MCS
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A free newsletter to the sectional title industry by Tertius Maree Associates

THE NEW COMPANIES ACT

It's Impact on Homeowners' Associations

PART 2

This is the second part of the previous article published in MCS Courier No 39, highlighting certain provisions of the new Companies Act, 71 of 2008, applicable to home owners' associations created in terms thereof. This article will concentrate on digital storing and electronic communication.

With the advent of new technology it is imperative that legislation stays in tune with technology and the desires and needs of affected parties. In this regard it is often frustrating when electronic storage of information or communication is not recognised by the relevant legislation.

In terms of section 24(4) of the Act every home owners' association (HOA) must keep a register of members containing their details including addresses. This register enables the executive committee to identify who is entitled to be notified of general meetings as well as who may vote, et cetera. It is the duty of the members (owners) to inform the executive committee of any change of address or other details.

The register is also important for members who wish to contact other owners, for example to gain proxies or to gather support regarding certain issues. It is also useful when a member or group of members should want to compel the executive committee to arrange a general meeting, for example to dismiss one or more of the directors.

The register must be kept in written form or in any other format that allows it to be converted into a document within a reasonable time. It can therefore be kept electronically as long as adequate measures (such as periodic back-ups) are put in place to ensure that the information is not lost.

The register is a public document and no member may be refused access thereto. Members are entitled to either inspect the register or obtain copies thereof at a fee that is not more than the prescribed maximum amount.

Notice of any meeting, whether it be a general meeting of members or an executive meeting may be sent electronically, as provided in section 6(10) and (11) of the Act, read in conjunction with regulation 7. The notice is deemed to be delivered on the date and time of sending thereof as recorded on the computer used by the sender, unless sufficient evidence to the contrary exists.

It is now possible (section 63 of the Act) to amend the memorandum of incorporation (MOI) of a HOA to provide for the electronic participation of a person to attend a meeting subject to -

(1) the notice of the meeting specifying that electronic participation is permissible;

(2) the notice providing the participant with sufficient information to 'attend' the meeting in such manner; and

(3) the system enabling all persons to communicate without an intermediary and to participate effectively.

Even though the above applies to any kind of meeting my view is that it could be very useful for executive meetings and not necessarily for general meetings of members. This could streamline decision-making by the executive committee. A system that immediately comes to mind is skype which allows one or more persons to communicate interactively via video conference call. If HOA's consider such participation, care should be taken in drafting the appropriate provisions in the MOI.

Another effective way of utilizing electronic communication is specified in section 74 of the Act. Members of the board of executives usually make decision at meetings. They may also adopt resolutions in writing which now include electronic communication. This would have the same effect of a resolution adopted at a meeting.

There are many exciting new changes introduced by the Act that could be exploited by HOA companies. These should all be considered when the required changes are made to their existing articles of association prior to 1st of May 2013.

Jacques Maree

Proceedings for Levy Recoveries: *WHO WILL HAVE JURISDICTION?*

Section 37(2) of the current Sectional Titles Act provides that levies '*may be recovered by the body corporate by action in any court (including any magistrate's court) of competent jurisdiction from the persons who were owners of units . . .* '

Arguably the above phrase may not have been strictly necessary because Magistrate's Courts and High Courts would have had jurisdiction in any event, according to their applicable monetary jurisdictions.

The corresponding phrase in section 3(2) of the new Sectional Titles Schemes Management Act, which is due to come into operation soon, determines that levies '*may be recovered by the body corporate by an application to an ombud from the persons who were owners of units . . .* '

Due to the use of the word '*may*' it has been postulated by some that trustees will not be compelled to launch recovery procedures through an ombud, but will still be able to institute an action in the Magistrate's Court or High Court as under the current regime. An application to an ombud would, according to this view, be optional and in practice this would mean that trustees will probably follow the most effective route. It could then be anticipated that the ombuds' offices will in all likelihood not be flooded with applications related to arrear levies from day one and that the 'conversion' from Magistrate's Courts will be a gradual one, which will obviously be a much more desirable situation.

It seems, however, that the above interpretation of the word '*may*' may be incorrect and that the ombud-procedure will in fact become compulsory for the launch of all levy recovery procedures as from the date when the new act comes in operation.

Although it may have been superfluous, the old act does state that levies 'may' be recovered by an action in a court. The fact that this provision is being removed in the new act must be afforded some significance and the word 'may' should not be given any other meaning than it had in the old act, which is that trustees had an option to institute proceedings or not to do so. Should the legislature have intended to retain court proceedings alongside ombud proceedings as an option, it should have been explicitly retained in the wording of section 3(2).

In as far as it may be argued that the word 'may' in the old act related to the alternative of arbitration, this would not hold sway as arbitration will be substituted by the ombud procedure and it cannot be argued that court proceedings will henceforth occupy that space even if not explicitly mentioned.

The clear meaning of section 3(2) seems to be that an application to the ombud will be the only procedure whereby proceedings may be instituted against defaulters.

This means that as from the date of operation of the new legislation, practitioners must be ready to follow the new procedures for recovery of arrear levies and so must the offices of the regional ombuds. I am not aware of the daily average of summonses for arrear levies now being processed by Magistrate's Courts, but I suspect that in major centres it could run into hundreds.

Based on the above it is a safe prediction that the primary task of all ombuds' offices will consist of dealing with applications for arrear levies on a daily basis, rather than dealing with occasional disputes.

In principle the idea that a specialised bureaucracy will be dealing with processes for levy recoveries is a good one. However, it does raise serious concerns about the capacity of the fledgling infrastructure and the possible delays which may occur.

