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

LATEST RULE AMENDMENTS

A range of amendments to the Regulations under the Sectional Titles Act was published on 14th March, coming into effect on 14th April. The amendments deal mostly with registration aspects, but include some amendments to the standard Management Rules.

The technical preparation of this set of amendments is of the worst quality seen since the introduction of sectional titles in South Africa in 1971. It seems that these amendments were rushed into print without having been properly checked for technical accuracy and unfortunately also without proper consideration of their suitability and substantive consequences.

The first amendment relates to a long-standing problem, namely the appointment and continuing in office of trustees who are levy defaulters. Until now there have been no restrictions in this regard and in practice it happens from time to time that levy defaulters gain control of the trustees, manipulate decision-making and even manage to block resolutions to institute levy recovery actions against themselves. This is clearly not a desirable situation and the amendments to Management Rules 7 and 13 seek to address this.

MR 7 deals with nominations and a proviso is now introduced to prohibit the nomination or appointment as trustee of a person in breach of MR 64(1) or 64(2).

- There are no rules 64(1) and 64(2). The correct references would be rules 64(a) and 64(b).

MR 64 deals with voting embargoes. Sub-rule (a) relates to owners in arrear with levy payments and (b) to owners who remain in breach of the Conduct Rules. These two classes will now be debarred from being appointed as trustees also.

> [*Two inherent defects in MR 64 should be noted: (1) the embargo in respect of levies does not include levies in respect of exclusive use areas; and (2) the embargo in respect of non-compliance with the rules only refers to Conduct Rules and does not affect a person who is in breach of the even more important decrees of S 44 of the Act or of MR 68*].

The next amendment, a 'substitution' of MR 13(g), seeks to compliment the above in order to tighten up the envisaged embargo. It proposes to disqualify and activate automatic dismissal of a serving trustee '*if he is in arrears for more than 60 days with any levies and contributions payable by him in respect of his unit or exclusive area (if any) and if he fails to bring such arrears up to date within 7 days of having been notified to do so*.' Thus, if a duly appointed trustee later defaults in his levy payments, his appointment will automatically lapse if he defaults and fails to comply with the notice.

However, the same does not apply in the event of a breach of the conduct rules. In contrast to the aim of the new MR 7 proviso, a trustee, once appointed, will not automatically vacate his office if he should breach a conduct rule. This may be an oversight.

- The provision is introduced as a '*substitution*' of rule 13(g). However, there is no rule 13(g). The provision should therefore be an addition rather than a substitution.

Apart from this technical inaccuracy, and the already mentioned oversight, the operation of a trusteeship embargo by invoking a provision about voting has possibly not been properly considered.

One of the common instances of a levy defaulter serving on and dominating a trustee board to his own advantage is the case of the developer. A developer seldom holds units in his own name. The defaulter, if levies are not being paid, will therefor not be the person of the developer, but his company or other entity utilised for purposes of the development. Both voting rights and liabilities to pay levies attach to the entity but whilst voting rights will be exercised by a representative of the entity, the liability to pay levies is not transferred to the individual.

On the other hand, appointees to a board are always natural persons and not entities which are registered owners.

Is a person disqualified from being a trustee if a company or trust in which he has an interest is the registered owner in arrear with levy payments? At best it could be said that the position is not clear.

The next amendment is the deletion of MR 31(4A). This rule was inserted in 2011 to 'bridge the levies gap' between the financial year-end and the date when new levies are determined after the annual general meeting. This 'gap' arises because levies are determined for one year only and at the end of the financial year no more levies fall due. Because new levies for the following year will only be determined and become payable after the AGM, usually three to four months after the year-end, MR 31(4A) has sought to fill this vacuum by providing that, after the end of the financial year, owners remain liable for continued payment of the levies as previously determined, until new levies are determined. In addition, the trustees were authorised to increase these interim levies by not more than 10%.

This useful provision has now been scrapped and one can only speculate why.

To the best of my knowledge I was the first commentator to point out what I called the 'gap in the financial calendar' in various articles and on p 6.13 of my book Sectional Titles on Tap. At the time I proposed that the trustees' power to impose a special levy be utilised to 'bridge' this gap. This also enabled the trustees to actually increase the levies to a new level, if needed. This was never intended to be more than a 'stopgap' measure until such time as the legislature addressed the flaw in a more structured manner, which was done by the introduction of MR 31(4A).

At the same time MR 31(4), which entitled trustees to impose special levies, was removed. Many trustees were confused by this deletion, but the answer lay in the fact that the ability to impose special levies had now been given recognition in the Act itself, by the introduction of S 31(2A) and (2B) in 2010. Perhaps this was not generally understood, hence the unnecessary re-introduction now of the special levy clause in MR 31(4B). I need not expand on the interpretational dangers which lurk when a statutory provision is duplicated in the rules.

But first, the useful MR 31(4A) is now repealed. Why? Perhaps it was felt that the 10% limit imposed for an increase may sometimes be insufficient. This is true, but as I have pointed out to managing agents and trustees who queried this, nothing prevented trustees from 'topping up' the 10% by imposing an interim special levy, if really necessary.

It was nevertheless somehow felt that MR31(4A) should be scrapped and a provision for special levies be 'forcibly re-injected' into the management rules, possibly to emphasise the fact that the special levy method, which is not restricted to a 10% increase, should henceforth be applied to bridge the levies gap.

In Afrikaans we have an expression '*om nie die baba met die badwater uit te gooi nie*' and this is what is happening here: The repealed MR 31(4A) did not only deal with the 10% increase aspect, but primarily with the automatic continuation of levies. In the absence of such provision trustees can still ensure continuation, but only if an interim special levy is imposed by means of a trustees' resolution. In practice this is not going to happen in many cases. This will mean that in such schemes levies are not going to be legally recoverable in respect of the interim period.

This is a seriously retrogressive step.

Lastly –

- The deletion of MR 31(4A) is followed ' *by the insertion in rule 31 after subrule (4A) of the following subrule . . .*' Then follows the new sub-rule (4B). But (4A) has just been repealed. What should have been done to be technically consistent is that the new provision should have been introduced as a substitution of MR 31(4A).

Tertius Maree

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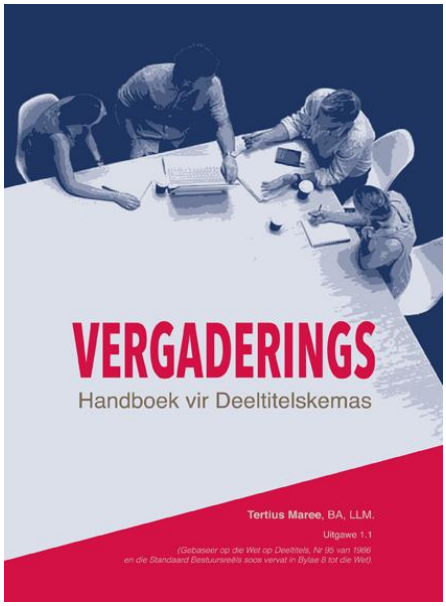

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Rig navrae en bestellings aan rosie@section.co.za

LevyProp

LevyProp (Pty) Ltd has recently been formed by Tertius Maree to assist 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 9002 or email admin@levyprop.co.za for an immediate response.

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