MCS COURIER Issue No 34 September 2009

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

MCS COURIER IS BACK

After a considerable period of silence, MCS Courier is back on track and will continue to be distributed electronically to interested parties. It remains an ad hoc publication and will appear when noteworthy events occur that my contributors (Jacques, Ilse and myself), who sometimes tend to be otherwise occupied, can be moved to write about.

This is not an academic publication, but at the same time it is our goal to maintain a high standard and to express considered opinions. If readers disagree with our views, they are welcome to let us know. Keep it short though, to avoid being consigned to the recycle bin.

Here's hoping that you will find the present issue both interesting and informative.

Tertius

***

LATEST PROPOSED AMENDMENTS TO SECTIONAL TITLES ACT

Will these be the last?

A Bill with proposed amendments to the Act has been published in the Government Gazette of 17th August. These may be the last amendments prior to the Act being effectively split into three separate statutes.

It should be noted that, with the latest amendments, a substantial number of problems have been eliminated and uncertain aspects clarified, to the benefit of both conveyancers, on the one side, and administrators (trustees and managing agents), on the other. Some of the amendments merely address 'housekeeping' issues, such as gender equality and removal of defunct provisions.

It is likely that the proposed amendments will be confirmed by Parliament before the end of the year and this will elevate the Sectional Titles Act to a sharply honed instrument, facilitating almost every aspect of the industry. This is not to say that there will be no further amendments in future, but these are,

subject to one reservation mentioned later, likely to relate to changed circumstances rather than to remove ambiguities and other interpretational problems.

In this edition of MCS Courier only the changes affecting administrative issues are focussed upon. Conveyancing aspects will receive due attention in a future special issue for conveyancers, after promulgation of the amendments.

Administrators should be aware that the amendments discussed in this article, are published for comment only, have not yet been promulgated and are therefor not yet law. It is unlikely, however, that the Amendment Act will be substantially different to the Bill.

COURT ORDER TO RATIFY UNANIMOUS RESOLUTION CLARIFIED

This relates to the existing provision that an order of the High Court may be obtained to ratify a unanimous resolution where the body corporate is unable to obtain one on an important matter. This provision has always been effectively nullified by the remaining requirement of s (3)(c) that where the '*proprietary rights or powers of any member as an owner*' are adversely affected, the written consent of such member must first be obtained.

The latter qualification has now been removed, leaving the entire matter and the balancing of the various interests, in the discretion of the court.

EXISTENCE OF DOORS AND WINDOWS RECOGNISED

An enduring debate in sectional title management has been the determination of maintenance responsibilities in respect of doors and windows located in boundary walls of sections. One approach would have it that the exact placement of such features should be carefully measured to determine whether they fall within the median line or not.

It has always been the view at Tertius Maree Associates that this approach is impractical and leads to irrational results. Our approach, that the median line automatically deflects to the median line of the door or window itself and that such features are therefor always private property on the inside and common property outside, has now been vindicated by a simple amendment to s 5(5)(a) in terms of which any such feature situated in a boundary wall (or floor or ceiling) of a section, '*shall be considered to form part of such floor, wall or ceiling*.'

EXTENSIONS OF SECTIONS MADE EASY

It has always been an, unexpected, hugely expensive, and often insurmountable problem that, in order to extend a section in terms of s 24, the consents of bondholders over all units in the scheme had to be obtained. (This applies only in respect of deviations of more than 10%). Whenever bondholders were approached for such consents, they would refer the matter to their attorneys, resulting not only in delays, but in costs out of all proportion to the total costs of the proposed extension.

This problem would be multiplied and become a monster, particularly in larger schemes, in the event of a body corporate planning to rectify a number of unauthorised extensions simultaneously.

In terms of the proposed amendment, bondholders must be notified in writing of the proposed extension/s and, if not responded to within 30 days, such bondholders shall be deemed not to have any objection.

This is a hugely important amendment and will enable owners and trustees to address unauthorised extensions which have been neglected in the past because of the impracticalities of s 24. It is to be welcomed.

