rules is that they must deal with the control, management, administration, use or enjoyment of the sections and the common property. In addition, rules must be reasonable and apply equally to all owners of units put to substantially the same purpose.

In sectional title schemes an owner's rights to use and enjoy his or her property is limited by a statutory obligation not to cause a nuisance to other occupiers.

In the particular circumstances you describe, I believe that owners are entitled to make a conduct rule that addresses and seeks to avoid the problems being experienced. This rule could include a restraint on the letting of units as holiday accommodation and may also include a restraint on short-term letting where experience in the scheme has proved that this results in similar problems.

In my view holiday accommodation is a "resort" use as opposed to a "general residential" use. Where in one scheme there are some owners who personally occupy their sections as permanent residents and others who use their sections to operate holiday letting operations with a series of short-term residents, there is bound to be conflict between the very different needs and lifestyles of the two classes of occupiers. Permanent owner/occupiers have a

substantial and often a long-term financial and emotional investment in the scheme. Short-term holiday makers have no such interests and often behave accordingly.

If a substantial number of owners feel that the behaviour you describe is serious enough to warrant body corporate action, I suggest that the trustees should get professional help. Find out if the title conditions, the scheme rules or the applicable zoning scheme regulations prevent the use of units for holiday letting. If so, the trustees have a legal obligation to prevent this activity. If not, they should get assistance to draft, adopt an lodge a conduct rule that will stand up to the very close scrutiny to which it will be subjected by the investor owners who are currently using their units in the scheme as holiday letting businesses. ■

Classifieds

Trident Managing Agent Software

Data and Debtors Modules
Visit our website:
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Contact: Ken Ward:
Cell: 083 235 54 95
Email:
kenw@tridentsoftware.co.za

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We specialise in Property-and Sectional Title Law. Our services include Commercial Law, Family Law, High Court litigation, Magistrate's Court litigation, collections, evictions, conveyancing, sequestrations and liquidations.

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Paddocks will now allow readers to advertise sectional title related products and services in the Paddocks Press Classifieds section.

Paddocks will limit the number of advertisers per issue. Adverts will be limited to 40 words. Adverts will be charged at **R390** each and will also be featured on the Sectional Titles Online Website (www.sto.co.za) free of charge.

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ABOUT PADDOCKS

Paddocks is a specialist sectional title firm providing a range of products and services through its **Learning, Consulting, Development, Publishing,** and **Software** divisions.

Prof. Graham Paddock is the head of Paddocks, an authority on Sectional Title law and practice and an adjunct Professor at the University of Cape Town. He is the Project Manager and one of the lead consultants to the Department of Housing in the restructuring of the Sectional Titles Act and the establishment of an Ombud Service.

Learning

Together with the Universities

of Cape Town and Stellenbosch as well as the National Association of Managing Agents and other professional organisations, Paddocks Learning offers several sectional title certificate courses, seminars and conferences.

Consulting

Graham Paddock leads the consulting division and is assisted by Judith van der Walt and Jennifer Paddock. Paddocks Consulting deliver consulting, drafting and representation services, primarily to sectional title bodies corporate, but also to developers, owners and others involved in schemes. They consult to vari-

ous levels of central and local government and act as mediators and arbitrators of sectional titles disputes. The consulting team also offers conveyancing services.

Development

Paddocks Development leverages the firm's sectional title expertise to complete niche sectional title property developments in the Western Cape.

Publishing

Since 1983, Graham Paddock has written sectional title books, pamphlets and training manuals for trustees and managing agents. Paddocks Publishing sets, prints and pub-

lishes a range of electronic and 'hard copy' sectional title publications by Graham and other authors which make Sectional Title expertise easily accessible to the South African population at large.

Software

Paddocks Software designs and manages the production and distribution of a variety of software tools which provide substantial efficiency gains to those involved in sectional title management and consulting.

Please see

www.paddocks.co.za for more information ■