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

BUILDING ALTERATIONS BY OWNERS

This article is loosely based upon a seminar presented to STASWEST during March 2014

When dealing with alterations to the comma property by owners of sections in a sectional title scheme, there are three important points to keep in mind:

(1) Alterations or improvements by owners do not equate to improvements to the common property effected by the body corporate, even if such 'private' alterations should affect the common property. Accordingly the provisions of Management Rule 33 in respect of luxurious and non-luxurious improvements do not apply.

(2) Trustees do not have superpowers to issue consents left, right and centre in respect of any request that comes their way. Before they consider a matter they should check by which provisions, if any, of the Act or the rules the particular situation is regulated, whether in fact the trustees are endowed with powers, and what the requirements are.

(3) Municipal approval of a building alteration, if applicable, is only one of the requirements with which an owner must comply. The approval of a building plan does not lend *carte blanche* to an owner to proceed with his project. This misconception stems from a continuing misconstruction that the municipality is the supreme authority in respect of sectional title schemes, whereas the body corporate in fact is. Of course the body corporate does not exercise such authority in a vacuum but within the parameters set by the Act and the rules.

Here is a list of typical 'private' alterations by owners, indicating whether or not trustees have authority to grant consent:

(a) Extensions of Sections **NO**

(b) Closure of Balconies (Part of Section) **NO**

(c)	Internal alterations, not affecting PQ	**NO**
(d)	Structures on Exclusive Use Areas	**YES**
(e)	Chimneys, flues, ducts, plumbing, wiring	**NO**
(f)	Minor external fixtures (locks, burglar bars, safety gates, screens)	**YES**
(g)	Other external fixtures (TV dishes, air conditioners, awnings, etc.)	**NO**
(h)	Subdivision / consolidation of sections	**YES**

So, what are trustees to do when confronted with a proposed (or completed!) alteration and they do not have the required authority to grant or refuse consent?

- In 'slightly edited' format, section 35(1) of the Act states that *A scheme shall as from the date of the establishment of the body corporate be controlled and managed, subject to the provisions of this Act, by means of rules.*

If such principle is adhered to, as it must, it means that if it is required that the trustees should have authority to deal with something, and the Act or the rules do not provide such authority, an appropriate rule should first be formulated and adopted.

In most instances the Conduct Rules would be the appropriate location for such rules, for which only a special resolution is required for their adoption.

(a) **Extension of a Section**. Procedures for the extension of a section may be summarised as follows:

Step 1. Application, accompanied by draft plans and specifications. Determination of conditions to be imposed. Framing of the draft special resolution. Notice of meeting to members.

Step 2.General meeting, deliberation and adoption of special resolution, including imposition of appropriate conditions.

Step 3. Municipal approval of building plans.

Step 4. Physical alterations - construction stage.

Step 5. Survey; preparation and approval of draft sectional plan of extension of section.

Step 6.Conveyancing; preparation of application for registration, procurement of bondholders' consents.

Step 6. Registration at the Deeds Registry.

Step 7. Implementation of adjusted participation quotas and determination of adjusted levies.

Step 8. Negotiate and arrange adjustments to insurance cover.

(b) Balcony Closures.

Is an appropriate rule in place? IF not, a rule should first be framed and adopted. Different criteria may apply depending upon whether the balcony is a part of the section or an exclusive use area. The nature and effect of the proposed closure must then be considered. Will the balcony space become capable of being utilised as an ordinary room eg a bedroom. An alteration of such nature should not be allowed. To determine potential usage, various aspects should be considered, including the materials used, finishes, and other physical aspects of the enclosure.

The impact upon neighbours is an aspect, which should not be neglected. Similarly the aesthetic impact of the proposed closure is a factor which must receive due consideration.

(c) Internal Alterations

Internal alterations should not go unregulated and if appropriate rules are not in place, this should first be attended to. Aspects to consider for such a rule include the following:

- Plans and specifications should be submitted.
- Will weight-bearing walls be affected?
- Is municipal approval of building plans required?
- Conditions regarding time-frame, hours of work, access, noise, rubble removal, etc.

