



BODIES CORPORATE AND COMPETITION CRITERIA

Tertius Maree

It was recently reported in the media that the Competition Commission had indicated that the controversial practice of bodies corporate and home owners' associations stipulating accreditation fees payable by estate agents, is in principle acceptable, provided that the process of accreditation is transparent and fully explained to interested parties.

Rather than about whether accreditation fees as such are lawful, the matter relates to the principle as to whether a developer, body corporate or home owners' association may adopt and enforce provisions in rules or constitutions which require payment of accreditation fees which selectively allow estate agents to operate within the scheme.

Such stipulation may be considered as an encroachment upon the freedoms of both estate agents (in the exercise of their trade) and owners (in their freedom of choice). However, the complaints submitted the Commission were by estate agents and their objection was that the requirement of accreditation fees prevented free access to the schemes in question, unfairly obstructing them in the exercise of their profession.

The Commission, in considering the matter, focused on the justifiability of allowing estate agents on a selective basis, and defined certain criteria to determine whether such interference is lawful.

In view of the underlying principles it should be asked whether the Commission has jurisdiction over the matter, entitling it to such pronouncements.

The Competition Commission is established in terms of the Competition Act, No 89 of 1998. The Act, in terms of section 3 thereof, encompasses all economic activities within the Republic, with certain exceptions. One such exception is '*concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.*'

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The reason why bodies corporate and home owners' associations introduce such restraints, are normally not for their own commercial benefit, but to protect certain other interests related to the sale and transfer of units. In principle such restraints would, in terms of section 3, fall outside the ambit of the Act, and as such outside the jurisdiction of the Commission.

It should be emphasised that a restraint of this nature may not be constituted by a mere contractual provision, resolution of the trustees, executive committee, or even the members at a general meeting, but should be a substantive provision in the rules or constitution which must have been adopted according to correct procedures.

A restraint would also be subject to challenge if it is not aimed at protecting legitimate interests, but to prefer certain random individuals or to achieve a direct financial benefit for the body corporate or association. In the latter instance the Competition Commission will indeed have jurisdiction.

Sometimes mention is made of a constitutional right to free exercise of a trade or profession and that such right may be infringed by restraints of this nature. Does such a constitutional right exist?

Section 22 of the Constitution determines that '*every citizen has the right to choose their trade, occupation, or profession freely.*' This is a far cry from a general right to exercise such activity in every outpost of the economy.

A restraint such as this may also be considered in terms of the provisions of section 33 of the Constitution, which guarantees everyone the right of just administrative action. This principle is further developed in the Promotion of Administrative Justice Act, No 3 of 2000 which determines that just administrative action is not only required from state agencies, but also from private institutions. It furthermore does not only relate to administrative tribunals, but to any decision or action, or lack thereof, which affects a person.

In my view the constitutional requirement of just administrative action and the ancillary provisions of the Administrative Justice Act do apply to sectional title bodies corporate and home owners' associations and the prescribed procedures should be applied. This means that if a body corporate or home owners' association wishes to limit access of estate agents to a scheme, three basic procedural steps should be followed, namely notification to all interested parties, invitation to comment, and evaluation and decision-making.

Underlying the stipulated procedures, the requirement remains that there must be justifiable reasons for the restraint.

EQUIP YOURSELF WITH THE RIGHT TOOLS

Jacques Maree

It is amazing to see how many owners, trustees and managing agents become involved in sectional title schemes without equipping themselves with the right tools. At some point down the line problems occur and the excuse is always “*I didn’t know*” or “*I didn’t have it*”. Apart from the Sectional Titles Act itself, the acquisition of certain documents is a must:

(1) The Rules

The current rules are probably the most important. The management rules contain provisions regarding the administration of the scheme such as the election of trustees, their duties and responsibilities, holding of meetings, determination of levies, insurance, etc.

The conduct rules relate to the conduct of owners and occupiers and address various issues such as keeping pets, parking of vehicles and refuse disposal.

We often hear from owners stating that they just moved into a sectional title scheme with their dog only to be notified that no animals are allowed. If such owner had obtained a copy of the conduct rules prior to his/her purchase he/she would have known that no animals were allowed.

