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

The Managing Agent Issue

Since the inception of sectional titles in South Africa in 1971, managing agents have played an ever-increasing role in respect of the management of sectional title schemes and home owners associations. At the same time, the standards required from managing agents have increased dramatically, a challenge which, in most cases, was met admirably. The fact that the industry has been able to elevate itself by its own bootstraps, so to speak, is largely due to the formation of the National Association of Managing Agents (NAMA) and the enthusiastic participation therein by the majority of managing agents. Due to this, managing agents have also played, and continues to play, a significant role in the evolution of the Sectional Titles Act itself.

Two decisive factors which affect the standards of management, are the matters of ethics and of education. NAMA has fulfilled a significant role in both.

Despite these positive trends, everything is not perfect in the industry and probably never will be, as is the case in any industry operating in a dynamic, challenging and ever-changing environment

This issue focuses on the doings of managing agents, the challenges, problems and, hopefully, some solutions.

Tertius Maree BA, LLB, LLM.

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MANAGING AGENTS: SOME DO'S AND DON'TS

A brief look at the functions and powers of managing agents

A discussion of what a managing agent may and may not do on behalf of his or her principal, the body corporate, may fill a sizeable chapter in a substantial book on sectional title management. Add to that what a managing agent *must* or *should* do, and you have the makings of an entire book.

For these reasons this article should be understood as a mere attempt to scratch the surface of the subject matter.

The functions and powers of a managing agent are chiefly determined by the provisions of the Standard Management Rules read with the provisions of the management agreement concluded with the trustees. Although SMR 46 purports to describe these powers and functions, it is by no means the only rule which impacts upon the activities of the managing agent.

Standard Management Rule 27 stipulates as follows:

> *No document signed on behalf of the body corporate shall be valid and binding unless it is signed by a trustee and the managing agent referred to in rule 46 or by two trustees or, in the case of a certificate issued in terms of section 15B(3)(i)(aa) of the Act, by two trustees or the managing agent.*

The Afrikaans text refers to a '*bestuurde*r' but this should be understood to refer to a managing agent appointed in terms of a SMR 46 contract and not an ordinary employee of the body corporate.

Prof CG van der Merwe, the doyen of sectional titles in South Africa, suggests on page 14-76 of his work *Sectional Titles, Share Blocks and Time-sharing, Vol 1*, that all documents signed by the trustees are subject to the provisions of SMR 27 and should be signed accordingly. This should probably be qualified to the effect that only documents which in fact require signing in terms of the Act or the rules need to be signed in the manner specified in SMR 27. Letters and various types of notices may also be regarded as 'documents' but neither the Act nor the rules actually require them to be signed and, in my view, the signing thereof need not comply strictly with SMR 27.

On the same page Prof van der Merwe also states that cheques must be signed in the manner specified in SMR 27. That would mean that a managing agent is not authorised to sign a cheque drawn on the banking account of the body corporate without it being co-signed by a trustee. In view of the provisions of SMR 42 this appears to be incorrect or incomplete:

> *The trustees may authorise the managing agent to administer and operate the account referred to in rule 41 and 43: provided that . . .*

In my view the terms '*administer and operate*' necessarily include the signing of cheques. However, it does not mean that a managing agent is automatically authorised to sign cheques on the basis of the quoted provision only. Such power must be specifically delegated to the managing agent by the trustees. Delegation may be effected by one of two methods as referred to later herein.

SMR 26(1)(a) provides that trustees have the following powers, namely -

> *to appoint for and on behalf of the body corporate such agents and employees as they deem fit in connection with-*
>
> *(i) the control, management and administration of the common property; and*

(ii) the exercise and performance of any or all of the powers and duties of the body corporate.

From the above provision, particularly the part which I have underlined, it may seem that all functions and powers of the body corporate may be delegated to a managing agent. This is obviously not so - the provision is framed very widely and must be interpreted and applied with caution. One obvious exception is the authority to appoint a managing agent. Of more relevance is the trustees' powers to (formally) determine levies, which power may not be delegated to the managing agent.