RIGHTS TO EXTEND EXTENDED

According to a proposed amendment to s 25 provision will be made for a developer to lengthen the time during which a real right to extend may be exercised, by agreement with the body corporate.

This agreement must be recorded in a bilateral notarial deed and must be concluded before expiry of the real right to extend, as recorded in the s 11(3)(b) certificate.

The provision does not specify which form of resolution is required by the body corporate to sanction such agreement. In terms of s 29(1) a special resolution is required to '*execute on their behalf a servitude or restrictive agreement burdening the land shown on the relevant sectional plan.*' In the absence of any provision to the contrary it should accordingly be accepted that the execution of a notarial deed referred to in the proposed amendment must be authorised by means of a special resolution of the members.

DEVELOPER TO PAY EXPENSES RELATING TO EXTENSION AREAS

In the past we have often pointed out the fact that developers had no obligation to contribute to the expenses, such as municipal rates and maintenance, in respect of areas of the common property reserved for future extensions. This inequitable situation has now been addressed by proposed amendments to ss 25 and 37.

In terms of the above a developer who is entitled to extend the scheme must make reasonable contributions to the body corporate as is estimated to be necessary to defray the costs of rates and taxes, insurance, and maintenance of the affected parts of the common property, including the use of '*electricity and water and other expenses and costs in respect of and attributable to the relevant part of parts*.'

According to the above, the determination is not necessarily dependent upon an agreement being reached between the developer and body corporate (although a determination by agreement is not excluded). Consequently such contributions are to be determined in the ordinary manner, namely by approval of a budget by the members at the annual general meeting, followed by a trustees' resolution.

Although the provision leaves a wide discretion, the determination must clearly be a reasonable one. Trustees should be careful not, for example, to include punitive determinations, which will lead to delays, litigation and possibly damages claims.

Following upon the above, a proposed amendment to s 25 requires that, similar to the familiar 'levy clearance certificate' the Registrar may not register a

cession of a real right to extend without a certificate that all monies due to the body corporate in respect thereof, have been paid.

SPECIAL LEVIES RECEIVE SPECIAL ATTENTION

Previously so-called 'special levies' were ignored in the Act and matters relating thereto were relegated only to Standard Management Rule 31.

In addition, the provisions of s 37(2) were not entirely clear as to when levies are payable, whilst SMR 31(3) stated that ordinary levies must be payable in instalments as determined by the trustees.

In terms of the proposed changes to s 37 these uncertainties are clarified by providing that ordinary levies, rather than becoming due and payable on the passing of a trustees' resolution, in fact accrue as from the date of such resolution – obviously in such instalments as are determined by that resolution.

As far as special levies are concerned, apart from being recognised in s 37, they are distinguished from ordinary levies in that they become due on the date of passing the apposite trustees' resolution.

NEED FOR TRI-PARTITE AGREEMENTS ELIMINATED

A further very important proposed amendment to s 37 will eliminate the need to enter into a tri-partite agreement at the time of change of ownership in order to ensure the continued flow of levies.

In terms of the proposed amendment, recorded as a proviso to s 37(2), the new owner will automatically become liable for his/her share of the annual levies as from the date of registration of transfer.

USE OF USE AREAS RESTRICTED

The purpose for which a section may be used is currently restricted to the intended purpose (if any) indicated on the sectional plan of a scheme. The fact that the usage of exclusive use areas was not similarly restricted has been an enduring oversight in the Act. This is now being rectified with an adjustment to s 44(1)(g).

The Sectional Titles Regulations Board is to be commended on a job well done by introducing these necessary adjustments. In my view one major 'evolutionary step' remains to be introduced to make the Act as perfectly balanced as it can be, namely the introduction of a requirement for the filing of a prospectus for new schemes by the developer. This is something which should be tackled as soon as the Act is 'split' and the responsibility to oversee the administrative aspects of the legislation is assigned to the Department of Human Settlements (Department of Housing)

Tertius

TRUSTEES FACE TOUGH TASK

And the hurdles just keep a-coming . . .

