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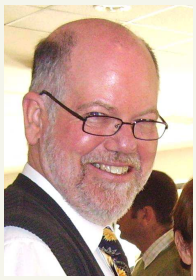
# Paddocks PRESS

## NEW SECTIONAL TITLES BILL PUBLISHED FOR COMMENT- 26 PROPOSED CHANGES

**By Prof. Graham Paddock**



In General Notice No. 1109 of 2009, Government Gazette No. 32498 dated 17 August 2009, the Minister for Rural Development and Land Reform published the Sectional Titles Amendment Bill, 2009, for comment. An accompanying memorandum setting out the objects of the Bill explains that:

1. the definitions of "developer" and "owner" need amendment;

2. section 1(3A) (which provides that a body corporate can approach the Court for relief where it cannot obtain a unanimous resolution) must be amended to make it workable in practice;

3. section 5(4) needs to be amended to provide that the "median line", the legal boundary of a section, will always run through the centre of any exterior window, door or other structure built into an exterior wall, floor or ceiling;

4. section 11 needs amendment to avoid confusion in regard to the format and content of an application and bondholder's consent;

5. section 11 needs changes to provide for lodgment of certificates for rights under sections 25 and 27;

6. section 12 needs amendment to allow for the issue of a number of certificates to parts of the future development rights, when scheme extension rights are fractionalised by the developer;

7. section 14 needs amendment to make it clear that an order of the High Court is not always necessary for the cancellation of a sectional plan and closure of a scheme;

8. section 15B *to page 3...*

## WILL IT STILL BALANCE?

**By Clint Riddin**

The accounting world has for some time now been going through a number of changes, with one of the major goals being an alignment with international reporting standards. Added to this, South Africa is about to introduce a new Companies Act, and whilst it has no direct bearing on sectional title, some aspects of accounting and reporting arising out of this new act may in fact have an indirect bearing on sectional title.

World financial markets are also in turmoil and the public at large and investors and lenders specifically are also looking to the accounting fraternity to set standards and levels of reporting which will be a more effective warning system for decision makers and users of the financial statements.

Where does all this leave sectional title? What applies to this form of legal entity in terms of standards and reporting? Should it have its own standards? In writing this article, it is feared that at this

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### INSIDE THIS ISSUE:

## WILL IT STILL BALANCE? ...continued

stage there are more questions than answers. The sectional title accounting and reporting aspects by and large are not ever part of a specific discussion forum; as a result the next "best fit" approach seems to be adopted.

This leads to reporting standards that may differ from one accountant to the next. Recently the Sectional Titles Act has seen a few amendments moving towards regulating some reporting aspects such as:

- ageing debtors and creditors as part of the financial statements;
- reporting on the period of insurance cover in place; and
- reporting on whether any management and conduct rules have been added to, deleted or amended.

Often these requirements are overlooked or even ignored by accountants, as they focus on the standards applicable to close corporations and companies, rather than finding standards that would be more applicable for sectional titles.

Whilst generally accepted accounting practice is still used, the type and size of entity needs to be looked at; this against a background of International Financial Reporting Standards, which generally is used by large public companies, but could also be adopted for Sectional Titles. The Sectional Titles Act makes it a requirement that generally accepted accounting practice be used, but as this is a management rule (PMR 37(1)), it could (and possibly should) be amended by members unanimously; or by the Developer prior to the opening of the register; but more specifically by the law-makers.

The current "best fit" is to use generally accepted accounting practice for small to medium enterprises, along with the specific STA reporting requirements listed above, but variations to this are needed in some instances, such as the definition of what an asset is, and whether equity is in fact equity in the sense used in commercial concerns versus reserves and funds for sectional titles purposes.

The accounting fraternity has mechanisms in place for adopting more meaningful accounting and reporting standards relative to a particular group, but as the sectional titles industry has largely been ignored when standards have been reviewed, this has led to where we find ourselves today.

With a cohesive and consultative process the reporting standards could be put in place specifically for sectional titles. A fundamental aspect of any reporting standard is to understand who the users of the financial statements are and for what purpose they will use the reports. By and large these users include owners of sections, prospective purchases of sections, financial institutions, SARS and creditors; these stakeholders should all be consulted to arrive at accounting and reporting standards which would be meaningful, relevant and timely.

In closing, and to show how confusing all the changes could be to the lay user, a balance sheet is no longer called a balance sheet.. ▪

## Sectional Title Bookkeeping Course

Paddocks in conjunction with Clint Riddin & Associates presents the Sectional Title Bookkeeping Course. This course is now presented as a 3 -week distance-learning course combined with a 2-day workshop focusing on the legal and financial aspects of sectional title bookkeeping.

**The two-day workshop will cover the following topics:**

- Budgets
- Accounting during each year
- End of year accounts
- Other financial aspects
- Audits
- Insurance
- Management aspects
- Membership aspects
- SARS/Tax Returns
- Value added tax
- Computers and the internet.

