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

ARE INVALID RULES VALID?

I have from time to time, in MCS Courier, expressed my misgivings regarding the assumed integrity / reliability of the rules of some sectional title schemes as filed at Deeds Registries, due to a number of reasons.

The following is a fictitious example which illustrates another perspective on the reliability of the rules. Unfortunately it is something which, I suspect, happens fairly often in the real world in one form or another:

> *At a general meeting of Swan Lake body corporate a member proposes the amendment of a particular management rule. The proposal seems a sensible one and is enthusiastically supported by the other members at the meeting. The chairman puts the item to the vote and it is 'unanimously' resolved to adopt the proposed amendment.*
>
> *Although no notice of a proposed unanimous resolution had been given and the requisite 80% quorum was not present, the trustees proceed to complete Form V and to file the 'amended' rule at the Deeds Registry.*
>
> *Subsequently the validity of the rule is questioned by a member who was not present at the general meeting.*
>
> *Upon considering the matter the trustees reach a conclusion that the proper procedures have in fact not been followed and distribute a notice to all members that, due to incorrect procedures, the resolution cannot be regarded as a unanimous resolution and accordingly that the proposed amendment had not been adopted and that the rule should be ignored.*
>
> *Another owner, who was also not present at the meeting, objects and claims that the amendment, which affects him favourably, is valid and insists that the trustees apply the rule. The trustees refuse and the aggrieved member refers the dispute for arbitration, asking that the amendment be ratified by the arbitrator.*

In my view an arbitrator does not have the power to 'ratify' an amendment, or to be more correct, to ratify a unanimous resolution. Notwithstanding the use of the controversial word '*may*' in section 1(3A), I submit that only a High Court has the jurisdiction to do so.

But the essence of the dispute and the issue which should be arbitrated is whether the amended rule, despite incorrect procedures having been followed, is binding or not. A pre-arbitration meeting should serve to clarify the true issue and the arbitration could then proceed on the basis thereof. What would a correct award be?

In my view the amended rule, accompanied by Form V signed by the trustees, filed at the Deeds Registry, is *prima facie* evidence of the amendment having been correctly adopted and that it may be relied upon by third parties, despite the formal defects in the procedures. Accordingly the amendment will stand unless it is (a) rescinded by the members by unanimous resolution in the prescribed manner, or (b) set aside by a court order.

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PERMITTED USAGE OF SECTIONS AND USE AREAS

The usage of sections and exclusive use areas is at present regulated by two similar, but not identical, provisions in the Act and in the standard management rules.

Section 44(1)(g) determines that –

> '*when the purpose for which a section or an exclusive use area is intended to be used is shown expressly or by implication on or by a registered sectional plan . . .*'

Management Rule 68(1)(v) expands on the above and states –

> '*when the purpose for which a section or an exclusive use area is intended to be used –*
>
> *(a) is shown expressly or by implication on a registered sectional plan;*
>
> *(b) is shown expressly or by implication on the original approved building plan thereof;*
>
> *(c) can be inferred from the provisions of the rules; or*

(d) is obvious from its construction, layout an available amenities . . .'

In both instances such section or use area may then not be used for another purpose except with the written consent of all owners.

I'll not venture into the challenging debate as to whether a rule may be made which in effect amends a provision of the Act, except to warn of the dangerous precedent set by the Regulations Board. The developer and subsequently the owners may also amend rules and the question now arises whether they are also entitled to make rules which deviate from the provisions of the Act.

The simple question which I want to address is whether the intended usage of a section changes when, for example, an owner effects building alterations to accommodate a shop in what was previously a residential section.

The obvious answer seems to be that the usage does not change, because sub-rule (b) refers to *the original approved building plan* of a section. The owner will accordingly have to obtain the written consent of all the owners for the change of usage.

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VERBETERINGE OP GEMEENSKAPLIKE EIENDOM

Die standaard bestuursreëls vir deeltitelskemas bevat voorskrifte omtrent hoe verbeterings op gemeenskaplike eiendom administratief hanteer moet word. 'n Onderskeid word getref tussen luukse en nie-luukse verbeterings met heelwat strenger vereistes vir luukse verbeterings, naamlik dat dit by wyse van 'n eenparige besluit deur die lede gemagtig moet word voordat trustees mag voortgaan om dit aan te bring.

Wat as luuks geklassifiseer moet word, sal verskil van een skema tot 'n ander, afhangend van faktore soos die aard en grootte van die skema, die koste daarvan in verhouding met die markwaardes en/of die heffings van die eenhede, en die behoefte aan die besondere verbetering.

'n Nie-luukse verbetering aan die ander kant vereis slegs 'n spesiale besluit en inderdaad is 'n makliker, kortpad-metode geskep deur 'n wysiging tot reël 33 in 2008 wat sake vir trustees heelwat vereenvoudig.

