



## AFFORDABLE HOUSING FOR THE PREVIOUSLY DISADVANTAGED

### *Where are we going?*

Catching up the backlog of housing for families who were previously excluded from the housing market by racially-based laws is proving to be a formidable task.

One obvious challenge is the fact that any successful housing project will simply attract more home-hunters to a particular area. The resulting pressure is almost overwhelming and is a result of the 'damming-up' effect of past racial laws which prevented urbanization taking place at a more natural pace and according to a more structured pattern.

In pursuance of the constitutional objective to promote access to adequate housing for the previously disadvantaged, municipalities have embarked upon a strategy of making rental housing, previously owned by local authorities, available for full ownership by the tenants.

In addition to the initiative by municipalities, banks are also entering the arena of affordable housing by making mortgage finance available on a broad front. In both cases, a large proportion of the housing accommodation will be in the sectional title format.

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Generally speaking these are admirable ventures. Not only do they seek to give substance to the directives of our Constitution, but the provision of housing to the previously disadvantaged segment is a key factor in ensuring balanced socio-economic growth on a national level.

For the last-mentioned reason it is of vital importance to everyone, not only the beneficiaries of such projects, that the national housing objective, and any individual project to provide affordable housing, must in the end be successful: The government, local authorities and citizens, including 'established' home-owners, will not attain social and political stability, if the national venture to furnish tenure-secured housing should fail.

How should 'success' be measured within this context? And are we on a clear road to success, or are existing and planned initiatives doomed to fail?

Success should not only be measured according to the numbers of housing units supplied. Ultimately it should be measured with reference to the long term benefits generated for the recipients.

In other words: The provision of tenure-secured housing for the previously disadvantaged must be converted into socio-economic growth for this sector before we may speak of success.

For the benefits associated with home-ownership to materialize, a certain understanding of such benefits is firstly needed: There should be a general recognition by recipients why home-ownership should be protected and nurtured.

Secondly, eventual success demands special skills from the new home-owners. For most of them such skills are lacking, due to their previous exclusion from the normal housing market.

Is it a realistic expectation that individuals who have never before been exposed to a

normal home-ownership environment should suddenly attain the necessary insights, knowledge, and skills to ensure their own socio-economic advancement through responsible management of their new-found home-ownership?

Consider further that a considerable percentage of such new housing units are sectional title units.

In the world of sectional titles even the '*previously advantaged individuals*' find it very difficult to master the imperatives and pitfalls of management and administration, as the growing number of failed schemes countrywide attest.

Based on the lessons learnt during the short history of sectional titles in South Africa, one can only come to the conclusion that a large-scale initiative to supply affordable housing is doomed to failure, unless accompanied with a plan which includes initial management by outside agencies and gradual introduction of self-management accompanied by effective, compulsory, training systems.

The introduction of training for 'ownership management' is, on the one hand, such a substantial task, and on the other, such an important one, that it could hardly be executed effectively without participation by the major players, including the Government, municipalities, and the banks.

Each of these institutions have major financial stakes in the eventual success of the project to supply affordable housing.

The stakeholder with the most to gain or lose, is the emerging class of home-owners, which may reap the fruits of the institution of private home-ownership, or may be bitterly disappointed. Either of these results will have a major impact upon the future housing scenario in South Africa and will affect the socio-economic health of everyone, with related political implications.

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## The Constitution, the Constitutional Court, and Mrs. Jaftha

### *How do they affect bodies corporate?*

Section 26 of the Constitution of the Republic of South Africa:

- (1) Everyone has the right to have access to adequate housing.
- (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Mrs. Jaftha, a Previously Disadvantaged Individual and resident of Prince Albert, had obtained a house with the aid of a once-off housing subsidy. Her decision to purchase some household items on credit could nearly proved fatal for her continued homeownership.

Being unable to settle this minor debt timeously, action was taken against her in the local Magistrates' Court, leading to the attachment and sale in execution of her new home.