For further information please contact Kate at 021 674 7818 or at kate@paddocks.co.za

## NEW SECTIONAL TITLES BILL PUBLISHED FOR COMMENT - 26 PROPOSED CHANGES...continued

*...from page 1* needs amendment to allow the owner of a whole unit to apply for and be issued a title to a fraction of that unit;

9. section 24 needs a cross-reference corrected and 24(6)(d) must be changed to provide that where a section is extended by more than 10% bondholders must be notified by registered post, with details of the extension. If they do not object within 30 days, they will be deemed to have no objection to the extension.

10. section 25's heading needs to be amended to make it clear that it caters for extensions of the scheme by only the addition of exclusive use rights, without at the same time adding further sections.

11. section 25(1) needs to be changed to allow for the extension of the period set by the developer for the further development;

12. section 25(1) needs to be changed to allow for extension of existing buildings;

13. the word "urban" needs to be removed from sections 25(4)(a) and 27(6);

14. a new section 25(4A) is needed to oblige a person ceding an extension right to first obtain a body corporate clearance certificate;

15. section 27 needs amendment to oblige developers to take out certificates to all the exclusive use areas shown on a sectional plan; at the moment this is optional, so developers can choose not to apply for rights to some of the areas shown on the approved plan;

16. section 27(4)(b) needs to be amended to provide for the vesting of an exclusive use area in the body corporate free from not only any mortgage bond but also any registered lease, usufruct, habitatio or usus;

17. section 27(5) needs to be amended to provide for the consent of the holder of any registered lease, usufruct, habitatio or usus before the rights to an exclusive use area can be cancelled;

18. section 27A(c) needs to be amended by the substitution of the word "owner" for the word "member";

19. section 29(3) needs to *to page 4...*

## Farewell to Christina Maxwell

Christina joined the Paddocks Team in the 3rd quarter of 2007. Her first responsibility was for a tele-sales campaign we ran for our flagship course, the UCT (Law@Work) Sectional Title Scheme Management Certificate course. It wasn't long before she had impressed all her colleagues and her list of responsibilities began to grow.

After consistently delivering exceptional results, Christina was given the responsibility of managing the marketing campaigns for two brand new courses: the UCT Sectional Title Development Course and the Sectional Title Bookkeeping Certificate Course. For both these new courses, Christina also coordinated face-to-face training events on a national scale. In the words of her Marketing Manager Robyn Allan, 'Christina had become indispensible'. Christina also took on the responsibility for marketing the UCT (Law@Work) Advanced Sectional Title Scheme Management Course.

Christina continued to grow from strength to strength. Being employed at Paddocks, Christina took advantage of every opportunity to learn new skills. Recently she was promoted to New Media Marketing Executive, which involved the execution of our Marketing Campaigns on mediums such as Facebook and Twitter. Did we mention that Christina has been studying a part-time 4-year degree in Business Management during the course of her employment?

We are sad to say goodbye to an exceptional employee, and wish her well with her new career in Web Development.

**- Sam Paddock**

## NEW SECTIONAL TITLES BILL PUBLISHED FOR-COMMENT- 26 PROPOSED CHANGEs...continued

...*from page 3* be amended to allow the bondholder's consents for servitudes to be limited to those bondholders who existed on the date the notarial deed was entered into and that they be lodged in a notarial protocol rather than with the Deeds Registry;

20. section 37(1)(b) needs to be extended to provide an obligation on developers to pay attributable costs in regard to future development areas;

21. section 37(2) needs to be amended to provide only for general, as opposed to special contributions/levies, to provide for a general accrual of liability of levies as opposed to their becoming both due and payable, and to cater for a pro-rata liability for successors-in-title from the date of change of ownership;

22. a new section 37(2A) needs to be inserted, catering for special contributions/levies payable by owners at the time the trustees pass the resolution;

23. the term 'special contribution' needs to be defined in a new section 37(2B);

24. section 44(g) needs to be amended to deal with exclusive use areas as well as with sections, restricting their use to any shown expressly or by implication on a registered sectional plan;

25. section 54 needs to be amended to update the name of the Association of Law Societies of the Republic; and

26. section 60 and 61 need to be amended by the removal of various redundant provisions.

Comments must be submitted in writing within 21 days of publication to the Chief Registrar Mr. N S (Sam) Lefafa at Private Bag X918, PRETORIA 0001, Fax No. 012338 7383, Cellphone No. 071 622 9658, Landline 0123387227 or e-mail lefafa@dla.gov.za. The contact people in the Chief Registrar's office are George Tsotetsi and Antoinette Reynolds.

A number of these proposed changes could be described as 'technical adjustments', including the changes to sections 11, 25(4)(a), 27, 54, 60 and 61. Some of them are additional consumer protections, for example the changes proposed to sections 25(4A) and 37(1)(b). My initial comments on some of the other proposed changes are:

**A. Applications to High Court for unanimous resolutions**

The proposed change to section 1(3A) is sensible and necessary to cure a defect in the current wording. But most sectional title bodies corporate cannot afford to bring High Court applications when they are unable to obtain unanimous resolutions, so this provision is not likely to be used often, even once it is fixed. Once the Community Scheme Ombud Service is operational, trustees will be able to afford access to justice.