Unfortunately this leaves somewhat of a grey area as to which powers may be delegated to the managing agent and which not and in cases of uncertainty, trustees should obtain legal advice.

What is clear, however, is that the delegation of powers may not be effected in an informal manner and neither the trustees nor the managing agent should, as a matter of course, assume that the agent is endowed with certain specific powers. The powers and functions of the agent should always be clearly set out in writing in a management agreement. It is important to ensure that the management agreement complies with both the formal and the substantial requirements of the Act and the relevant management rules.

If a certain task or power is not covered in the management agreement, it may be possible to delegate it to the managing agent in terms of a formal, minuted, trustees' resolution, provided that it is also formally accepted by the agent.

As said, the underlined portion of SMR 26 should be interpreted and applied restrictively. For example, the power to make a unanimous resolution can certainly not be delegated to the agent (or anyone else for that matter). The same would apply in respect of various other functions and powers assigned to the body corporate by the Act and the rules, each of which must be assessed according to its own nature before it can be determined whether it is capable of being delegated or not.

It should also be kept in mind that a principal (the body corporate) is not able to delegate powers of which it does not possess itself.

The following examples may be given of powers which are capable of being delegated, namely to -

- sign applications and other documents in respect of services to the body corporate;
- conclude contracts with employees;
- sign documents relating to banking accounts;
- issue instructions to attorneys; and
- complete and sign documents related to insurance and insurance claims.

Some of the above may not be covered by the management agreement, in which case delegation should be effected by means of a trustees' resolution, as aforementioned.

In conclusion, it is clear that the question as to which powers an agent may or may not exercise, should be approached with some caution. At the same time the scope of powers and functions which are potentially capable of being delegated is quite wide and probably only limited by -

- the scope of the actual delegation to the managing agent;

- powers and functions specifically reserved for the trustees or body corporate by the Act or the rules; and
- powers which fall outside the capacity of the trustees and which may accordingly also not be delegated.

Tertius Maree BA, LLB, LLM.

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LEVY CHANGES DURING A FINANCIAL YEAR

Once the members of a body corporate have approved the budget for the ensuing financial year at the annual general meeting, the trustees will usually determine the ordinary levies due by the members in respect of their sections by apportioning the approved budget to the members in accordance with the participation quotas of their sections. The trustees will similarly determine the additional levies due by the owners of exclusive use areas, by apportioning the amount required in terms of the budget pro rata to each owner, in accordance with the estimated expenses relating to his exclusive use area.

Although the Act and Management Rules is silent in this regard, certain transactions may take place in respect of the sections and/or exclusive use areas of a scheme during a financial year, requiring the registration of amended sectional plans. The registration of amended sectional plans and, where applicable, the amended participation quotas of sections, will inevitably require the recalculation of the levies due by the owners for the remainder of the financial year. The following transactions may take place during the financial year of the body corporate, which require the registration of amended sectional plans and the adjustment of the levies for the remainder of the financial year:

1. An owner may consolidate two or more of his sections into one section and in consequence the owner will only be liable for one levy to the body corporate, calculated in accordance with the participation quota of the consolidated section, in stead of two or more levies. Participation quotas of other sections in the scheme will not be affected by the consolidation. Upon registration of the sectional plan of consolidation, the trustees should determine the levies due in respect of the consolidated section in respect of the remainder of the financial year and notify the owner accordingly.

2. An owner may subdivide his section into two or more sections and transfer one or more sections to a purchaser/s, and in consequence each owner of a section (arising from the subdivision) will be liable to the body corporate for a levy calculated in accordance with the participation quota of such section. Participation quotas of other sections in the scheme will not be affected by the subdivision. Upon registration of the sectional plan of subdivision, the trustees should determine the levies due in respect of the newly created sections in respect of the remainder of the financial year and notify the owners of the sections accordingly.