(d) Structures on Exclusive Use Areas

This is already regulated by the Management Rules and the introduction of a special rule is therefore not strictly required. Such alterations could nevertheless benefit from a general rule regulating construction work.

Management Rule 68(1)(vi)states the following:

An owner –

> *Shall not construct or place any structure or building improvement on his exclusive use area without the prior written consent of the trustees, which shall not be unreasonably withheld (provided that) the provisions of section 24 and section 25 or other relevant provisions of the Act or the rules will not be contravened.*

(f) Minor External Alterations

Standard Conduct Rule 4 regulates the following types of alterations:

- *Locking device,*
- *Safety Gate,*
- *Burglar bars or other safety device,*
- *Insect / animal screen*.

The rule is not sufficiently comprehensive and would benefit from an augmentation to include the aspects mentioned in the **next part.**

(g) Other External Alterations.

To optimize utility of the rule, an extended Conduct Rule 4 should be adopted making provision for items such as:

- *TV dishes*
- *Air conditioners*
- *Awnings*
- *Balcony enclosures*
- *Chimneys and flues*
- *Building projects affecting the interiors of sections.*

(h) Subdivision and Consolidation of Sections

Although trustees do have powers to grant consent for such exercises, these activities necessarily include a certain amount of physical building activities, which must also be regulated. Although trustees would be entitled to link conditions to their consent, an extended Conduct Rule 4 would also be of benefit in this respect.

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LEVY DEFAULTERS

May penalties be imposed for arrear levies?

A disturbing tendency has taken root to penalise owners who have fallen in arrear with their levy payments by the imposition of a fine.

At the outset it must be understood that a penalty or fine can only be imposed for a breach of a rule or statutory provision on the basis of a sound, specially drafted rule which has been adopted and filed and which provides for all the elements required in terms of the Promotion of Administrative Justice Act, which in a nutshell entail a fair hearing, including an opportunity for the offender to present his or her case. In the absence of such rule and due procedure, any fine imposed would be unlawful.

And of course it is of little to use to have a well-considered rule in place and simply ignoring its prescripts as regards procedures when imposing fines in practice, something which happens with puzzling frequency.

But a penalty or fine is in any event not the appropriate method whereby a levy defaulter should be dealt with because Management Rule 31 already provides an effective and more appropriate technique, namely the charging of interest on arrears. To do this, rule requires a trustees' resolution, preferably at the time of determination of the levies, although the resolution may be adopted and the rate imposed at any time.

Although there is no statutory limit applicable and it is permissible to raise compound interest, a rate of 15,5% per annum is recommended.

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LEARNING TO COUNT: PART 2

Everything is not as it seems

In issue No 41, I made the point that one can easily be confused by the different counting requirements prescribed for establishing a quorum and for counting votes:

"*Sometimes even the experts need a 'second take' and may even differ in their opinions*."

In that article I argued that when counting the votes for a special resolution, the votes must be counted according to value (aggregate participation quota) as well as the number of members (not units). The argument was based upon the definition of 'special resolution' in section 1 of the Act which refers to the number of members and the fact that a person can only be one member, irrespective of the number of units held by him, her or it.

How does this argument stand up to the fact that Management Rule 62 clearly states the on a show of hands an owner shall have one vote for each section owned? The point here is of course that a special resolution will always be conducted by poll in order to calculate the values of votes, and MR 62 would accordingly never apply in respect of a special resolution.

In the article it was also pointed out why, from a minority protection point of view, it is desirable to count such votes by number rather than number of units.

While on this subject, the immediate neighbour of MR 62 deserves to be looked at in view of the confusion it often causes to owners and trustees:

"63. For the purpose of a unanimous or special resolution (with or without a ballot), or on a poll, the value of the vote of the owner or owners of a section shall be reckoned in accordance with a determination made in terms of section 32(4) of the Act or, in the absence of such determination, in accordance with participation quotas."

The wording of this rule raises several questions.

Firstly, how are participation quotas relevant to the counting of votes for a unanimous resolution? The answer is not at all, except for the purposes of determining a quorum. Once a quorum has been established, a unanimous resolution needs to be simply unanimous irrespective of participation quotas. In this respect the wording of the rule is somewhat misleading.