**B. Definition of median lines in regard to doors, windows etc.**

The amendment to section 5(4) will bring a welcome end to the *"who owns the windows?"* question and the linked debate *"who should pay for their repair/replacement?"*

**C. Changes to s 24 - Extensions of sections**

The proposed amendment to section 24(6)(d) would provide that when a section is to be extended by more than 10% bondholders must be notified by registered post, with details of the extension. If they do not respond to the notice within 30 days of its posting, they will be deemed to have no objection to the extension. This proposal is motivated in the memorandum accompanying the Bill as follows: *"The conveyancing fraternity encounter practical difficulties in obtaining such consents."*

While the difficulty being experienced by conveyancers in obtaining bondholders consents deserves attention, this proposal goes way too far. First it introduces a dangerous precedent in its effect that "silence means consent", moving from the current requirement for a formal voluntary act of consent to an assumption of consent by the bondholder's silent acquiescence. Second, it implies that section extensions in excess of 10% are relatively trivial issues, unlikely to negatively affect the interests of bondholders. In practice I have come across massive section extensions, very often made without any prior permission or consent from owners or bondholders. When the extension is within an exclusive use area, it may not be noticed at all for some considerable time. By the time the trustees and other owners need to address the issue, the building is completed and occupied - often with no building plans, no special resolution by owners and no bondholder consents. And then it becomes very difficult to either get the extension removed or legalised. The third issue is that section 24 does not contain an unambiguous formula for the calculation of the 10% deviation threshhold. The *to page 5...*

## NEW SECTIONAL TITLES BILL PUBLISHED FOR-COMMENT- 26 PROPOSED CHANGEs...continued

...from page 4 phrases *"a deviation of more than 10 per cent in the participation quota of any section"* contained in the current section 24(6)(d) and *"a deviation of more than 10 per cent"* in the proposed section 24(6)(d)(i) are capable of different interpretations and while Mr. Allen West has expressed an authoritative opinion on the current situation, this does not provide the certainty that practice requires.

**My suggestions in regard to S 24 are:**

(i) the formula for calculation of the deviation threshold should be stated clearly;

(ii) there should be a clear prohibition against an owner commencing any building works that extend a section until the body corporate and all affected bondholders have consented and all other applicable laws have been complied with; and

(iii) the requirement for bondholder consent, by way of a written and signed consent in the normal format, should be limited to those who hold rights over sections from which the proposed extension is visible, and the conveyancer should certify to the Deeds Registry that she or he has obtained written consent from all such bondholders.

**D. Clearance certificates**

Section 15B(3)(a) and the proposed new 25(4A) both need to specify that the clearance certificate must be in writing and cater for lodgment of the clearance certificate at the Deeds Registry, not with the conveyancer. In practice there have been regular reports of conveyancers who have registered transfers without obtaining written clearance certificates, to the benefit of their clients and the detriment of all other owners in the scheme. Clearance certificates should be lodged by conveyancers and examined by Deeds Registry examiners as is the practice with homeowners association clearances.

**E. Rule-based exclusive use rights**

The proposed replacement wording for 27A(c) does not, in my view, achieve the required outcome. Instead of simply replacing the word 'member' with 'owner' the provision should be amended on the following lines:

*"include a schedule indicating to which section or sections each such part is allocated for the use and enjoyment of the owner or owners from time to time of such sections".*

**F. Liability of successors in title for contributions**

The proposed change to section 37(2) needs to cater not only for changes in ownership but also changes in holdership of exclusive use and future extension rights.

**G. Conditions on trustees' right to levy special contributions/levies**

The proposed new section 37(2A) should incorporate some restraint on the ability of trustees to burden owners with additional liabilities to pay levies. The principles in prescribed management rule 31(4), which can now be changed by the developer on opening the register, could be considered, i.e. that the trustees can only levy special contributions when this is necessary and in regard to an expense that is unbudgeted.

**H. Definition of 'special contribution'**

The proposed new section 37(2B) definition of 'special contribution' should be in section 1 with all the other definitions rather than in an additional subsection in the body of the Act.

## WELCOME TO- THE NEW MEMBERS OF THE PADDOCKS AND GETSMARTER TEAM

**Jill Pienaar**
Course Coordinator

**Kate Blake**
Marketing Executive

**Karin Schefermann**
Marketing Executive

**BUILDING MAINTENANCE**

BY ROB PADDOCK (Rob the Builder)

# Window and Exterior Door Maintenance 101

**By Rob Paddock**

In the idyllic and well organised world in which all sectional title owners and managers live and work, there should be plenty of time to complete inspections of all windows and exterior doors twice a year in both spring and autumn. Maintenance can then be completed at a leisurely pace once a year in summer between walks on the beach and late breakfasts.

**Does this sound like your scheme? Perhaps not!**

However, a reasonably well-built window or door assembly should have a life expectancy of 30+ years, but a lot depends on the size of the openings, level of exposure to the elements and, of course, maintenance. A small window under a deep overhang in a one-storey retirement development in Stellenbosch will not require as much attention as a very large window in a modern high-rise development on the Atlantic Seaboard.