Traditional debt collection procedures provided for attachment and sale of movables and, if insufficient movables were found, a warrant of execution against immovable property was issued upon request, virtually automatically, by the Clerk of the Court. These procedures are governed by section 66 of the Magistrates' Court Act.

Until recently, such procedures were not subject to scrutiny because (a) we did not have a Constitution which had something to say about such matters,

and (b) persons such as Mrs. Jaftha were not in a position to own a house.

The conduct of one attorney changed all this, when he made the decision to apply the full force of the law against Mrs. Jaftha's home in recovery of a relatively insignificant debt.

Her plight was brought to the attention of a concerned lawyer, who pursued the matter as far as the Constitutional Court where a decision was reached which has permanently altered the debt collection landscape.

The Court considered the effects of section 66 in the light of the protection extended in terms of section 26 of the Constitution, quoted above, and found that the procedural provision of the Magistrates' Court Act fell short of constitutional standards.

Rather than declaring section 66 unconstitutional and therefore null and void, the Court issued a groundbreaking order that specific words have to be read into section 66, to the effect that the issue of a warrant

against immovable property is subject to judicial oversight, where such property is the debtor's home.

Guidelines were also issued as to how such judicial supervision must be exercised. The factors to be taken into account includes the circumstances and amount of the debt, efforts towards payment and collection, the financial position of both parties, and other circumstances, including personal circumstances.

Since this decision it is compulsory to follow procedures requiring the judgment creditor in a civil action to submit evidence in line with the guide-

lines provided by the Constitutional Court, and that such aspects be considered by the judicial officer concerned, before a warrant is authorized against a debtor's home.

This also affects bodies corporate in their recovery of arrear levies, entailing additional costs and delays, despite the fact that, in most cases, the constitutional concerns may not be relevant.

This additional burden is the price to be paid by all to combat unscrupulous, practices of a few short-sighted individuals.

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## Waarskuwing oor Keuring van Huurders

'n Durbanse dagblad doen op 28 April berig oor 'n hofbeslissing aangaande die bevoegdheid van 'n deeltitel regspersoon om keuring uit te oefen ten opsigte van huurders in 'n deeltitelskema.

Die betrokke gebou is 'n woonstelblok in Durban en dit lyk dat die regspersoon 'n prosedure van 'n aard in plek gestel het om bewoners van dele te keur. Die berig meld geen verdere besonderhede oor die prosedure of oor die vraag hoe dit daargestel is nie. Volgens die verslaggewer is die geval 'n beginselprong (*ground-breaking decision*) wat sal uitkring in die deeltitelwêreld en wat regspersone sal dwing om hul keuringsprosedures drasties te hersien.

Hier is dit eers nodig om sake ietwat in perspektief te stel.

Eerstens was die uitspraak waaromtrent verslag gedoen word 'n uitspraak van die Hof vir Klein Eise in Durban en as sulks dra dit geen presedensiële gewig waarop ander ho-

we, selfs 'n Hof vir Klein Eise, hoef ag te slaan nie.

Tweedens is dit in my ondervinding hoogs uitsonderlik dat 'n deeltitel regspersoon so ver gaan as om spesiale reëls in plek te stel om 'n keuringsprosedure vir huurders te skep en af te dwing. Terwyl dit aanvaar word kan dat 'n behoefte aan sodanige prosedure wel in sekere gebiede en besondere geboue mag bestaan, het ek in my hoedanigheid as deeltitelpraktisyn nog nie 'n enkele deeltitelskema, anders as aftree-oorde, teëgekomp met 'n keuringsprosedure nie.

Volgens die berig het die woonstel-eienaar 'n advertensie geplaas vir die verhuring van sy woonstel en in reaksie daarop is dit verhuur aan 'n vrou met twee volwasse seuns. Die voorgenome verhuring is aan die trustees voorgelê wie bevind het dat die voornemende huurders totaal onaanvaarbaar en van bedenkbare karakter is. Gevolglik het die trustees toestemming tot die verhuring geweier. Aangesien die eienaar weens die negatiewe uitslag verlies gely het aan een maand

se huurgeld, het hy hiervoor 'n eis ingestel teen die regspersoon in die Hof vir Klein Eise.