Tertius Maree

DETERMINATION OF SPECIAL LEVIES

Except for ordinary levies for sections and additional levies for exclusive use areas as determined by the trustees after budget approval, the trustees may also determine and recover special levies from owners when the body corporate requires additional funds. A body corporate may for example require additional funds for the purpose of unforeseen maintenance of the common property. A special levy must be apportioned to owners according to participation quotas unless the management rules of the body corporate prescribe another formula.

Although in most instances a special levy is required for general expenses of a body corporate, a situation may also arise where the *additional* levies by the owners for their exclusive use areas are insufficient to cover expenses relating to the exclusive use areas. For example, urgent maintenance or improvements may be required to the exclusive use area balconies or parking bays in the scheme.

In my opinion a special levy may also be recovered from the owners of exclusive use areas if the budget in respect of such expenses was inadequate. A special levy in respect of exclusive use areas should in my opinion be apportioned to the owners of such areas, equally or alternatively according to the actual expenses payable in respect of each exclusive use area. Similarly it is also possible to impose a special levy on one owner of an exclusive use area,

where, for example, urgent maintenance is required to that exclusive use area only.

A special levy becomes due by the owners of sections on the passing of a trustees' resolution and is payable in one amount or in the instalments determined by the trustees. Once the trustees have determined a special levy, they should by written notice inform the owners of the amount payable.

(EXAMPLE OF TRUSTEES' RESOLUTION)

BODY CORPORATE OF
THE ABC[1] SECTIONAL TITLE SCHEME
SS No. 123/2001[2]

TRUSTEES' RESOLUTION

to determine a special levy in terms of sections 37(1) and (2A) of the Sectional Titles Act, No. 95 of 1986 (the Act)

PASSED AT A TRUSTEES' MEETING HELD AT * ON * 2012 /

ADOPTED IN WRITING AT * ON * 2012[3]

WHEREAS additional funds are required for the management and administration of the body corporate, specifically in respect of [4], for which no or inadequate provision has been made in the budget for the current financial year as contemplated in Management Rule 36.

ACCORDINGLY, the trustees hereby resolve in terms of sections 37(1) and (2A) of the Act that a special levy of R[5] (before apportionment) be determined and apportioned to owners of sections according to the participation quotas of their sections[6] and/or apportioned to owners of exclusive use areas, equally/according to the actual costs payable in respect of their exclusive use areas.

THE SPECIAL LEVY shall be payable in one sum / in the instalments and by the date/s indicated in the attached Schedule marked "A"[7], provided that the full balance of the special levy will become due and payable upon payment default by any owner of any instalment and provided further that if an owner

[1] Insert name of the scheme.
[2] Insert SS number of the scheme.
[3] Insert place and date of Trustees' meeting or alternatively of Trustees' resolution.
[4] Insert purpose for which funds are required, for example maintenance of common property or maintenance of exclusive use areas.
[5] Insert amount.
[6] Refer to the management rules of the scheme for other formula for apportionment of levies.
[7] Attach a schedule containing names of owners, section numbers, participation quotas, exclusive use areas, total of special levy payable by each owner, installment(s) if any and the scheduling of payment date/s.

alienates his or her unit the full balance of the special levy will become due and payable on or before the date of registration of transfer.

CERTIFIED a true extract of the minutes of a trustees' meeting

SIGNED AT ON 2012

______________________________ ______________________________

Trustee / Managing Agent Trustee

NO PETS POLICY A NO-GO!

Trustees Powers regarding Pets in Sectional Title Schemes

I'll be short and (not so) sweet about it: In sectional title schemes the rules rule and a so-called policy can only be enforced if it is done in terms of the rules, properly drafted, adopted, and applied.

Problems regarding pets admittedly give rise to endless problems to the frustration of other owners and of the trustees. We all know that. Trustees should not, because of their frustration, resort to unauthorised methods to combat these problems.

If the standard conduct rules apply, the trustees may not, I repeat may not, themselves adopt a 'blanket' policy in terms of which no pets are allowed and then deal with applications by owners and tenants accordingly. Conduct rule 1 clearly requires that trustees must consider each application on its own merits and furthermore their consent may not be withheld unreasonably. Refusing such consent on the basis of some 'policy' would not only be unreasonable but legally indefensible and will not be upheld in a court or at arbitration.

Should the owners wish to disallow any pets, they should consider making appropriate and carefully designed amendments to conduct rule 1. This should make allowances for owners who already have pets and other contingencies such as for a blind person with a guide dog.

A simple no-pets policy devised by the trustees is simply a no-go.

As simple as that.

Tertius Maree

ABOUT TERTIUS MAREE ASSOCIATES

Tertius Maree Associates is a firm of attorneys based at Stellenbosch, specialising in the legal aspects related to the management and administration of sectional title schemes, home owners' associations, retirement and share block schemes, and similar structures.

At Tertius Maree Associates we consult with and advise trustees, owners, managing agents, developers and attorneys, draft amendments and develop rules and constitutions, and have been doing so since 1994.

We also specialise in the recovery of arrear levies.

Tertius is the author of three books and approximately 800 articles on sectional title matters. He obtained a master's degree in law (*cum laude*) focusing on sectional title law, at the University of Stellenbosch in 1999 and has served as part-time lecturer in sectional title law at that institution. He is also a proud honorary member of NAMA and member of the development team of the STILUS levy insurance product for bodies corporate.

Tertius is ably assisted by two attorneys, Jacques Maree and Ilse Kotze, and a dedicated staff of long standing.

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