



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

WITHHOLDING LEVY CLEARANCE

When is it permissible?

An opinion has been expressed that a so-called levy clearance certificate may be withheld in circumstances where unauthorised alterations, affecting the common property, have been made to a section about to be transferred. I disagree and regard such refusal to be a wrongful and dangerous practice for reasons which I shall explain.

There are actually two documents known as a 'levy clearance certificate.' The first is a certificate by issued on behalf of the body corporate that –

'all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof.'

On the basis of the first certificate issued on behalf of the body corporate, the conveyancer attending to the transfer then issues a further certificate to the Registrar of Deeds, affirming that it has indeed been certified on behalf of the body corporate as quoted above.

Without the first certificate the conveyancer may not issue the second. Without the second the Registrar may not allow transfer to pass. The above requirements are stated in Section 15(3) of the Sectional Titles Act, No 95 of 1986.

The reasoning of the proponents of withholding is that the provision is a restraint on the Registrar's power to register the transfer of a unit without the necessary certificate and that it does not actually oblige a body corporate to issue a levy clearance certificate.

I do not believe this argument to be correct. The issue of a clearance certificate by the body corporate is not a discretionary action. Should a body corporate withhold a certificate for no reason at all, the affected parties will be entitled to apply for a court order compelling the body corporate to do so, and there can be little doubt that such an application will succeed. If this is true, then it is clear that the body corporate has a duty to issue the certificate, subject to compliance with the statutory requirement. It remains then to establish the scope of such statutory requirement.

The further argument in support of the right to withhold is that, ultimately, the body corporate may have to perform the rectifying work at its expense if the owner does not, and that this will entail a monetary obligation. However, it is not a monetary obligation yet. The statutory requirement refers to '*all moneys due*' and not to non-monetary obligations or even potential monetary obligations such as compliance with certain other statutory provisions or rules. In my view such non-monetary obligations cannot fall in the category of '*all moneys due*' until such time as –

- (a) it has materialised that the owner has failed to perform the necessary work, transferring the duty to do so to the body corporate, and
- (b) the actual amount of the expenses to perform the work has been quantified.

Before these things happen there can be no mention of '*moneys due*.' In fact, should the body corporate withhold a clearance certificate for such reasons, the affected parties will be entitled to ask that a (justifiable) amount be specified. If the body corporate is then unable to do so and still withholds the levy clearance certificate, it is likely that the body corporate will become liable for damages should the transaction fail as a result.

The corrective obligation of the owner concerned must accordingly first be converted to a quantified monetary obligation before the trustees would, with justification, be allowed to withhold the issue of a levy clearance certificate.

What then are the trustees to do when an owner is about to transfer a unit and it appears that certain unauthorised things have been done, affecting the common property? A

frequent example is the unauthorised physical extension of a section, but there could be many other examples. Dealing with such issues when a unit has already been transferred to a new 'innocent' owner is always problematic.

The first point is obviously that trustees should at all times remain aware of what is happening in their own scheme and take appropriate and timeous action. The majority of instances where non-compliance becomes an issue at the time of transfer can in my view be ascribed to the trustees' failure to remain alert to aspects such as building alterations.

Should an unauthorised alteration, for whatever reason, only come to the trustees' attention at the time when a levy clearance certificate is applied for, the solution would not be to withhold the issue of the certificate. In my view that would be irresponsible and could expose the body corporate to a civil damages claim. What they should rather do is to take steps to bring the situation to the attention of the purchaser, notifying him of the fact that compliance would become his responsibility upon registration of transfer. The issue would then become one to be addressed between seller and purchaser and if that should lead to cancellation of the sale, the body corporate would not be at risk of facing a damages claim. Should the transfer nevertheless be proceeded with, such early notification would serve to ease the trustees' later task to procure compliance by the new owner.

Should trustees attempt to withhold levy clearance certificates for reasons other than a truly liquidated debt to the body corporate, it would open the gates to do so for any reason which may eventually result in some as yet unspecified amount of money becoming due to the body corporate. This could never have been the intention of the legislature.