Secondly, can a special resolution be conducted without a poll? The answer here is 'no' except perhaps in very small schemes where the values of votes (participation quotas) are obvious and known to all, and the calculations very simple.

The third question is what is a poll if not a ballot? It is generally accepted that there are two voting procedures available at meetings, namely by a show of hands and by expressing a member's vote in writing on a ballot paper. (I have, for the purposes of argument ignored the possibility of counting according to special formulae which may have been determined in terms of section (32)(4)).

When looking at the Afrikaans text this particular issue is immediately clarified:

> *"63. Vir die doeleindes van 'n eenparige besluit of spesiale besluit (met of sonder stemming per stembrief word die waarde van die stem van die eienaar of eienaars van 'n deel bepaal in ooreenstemming met . . . . "*

According to this text the value of a vote in for the purposes of a special resolution, and to determine a quorum for a unanimous resolution, as well as for counting votes for an ordinary resolution conducted by poll, is counted in accordance with participation quotas. If this interpretation is correct, the wording of the English text is unnecessarily befuddling.

Tertius Maree

VALUE ADDED TAX: HOME OWNERS' ASSOCIATIONS AND SECTIONAL TITLE BODIES CORPORATE

By Clint Riddin

I have previously written about why a homeowners' association, whether a non-profit company or by virtue of a constitution or a common law association, needed to register as a VAT vendor where the annual levies exceeded R1m annually.

The VAT Act listed those entities relative to housing developments that are exempt from registering as a VAT vendor even though turnover exceeds the threshold, which list excluded home owners' associations.

The reason for this was set out by SARS and in summary was that owners in individual residences pay their rates, which is an exempt supply, individually to the local authority,

but in the schemes listed in the exemptions below, the scheme which represented the co-owners was liable for the rates. The exemption was therefore aimed at the equal treatment of property owners by ensuring that VAT is not levied indirectly on property rates, which was often the largest single cost item to be covered by levies. It followed, in SARS' view, that an inequity would be created if the services of home owners associations were included in the exemption.

A few years ago the various local authorities started charging rates to the individual owners and so the rates part of a scheme's budget and therefore levy was removed. It was then feared that SARS would remove the exemption in section 12 of the VAT Act for a body corporate, as this was now more aligned to the homeowners' association in terms of levies and rates structure.

Thankfully is seems that SARS has changed its views on this matter and has rather included a homeowners' association in the exemptions under section 12 of the VAT Act, Act 89 of 1989. The changes come into effect as from 1 April 2014. As with a body corporate it must be noted that homeowners' associations can also voluntarily register as a vendor; this would be advantageous to homeowners' associations where the scheme is commercial of nature and where owners could claim input VAT, as they would probably also be VAT vendors.

This also means that homeowners' associations which are currently registered may elect to continue as before if it is felt that there is a benefit to them. Otherwise it would make sense to de-register as a VAT vendor, but remember that there will be a recoupment of any capital input VAT claimed and this would have to be paid over to SARS before the final de-registration takes place.

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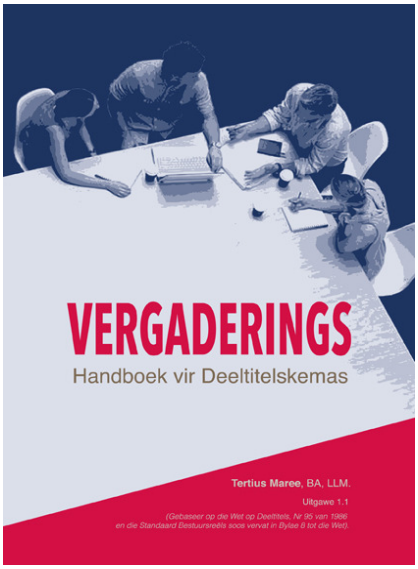

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Rig navrae en bestellings aan rosie@section.co.za

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Tertius Maree Associates

Merlot House
Brandwacht Office Park
Trumali Road
STELLENBOSCH

PO Box 12284
DIE BOORD
7613

Tel: 021 886 9521
Fax: 021 886 9502
e-mail: tertius@section.co.za