'n Beslissing om 'n onderskeid te maak tussen die twee tipes verbeterings is duidelik van groot belang en nie altyd voor die hand liggend nie. My voorstel in díe verband is dat waar onsekerheid heers, trustees die saak aan die lede voorlê om eers by wyse van 'n gewone meerderheidsbesluit te bepaal of die item as luuks of nie-luuks geklassifiseer moet word, waarna die toepaslike goedkeurings-prosedure gevolg moet word.

Alles tot dusver gaan omtrent verbeterings op gemeenskaplike eiendom wat tot voordeel van die gemeenskap van eienaars aangebring word. Dit is egter nie die enigste tipe verbeterings wat moontlik op gemeenskaplike eiendom aangebring kan word nie aangesien individuele eienaars ook soms 'n redelike behoefte mag hê om iets op gemeenskaplike eiendom te plaas. Inderdaad het die wetgewer díe behoefte voorsien en 'n meganisme geskep om dit tot n mate te akkommodeer.

Ten eerste moet besef word dat geen eienaar 'n outomatiese reg het om enige item op gemeenskaplike eiendom te plaas nie. Gemeenskaplike eiendom is alles buite die middellyn van die grensmure, plafon en vloer van dele. Selfs ten opsigte van sy eie gebruiksgebied bepaal Bestuursreël 68(1)(vi) dat 'n eienaar nie sonder skriftelike toestemming deur die trustees enige '*struktuur of verbetering*' daarop mag aanbring nie. Eienaars is steeds baie geneig om hul deeltiteleiendom te benader asof dit hul absolute eiendom is ten opsigte waarvan geen reëls geld nie en dat hulle daarmee kan doen wat hulle wil. Dit is eenvoudig nie waar nie en díe benadering sal uiteindelik die waardes van alle dele in die skema ondermyn.

Daar bly egter steeds 'n daadwerklike behoefte dat eienaars soms veranderinge aan die gemeenskaplike eiendom kan aanbring. In díe verband bepaal Gedragsreël 4 as volg:

(1) 'n Eienaar of bewoner van 'n deel mag nie sonder die skriftelike toestemming van die trustees enige gedeelte van die gemeenskaplike eiendom verf of merke daarop aanbring, spykers of skroewe of iets soortgelyks daarin slaan of dit andersins beskadig of verander nie.

(2) Nieteenstaande subreël (1) mag 'n eienaar of 'n persoon deur hom gemagtig-

(a) enige sluittoestel, veiligheidshek, diefwering of ander veiligheidstoestel vir die beskerming van sy deel; of

(b) enige skerm of ander toestel om diere of insekte uit te hou, installeer,

met dien verstande dat die trustees eers skriftelik die aard en ontwerp van die toestel asook die wyse waarop dit geïnstalleer word, goedgekeur het.

'n Paar punte verdien vermelding.

Eerstens is die omvang van die reël onvoldoende. 'n Ooglopende tekortkoming is die feit dat geen voorsiening gemaak word vir televisieskottels nie. Selfs al word iets binne die plafonruimte opgerig, is dit steeds op gemeenskaplike eiendom en mag 'n eienaar dit nie sonder meer doen nie (warmwaterstelsels uitgesonder). Verdere voorbeelde is lugreëlaars en skadu-blindings op balkonne.

Myns insiens skiet Gedragsreël 4 hier te kort en die beste raad is om die reël te wysig om voorsiening te maak vir verdere items ten opsigte waarvan daar 'n behoefte mag bestaan. Dit is nie so moeilik nie aangesien slegs 'n spesiale besluit daarvoor nodig is.

Wat kan trustees doen indien iemand die voorskrifte oortree? Mag hulle die item verwyder, met of sonder kennisgewing aan die eienaar? Nee, want volgens ons gemene reg mag niemand die reg in eie hande neem nie en selfs al het die eienaar die reël oortree, sal die trustees hulself skuldig maak aan *spoliasie* en sal 'n hof die eienaar te hulp kom deur uitreiking van 'n interdik bekend as 'n mandament van spolie in terme waarvan die item teruggeplaas moet word en die eienaar se regskoste betaal moet word. Die oplossing is dat die trustees by 'n hof aansoek moet doen vir verwydering. 'n Alternatiewe metode is om 'n redelike boete, moontlik herhalend, op te lê, mits 'n boetebepaling wat voldoen aan die voorskrifte van die Wet op Bevordering van Administratiewe Geregtigheid in die Gedragsreëls opgeneem is.

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WHAT DOES

'. . . .*and shall determine the amount estimated to be required to be levied . . . .*'

MEAN?

