



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

## DIRECTIVES AND RESTRICTIONS

### *Looking for the Legitimacy Lodestar*

Section 39(1) of the Sectional Titles Act determines that all functions of the body corporate, such as imposed in section 37 and 38, are to be exercised by the trustees (accordingly not by the body corporate in general meeting), excluding such functions in respect of which the Act or the rules determine differently, and subject to any restrictions imposed or directions given by the members at a general meeting.

An example of a function about which the Act determines differently would be authorisation for extension of a section, for which a special resolution by the members is required. The provisions in section 24 are specific and approval can never be granted by the trustees.

The exercise of the trustees' powers and functions are furthermore subject to such directives or limitations as may be issued by the members at a general meeting. The imposition of such '*instructions*' to the trustees only require a normal members' majority resolution and may be issued at a special general meeting, or at the annual general meeting as '*special business*' provided that it had been included as an agenda item under '*Special Business*' for such meeting.

Diverging briefly from the subject matter, it is disquieting how trustees and even novice managing agents sometimes think that matters to be dealt with as *special business* in an agenda or even at a *special* general meeting require a *special resolution*, which is obviously not correct. Trustees should note that a special resolution or a unanimous resolution is required and permissible only when specifically prescribed by the Act or the rules.

What trustees should also remember is that a resolution adopted unanimously is not equivalent to a unanimous resolution and it should not be recorded as a unanimous resolution in the minutes.

Returning to the actual matter to be considered in this article, the question arises whether the scope of the members' powers to issue directives to, or impose restrictions upon trustees are subject to any constraints and if so, how such limitations must be determined.

In my view the members' powers to '*instruct*' trustees are undoubtedly limited. The members cannot instruct trustees to do something or prohibit them from doing something if such action or inaction would be in contravention of any law or the provisions of the Act or the rules. That would be the underlying principle but applying the principle in specific instances is not always a simple matter. Clarity is served by considering some examples.

I have seen members at a general meeting resolving 'unanimously' and instructing their trustees to assign levies differently. Convincing as the reasons may be, they should first amend the Management Rules. Sectional title schemes are governed by rules, not by resolutions as I have pointed out before in previous issues of this humble publication.

A directive or restriction not to perform maintenance, for example not to repair the lifts in a building would not be legitimate, because section 37(1)(j) specifically instructs the body corporate, and therefore the trustees, '*to properly maintain the common property (including elevators) and to keep it in a state of good and serviceable repair.*'

Similarly, the members do not have the power to instruct the trustees to increase levies at a certain percentage or determine levies at a certain level because Management Rule 31 prescribes how levies are to be determined and neither the trustees nor the members in general meeting can deviate therefrom without changing the rule.

A very general problem is the keeping of pets by residents. Can the members at a general meeting instruct the trustees not to allow cats in their scheme? Again, such an instruction would not be legitimate unless Conduct Rule 1 is amended appropriately. Upon the Ombud Service coming into operation a resident being denied consent for such a reason would be able to apply successfully to the Ombud for an order setting the members'

resolution aside and instructing the trustees to consider the application properly according to the prescripts of the rule.

A question raised in a recent test paper of my distance training course was whether trustees are empowered to purchase a unit in their scheme. The answer is that they are able to do so without the consent of the members, but that s 38(b) sets the condition that the trustees may only do so if the transaction is essential '*for the proper fulfilment of its duties.*' Many students sensibly pointed out that a matter as important as this should preferably be referred to the members at a general meeting in order to keep them informed or even to allow them to vote on the matter and instruct the trustees. Commendable as such transparency may be, it should be kept in mind that a directive by the members to proceed with the purchase would still not legitimise the matter without a subsequent trustees' resolution. The action would also be at risk of being set aside by a court, unless the statutory requirement of being '*essential for the proper fulfilment of its duties*' has also clearly been complied with.