3. An owner may extend his section, and upon registration of the amending sectional plan of extension of the section, the participation quota of the extended section will increase, whilst the participation quotas of all other sections in the scheme will decrease. The trustees should upon registration of the amending sectional plan, reapportion the remainder of the approved budget to all the sections in accordance with the new participation quotas of the sections, and subsequently notify each owner of the adjusted levy payable by him for the remainder of the financial year.
4. A further phase of the scheme (additional sections) may be registered and the participation quotas of all existing sections will be adjusted accordingly. The trustees should upon registration of the extension, reapportion the approved budget to all the newly created and existing sections in the scheme, in accordance with the participation quotas of the sections, and subsequently notify each new and existing owner of the levy payable by him for the remainder of the financial year.
5. A sectional plan of destruction of sections may be registered, entailing the entire or partial destruction of specific sections in the scheme, and the participation quotas of the remaining sections will be adjusted accordingly. The trustees should upon registration of the amended sectional plan, reapportion the approved budget to all the remaining sections in accordance with the participation quotas of the remaining sections, and subsequently notify each remaining owner of the levy payable by him for the remainder of the financial year.
6. New exclusive use areas may be delineated on the sectional plans and ceded to the members of the body corporate by unanimous resolution. Upon registration of the amended sectional plan, the trustees should require that each owner of an exclusive use area, pay an additional levy to the body corporate as is estimated necessary to defray the costs of maintenance and other expenses in respect of the use area. Once the trustees have determined the additional levy payable by each owner of a use area, the trustees should notify each owner of the additional levy payable by him for the remainder of the financial year.

Until the legislature has amended the Act and Management Rules with reference to the aforesaid transactions, we suggest that the trustees should take the above course of action to adjust the levies payable accordingly. The alternative options available to the trustees are as follows:

1. If an owner extended his section during a financial year, the trustees could impose a special levy on such owner for the remainder of the financial year, calculated in accordance with the floor area of the extension.
2. If a further phase of the scheme (additional sections) has been registered during a financial year, the trustees could calculate the levies due in respect of the new sections, by apportioning the remainder of approved budget in accordance with the participation quotas of the new sections.

Ilse Kotze B Comm LLB

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HOW TO HIJACK YOUR AGM

I should probably not be writing this article. But then I thought I could probably provide some valuable insights to chairmen as to what they could expect (worst case scenario) and how they should prepare themselves for an annual general meeting.

I don't always understand why someone should purposefully disrupt an AGM but I can say from experience that it does happen fairly often.

So you attend the AGM and your main and only goal is to disrupt it. If the meeting is adjourned prematurely you have succeeded in your goal. The point of departure, your strategy, is to annoy the chairman or to make life so difficult for him (or her) that he (or she) loses his (or her) cool. We all know that once the red mists descend we tend to utter things we later regret. If the chairman has lost face in front of all the other members the battle is half won.

The meeting starts. As soon as the chairman raises his hand, raise yours and demand to be heard. Ask for the members to elect a new chairman. Maybe you want to stand yourself? In terms of management rule 59(1) the members must vote to have a new chairman elected.

If a vote is taken, make sure that every hand is counted. Demand that proxies be disclosed, in fact, insist that you want to check every single one of them. If a unit is owned by a company, ask to see the resolution in terms whereof a nominee was appointed. If you pick up or can suggest any irregularities, ask that such votes be excluded.

Here is something important to remember: Even though management rule 60 makes provision for a vote by poll (participation quota) it often happens that the chairman or managing agent is not prepared for this. After every vote, demand a vote by poll. A vote by poll, especially in larger schemes, can severely disrupt a meeting, especially if the chairman was not prepared. It may even happen that the meeting must be postponed in which case you have achieved your goal.

The chairman will now probably proceed in terms of the agenda and voting should take place on items such as financials, insurance, appointment of an auditor and budget. Take the proposed budget apart. Query every single expense and demand an explanation. What are the estimates based upon? Why does the managing agent get a 10% increase? Can we not get rid of the supervisor?

