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A free newsletter tothe sectional title community by Tertius Maree Associates

LIFE RIGHT CONTRADICTIONSIN SECTIONAL TITLE SCHEMES

Did the Legislature misunderstand the Possibilities?

In terms of Regulation 2 of the regulations applicable to retirement housing schemes in terms of the Housing Development Schemes for Retired Persons Act, (the Retirement Schemes Act) the provisions of Regulations 7 to 14 do not apply in the event of a retirement scheme being a sectional title scheme.

The Regulations referred to are the ones in terms of which the developer is required to establish an association of which holders of rights of occupation (life-right holders) are to be the members.

The understanding of the legislature had presumably been that the establishment of such an association would be unnecessary in the case of a sectional title scheme because provision is already made in terms of the Sectional Titles Act for the membership of owners to a body corporate. However, if this assumption is correct, sight may have been lost of the fact that even if the retirement scheme is registered in the form of a sectional title scheme, it may be the developer's intention to retain ownership of the units and to grantonly so-called life-rights in respect of sectionsto residents. In fact this unusual and probably unanticipated type of development does occur from time to time, leaving the question whether a developer should then establish a life-right association irrespective of the provisions of Regulation 2, or is the intention that such life-right holders should become members of the body corporate?

The latter problem is not made much easier when one attempts to find answers in the Sectional Titles Act(the Act). Membership of a sectional title body corporate is dealt with in Section 36(1) of the Act. What is evident therefrom is that a person becomes a member when he or she becomes an owner of a unit in the scheme. This prompts one to

determine the meaning of 'owner'. The term 'owner' is defined in Section 1 of the Act as follows:

*'**owner**' means in relation to-*

(a) immovable property, subject to paragraph (b), the person registered as owner or holder thereof and includes the trustee in an insolvent estate, the liquidator of a company or close corporation which is an owner, and the executor of an owner who has died, or the representative, recognised by law, of an owner who is a minor or of unsound mind or is otherwise under a disability, if such trustee, liquidator, executor or representative is acting within the scope of his or her authority;

(b) immovable property and real rights in immovable property -

(i) registered in the names of both spouses in a marriage in community of property, either one or both of the spouses;

(ii) registered in the name of only one spouse and forming part of the joint estate of both spouse in a marriage in community of property, either one or both of the spouses.

The underlinings are my own.

Whilst the reference to '*or holder thereof*' and '*real rights in immovable property*' may be somewhat confusing it seems to be that the purpose of the insertion sub-clause (b) had been to regulate the position of spouses married in community of property and not to extend the concept of ownership to include real rights other than registered ownership in the traditional or normal sense.The peculiarity ofinclusion of the two underlined phrasesin sub-clause (b), clarity is made more difficult to explain by the provisions of Section 4A of the Retirement Act in terms of which a right of occupation is held to be equivalent to a registered 99 year lease.

However, there may be an explanation for the odd wording of the definition in the Act when this definition of 'owner' in the Act is compared to the definition of 'owner' in the section 102 of the Deeds Registries Act.

Such comparison leads to an inevitable conclusion that the drafters of the Act had simply intended to 'borrow' the tried and tested definition of the Deeds Registries Act. In doing this they had to eliminate certain parts which clearly had no reference to sectional titles but had omitted to remove the seemingly harmless phrases *'orholder thereof 'and* '*real rights in immovable property.*'

The above suggestion was put to me by Prof Corne van der Merwe and in my view it must be the correct explanation for the inclusion of the confusing phrases in the definition of 'owner' in the Act. It means that sub-section (b) of the definition has no other meaning or purpose than to deal with the case of spouses married in community of property and that the retention of the underlined phrases had been no more than an oversight.

It also means that the definition lends no latitude for the inclusion of life-right holders as owners and as members of a body corporate of a sectional title scheme. This leads to the conclusion that notwithstanding the instructions of Regulation 2 of the Retirement Schemes Act, a developer must establish an association for life-right holders at retirement schemes which are also sectional title schemes where the units are not being transferred to the retirees.