It seems evident that the members' powers to instruct the trustees are subject to important constraints. Scope nevertheless remains to instruct trustees about *how* to go about doing certain things, if not always *whether* to do something. Although the imposition of special levies requires a trustees' resolution and the members cannot impose levies, special or otherwise, it would not be wrong to call a general meeting to give guidance to the trustees for decision-making regarding funding for, for example, a maintenance project. Members would also be able to instruct trustees regarding certain aspects of the maintenance project itself, although they would not be able to instruct the trustees *not* to perform the maintenance.

It may accordingly be said that members may instruct the trustees in respect of aspects where choices are allowed by the Act or rules, but not in respect of matters where the Act or rules already provide clear directives or imposes clear duties to do something.

*Tertius Maree*

## HOME OWNERS ASSOCIATIONS

*Willow Waters - Standing of Levies reassessed*

*Some random Thoughts*

For some time the security of home owners' associations regarding their claims for levies at the time of transfer of erven have been under threat. This was particularly, but not exclusively, true in the case of sequestration / liquidation of the owners of such erven. The problem arose due to the different legislative regimes pertaining to home owners' association levies compared to sectional title levies. Whilst section 15B(3) of the Sectional Titles Act explicitly bars Registrars of Deeds from registering the transfer of a unit without what is generally known as a levy clearance certificate, no similar statutory embargo exists in respect of levies due to home owners' associations. Recovery of HOA levies at the time of transfer is reliant upon conditions recorded in the transfer deeds of erven, which are carried forward to successive owners in their title deeds.

The attack upon the protection derived from the levy clearance arrangement came from two sides, namely the mortgagor-banks and Registrars of Deeds, supported by a third party, namely the trustee of insolvent estates in the event of sequestration / liquidation. The case of the banks related also related mainly to instances where the registered owner was sequestered / liquidated, and is easily understood, because insistence upon a levy clearance certificate before transfer of property in an insolvent estate, in effect provides preferent treatment of claims for levies, which undercuts even the preferent claim of a bank in terms of a mortgage bond which enjoys statutory recognition in cases of insolvency and sales in execution. The 'attack' from the Registrar of Deeds against the title condition embargo was not so clearly founded in law, but in a sense even more dangerous.

As I understand it, the Registrar's objection to the embargo was because of the additional functions and responsibilities assigned to the Deeds Office and its staff for something which was considered to be without a legal basis and therefor unnecessary.

Because the embargo had no statutory basis, enforcement could only rely on a title condition. In order to be binding upon successive owners, including trustees of insolvent estates, the condition had to constitute a real right as opposed to a mere personal right, such as a contractual right.

The practice in the northern provinces to include in the title condition a requirement that a new owner must sign for his/her acceptance of membership of the association considerably weakens an argument that the condition constitutes real right and also creates vulnerability in cases where such signing had for some reason not been obtained. Such condition is not necessary in the former Cape Province where a different Ordinance applies, which states plainly that such owners shall be members of the association, discarding any requirement of signing for such membership. This difference may possibly have been a contributory factor to the matter having first become the subject of litigation in Gauteng and not in the Cape. Be that as it may, all home owners' associations owe a debt of gratitude to NAMA for having stepped in as *amicus curiae* which led to the matter being resolved for once and for all in favour of home owners' associations.

The Appeal Court's finding was based upon its view that the title conditions in question constitutes real rights and not mere personal rights, and that, accordingly that the Deeds Offices are bound to comply and must require proof of payment of levies before allowing registration of transfer of an erf within a subdivisions for which a home owners' associations have been established.

From the case report it seems evident that the Court had placed considerable value on the financial needs of home owners' associations, which were considered to be the same as sectional title bodies corporate. In this regard the Court may perhaps have somewhat overstepped the boundaries of interpretation and entered into the field of law-making, but I am certainly not going to argue the point.

It was also a clever move of NAMA's legal representatives to abandon the constitutional argument in support of its case, thereby avoiding the danger of a further appeal to the Constitutional Court.

All in all this decision, putting to rest the prevailing uncertainties regarding the status of home owners' associations' levy claims, must be welcomed by owners in such schemes.