Tydens die verhoor het die eienaar geargumenteer dat, ingevolge grondwetlike beginsels, die regspersoon onbevoeg is om huurders te keur en slegs 'n huurder mag uitsit op grond van verbreking van die reëls. Hy het steun gesoek in artikel 25 van die Grondwet omtrent die reg op geskikte behuising.

Die kommissaris het die eienaar gelyk gegee en beveel dat die regspersoon die skadevergoeding betaal.

My kommentaar hierop is dat regstreekse toepassing van die reg op behuising in die Grondwet nie hier ter sprake is nie, aangesien prosedures reeds bestaan wat bewoners teen onregmatige uitsetting beskerm. Om teen die regspersoon te kan beslis, was 'n beroep op die grondwetlike reg tot behuising dus nie nodig of aangewese nie.

Terloops is regspersone ook nie bevoeg om bewoners uit te sit weens verbreking van reëls, soos in die saak beweer nie. Anders as in sekere Europese lande, bevat die Suid-Afrikaanse Deeltitelwet geen bepalings wat sodanige magte verleen nie.

Alhoewel die uitspraak self nie van aardskuddende belang is nie, vestig dit tog die aandag op die behoefte van regspersone om beheer uit te oefen oor wat in 'n gebou of deeltitelbuurt plaasvind.

Die eerste reaksie van trustees is moontlik om persone van bedenklieke karakter uit te hou deur een-of-ander vorm van keuring. My advies is egter om nie die keuringsroete te volg nie. Op hierdie stadium van ons regsontwikkeling is die vraag of regspersone hoegenaamd keuring mag uitoefen, ongetoets en is dit inderdaad *terra incognita* wat trustees liefste nie moet betree nie.

(This article is taken from the series *DeeltitelForum*, written by Tertius Maree, which, since 1998, appears weekly in Die Burger).

Die wyse waarop beheer uitgeoefen moet word, is deur te verseker dat doeltreffende reëls in plek is om die gedrag van bewoners te beheer, en om daardie reëls behoorlik toe te pas.

Ek raai trustees dus aan om jaarliks die inhoud van hul gedragsreëls te heroorweeg in die lig van ondervinding wat opgedoen is, en om geskikte wysigings aan te bring.

Die tipe reëls wat oorweeg kan word, hou verband met beperkings op die aantal persone wat 'n woonstel mag bewoon, die benutting van gemeenskaplike eiendom en fasiliteite, lawaai en ander vorms van steurnis, ensovoorts.

Tweedens help goeie reëls min indien dit nie gekoppel word aan 'n doeltreffende boetebepaling in die vorm van 'n spesiale gedragsreël nie. Sodanige bepaling moet nie alleen met groot sorg opgestel word nie, maar trustees moet die voorgeskrewe prosedure om boetes op te lê noulettend toepas.

Ek het die opneem van boetebepalings in gedragsreëls reeds meermale in *DeeltitelForum* bespreek. Twee aspekte wat ek egter graag wil uitlig is die versameling van oortuigende rekords van oortredings, en die streng nakoming deur die trustees van die voorgeskrewe strafprosedures. Om 'n boete op te lê behels veel meer as 'n blote besluit deur trustees.

Gewapen met doeltreffende reëls en prosedures, is dit die trustees se taak om die gedrag van bewoners te monitor en waar nodig stappe te neem om nakoming van die gedragsreëls te verseker. Nakoming van realistiese gedragsreëls is een van die essensiële faktore wat bydra tot die behoud van komersiële waarde van eenhede in 'n deeltitel-skema.

## *NewsFlash!*

*The long-promised English (and updated) version of Kits Deeltitel Oplossings is now available as-*

### **Sectional Titles on Tap**

#### **Volume 1**

*(Order form attached at the end of this newsletter)*

#### **About Sectional Titles on Tap:**

Volume 1 is substantially an updated English version of Kits Deeltitel Oplossings which was first published in June 2001 catering for the needs of trustees, owners and managers. All amendments to date hereof have been incorporated.