Tertius Maree

LEARNING TO COUNT: PART 3

Are we all still learning?

My friend andesteemed northern colleague Elmo Stuart has expressed certain viewson the manner in whichof a quorum should be determined at general meetings, stating in his interesting newsletter as follows:

'A closer look at PMR57(2) indicates:

'The percentage of the quorum requirement is established with reference to the number of units in the scheme (10 units or less) = 50% of the votes; (50 units but more than 10 units) = 35% of the votes; (more than 50 units) = 20% of the votes.

'The percentage is linked to the total **votes** and not to the number of units represented, i.e. 50% of the votes, 35% of the votes, and 20% of the votes.

'Section 32(3) stipulates:

'32(3) Subject to the provisions of subsection (4) of this section, the quota of a section shall determine-

(a) the value of the vote of the owner of the section, in any case where the vote is to be reckoned in value;

(b) the undivided share in the common property; and

(c) . . .”

‘Therefore, if we have a scheme comprising of 100 units of equal size, the quorum requirement would be 20% of the votes and therefore 20 members present (or represented) and entitled to vote.

‘If the units in our example are not of equal size, then the quorum is determined by reference to the percentage of votes and the participation quotas (the value of the vote of each owner will have to be established in accordance with the participation quota schedule) of each unit/owner represented and entitled to vote, will have to be established with reference to the participation quotas.’

I had verbally expressed my disagreement to Elmo but had ‘wisely’ withheld my reasons for doing so, because shortly thereafter my esteemed teacher and friend Cornie van der Merwe added his considerable weight behind Elmo’s view, quoting S 32 as follows:

Behoudens die bepalings van subartikel (4) van hierdie artikel, bepaal die kwota van 'n deel-

*(a) die **waarde van die stem** van die eienaar van die deel, in 'n geval waar die stem volgens waarde gereken moet word;*

Cheekily, my own pupil and son Jacques had then chipped in with the following observation:

‘ *Ek stem nie saam dat ’n kworum volgens waarde bereken word nie. Na my mening beteken “total votes” die totaal van die stemme, waar een eienaar een stem het vir elke eenheid wat hy besit. Indien die bedoeling was dat dit volgens waarde bereken word sou dit iets soos “value of votes” gemeld het soos in die geval van spesiale besluite of eenparige besluite*.’

This unexpected support fortified my resolve and now prompts me to attempt to justify a counter-argument to Elmo’s view.

Starting with the weakest argument first: Requiring that quorums at general meetings must for ‘general’ purposes be calculated according to participation quotas presents managing agents and trustees with somewhat of a practical difficulty at general meetings as it is considerably easier to count attendance by number of units than by participation quotas.

Of course interpretations of the law cannot simply be based upon expedience. But there it is anyway.

The majority of all decisions made at general meetings is in the form of ordinary resolutions and conducted by a show of hands. The majority of votes are therefor, in terms of Management Rule 62, counted on the basis of 'one unit one vote'. In fact, in every instance where voting is to be counted differently, it is stated so explicitly. One could therefore say that 'one unit one vote' is the normal or usual value conferred to the term 'vote.' If this is so, it should also be the value conferred to the term 'vote' in Management Rule 57(2) in respect of the determination of a quorum.

In my view it is not correct to refer to a provision in the Act which determines the value of votes in the instances where votes are to be counted in value to establish the manner in which votes should be counted for the purposes of a quorum.

A remaining and argument of the PQ-for-quorum protagonists relate to the protection of commercial interests in terms of which it is held that a person with a higher participation quota has a higher monetary stake in the scheme and should therefore be present or be represented when important decisions are made at general meetings. Agreed, but he has the opportunity to be present or be represented and if he does not avail himself thereof he should not enjoy any additional protection. This argument should therefore not affect the quorum requirements.

I am of the view that for the purposes of calculating votes for a quorum, votes should be counted on the basis of one unit one vote. I may be right or wrong but what remains clear is that we are all still learning to count.