**Glass care and maintenance**

If your building has a window cleaning service, it should be directed to ensure that the following steps are taken for glass care and maintenance:

- Glass should be cleaned regularly with the use of mild soap and water, thoroughly rinsed and wiped dry.
- Do not have the glass washed when the surfaces are hot and don't let the soap solution dry on the surface.
- Water under high pressure, such as a high-pressure hose or pressure washer, should not be used to rinse the windows as this may drive water into the building envelope or wall assembly.
- Cleaning agents containing abrasives or strong chemicals and solvents should not be used.
- Extreme caution should be used to avoid damaging the surrounding glazing seals when cleaning windows.

**Condensation**

Evidence of any condensation problems should be identified during the inspection and maintenance process. Condensation results when warm, moist air comes into contact with a cold surface and the moisture in the air reverts to its liquid form. Condensation can lead to substantial deposits of water on the window and interior wall surfaces, and must be controlled to avoid problems.

Wooden frames are less likely to develop condensation problems as the material is a good insulator from colder outside temperatures. Some metal frames are not good insulators because they let the colder outside temperature move through the entire frame and can cause condensation problems on the interior side of windows and doors.

**Action plan tips**

- If possible, windows and exterior doors should be inspected twice a year. Look for leaks, condensation problems and the items listed on the checklist of common window and door maintenance items.
- Inspection and maintenance items should be addressed by your managing agent or an experienced contractor.
- Notify your managing agent if you have a concern with your windows or exterior doors.

**Checklist on page 7**

**Having Body Corporate Employee Problems?**

See Carol Tissiman's article entitled "**Dismissal of a Body Corporate Employee**" on page 11.

# Window and Exterior Door Maintenance 101 Checklist

| Maintenance Items | Description and Suggested Actions |
|---|---|
| Accumulation of dirt and debris at the sill | Presence of dirt and debris can affect proper functioning window openings and doors, and can block drainage holes that carry moisture to the outside. Vacuum and clean sills on a regular basis, and clean any drain openings that may exist on the interior side if they appear blocked. |
| Dirty, damaged or worn out weather-stripping | Notify your managing agent if there is a problem with the weather-stripping as it is important to ensure a continuous and tight-fitting seal around operable windows and exterior doors. |
| Loose or missing seals and gaskets | Glazing seals provide a weather tight connection between the glass and the frame or sash components, and can become damaged or worn over time. Repair or replacement generally requires the services of qualified contractor and would be coordinated by your managing agent. |
| Improper hardware operation | Your windows and doors should operate smoothly and lock securely. The moving parts of your window and exterior doors should be kept clean and properly lubricated, and can be more susceptible to problems in coastal (salt-air) environments. Specific maintenance items to be coordinated by your managing agent include: adjustments to the rollers on sliding exterior doors, widows and screens to ensure proper clearances, and checking safety and security items such as locks, hinges and window stops. Adjustments may require a specialist technician. |
| Dirty, stained or deteriorating frame finishes | A number of items to consider:<br>• Interior side of frames should be cleaned regularly with mild soap and water, and rinsed thoroughly. Don't wash frames when surfaces are hot.<br>• Wood frames require paint or stain every five to 10 years.<br>• Wood sills are more susceptible to damage, so keep sill finishes and sealant in good condition.<br>• Maintenance such as cleaning on the exterior side of frames should be looked after by the managing agent. |
| Condition of the sealant at joints at the bottom inside corners of the window frame | Aluminum windows are typically built with joints at these locations, and sealant is applied to stop any moisture from draining into the window frame and wall itself because moisture can cause significant damage. The inspection and maintenance of this item should be coordinated by your managing agent. |

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**- Quirk Certificate course in eMarketing (Online Marketing)**
**- UCT (Law@Work) Certificate course in Practical Labour Law**
**- Stellenbosch University Certificate course in Wine Evaluation and Advanced Wine Appreciation**
**- UCT Certificate course in Guest House Management**
- **Certificate course in Creative Writing**

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## Why?

We regularly update our Paddocks Fan Page with relevant articles as well as photos of the various courses and events presented during the year. Stay connected with your student group and other Paddocks' students and keep up to date with bite-size Sectional Title articles.

### How to find us:

- Simply log-in to Facebook, and search for "Paddocks" on the top right hand side.
- If the Paddocks Fan Page is not displayed under "All Results", click "Pages" and it will be displayed.
- Click "Become a Fan".

## Why?

For short updates on the Sectional Title industry and hot "sectional title tips of the day."

### How to find us:

- Type the following into browser's address bar: **http://twitter.com/paddocks_tweet**
- If you are already registered on Twitter, click "Follow".
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We are looking forward to keeping in touch!

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**Registrations close:** 25 September 2009
**Course begins:** 5 October 2009

Contact Karin via e-mail on karin@getsmarter.co.za

# Q & A WITH JENNIFER PADDOCK

**By Jennifer Paddock**

**Defaulting levies**

**Q1:** I would be very grateful to receive some advice from you. My mother and I have owned a flat in a Sectional Title building in Johannesburg for many years and have never defaulted on our levies. I have recently heard that two tenants in the block are owing levies in the amount of R22,000.00 and R13,000.00 respectively. What legal advice do you have to offer me? As an owner, I am very concerned and I do not want our building, which has always been very pleasant, to degenerate. I believe 95% of the owners regularly pay their levies. Is it possible that if the money is not recovered from these who have defaulted on paying their levies, the rest of us could suffer by having power to the whole building cut off? How can we remedy this situation?