In order to preserve a practical format, the useful Schedule of Resolutions has been moved to a second volume, soon to be published.

#### **Volume 2 will contain-**

- Table of Resolutions and Consents required in terms of the Act and the rules
- Standard Management Rules
- Standard Conduct Rules
- Reproduction of portions of the Act relating to administration, management, and ownership.
- Library of Forms and Precedents for sectional title administration and management

The date of availability of Volume 2 will be made known in the media, including MCS Courier.

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# Freezing the Developer's Voting Powers

## *A closer look at some effects of phased development*

It is a common occurrence that decision-making and management in a new scheme is initially dominated by the developer and that the functions and powers gradually shift to new unit-owners and their elected representatives. This is normal and desirable in view of the developer's intimate involvement with the project and the relative naïveté of the new owners.

The voting powers of any member of a body corporate is directly proportional to the number of units registered in his or her name. Accordingly the voting powers of the developer wanes as units are transferred to the new owners. In most instances, this process unfolds fairly harmoniously, with the developer's role diminishing until finally exiting the scene upon transfer of the last unit.

However, problems occur when direct conflicts of interest arise between developer and individual owners, or developer and body corporate. In such cases, the relative ignorance of unit-owners, their lack of cohesion and ineffective articulation and functioning as a group, as well as the actual and apparently strong position of the developer, tends to swing the scales sharply in favour of the developer in any confrontational situation.

The problem is aggravated by the well known fact that a developer who is at fault, often neglects or completely fails to call the crucial first general meeting. For this reason the Act was amended in 2005 to provide for imprisonment of up to two years for a developer found guilty of non-compliance in this regard. Hopefully this kind of situation will diminish, if not disappear, in view of the harsh penalty.

Developers who wish to impose their will upon the new owners, frequently use their initial superior voting powers to influence decision-making. Accordingly it often happens that early trustees are the developer's appointments, ensuring trustee support for his or her position.

Section 36(4)(e) determines that a body corporate may only institute an action against the developer if so resolved by unanimous resolution. Such resolution requires a 75% majority, a target which is usually unattainable in a newly established scheme with the developer still retaining the bulk of the votes. This requirement often presented unit-owners with a major obstacle, and furnished the developer with effective fortification against actions by the body corporate. Recently this impediment to actions by the body corporate was removed by the High Court in *Wimbledon Lodge v Gore* (See MCS Courier No 6) by deciding that in the event of such a resolution, a developer may not use his voting powers to veto the resolution, and that his votes should therefore be disregarded.

A developer is in a difficult position where a scheme is developed in phases. When all units in the first phase are sold and transferred, without the second phase being completed to the extent that units therein may be transferred, he or she becomes bankrupt in terms of voting powers. Accordingly he or she will have no say in decision-making and management. Even when the last unit in the first phase is not yet transferred, the developer's voting powers will have become extremely diluted compared to his or her initial position. This voting strength will only be 'revived' upon registration of the second phase in the scheme when all new units will vest in the developer.

Where phased development is planned, the developer needs to protect his or her development rights. However, the development rights do not endow voting rights. One exception exists to protect the developer, namely that any decision by a body corporate to alienate a part of the common property must not only be carried by unanimous resolution, but such resolution must include the vote of the developer. To this limited extent the developer retains some voting power during his or her 'bankrupt' period between phases.

Developers are often caught by surprise by their loss of voting powers, feeling perhaps that their voting powers should be retained until completion of the last phase. The legal position, however, is that the developer's votes are eroded to nothing at the end of each phase, and are revived upon registration of each new phase. In the periods 'between phases' developers have no votes.

This situation, which could sometimes be uncomfortable, should be taken account of by developers during the planning phase.