The next juicy item which should be the focus of your attack is the determination of the trustees. Ask to see the nominations as well as proof that they were submitted at least 48 hours prior to the meeting. If upon close scrutiny you find any irregularities, ask that such nominations be excluded. Insist that nominees of companies may not stand as trustees (even though you know they may). If they overrule you, ask to be quoted from the rules. Also ensure that you have nominated yourself (this should throw the trustees for a loop). When the meeting proceeds to voting ask that each trustee be voted for individually for an ordinary majority vote (remember to demand a poll).

Finally, if all else fails, throw the whole kitchen sink at them under special business. Complain about every single cat and dog in the scheme. Throw in some budgies and parrots as well for good measure. Take the previous trustees apart and imply (don't

accuse them of!) gross negligence. Complain about your neighbour, the venue for the meeting, the state of the common property, poor maintenance, and anything else you can think of.

Any chairman who is able to survive an onslaught such as the above, and keep his cool, is worthy of a medal and must be re-elected.

Jacques Maree B Comm LLB

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BESTUURSAGENTE SE PLIGTE TEN OPSIGTE VAN TRUSTEES SE OPTREDE

Vir 'n bestuursagent om konsekwent professioneel korrek op te tree ten opsigte van eise deur trustees gestel, is dikwels 'n nou en doringrige paadjie om te loop. Die feit van die saak is dat bestuursagente deur die trustees aangestel word en uit die aard van die saak wil bestuursagente graag hul kliënte tevrede stel en gelukkig hou. Alhoewel bestuursagente vandag oor die algemeen goeie kennis het van deeltitelreg en -administrasie, kan dieselfde ongelukkig nie altyd van trustees gesê word nie.

Trustees word jaarliks verkies uit 'n poel van eienaars, gewoonlik sonder veel kundigheid, sodat persone sonder die nodige ervaring dikwels aangestel word. Sodanige trusteerade tree dan soms op wyses wat nie wetlik verantwoordbaar is nie. Wat veral dikwels gebeur is dat 'n raad van trustees oorheers word deur die wil van 'n enkele trustee, gewoonlik die voorsitter, wat moontlik ook nie behoorlik geskool is in deeltiteladministrasie nie, maar nogtans reken dat hy alle kennis (en mag) in pag het. Anders as wat deur die reëls toegelaat word, reken die voorsitter dan ook dat hy besluite op sy eie mag neem, sonder om die ander trustees te raadpleeg. Dikwels laat die ander trustees dit oogluikend toe.

Vir 'n bestuursagent om in só 'n situasie die voorsitter / trustees gelukkig te hou, wetende dat hy of sy afgedank mag word, en om terselfdertyd aan wetsvereistes te voldoen, is geen maklike taak nie en kan vergelyk word met 'n balanseertoertjie in 'n sirkus.

Hier is 'n tipiese voorbeeld:

> 'n Besondere skema beskik nie oor 'n sterk, kundige trusteeraad nie en besluitneming word deur die voorsitter oorheers. Die voorsitter voel geïrriteerd deur een of twee 'lastige' eienaars wat sy doen en late bevraagteken. Sonder enige besluitneming deur die trusteeraad, reik hy opdragte aan die bestuursagent uit dat niemand toegang mag verkry tot die notules of finansiële rekords van die regspersoon sonder sy, (die voorsitter), se toestemming nie. Die bestuursagent weet dat dit verkeerd is maar eerbiedig die opdrag in elk geval aangesien besef word dat die

voorsitter die effektiewe mag hou betreffende die bestuursagent se aanstelling en afdanking.

Wat is hiermee verkeerd?

Eerstens, soos reeds genoem, het 'n voorsitter nie die bevoegdheid om sulke *ad hoc* besluite te neem sonder die medewerking van sy mede-trustees nie. 'n Voorsitter van 'n trusteeraad is self maar net 'n trustee en het net twee unieke bevoegdhede, naamlik om as voorsitter op te tree en om in 'n geval van 'n staking van stemme op 'n trusteevergadering die knoop deur te haak met sy eie stem. Hierbenewens het hy geen spesiale magte nie.