Tertius Maree

AMENDING THE RULES FOR LEVIES DISPENSATION

Section 32(4): Which Rules did the Legislature have in Mind?

Standard Management Rule 31 (1) prescribes the 'participation quota standard' for determination of the value of owners' votes or the apportionment of their financial liabilities, unless a different formula should have been introduced in terms of Section 32(4).

Section 32(4) allows a developer, or later the body corporate, to deviate from the participation quota norm for the assignment of levies. To achieve this the developer is required to submit special rules with his application for opening the sectional title register, which rules must prescribe the divergent formula whereby the value of owners' votes and / or owners' levy liabilities are to be determined. The members of the body corporate may subsequently achieve the same by adopting such special rules by means of a special resolution.

S 35 (2) of the Act provides that the rules of a sectional title scheme shall consist of two sets, namely Management Rules and Conduct Rules. There is no opportunity left for a third set of rules, such as "house rules' made by the trustees as is sometimes attempted. This should also exclude the possibility for a third set made in terms of the provisions of Section 32(4).

In terms of S 35(2)(a) Management Rules may only be amended by unanimous resolution whilst the Conduct Rules may be amended by special resolution. In terms of S 32(4) the special rules may be adopted by special resolution, which seems to indicate that such rules should be Conduct Rules. But would it be correct to include special rules dealing with the apportionment of levies in the Conduct Rules whilst the other rules dealing with levies are to be found in Management Rule 31? In my view certainly not.

Apart from what S 35 says, there is a clear distinction in nature and content noticeable between Management Rules and Conduct Rules, and to insert provisions about levies in the Conduct Rules would ignore such distinction. The correct 'domicile' for rules about levies should plainly be in Management Rule 31 itself.

Prior to 1993 Management Rule 31 was one of the 'protected' rules in terms of Regulation 30(1) which the developer was not allowed to amend at the time of registration of the scheme. It was brought to the attention of the Regulations Board that this was the exact rule which the developer had to amend in order to adjust the formula for assignment of levies, as he was entitled to do in terms of S 32(4). The Regulations Board reacted in 1993 by removing Management Rule 31 from the list of unalterable or 'protected' rules in Regulation 30(1). This indicated some acknowledgment by the Regulations Board that, notwithstanding the fact that Section 32(4) rule could be adopted by special resolution, the proper home for such rules would be the Management Rules, and more precisely, Management Rule 31.

There is at least some implied support for a '*soort by soort*' approach to rule amendments to be found in the 2003 decision in Thompson v Body Corporate of Woodbridge Island in which case the Cape High Court had in effect found that where the assignment of exclusive use areas had previously been dealt with in Management Rules, it is not allowed to assign additional exclusive use areas at a later stage in the Conduct Rules.

My conclusion is that when the levies formula is to be altered in terms of S 32(4), such divergent formula should be incorporated in Management Rule 31. The fact that such amended rules may be adopted by means of a special resolution, should simply be seen as a legislative exception to the provisions of S 35(2)(a).

In fact all rules relating to levies which may be adopted by the body corporate belong in the Management Rules and not in the Conduct Rules. The tendency to sometimes utilise the 'easier' Conduct Rules to adopt new rules related to levies cannot be condoned.

Tertius Maree

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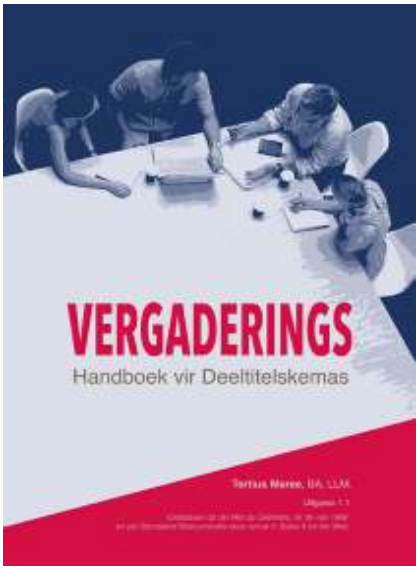

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