By any standards the task of being an effective trustee or managing agent of a sectional title body corporate in this 21st century is no easy burden. Between day-to-day administration, arranging and preparing for meetings, preparing budgets, attending to complaints, dealing with transgressions of rules, maintenance issues, unauthorised structures, chronic levy defaulters, and stray pets, trustees have little time to keep track of other developments which affect their functions and powers.

Unfortunately they neglect these 'other' issues at their peril.

As far as the legislature is concerned, it seems that, once having given trustees the necessary administrative tools to do their job, it now seems intent upon taking them away again. I refer specifically to the National Credit Act which allegedly applies in respect of sectional title levies, the bottom line of which is that regular levy payers must subsidise the non-payers because, ag shame, they are the only ones who are suffering.

The difficulties facing trustees are sometimes also aggravated by court decisions, such as the Jaftha case in which the constitutional principle of each citizen's right to access to a home is upheld.

I have no axe to grind with the Jaftha decision which requires that due process must be followed before a debtor's home is sold in execution in order to ensure that the constitutional right is not infringed without consideration of certain factors.

But it is clear that certain magistrates have used the Japhtha case as a blunt weapon to frustrate trustees in their efforts to recover arrear levies. A case in point is the trustees of the Sunninghill Park body corporate in Port Elizabeth, who instructed their attorneys to recover arrear levies of R 6 599,38 from the owners of a unit in the scheme. Because no movable assets could be found, the body corporate applied for the issue of a warrant of execution against the unit itself, in compliance with the procedures laid down in the Jaftha case and s 66 of the Magistrates' Court Act. In dismissing the application for a warrant, the magistrate in his written reasons uttered the following insightful wisdoms amongst many others:

> *"This is an equivalent of the abuse of court process which has caused the Constitutional Court to make a ruling in an endeavour to put a stop on this conduct."*

And later:

> *"The whole system of body corporate is not in harmony with our constitutional setup because it is a business and a genuine one, but is a systematically way of dispossessing people housing whilst it is constitutional correct to have every citizen in South Africa a house to stay in.*
>
> *Secondly the ruling was given and all aspects were considered and to dismiss the application was the only option because by the look of the things this application is an attempt to overrule the Constitutional Court decision because our local practitioners are not prepared to adhere to the prescribed procedure. For reasons unknown because they were either there personally or in their representative capacity."*

(Quoted verbatim from the review report of the High Court)

Ex Africa semper aliquid novum

The matter was taken on review to the Eastern Cape Division of the High Court and, in setting aside the magistrate's ruling, judge Plasket had this to say:

> *"It is clear that the* (magistrate) *has taken no care at all in formulating his reasons. He has simply thrown together a jumble of words without a jot of intellectual rigour, attention to detail or care that can legitimately be expected of a public official exercising judicial power."*

And later:

> *"To accuse the applicant of an abuse of court process and to equate its conduct with that of some of the respondents in Jaftha whose conduct attracted the criticism of the Constitutional Court, is as misguided as it is unfair.*
>
> *The passage I have quoted illustrates a lack of understanding on the part of the* (magistrate) *of the issues before him, the import of the Jaftha decision and the applicable constitutional provisions. Once again, this passage is so sloppily drafted that, in places it is impossible to fathom what the* (magistrate) *is trying to convey.*
>
> *There is simply no possible basis upon which the* (magistrate) *could conclude that the 'whole system of body corporate' is constitutionally objectionable and that is 'a systematically way of dispossessing people housing' The hostility towards the applicant* (body corporate) *evident from these assertions appears to be based – to put it bluntly – on uninformed conjecture.*
>
> *I am at a loss to understand what the (*magistrate*) meant by the sentence quoted above, namely:*
>
> > *'For reasons unknown because they were either there personally or in their representative capacity.'*
>
> *I am also at a loss to understand what the relevance of this statement may be. As with the other aspects of the* (magistrate's) *reasons, the passage that I have quoted above is illustrative of the objective irrationality of the* (magistrate's) *conclusions.'*

And so forth. This may be an extreme example of a magistrate's attitude toward a legitimate attempt to recover unpaid levies, but it does reflect a widespread lack of sympathy amongst magistrates for the troubles of bodies corporate, partly due to pressures of work, but mostly because of an intrinsic lack of insight in matters sectional title and the real need of bodies corporate to be able to recover unpaid levies.