**A1:** The local authority will not cut off the power to the scheme's building unless the body corporate fails to meet its financial obligations to the local authority in this regard. What normally happens is that the body corporate continues to meet its payments to the local authority despite the fact that there are owners in arrears with levies and therefore in effect all non-defaulting owners subsidise those in arrears. This is clearly an inequitable situation which needs to be rectified immediately.

If the trustees have not already set a rate of interest to be charged on arrear levies they should do so in terms of prescribed management rule 31(6). The trustees should also hand these owners over to a debt collecting attorney who will institute action against them to recover the arrear amounts.

The trustees are obliged to collect levies from all owners in the scheme and if they refuse to do anything about the current situation I suggest that you rally the support of owners holding 25% of the participation quotas in the scheme to request the trustees to call a special general meeting in terms of prescribed management rule 53. If the trustees fail to call the meeting within fourteen days of being requested to do so, then the owners themselves are entitled to call the meeting.

At this meeting the owners should direct the trustees in terms of section 39(1) of the Sectional Titles Ac 95 of 1986 to hand the defaulting owners over to debt collecting attorney and to set a rate of interest to be charged on arrear amounts if they have not already done so. If the trustees fail to comply with the owner directives imposed upon them at the meeting then the owners will be entitled to declare a dispute with the trustees in terms of prescribed management rule 71 and if after fourteen days it has not been resolved either party may demand that the dispute be referred to arbitration for resolution.

**Body corporate responsibility?**

**Q2:** We are a complex of 4 units. Unit 3 had a blockage on the main sewage line from the service duct between unit 2 and 3. Should the cost be for body corporate or the owner of Unit 3?

**A2:** Your question refers to a service duct. The liability to maintain and repair pipes, wires, cables and ducts is dealt with in section 37(1)(p) of the Sectional Titles Act 95 of 1986 and differs depending on the principles set out below:

1) If the duct is part of your section (ie. within the median line / midpoint of its floors, walls or ceilings) it is your responsibility unless the duct serves a number of parts of the scheme (ie. more than one section), then it is the body corporate's responsibility.

2) If the duct is outside your section (i.e. on the common property) the body corporate must maintain and repair it even if it only serves your section.

It is not clear from your question whether the duct forms part of section 2 or 3 or both, or part of the common property. However it sounds as if it serves both section 2 and 3. If my assumption is correct and the duct does serve both sections, it will be the responsibility of the body corporate to repair and maintain this duct in line with principle two set out above as it serves a

# Q & A WITH THE JENNIFER PADDOCK ...continued

number of parts of the scheme. If my assumption is incorrect, please use the above principles to determine who is liable for maintenance of and repairs to the ducts.

**Alterations to units**

**Q3:** Good day Jennifer, four year ago I enclosed a court yard in my complex with permission from the chairman at the time. We have 50 units and half of them have done small alterations without the required plans. Now we have a new chairman and he is doing alterations and getting plans done and is insisting everyone do the same. People have sold and gone. What about the new owners? He wants them to pay. Can he do this?

**A3:** The situation you describe is not uncommon. A number of alterations have been effected without the required authorization and / or without approved building plans. The chairman is now attempting to 'regularise' the irregular alterations in the scheme.

Can he do this? Yes, and in terms of the trustees' statutory obligation to control and administer the common property for the benefit of all owners and to enforce the rules of the scheme, he is obliged to do so.

What about the new owners? If the units that they have bought have unauthorized alterations, they have 'inherited' these problems from their predecessors-in-title. The body corporate can only act against the current owner of a unit and therefore it is unlikely that it will have any luck in taking up the unauthorized alterations with a previous owner. However, the current owner in his/her capacity as buyer of the unit may have a claim against his predecessor-in-title as the seller of the unit but s/he may require legal assistance in realizing such a claim.

**Auditor for body corporate?**

**Q4:** Does a body corporate have to have an auditor? In one article you refer to an auditor or an accounting officer. What is the distinction between the two?

**A4:** Prescribed management rule 40 deals with the appointment of an auditor or an accounting officer, it says the following:

"**Audit**

40. At the first general meeting and thereafter at every ensuing annual general meeting, the body corporate shall appoint an auditor to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting: Provided that where a scheme comprises less than 10 units, an accounting officer may be appointed for that purpose and the auditor or accounting officer, as the case may be, must sign the financial statements."

Therefore schemes comprising less than 10 units may appoint an accounting officer instead of an auditor, but schemes with more than 10 units are obliged to appoint an auditor. ▪

## UCT CERTIFICATE COURSE IN GUEST HOUSE MANAGEMENT

**When offering any category of accommodation to paying guests in the hospitality industry, you are governed by the relevant provisions of the Rental Housing Act (RHA).**

Getsmarter is offering a 10-week part-time course presented via the internet.

