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

UMBRELLA SCHEMES

How should they not be structured?

In this first edition of 2019 I want to touch upon a difficult and controversial subject, namely the administrative and management framework for a 'complex' scheme. By the term 'complex scheme' I have in mind a scheme consisting of multiple sectional title schemes under the 'umbrella' of a master association.

The first problem is that such complex schemes differ from each other as far as management structures are concerned, depending upon the extent to which powers and functions are to be assigned to the master association, and what, if anything, is reserved for the constituent bodies corporate to deal with. It is therefore not possible to generalise when discussing such schemes.

A further complication is that some of such master associations have been established as companies – a method not compatible with sectional title legislation and burdening the management framework with insoluble problems.

A third problem might be that some of the components of the complex scheme may be of types other than sectional title, which necessitates a constitution accommodating various types of structures.

A fourth and most common problem is that the structuring of the Management Rules had not been dealt with correctly at the time of establishment of the scheme.

Let us first look at what the legislation allows for and/or requires. The first point to keep in mind is that at the time of establishment of a sectional title scheme, the developer, with a few exceptions, does not have the power to amend the Management Rules, and in order to make provision for the management of a sectional title scheme governed under a master association, the Management Rules need to be amended comprehensively. For this purpose, Regulations 6 (4) and (5) under the Management Act provide as follows:-

(4) If the schedule referred to in section 11(3)(b) of the Sectional Titles Act contains a condition restricting transfer of a unit without the consent of an association whose constitution stipulates that-

(a) all members of the body corporate and of the development scheme of which the unit forms part, must be members of that association; and

(b) the functions and powers of the body corporate must be assigned to that association;

the developer may, when submitting an application for the opening of a sectional title register, substitute any management rule that appears in Annexure 1.

(5) If at the commencement of the Act the members of a body corporate are all members of an association whose constitution binds its members to assign the functions and powers of the body corporate to that association, the management rules in Annexure 1 do not apply.

What does this all mean? In practice I am afraid that many developers and their attorneys have failed to interpret and apply these provisions correctly, with harsh consequences for management.

As an aside I should once again point out the woolliness caused by the legislator's indiscriminate replacement of the word '*shall*' by '*must*.' It is needlessly vague to say that somebody *must* be a member of the association if the true meaning is that he *is* in fact a member.

But what is required in respect of the Management Rules in terms of these provisions? What happens in practice is very often that the prescribed rules remain with only a few changes. But what is in fact required if the functions and powers are assigned to the master association, is that ALL the Management Rules must be amended. In fact, because the rules are actually replaced by the constitution of the master association, the Management Rules should all be scrapped except to state that the scheme is to be managed according to the provisions of the constitution.

Tertius Maree

ATTORNEYS ARE NOT TO BE TRUSTED!

A clear message regarding collection costs

Is protection of minorities devolving into terrorism by minorities? Inasmuch as this may be general question of some socio-political importance, it cannot be answered by a political layman such as myself. In pursuance of '*skoenmaker, hou jou by jou lees*' I shall confine my views to sectional title legislation.

At the risk of harping too much on one subject, I again wish to focus some attention on the meaning and effects of prescribed Management Rule 25(4) and (5):-

(4) A member is liable for and must pay to the body corporate all reasonable legal costs and disbursements, as taxed or agreed by the member, incurred by the body corporate in the collection of arrear contributions or any other arrear amounts due and owing by such member to the body corporate, or in enforcing compliance with these rules, the Conduct Rules or the Act.

(5) The body corporate must not debit a member's account with any amount that is not a contribution or a charge levied in terms of the Act or these rules without the member's consent or the authority of a judgment or order by a judge, adjudicator or arbitrator.

Owner Jeremiah Jackson does not pay his levies and the managing agent of the scheme instructs attorneys ABC Associates to take steps to collect same. ABC Associates send a letter of demand, conduct telephonic communications with Jackson and Jackson's attorneys, XYZ Associates, dealing with some errors, disputes and misunderstandings on the debtor's part. A summons is eventually issued but Jackson promptly sells his unit and the transfer is dealt with by XYZ Associates, who apply for a levy clearance certificate to the managing agent.

At this stage ABC Associates have incurred considerable costs and disbursements, but the managing agent has not been able to debit these against the debtor's account, because of MR 25(4).

Consider too that Jackson's consent for payment of costs is extremely unlikely to be obtained and that taxation of the costs is usually impossible, particularly at short notice.

Accordingly the costs of ABC Associates are not included in the requirements for a levy clearance certificate and are not paid against transfer of Jackson's unit.

What must ABC Associates do to get paid? They have no direct action against the debtor and cannot pursue the claim against Jackson in court. The managing agent says sorry, we could not include your costs for levy clearance without debiting the costs against Jackson's account, which we are not allowed to do.

Strictly speaking, of course, the body corporate is the client and is responsible for payment of the costs – but where must the money come from? If the trustees are prepared to pay, which is unlikely, the end result would be that the other owners will pay Jackson's costs.

It seems that poor Jackson's interests as an individual carries more weight than the rest of the owners. It also seems clear that the legislator considers attorneys to be untrustworthy as far as the rendering of accounts are concerned and that invasive measures are required in order to protect Jackson against unscrupulous attorneys. It should be noted that the same mistrust is not displayed in other legislation, such as the Magistrates Courts Act.

In my view the restrictions imposed by MR 25(4) and (5) are unwarranted, unreasonable, and do not promote the achievement of justice.

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