Tweedens is trustees hoegenaamd nie in staat om enige besluit te neem wat in botsing is met 'n wetsbepaling of 'n bestaande reël nie. Nog minder kan hulle enige besluite neem wat neerkom op 'n wysiging van die reëls. Bestuursreëls 34(3) en 35(2) bepaal respektiewelik as volg:

> *Die trustees moet op skriftelike aansoek deur 'n eienaar . . . . alle notules van hul verrigtinge en van die regspersoon ter insae beskikbaar te stel aan sodanige eienaar . . . .*
>
> *Op aansoek van 'n eienaar . . . . of van die bestuurder moet die trustees al of enige van die rekeningboeke en rekords ter insae beskikbaar stel aan sodanige eienaar . . . . of bestuurder.*

Ek is van mening dat dit nie eers moontlik is om van hierdie vereistes af te wyk deur die reëls vir daardie doel deur die lede te laat wysig nie, want dit sou strydig wees met die bepalings van die Wet op Bevordering van Toegang tot Inligting en sal deur 'n Hof tersyde gestel kan word.

Dit is belangrik dat 'n bestuursagent in gevalle soos díe leiding gee en nie die voorsitter op sy verkeerde paadjie soos 'n skaap naloop nie, hoe moeilik en gevaarlik dit ookal vir hom of haar mag wees. Om dit te kan doen is dit myns insiens belangrik dat elke bestuursagent, wanneer hy of sy aangestel word, reeds 'n 'beleidsverklaring' as deel van die kontraksluiting aan die trustees uitreik waarin uitgestip word dat hy of sy streng by die bepalings van die Wet en die reëls sal hou, dat die trustees nie van hom of haar moet verwag om daarvan af te wyk nie en dat dit as kontrakbreuk beskou sal word indien die trustees hom of haar daaroor wil afdank. Dit is ook belangrik dat dit by die aanvang van sy of haar diens mondeling aan die trustees verduidelik moet word.

Indien 'n bestuursagent sou afwyk van hierdie reguit paadjie om 'n trustee of trustees tevrede te hou, sal gou gevind word dat hy of sy in elk geval op 'n steil afdraand na niemandsland beland het en dat sy of haar reputasie onmeetbare skade aangedoen word.

'n Bestuursagent staan in 'n vertrouensposisie tenoor die eienaars, wat voorrang moet geniet bo enige gevoel van lojaliteit teenoor die trustees of 'n individuele trustee. Die bestuursagent moet, behalwe om die administrasie van die regspersoon effektief te behartig, ook leiding gee waar leiding nodig is en hom of haar nie laat verlei deur opportunistiese versoekinge nie.

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HOW DOES OUR NATIONAL CONSTITUTION AFFECT SECTIONAL TITLE ADMINISTRATION?

Section 33 of our national Constitution determines that everyone is entitled to administrative treatment which is lawful, reasonable, and conducted by means of fair procedures. Any person whose rights are harmed by such administrative action has a right to be furnished with written reasons.

Furthermore the Constitution requires that legislation be enacted to lend expression to the above basic constitutional right. In pursuance of this requirement, the Promotion of Administrative Justice Act (PAJA) was promulgated on 30th November 2000. This should not be confused with the Promotion of Access to Information Act (PAIA), which also has significant relevance to sectional title administration, and which will be discussed at a later date.

Contrary to general belief, PAJA does not only relate to decisions made in the public sector by departments of state, municipalities, etc. It is clearly stated in section 1 of the Act that it also applies to natural persons and bodies corporate in general. This means that all members of the private sector are also bound by PAJA.

Accordingly the provisions of PAJA are also relevant in respect of all decisions made by trustees of a sectional title body corporate and by the body corporate itself at a general meeting, in as far as it may affect the rights of a member of such body corporate.

Importantly, PAJA does not only relate to decisions actually made, but also to the failure to make decisions.

In terms of section 3 every administrative action must be fair. This implies that -

(a) sufficient notice of the proposed action must be given;

(b) the proposed action must be clearly described;

(c) a reasonable opportunity must be given to submit representations;

(d) sufficient notice must be given of the right to any internal appeal mechanism which may be available; and

(e) sufficient notice must be given of the right to request written reasons.