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## Practice Note

We know that the AGM of a body corporate must take place not later than 4 months after the end of the financial year. (See Management Rule 51). Trustees usually have their work cut out to comply with this requirement, the chief obstacle being timely completion of the audited financial statements by the body corporate auditor.

The problem is partially caused by the bottle-neck at auditors' firms at the time when most year ends, including that of companies, tend to converge.

The difficulty may be eased by changing the year-end of your body corporate to a date not affected by such convergence.

This may, in terms of Management Rule 51(2), be done by an appropriate trustees' resolution or a members' resolution at a general meeting.

Clint Riddin

# MCS Consulting

*Our business is to design effective management systems for high density housing developments.*

## Home Owners' Associations

The statutory controls for this form of group housing is largely undeveloped. Whilst allowing flexibility, it also means that developers and their legal advisers are often at a loss as to the criteria needed for successful administration of the resultant creature by an association of owners who are usually unprepared for the task.

## Sectional Title Schemes

Whilst the statutory controls for sectional title schemes are highly developed, such development has, over the last decades, focused upon the registration and cadastral aspects rather than the 'consumer' aspects of administration and management.

Although Sectional title schemes have the advantage of a built-in administrative system, the model is designed for the 'average' apartment block and often not suited to the needs of a specific development.

Unless the model rules and scheme conditions are suitably adapted at the time of establishment, many schemes cannot reach their full potential.

Non-delivery of adequate management frameworks by developers and lack of trustee training, have resulted in a growing number of failed schemes in all provinces.

## Complex Schemes

Schemes based on more than one constitutional model, (sectional title scheme within a freehold scheme) or which combine more than one usage element such as residential/commercial, or which include unusual facilities such as a golf course, harbour, recreational, dining, or medical facility, infirmary, etc., should never be established without expert assistance in drafting the essential founding documents.

## Retirement Schemes

The statutory and practical demands of retirement schemes are complicated and specific. In addition, developers should accept a greater degree of moral responsibility towards the eventual housing consumers. Because multiple enactments usually apply, the resultant complexity often confounds developers and their advisers, and, almost invariably, the housing consumers.

*MCS Consulting renders advisory and drafting services in these fields to attorneys, developers, bodies corporate and home owners' associations.*

## ASK THE EDITOR:

Hi Tertius

I have recently been elected as a trustee in a coastal sectional title building. Because I have been an owner for seven years, I have some knowledge of the history of the building. A problem arose recently regarding an instruction given by members at an annual general meeting to trustees in 2003. Due to certain irregularities, the trustees were instructed that all cheques must be signed by three trustees.

Now that I am a trustee myself, I find that this instruction is not being adhered to. The attitude of my co-trustees is that the instruction is impractical, is 'water under the bridge' and is in any event not binding.

What is the legal position?

Concerned Trustee

Dear Concerned Trustee,

A few things need to be considered. Firstly, Section 39 enables members to issue directives or impose limitations upon trustees at a general meeting. It appears that the instruction referred to by you falls in the category of a duly imposed limitation or directive.

Management Rule 27 determines that documents (except a levy clearance certificate) must be signed on behalf of the body corporate by two trustees, or one trustee and the manager. A cheque is a document which must be signed on behalf of the body corporate, and is therefore subject to the rule provision. Despite this provision my view is that the directive referred to was legal and binding.

It should be kept in mind that banks are not bound by the rules, much less directives, and it is therefore really the responsibility of the trustees themselves to see that the rules and such directives are adhered to.

The problem with a directive, in contrast to a rule, is that it is not formally recorded, except in the minutes of a particular meeting. It is therefore quite likely that it will in due course be forgotten, due to annual replacement of the trustees and changes of ownership.

It is furthermore debatable whether a directive to trustees during a particular year is even binding upon future trustees.

If it is sought to preserve the terms of a directive for an indeterminate period, the safe approach would be to ensure that it appears on the agenda for every annual general meeting for ratification by the members. This would ensure that the directive remains legal and binding and at the same time remind everyone of its existence.

Editor

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