For the above reasons, there is, for example, a growing tendency towards accepting without questioning that the National Credit Act applies to sectional title levies and that such matters should be referred to a debt counsellor to initiate debt review proceedings. Quite apart from compelling arguments against such interpretation, imagine what the practical effects would be on body corporate administration if a substantial number of its owners apply for debt review and their levy payments are rescheduled. In worst cases it could lead to insolvency of the body corporate.

Three conclusions arise from the Sunninghill spectacle and the continuing further developments affecting sectional title management: First, trustees should entrust their levy collections to an attorney who is well versed in the ever-changing complexities surrounding these matters. Second, the day-to-day management of sectional title schemes require a high degree of knowledge and professionalism. These skills are seldom found within the community of owners in a scheme. Larger or more complex schemes are well advised to appoint an effective managing agent.

Ex Africa semper aliquid novum

And lastly, we should thank the magistrate concerned for fumbling the ball to the extent that he has. This has necessitated a High Court review which has clarified some issues regarding section 66 of the Magistrates' Court Act and have made the task of attorneys dealing with the recovery of arrear levies slightly easier.

Tertius

BARKING DOG CAUSES NUISANCE

Over the past few decades rising costs and security concerns have lead to a decrease in the size of properties. Cluster housing developments and apartment buildings have literally mushroomed all over South Africa. However, people still have the same desire to keep pets. Because we are all living closer to each other the sounds we or our pets make become more and more of an issue to our neighbours.

Sectional title schemes all have rules regarding the keeping of pets. The standard rule provides that a pet may be kept with the written consent of the trustees, who may impose conditions. Trustees may not withhold their consent unreasonably. It often happens that trustees grant consent upon condition that the pet does not cause a nuisance to other owners or occupiers.

Many bodies corporate have adopted special rules that allow for the imposition of fines if owners transgress the rules. If there is no provision for fines the only remedies left for the body corporate are arbitration or an application to court.

So you live in a sectional title scheme consisting of semi-detached houses, each with its own little garden area. You work normal working hours and own a beautiful golden retriever called Sparky. You have permission from the trustees to keep Sparky provided that he does not cause a nuisance to other owners. Other owners also have dogs. Everything appears to be fine, Sparky barks a little at the refuse collectors, roaming security guards or other passers-by but so do all the other dogs. Everything appears to be hunky-dory.

Enter Mr Sensitive.

Mr Sensitive does not particularly like dogs and more specifically barking irritates him. He is surrounded by dog owners and non-dog owners. He is at home during the day.

Mr Sensitive has made it his mission in life to rid himself of the nuisance caused by the barking dogs of other owners. Every month he writes a letter to the managing agent to complain about the barking dogs, including Sparky, around him. The managing agent immediately responds by writing you a letter warning that a fine will be imposed if Sparky continues to cause a nuisance to Mr Sensitive. In total five owners bare the brunt of Mr Sensitive's complaints.

What do you do? Sell your unit? Quit your job? Get rid of Sparky?

What is the problem with the scenario that I have sketched above? Well, firstly, one has to acknowledge the fact that dogs bark. It is normal behaviour. It is also one of the reasons why people acquire dogs. You want them to bark to warn you and to scare off

intruders. If you allow dogs in a development or scheme they will make a noise. So when does barking become a nuisance?