*Tertius Maree*

## ADDITIONAL LEVIES

### *The Why and the How of Levies for Exclusive Use Areas*

Ordinary levies due by the members in respect of their sections are determined by the trustees by apportioning the budget to the members in accordance with the participation quotas attaching to their sections, unless an alternative formula for levy apportionment has been put in place in the management rules of the body corporate.

It is also the function of the trustees to determine levies due by the members to the body corporate in respect of their exclusive use areas. These are referred to in the Act as '*additional contributions*', and more commonly known as '*additional levies*'.

Because exclusive use areas form part of the common property of the body corporate, these are the responsibility of the body corporate to repair and maintain, unless the rules of the body corporate stipulate otherwise. It is therefore important that the body corporate receives sufficient additional levies from the owners concerned to defray the costs of maintenance in respect of their exclusive use areas. The additional levies determined in respect of the exclusive use areas in respect of the financial year must correlate with the expected expenditure in respect of the exclusive use areas, including maintenance, insurance, water and electricity and rates, if applicable.

It is the responsibility of the trustees, to prepare a draft budget for the body corporate for the ensuing financial year, which budget should include the estimated income and expenses relating to the exclusive use areas. Once a budget has been approved at the annual general meeting of the body corporate, the trustees must then determine the additional levies due by the members by apportioning the estimated exclusive use area-expenses to each member according to the estimated expenses relating to his or her exclusive use area. Additional levies then become due on the passing of the trustees' resolution.

1. Where a body corporate has failed to determine or recover additional levies from the members in respect of their exclusive use areas, it would be inappropriate for the body corporate to utilise the ordinary levies paid by the members in respect of their sections to repair and maintain their exclusive use areas. For example, where an exclusive use area, such as a balcony must be repaired and waterproofed and insufficient '*additional*' funds are available for such repairs, the trustees should

impose and recover a special levy from the member concerned in respect of his or her balcony. The special levy will become due by the member upon passing of the trustees' resolution. If the trustees had determined and recovered adequate additional levies from the members, it should not become necessary to raise such "targeted" special levies in respect of exclusive use areas.

I recommend that the trustees consider preparing a 5-year maintenance plan in respect of exclusive use areas to enable the trustees to sufficiently budget for the maintenance of exclusive use areas, and to collect sufficient additional levies on an annual basis.

Alternatively the trustees could consider a proposal to amend the conduct rules (if the exclusive use areas were created in the conduct rules under section 27A) to make each owner responsible for the repair and maintenance of his or her own exclusive use area. Once approved by special resolution of the members, the amended conduct rule will take effect upon filing thereof at the Deeds Registry.

The body corporate and the trustees would then not be burdened with the maintenance and repair of the exclusive use areas, which would become the responsibility of the owners concerned. However, the trustees would still have to recover additional levies from the owners to defray other expenses relating to the exclusive use areas, as may be necessary.

**Ilse Kotze** B. Comm LL.B.

# DeeltitelForum

## *Eerste Afrikaanse Deeltitel Slypskool!*

Saterdag 21 Maart 2015  
Helderberg Village, Kilberry Saal

Aanbieders: Tertius Maree, Judith van der Walt en genooide spesialiste

Koste : R 200 plus VAT per persoon (Bespreek afslag vir meerdere trustees van enkele skemas met Louise)

Skakel: Louise Hofmeyr, Tel 021 886 9521 of [louise@section.co.za](mailto:louise@section.co.za)

Sitplekke is beperk – vroeë inskrywings noodsaaklik.

Sover ons weet sal hierdie die eerste Afrikaanse aanbieding van hierdie aard wees. Engelsprekende gaste is egter ook welkom en vrae sal beantwoord word in taal van keuse.

GASTE MOET ASSEBLIEF HUL **BESTUURDERSLISENSIES** BY DIE SEKURITEITSHEK TOON OM TOEGANG TE VERKRY.

## Tertius Maree Medewerkers / Associates

Merlot House  
Brandwacht Office Park  
Trumali Rd  
STELLENBOSCH

PO Box 12284  
DIE BOORD  
7613

Tel: 021 886 9521  
Fax: 021 886 9502  
e-mail: [tertius@section.co.za](mailto:tertius@section.co.za)

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