Highly practical with several assignments completed during the course.

Includes additional modules on short-term letting and preparing for the 2010 Soccer World Cup.

Registrations close: 18 September 2009.

Contact Deborah on

deborah@getsmarter.co.za or 021 683 3633

# Dismissal of a Body Corporate Employee

By **Carol Tissiman**

There are very few Sectional Title Schemes in South Africa that do not have at least one full or part time employee/s working for them. Amongst others, these include gardeners, cleaners, security guards, and for larger schemes; supervisors, caretakers, and even in-house management teams. Employees play a vital role in effective upkeep of a scheme, but not all employees are a joy to behold, and body corporates looking to dismiss an employee must follow due procedure.

Labour legislation in South Africa is one of the biggest challenges facing employers of all kinds today. There is a maze of labour legislation governing correct practices and procedures that changes on a regular basis. The result of implementing or following unsound practices or procedures in the workplace can result in costly and time-consuming battles with employees down the line.

The Basic Conditions of Employment Act includes a very broad definition of an employee, including any person who assists in carrying out or conducting the business of an employer or who works for another person and receives any remuneration. An employee who works more than 24 hours per month is automatically protected by minimum standards set out in the Act. Employers should be careful of words such as "casual' and "temporary" when categorizing an employee, as the Act does not recognise these descriptions.

If the body corporate (the "employer") wants to dismiss an employee, the dismissal must be fair. Fairness is decided on two grounds - substantive fairness, and procedural fairness.

"Substantive fairness" weighs up whether the dismissal is appropriate in the circumstances. Specific focus is placed, for example, on whether a rule/term that was broken was valid and necessary, whether the employee knew the rule, whether the employer has been consistent in applying the rule and finally, what mitigating factors apply.

"Procedural fairness" considers the rights of the worker to be treated justly in the course of the procedure that is followed in the process of discipline or dismissal. This usually requires that:

- The employer must warn the employee that his or her work is not acceptable or behaviour is not good enough, and that next time this occurs, corrective or disciplinary action will be taken which may lead to his or her dismissal;
- The employee must understand the complaints or charges against him/her and be given enough time to prepare an explanation for the behaviour or a defence against the charges;
- The employer must hear and consider the employee's side of the story before deciding to dismiss him or her; or
- The employee must be given a chance to be represented by a fellow-employee and given an opportunity to query any statements or evidence.

The employer must have a proper and fair reason to dismiss the employee. The Labour Relations Act stipulates that an employer is allowed to dismiss an employee for any one of three reasons:

1. misconduct (the employee has done something wrong);
2. incapacity (the employee does not do the job properly , or cannot do the job properly due to illness); or
3. retrenchment (the employer must cut down on staff, or the job is redundant).

In the case of dismissal for misconduct, if the employee has behaved unacceptably in the workplace, or has broken a rule of conduct, and the employer wants to dismiss the employee, the employer must ensure that they:

- tell the employee what is wrong in a manner he or she understands;

*...to page 12*

# Dismissal of a Body Corporate Employee ...Continued

*...from page 11*

- give the employee informal advice, if it is a relatively minor problem;
- try to help the employee correct and resolve the problem (corrective discipline);
- take formal disciplinary action, the become more harsh if the employee repeats the misconduct (progressive discipline);
- give the employee warnings;
- the final warning should be in writing (you can immediately issue a final warning , if the nature and implications of the misconduct is very serious, such as assault or theft);
- keep a record of all disciplinary action taken, and make sure either the employee or a witness signs to acknowledge receipt (but not necessarily agreement with) the warning;
- written warnings are usually kept on record and remain valid for a period of 6 months;
- notify the employee in writing that you wish to hold a formal investigation - here the employee must have a fair chance to respond to the charges and is entitled to be represented by a co-worker or;
- employees dismissed for misconduct must receive notice or notice pay, unless the misconduct is a very serious breach of the employment contract, such as theft or assault in which case notice period or notice pay would fall away.

Where normal termination of employment takes place in the first six months of employment, (and the reasons for and procedures followed in termination need to be fair) if an employee is paid weekly, then the employer must give the employee one week's notice, or pay for one week, if the employer wants the employee to stop working immediately. After six months of service, and up to one year, the employer must pay the employee two weeks notice.

**About Carol:**

Carol Tissiman is the course convener for the UCT (Law@Work) Certificate Course in Practical Labour Law. The course introduces the key areas of applicable South African Labour Law. It focuses on the practical application of good business practice, procedure and governance in the workplace, the application of which, will assist you to get the best out of your staff and to ensure that you avoid the Commission for Conciliation, Mediation and Arbitration (CCMA) and Labour courts in the future.

For more details on the UCT (Law@Work) Certificate Course in Practical Labour Law, contact Deborah on 021 683 3633 or via e-mail on deborah@getsmarter.co.za ▪

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**Registrations close:** 2 October 2009.

Contact Deborah on 021 683 3633 or

deborah@getsmarter.co.za.