Secondly one should look at the action being taken. Can a fine be issued against the owners whom Mr Sensitive has complained about? What should the managing agent or trustees do when faced with such a scenario?

There is not much one can do regarding a barking dog save for taking reasonable precautions to prevent it. The most effective manner to stop the barking is by telling the dog not to, but for this someone has to be with the dog. In order to determine whether a particular dog causes a nuisance one needs to look at the specific circumstances.

Most of us work during the day during which time our pets are alone at home. We sleep at night. It is generally accepted that one should remain quiet at night. During the day we can mow our lawn, drill holes or builders can attend to building activities. It is generally accepted that we can make more noise during day time hours. The same principal should apply to barking dogs. Most dogs are alone at home when we work and they will bark. At night, when we are at home, or over weekends, it is expected of us to keep our dogs and their barking under control.

Once the managing agent or trustees receive a compliant they should consider the merits thereof. The complaint should provide enough detail regarding the alleged nuisance such as the times when it occurred as well as the identity of the culprits. The most important factor to consider, however, is the personality of the complainant. The test for nuisance is an objective one measured against the reasonable owner. A complaint received from an overly-sensitive, touchy or irritable person does therefore not necessarily constitute a valid complaint. The question to ask is whether the reasonable owner would have considered the barking a nuisance.

I believe that in most cases complaints about barking dogs are received from overly sensitive persons such as Mr Sensitive. In such cases it would be unfair for the trustees to issue a warning or a fine. It is important that every case should be considered on its merits. If possible the trustees should offer suggestions in order to alleviate the perceived nuisance.

The practice whereby a letter is ‘automatically’ sent to an owner once a complaint is received without properly considering the allegation as well as the personality and circumstances of the complainant is not only wrong but deplorable and can only lead to further aggravation of the matter.

In the case of Mr Sensitive the trustees should have, when the complaint was received, informed him that, objectively speaking, they are not of a view that his complaint has merit.

Jacques

(An unrehabilitated dog lover - Tertius)

Minor use areas are NOT negotiable !

I've said it before and I'll say it again.

You may be excused if you are somewhat confused by the heading to this piece, and I agree - an explanation is called for.

In my opinion the language of sectional titles should be kept simple and often-used expressions should be kept short. Clarity should at the same time be strived for in order to avoid misunderstandings and time wasted on intricate explanations.

In furthering my personal crusade for brevity, I prefer to use the expression 'use areas' rather than 'exclusive use areas' as the shorter term is entirely adequate without giving rise to confusion or serious misunderstanding.

Use areas may be established in one of two ways:

(1) As a real right to a part of the common property indicated on a sectional plan and held under a notarial deed of cession of exclusive use area; or

(2) By adopting a special rule in the manner prescribed in section 27A of the Act.

There is actually a third variety of use areas, namely ones that were established in the rules under the regime of the 1971 Act.

It seems so unnecessary to repeat the entire description (yawn) whenever one wants to refer to one of these. Accordingly, I have developed the habit to refer to the three varieties as real use areas, minor use areas, and historic use areas respectively.

Real use areas offer the advantage of conferring a real right capable of being mortgaged and ceded by notarial cession. This also means that Owner A is able to 'sell' his parking bay to Owner B, which is effected by a notarial cession and Owner B becomes the legal holder of the real right to that parking bay. But real use areas are, in the normal course of events, somewhat cumbersome: In most cases a cession of a real use area will follow the transfer of the related unit. The cession and registration procedure not only entails additional costs, but holds the risk that the parties may forget about the cession when a unit is being sold. This could result in difficult problems if the previous owner cannot be found when the error is discovered.

Minor use areas offer the advantage that they are automatically assigned to the new owner of the related unit when transfer occurs, without any costs or special procedures being involved. But they cannot be freely ceded or transferred between owners as in the case of Owner A and Owner B above. The reason for this is that minor use areas are established and assigned to owners by the adoption of a special rule, incorporating a plan to scale and, importantly, a schedule in terms of which the use areas are assigned to specified sections. The establishment and assignment take effect when the special rule is filed at the Deeds Registry. This means that it cannot be assigned to an owner of another section in the scheme without having to change the schedule, which is tantamount to an amendment of the rule itself and would therefore require a unanimous or special resolution, depending on whether the management or conduct rules have been used to create the minor use area.