PARAMETERS / LIMITATIONS OF MEMBERS' POWERS TO INSTRUCT TRUSTEES

*May owners issue directives to trustees regarding pets?
May members impose restrictions regarding maintenance?*

Is it possible for trustees to establish a 'policy' regarding pets?

May owners' actually instruct trustees as to how a 'pets policy' must be implemented?

In terms of section 39(1) of the Act the owners may from time to time issue directives or impose restrictions upon trustees regarding their functions. Such a directive or restriction is issued by an ordinary majority vote at a general meeting. This is in fact a compulsory item on the prescribed agenda for the annual general meeting, but this of course does not mean that the owners must issue directives or impose restrictions at the AGM. Nor does it mean that this can only be done at the AGM, and can it in fact be done at any general meeting. In the normal course of events notice of the intention to issue directives or impose restrictions will have been given as part of the agenda for the meeting. However, a matter could also arise during the course of a meeting which requires instructions from the members. This could in my view be in order, depending upon the nature of the matter.

A question which arises is whether the powers of owners to direct or restrict is subject to any limitations. It is a subject previously mentioned in MCS Courier and the conclusion then was that owners do not have an unrestricted power to instruct. Obviously they cannot issue instructions which are illegal or contrary to the provisions of the Act.

With regard to the two questions posed above, my answer to the first is that it should be assumed that there is no such thing as a 'policy' in sectional title management, unless it has been captured in the rules.

Are the owners, however, in terms of section 39(1) entitled to instruct the trustees regarding the pets issue?

In my view any expression of the owners' wishes at a general meeting can be no more than an opinion poll which the trustees may take into account when exercising their discretion, as they must in terms of Conduct Rule 1(1). They must still make a decision which is objectively reasonable, and the wishes of the majority of owners is only one of the aspects which they should consider.

A related question is whether members may impose restrictions upon trustees regarding maintenance of the buildings. In this regard trustees should be careful: The duty to maintain is a statutory injunction which cannot be ignored or avoided, and in terms of Section 39(1) it is a duty which must be exercised by the trustees. But the same provision also makes it clear that the exercising of trustees' functions are subject to directives given and restrictions imposed by the members.

The judicious interpretation seems to be that the members are allowed to issue directives or impose restrictions as part of a maintenance plan or schedule, but that members are never entitled to instruct the trustees not to maintain. A typical example would be where,

in a mixed use scheme, the majority of owners feel that the body corporate should not be responsible for maintenance of certain elements of the common property used only in respect of certain commercial sections, and the trustees are instructed accordingly. Such an instruction would be *ultra vires* the powers of the members and the trustees would be obliged to ignore it. The proper way to address the situation is to make a special, reasonable management rule in terms of Section 32(4) by which the entire or a portion of the costs of maintenance of the area in question is assigned to the commercial owners.

The above are two examples where owners are not authorised to issue instructions to the trustees. It must not be forgotten that trustees are appointed to perform specific functions and that they are required to exercise certain discretions. Trustees should be careful not to evade their fiduciary duties by referring certain decisions to the members and then to accept directives which the members are not authorised to give.

SECTIONAL TITLE FIRST AID

Quick Advisory Service for Sectional Title Queries

Tertius Maree Associates offer a low cost, e-mail based, instant, ad hoc advice service called

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:

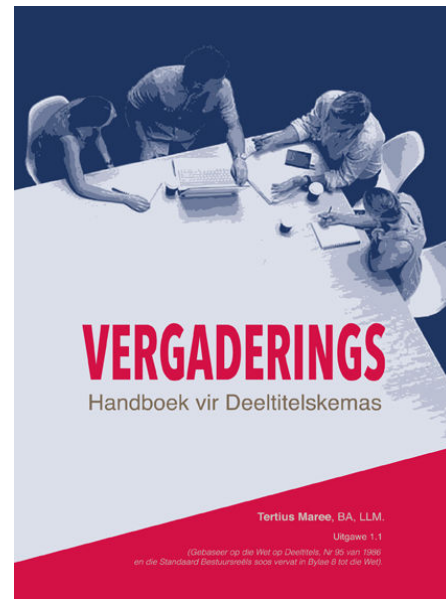
firstaid@section.co.za

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 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 Cindy Tel (021) 886 9521 or email levyprop@section.co.za for an immediate response.

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