If the rules of a sectional title body corporate which regulate certain actions already contain provisions for fair administrative procedure, such rules may be followed to the exclusion of PAJA.

It should be understood, however, that the adequacy of such rules will in all likelihood be measured against the PAJA standards, should it become a subject of dispute in a court, arbitral hearing or before an adjudicator of the Ombud Service.

A good example of the latter type of rule would be a penalty provision in the rules of a sectional title scheme.

Contrary to recent reports in the press, trustees are not automatically entitled to raise a fine or penalty against an owner or occupier for non-compliance with a rule. To do this a special rule must be formulated, adopted and filed. Some years ago I have formulated a penalty provision for sectional title schemes in collaboration with the South African doyen of sectional title law, prof CG van der Merwe and Prof Lourens du Plessis of the Department of Constitutional Law at Stellenbosch University. This *pro forma* rule was drafted with the constitutional requirements in mind and therefore complies with the provisions of PAJA. It has since been widely adopted and is today regarded by some as the 'industry standard' for a penalty rule in the sectional title environment. The provisions of PAJA will accordingly not apply when it is sought to raise a penalty in instances where a body corporate has adopted that rule.

What should be emphasised here is that it is not sufficient merely to have provisions for fair administrative action incorporated in your rules, but that such provisions must also be followed to the letter when action is taken. This seems obvious, but it is remarkable how many trustees think that, provided that they have an appropriate rule in place, they may issue penalties left, right and centre without further ado.

In terms of section 5 of PAJA any person whose rights are affected substantially and negatively by administrative action, may within 90 days of becoming aware thereof, require to be furnished with written reasons. The body corporate then has a further 90 days to respond (by furnishing the reasons).

Subsequently, an aggrieved person may then institute action in a court for review of the administrative action. At present such reviews are conducted only in High Courts but it is proposed that legislation be made to endow Magistrates Courts with the necessary jurisdiction to conduct reviews.

An application for review must be launched within 180 days after receipt of the written reasons. This means that a person will lose his or her right to contest an administrative action after expiry of this period. This is particularly important in the sectional title environment where it often takes a long time before owners react to decisions.

Upon review, a Court is empowered to declare a decision null and void and/or to refer the matter back for re-evaluation. In special circumstances a Court may even issue an amended decision itself. Where the unjust action consists of a failure to act, the Court may itself issue a fair decision and may then order the parties to act in accordance thereof.

The Court is also empowered to issue a temporary interdict to stop any action subsequent to a decision which has been declared null and void.

It is important to be aware that, where another forum has already been nominated by existing law or rules, the review procedures of PAJA will not apply, but the procedures provided in such legislation must still be followed. This will become particularly relevant when the long-awaited Ombud Service is legislated for sectional title disputes.

It is important that members of the body corporate, and particularly trustees, should be aware of the provisions of PAJA, and to keep these in mind when any decisions are made which may impact negatively upon the interests of owners or occupiers.

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ABOUT TERTIUS MAREE ASSOCIATES

Tertius Maree Associates is a firm of attorneys based at Stellenbosch, specialising in the legal aspects related to the management and administration of sectional title schemes, home owners' associations, retirement and share block schemes, and similar structures.

At Tertius Maree Associates we consult with and advise trustees, owners, managing agents, developers and attorneys, draft amendments and develop rules and constitutions, and have been doing so since 1994.

We also specialise in the recovery of arrear levies.

Tertius is the author of three books and approximately 800 articles on sectional title matters. He obtained a master's degree in law (*cum laude*) focusing on sectional title law, at the University of Stellenbosch in 1999 and has served as part-time lecturer in sectional title law at that institution. He is also a proud honorary member of NAMA and member of the development team of the STILUS levy insurance product for bodies corporate.

Tertius is ably assisted by two attorneys, Jacques Maree and Ilse Kotze, and a dedicated staff of long standing.

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