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

THE PEAKS DECISION

In a recent case in the Cape High Court, the body corporate of The Peaks sectional title scheme applied for the sequestration of the owners of a unit whose arrear levies amounted to R 110 752.

It is significant that, at this point in time, the body corporate had already obtained judgment for a portion of the levies in the Magistrates Court and that liability for payment of the levies had been acknowledged by the owners' legal representatives on several occasions.

The owners, the executor in the deceased estate of a mr Spassov and his surviving spouse, opposed the application on various grounds, including that there was no *prima facie* proof of a liquidated claim against the owners of the unit, due to the fact that the levies claimed had not been determined by means of a trustees' resolution as required under section 37(2) of the Sectional Titles Act. The absence of such resolution was acknowledged by the applicant's advocate but it was argued that, due to numerous admissions and offers to settle by the owners' legal representatives, the owners were now prevented by estoppel from raising the illegality of the levies claimed.

Judge Meer considered various authorities on the point and came to a conclusion that estoppel can never be applied in order to endow validity to something which is rendered illegal by operation of statutory or common law.

Due to the absence of the necessary trustees' resolution, levies were not legally determined and were not due and claimable in law. Accordingly the application for sequestration failed.

(*Judgment in the case of The Body Corporate of The Peaks Sectional Title Scheme v Spassov was handed down on 20th September 2012. It has not yet been reported*).

Tertius Maree

CAVEAT

The function of the members to approve a budget does not include the power to determine levies.

Trustees, on the other hand, should also refrain from abdicating their decision-making powers in respect of both ordinary and special levies in favour of 'democratic' decision-making by the members.

In terms of section 37(2) there simply are no levies without a trustees' resolution.

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IS THERE A CAP ON INTEREST RATES FOR ARREARS?

Standard Management Rule 31 (6), prescribed under Annexure 8 to the Act, allows the trustees to determine an interest rate and to recover such interest on arrear amounts due to the body corporate by an owner. Normally the interest rate is determined at the time when the levies are determined, but trustees are not prevented from determining or changing the interest rate at any time. As in the case of levies, the determination of a rate of interest requires a trustees' resolution. A resolution made by members at a general meeting will not suffice, although members are probably entitled to direct the trustees in this regard.

The ability to determine and collect interest is the device provided by the rules to discourage non-payment of levies and to compensate the body corporate for resultant losses. Trustees should not resort to other methods such as the imposition of penalties for this purpose.

The power to determine a rate of interest is seemingly not qualified by any extraneous law, but it is accepted that the *in duplum* rule applies which, simply put, limits the amount of interest recoverable to the unpaid balance of the capital. This, however, does not limit the rate of interest which may be applied.

In terms of section 1(2) of the Prescribed Rate of Interest Act (PRIA) the current prescribed rate of interest is 15,5% per annum.

In determining an appropriate interest rate, it should be considered at which rate the body corporate would be able to borrow money in lieu of unpaid levies, in order to enable it to fulfil its prescribed functions. Measured according to this standard, the prescribed interest rate of 15,5% is clearly inadequate. The question is accordingly whether PRIA applies to interest on sectional title levies or not. In this regard the authorities are not entirely conclusive.

The conclusion in *Body Corporate of Lynwood Gardens v Yegi* was that PRIA did not apply, but this was based upon the fact that the determination of interest was regarded as an 'agreement' having been determined by the owners at a general meeting. As mentioned, I am of the opinion that such determination is not allowed.

In *Mitchell v Beheerliggaam RNS Mansions* it was ruled that compound interest in respect of arrear amounts due to a sectional title body corporate is allowed. In effect this means that a rate higher than 15,5% is allowed. Prof van der Merwe (Sectional Titles, Share Blocks & Time Sharing, Vol 1 p 9-10(3) criticises this decision on the basis that to allow compound interest would thwart the *in duplum* rule. I cannot agree with this as the *in duplum* rule could still be applied whatever method of calculation is used and whatever the rate of interest may be. The fact that interest is 'capitalised' does not render it impossible to distinguish between capital and interest.

PRIA seems to have been enacted to provide a rate of interest where none has been provided otherwise. I do not see its purpose as placing a limitation on rates of interest. In my view this can be concluded from the ambit of the act as set out in section 1 which describes it as rates of interest *not governed by any other law or by an agreement or a trade custom* <u>*or in any other manner*</u>.' This is very wide and the intention seems to come to the assistance of creditors who have neglected to stipulate a rate of interest.

Accordingly I am of the view that the *in duplum* rule is the only limitation applicable to interest levied upon owners in respect of amounts mentioned in Management Rule 31(5) and (6).

Tertius Maree

MAY TRUSTEES CONCLUDE RESOLUTIONS BY E-MAIL?

Recently the various ways of communicating offered by technological advances have begun to penetrate the sectional title environment, mostly to good effect. These new methods relate typically to the dispatch of notices to members in respect of general meetings and the transmission of ancillary documents.

The giving of notice of, and procedures at, trustees' meetings have always been allowed to be somewhat more less formal than at general meetings. However, trustees should beware of becoming too casual about their meetings. The minimum requirements for notice should always be complied with.

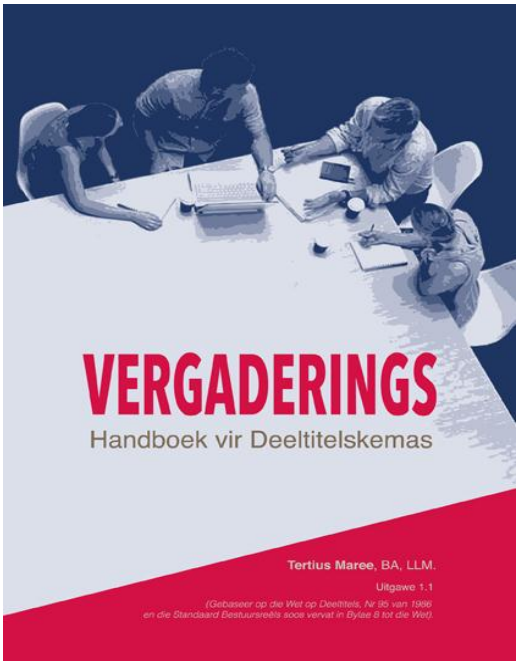
Particularly at leisure schemes where trustees often reside at different locations, a type of *round robin* e-mail practice has developed for holding meetings and making resolutions. The chairman may propose a particular resolution to all trustees by e-mail. An e-mail conversation may then ensue, involving an exchange of ideas and resulting in a 'resolution' being agreed upon. Does this constitute a valid trustees' resolution?

It is necessary to return to the basic meaning of what a 'meeting' is supposed to be, namely a gathering of known persons in order to make authorised decisions. Accordingly, to be able to qualify as a proper meeting at which valid resolutions can be made, it must be possible to establish the identities of the attendees without any doubt.

I doubt that a round robin meeting by e-mail qualifies as a proper meeting. To be on the safe side, it is accordingly recommended that, having concluded their e-mail discussions, a formal written resolution or resolutions be sent to all trustees for signing and returned to the body corporate's *domicilium* address, to have the signed resolutions on record, in compliance with the provisions of Management Rule 24.

Tertius Maree

NUUT!



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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 900 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 several institutions. 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 Ilse Kotze, and a dedicated staff of long standing.

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