# THINKING OF ADVANCING YOUR PORTFOLIO?

Paddocks' yearly presentation of the Advanced Scheme Management Course topics 1-6 is due to start in October of this year. We would like to provide you with a deeper look into what we will be covering:

**Topic 1: Financial and maintenance obligations in mixed schemes**

Some of the most complex problems in the context of sectional title come from mixed schemes. Mixed schemes are schemes that have components designed for different uses, such as retail and residential. An example of a mixed-use scheme is one with shops on the ground floor (retail) and apartments on the four floors above that (residential). In schemes like this there can be significant financial cross-subsidization between the components unless separate cost centres are created by using the provisions of section 32 of the Sectional Titles Act 95 of 1986 ("the Act") which allows the developer to change the actual participation quotas in the scheme or their effect. This topic unpacks the provisions of section 32 of the Act and how to create financial harmony in mixed schemes.

**Topic 2: Individual and en-masse extension of sections**

This topic deals with the situation when one or more owners intend to extend the boundaries or floor area of their sections and also when they have already done so informally. When a number of different owners wish to legally extend their sections at the same time, this is referred to as an en masse extension of sections and the owners concerned can cooperate to reduce costs and overcome some of the practical difficulties involved.

**Topic 3: Extension of schemes and fractionalising scheme extension rights**

Developers these days often prefer to build and sell sectional units in phases, commonly known as a "phased development". This topic details the process of reserving scheme extension rights as well as the rights and duties of the holder of the rights. Either the developer or the body corporate of a scheme can apply for the right to extend the scheme. Scheme extension rights can also be fractionalised so that the rights to build particular parts are broken up and can be sold to different people.

**Topic 4: Sectional title meeting law and procedures**

This is a high level overview of the principles taken from the Act, the prescribed management rules and the common law that govern trustee and owner meeting procedures. A very much fuller treatment of this topic is given in the Paddocks and UCT (Law@Work) Law of Sectional Title Meetings course.

Topic 5: Creating exclusive use rights and appropriate conditions

This topic deals with the two types of exclusive use rights in sectional title. We cover how to create these different types of rights and what conditions should be created at the same time.

**Topic 6: Providing for and enforcing financial sanctions**

Fines are not provided for in the Act or prescribed rules but in some schemes can be an effective way to enforce the scheme rules. This topic takes students through the statutory and common law principles applicable to the creation and enforcement of such rules. It also explains the process of creating rules and bringing them into effect.

## Advanced Sectional Title Scheme Management

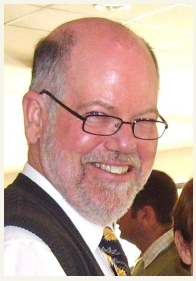
Registrations for the next UCT (Law@Work) Advanced Scheme Management Course close on the 25th of September 2009. The course combines 3 weeks of internet-based distance learning together with an intensive 3-day contact session in Cape Town.

**Course Dates:**

| | |
|---|---|
| Registrations close: | 25th of September 2009 |
| Course begins: | 5th of October 2009 |
| Course fee: | R7,000 (excl VAT) |

For further information contact Kate on 021 674 7818 or kate@paddocks.co.za.

# CAN SECTIONAL OWNERS IN ARREARS WITH LEVIES USE THE DEBTOR-PROTECTION PROVISIONS IN THE NATIONAL CREDIT ACT?



**By Prof. Graham Paddock**

Attorney Andries Landman of Wynberg drew my attention to Tertius Maree's article in Die Burger's 'Deeltitelforum'. The article is entitled 'Credit Act Developments Cause Concern' (Verwikkelings met kredietwet wek kommer). Some time ago Andries identified the possible application of the National Credit Act ('NCA') as a potential problem in collecting arrear levies. He now highlights Tertius' view that the NCA does not apply to levy recoveries and Tertius' advice to trustees not to raise interest on arrear levies, at least until a court has given a clear ruling on the subject.

In his article Tertius confirms that sectional title owners who fall into arrears with levies now frequently hide behind the credit consumer protection provisions of the NCA. He states that the National Credit Regulator ('NCR') has recently issued a directive confirming that sectional title levies are indeed subject to the NCA and he forsees dire consequences for schemes where owner's levy debts are re-scheduled, sometimes over a number of years, in terms of section 86 of the NCA.

Tertius points out that in terms of the definition of an 'incidental credit agreement' the provisions of the NCA only apply if interest or penalties are collected on arrear levies. This means, he says, that trustees can and should avoid the extremely punitive provisions of the NCA by not charging any interest on arrear levies until a court order has confirmed that the NCR is wrong and that the provisions of the NCA do not apply to levies. In support of his view that the NCA does not apply to the recovery of arrear sectional title levies, Tertius argues in his article:

1. There is no 'agreement', arrangement or understanding between the body corporate and owners - Tertius does not think that the liability for levies arises as a result of an arrangement or understanding that qualifies as an "agreement" for the purposes of section 1 of the NCA. In the process of raising levies, he sees no agreement between the owner and the body corporate, but only a legal relationship resulting from the provisions of the Sectional Titles Act and the management rules. While it is true that the decision of trustees to raise levies is a unilateral legal act, a counter-argument could be that trustees must base levies on a budget agreed to by owners at the annual general meeting.