Accordingly, rights to minor use areas cannot be exchanged between existing owners in a scheme by means of an agreement between the parties, or by any other means other than a proper rule amendment.

Minor use areas are not negotiable.

There, I've said it again.

Tertius

DETERMINATION OF LEVIES AND INVOLVEMENT OF THE TRUSTEES

Trustees are very much involved in the process of the determination of the levies payable by the members of a body corporate.

The functions of the trustees with regard to levies can be briefly summarised as follows:

- to determine ordinary levies;
- to increase the ordinary levies after the end of a financial year until the new budget is approved;
- to determine special levies when required; and
- to determine and require owners to pay additional levies in respect of their use areas.

The processes involved in respect of the determination of levies and the related functions of the trustees entail the following:

ORDINARY LEVIES

Once the members of the body corporate have approved the estimate of income and expenditure (the budget) of the body corporate for the ensuing financial year, it is the function of the trustees to apportion the budgeted amount to the members in accordance with the participation quotas of their sections (or such other formula determined in terms of section 32(4) of the Act). Once they have calculated the apportionment, levies are fixed by a trustees' resolution and become due and payable in such instalments as determined by the trustees as part of their resolution. The trustees must notify the owners accordingly.

INCREASED LEVIES

In terms of the recently prescribed Standard Management Rule 31(4A), the members of a body corporate should upon expiry of a financial year and until a new budget is approved for the ensuing financial year, continue to pay the same ordinary levies to the body corporate than as for the expired financial year. But the trustees have the authority to increase the ordinary levies payable by the members by a maximum of 10 percent, and should the trustees resolve to determine increased levies, they should notify the owners accordingly. Such increased levies shall be payable until the new budget for the ensuing financial year is approved.

SPECIAL LEVIES

The function of the trustees do not end here, but the trustees also have the authority to impose special levies upon members in respect of any shortfalls in the budget for a financial year, and such special levies may be made payable in one sum or by such instalments and at such time or times as the trustees shall think fit. Special levies are

also apportioned to owners in accordance with the participation quotas of their sections or such other formula determined in terms of section 32(4) of the Act.

ADDITIONAL LEVIES

Another function of the trustees is to require owners with rights of exclusive use of a part or parts of the common property to make additional contributions to the body corporate in respect of insurance and maintenance and other expenses related to their exclusive use areas. Such additional levies are also due and payable upon the adoption of the trustees' resolution. The budget in respect of a financial year should include the income and expenditure with regard to exclusive use areas as a separate budget item.

The amount required in respect of exclusive use areas should be apportioned to the owners with exclusive use areas in proportion to the actual estimated costs related to each exclusive use area. I further suggest that the trustees should keep the levy income relating to exclusive use areas in a separate bank account, which account should only be utilised for expenditure related to such exclusive use areas. Should extensive repairs be required to an exclusive use area, for instance in respect of a balcony with a structural defect, and the budget is insufficient in this regard, then the costs related to the repairs should be recovered from the owner concerned as an additional levy.

Ilse

IMPORTANT NOTICE

SECTIONAL TITLE e-LEARNING COURSE

Presented by IEASA and Tertius Maree Associates

Important dates:	1 September 2009 – Registrations close.
	4 September 2009 – Course starts.
Course duration:	23 weeks including a workshop and exams.
Who should enlrol:	Owners, trustees, managing agents, attorneys, or any other persons wanting to know more about Sectional Titles.
Costs:	R 6 000 per person with a 20% discount for groups of three persons or more from a single body corporate, firm or company.
Where:	Nationwide

To register/find our more log into www.ieasawcape.co.za or contact Lee-Ann at 021 531 3180

***