The continuing misinterpretation of this controversial and somewhat clumsy phrase in Management Rule 31(2) gives rise to consistent malpractice, erroneous budgeting, cash shortages, unnecessary special levies, and, as demonstrated by The Peaks decision, causes levies to be irrecoverable in law. The sub-rule reads as follows:

> '*At every general meeting the body corporate shall approve, with or without amendment, the estimate of income and expenditure referred to in rule 36, and*

shall determine the amount estimated to be required to be levied upon the owners during the ensuing financial year.'

A popular but incorrect interpretation is that the owners determine the levies at the annual general meeting. There are very good reasons why the legislature wanted to keep this critical function from the hands of the owners, being the very individuals who will subsequently have to pay these levies. The owners' function and their only power is to determine the amount which is required to be levied and they do this by approving the budget.

Of course, it is much harder to justify specific changes to budgetary items than to 'blindly' determine the levies without reference to budget items. This is what the legislature had intended, namely that in order to 'manipulate' the levies, the owners must introduce defensible amendments to the budget itself. By approving the budget, with or without amendments, which is the only function the owners are allowed, they have automatically *determined the amount estimated to be required to be levied.*

Subsequently, the trustees also have no discretion in determining the levies, and must simply apply the participation quotas (or other admissible formula) to the nett amount of the approved budget. To do this, a levy schedule must be prepared and formalised with a trustees' resolution.

There is no contradiction between Section 37(2) which states that levies must be determined by a formal trustees' resolution and Management Rule 31(2) which requires owners to approve the budget and no more.

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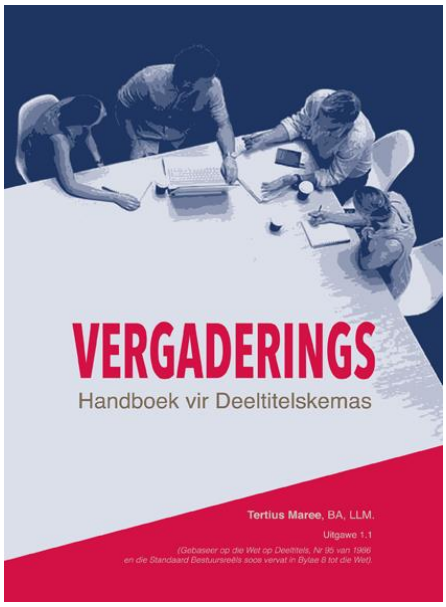
NUUT en NOODSAAKLIK



Die Vergaderings Handboek vir Deeltitelskemas is 'n nuwe Afrikaanse handleiding deur Tertius Maree, in A5 formaat met 120 bladsye onmisbare inligting vir voorsitters, trustees, bestuursagente, eienaars en studente omtrent alle tipes vergaderings en besluitneming by deeltitelskemas.

Dit is beskikbaar teen R 220,00 per eksemplaar (gepos) of R 200,00 (indien persoonlik afgehaal).

Rig navrae en bestellings aan rosie@section.co.za

LevyProp

LevyProp (Pty) Ltd has recently been formed by Tertius Maree with the sole purpose of assisting bodies corporate experiencing liquidity problems. The company's financial product *LevyProp* is designed to assist distressed bodies corporate with an immediate cash-injection. *LevyProp* will acquire a body corporate's accumulated or historic debt at a mutually agreed discount, thereby providing immediate funding to the body corporate to meet its most urgent commitments. Each application to *LevyProp* will be assessed on its own merit, which would vary from body corporate to body corporate and debtor to debtor. *LevyProp* would require certain documentation from the body corporate's

managing agent or trustees in order to verify the body corporate's levies had been correctly raised and are legally recoverable. In many cases the debt would have been handed over to collection attorneys and judgments may have been granted quantifying the debt and the interest rate payable on it until settlement. *LevyProp* would normally arrange for the present collecting attorney to continue the process, under the direction of *LevyProp* should the debt be acquired.

LevyProp will pay the agreed sum to the body corporate within 7 working days from the date the aforesaid documentation has been concluded. The *LevyProp* payment to the body corporate is an outright payment and not a loan. *LevyProp* will have no further recourse against the body corporate.

All bodies corporate are welcome to contact *LevyProp* for 'cashing in' their historic debt. Funding for the body corporate's immediate requirements could then be provided by *LevyProp* without any undue delay following the aforesaid process.

Contact Estelle Sutherland Tel (021) 914 0866 or email admin@levyprop.co.za for an immediate response.

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SECTIONAL TITLE FIRST AID

for sectional title queries by owners, trustees, managing agents and anyone pondering a sectional title-related question.

Obtain details of the service from:

tertius@section.co.za

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 five books and approximately 900 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 several institutions, including the University of Stellenbosch. He is 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 Ilse Kotze, and a dedicated staff of long standing.

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