2. There is no arms-length relationship between an owner and the body corporate - While he sees the relationship between a credit provider and a credit consumer as being one 'at arms-length', Tertius sees the relationship between a unit owner and the body corporate as being of a different kind, because the body corporate is made up of all the owners.

3. The body corporate does not deliver goods or services to owners - Tertius does not believe that the body corporate delivers goods or services as such to the owners but argues that instead it fulfills functions set out in the Act and scheme rules.

4. The obligation to pay interest on arrear levies is not based on an agreement - In Tertius' view the obligation to pay interest on arrear levies is based not on any agreement but on the provisions of management rule 31 (6) activated by a trustee resolution.

The idea that a body corporate should not raise interest on overdue levies is not an attractive one, primarily because it means that there is no financial penalty associated with an owner's failure to comply with what must surely be regarded as his or her primary obligation to co-owners, the duty to pay his or her fair share of common expenses on due date.

I contacted the National Credit Regulator's office, explained my interest in the industry and was soon contacted by Annemarie Friedman, a Senior Legal Advisor. She explained that the NCR cannot issue formal opinions or directives, but she was prepared to issue a non-binding opinion on the issues. The opinion I received indicated that it was not intended for circulation. I respect that condition and therefore will incorporate into this article only my conclusions drawn after reading that opinion.

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# CAN SECTIONAL OWNERS IN ARREARS WITH LEVIES USE THE DEBTOR-PROTECTION PROVISIONS IN THE NATIONAL CREDIT ACT?

*...from page 14* In dealing with the question of whether the recovery of sectional title levies payable by owners is governed by the NCA, the NCR will first ask whether or not there is in law a credit agreement or an incidental credit agreement between the parties. The principles it is likely to consider apply in this regard are:

(a) If there is no agreement to defer the payment date, there will be no credit agreement;

(b) If payment of the amount is deferred but no fee or interest is payable in respect of the amount that has been deferred, there will be no credit agreement;

(c) It will be considered to be an incidental credit agreement if it is an agreement in terms of which an account is tendered for goods and services that have been provided to the consumer, or are to be provided over a period of time on condition that a fee, charge or interest becomes payable if the amount charged is not paid before a certain date;

(d) The body corporate and the owner in arrears will be deemed to have made an incidental credit agreement after a certain lapse of time in terms of which interest or a late payment fee became payable when payment was overdue; and

(e) If the obligation to pay interest and collection charges arises by operation of law, it will not be considered an incidental credit agreement.

Accordingly, my view is that the best argument trustees can make to support the view that there is no credit agreement or incidental credit agreement between the body corporate they administer and owners in arrears is:

(i) there is no agreement to defer the payment date, so there is no credit agreement; and

(ii) section 37 of the Sectional Titles Act, 1986, in terms of which levies are payable, was made by Parliament and prescribed management rules 31(4), (4A), (5) and (6) contained in Annexure 8 to the regulations thereunder were made by the Minister, thus the owners' obligation to pay levies, interest and collection charges arises by operation of law and accordingly there is no incidental credit agreement.

Will these arguments convince a High Court judge to give a declaratory ruling to the effect that sectional title levy arrears are not the result of any type of credit agreement and that defaulting sectional owners are not entitled to the consumer protections under the NCA when a body corporate acts against them for recovery of overdue levies, interest and collection costs? I really don't know.

But I do know that if the protections afforded to credit consumers under the NCA are held to apply to property owners who are liable to contribute to the common expenses of a sectional title scheme, the managing agents and trustees who handle the day-to-day management of these schemes, as well as those who help to manage share-block schemes, homeowners associations and retirement developments, will - as a matter of urgency - have to learn how to deal with situations in which defaulting owners apply for debt review under section 86 of the NCA. Particularly in smaller schemes, non-payment of contributions by one or more owners can mean a cash-flow crisis that requires the trustees to raise special levies from the owners who are in good financial standing to raise the money necessary to pay scheme creditors.

While we wait for certainty, here is my non-accountant's "work-around" suggestion to avoid the problem.

Instead of focusing on interest or penalties as disincentives for late payment, how about substituting incentives for early payment?

The trustees could build a premium into the amount of the levies they declare (advance interest if you will) and then stipulate that the levies must be paid in installments and that those owners who make the scheduled payments on time will be entitled to substantial discounts, calculated at the same reasonable rate as interest has historically charged on late payments. If levies remain unpaid at year end, the trustees could then decide that conventional interest will be applied to any outstanding portion of the levy and accept that this might bring the debt within the ambit of the NCA. ▪

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# ABOUT PADDOCKS

Paddocks is a specialist sectional title firm that offers a range of sectional title training products.

Prof. Graham Paddock is the head of Paddocks, an authority on Sectional Title law and practice and an adjunct Professor at the University of Cape Town. He is the Project Manager and one of the lead consultants to the Department of Human Habitation in the restructuring of the Sectional Titles Act and the establishment of an Ombud Service.

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