(2) The Sectional Plan

This is the plan of the entire scheme depicting the various sections and also includes the participation quota schedule. It is not a building plan. The plan is lodged at the offices of the Surveyor-General as well as the Deeds Office. Trustees and managing agents must have a copy of the updated plan in order for them to make informed decisions especially concerning the maintenance of the common property.

We often receive calls from trustees requiring an opinion as to who is responsible for maintenance of balconies, stoeps, patios, garages, etc. The first step in determining such responsibility is to clarify what the status of these areas are.

The sectional plan clearly depicts the boundaries of the sections, exclusive use areas and common property. The only exception is exclusive use areas that were created in terms of the Rules.

The monthly levies due by the owners are determined in accordance with the participation quota as reflected in the participation quota schedule which is part

PRACTICE NOTE:

When an owner, with the support of 25% of the owners (calculated according to the aggregate of their participation quota), requests a Special General Meeting in writing, the trustees must convene a meeting within 14 days. Accordingly it is still the responsibility of the trustees to organize the meeting, with regards to place, time and notice. Only when trustees fail to do so, may the petitioning owners arrange the meeting themselves.

Louisa de Lange

of the sectional plan. These values must be used. Many schemes determine their levies based on the size of the section, ignoring the participation quota schedule, and some have even gone as far as including exclusive use areas as part of the floor area of the section and determined the levies based on the combined floor area.

Even though the participation quota is calculated according to the floor area of the section errors often occur in determining it to the wrong decimal.

(3) Financial Statements

These statements are especially important for buyers as it will indicate the financial position of the body corporate. Buyers should ask Sellers for copies of these statements as a prerequisite before buying a sectional title property.

A well-managed sectional title scheme should have a healthy reserve fund. Owners often resist including such item in the annual budget, especially if they intend to sell their units in the near future. They fail to understand that a healthy reserve fund is an asset and improves the value of the individual units.

(4) Latest Budget

The budget is probably the most important document for purposes of evaluating the administration of the scheme. Buyers are often attracted by low levies as reflected on the current Levy Schedule whereas often it is indicative of bad planning and future problems.

If possible the current budget should be compared with the previous budget as well as actual expenditure.

An inspection of the building should give a person a good idea of the future maintenance requirements of the scheme. This should then be viewed in conjunction with the budget for maintenance for the current year as well as provision for future expenses.

Any purchaser should obtain the above documents before purchasing sectional title property.

Trustees and managing agents must have copies of the applicable rules and the sectional plan in their possession. Without these they cannot fulfil their duties and responsibilities and cannot conduct proper administration. Most of the problems of any body corporate can be solved by proper study of the sectional plan and rules.

PRACTICE NOTE:

Managing Agents are not bound by the provisions of the Management Rules, in particular Management Rule 46. If a written agreement is concluded with the trustees, acting on behalf of the body corporate, which is in conflict with the rules, such agreement is valid and enforceable.

It is the duty of the trustees to ensure that contracts with managing agents include provisions that comply with the Management Rules.

Jacques Maree

WHAT TO DO ABOUT NON-RESIDENT TRUSTEES

Louisa de Lange

Standard Management Rule 5 determines who qualifies for the position of trustee. It is a well known fact that a person need not be an owner of a section before he or she qualifies to be a trustee, provided that the majority of the trustees are owners, or spouses of owners. However, it is not a requirement that the owner should also be an occupier or resident.

SMR 25 determines that the duties and powers of the body corporate be performed or exercised by the trustees of the body corporate. SMR 28(2) furthermore determines that the trustees shall do all things reasonably necessary for the control, management and administration of the common property and in terms of SMR 28(3) the trustees shall do all things reasonably necessary for the enforcement of the rules in force.

The board of trustees is the engine room of the body corporate. The reality is that because many owners buy their units for investment purposes, they do not live there themselves. Accordingly in many instances the trustees do not live in the scheme at all and perhaps rarely even visit the premises.

The question which arises is if the body corporate can do anything about this situation: May the body corporate require that a trustee must also be an occupier and not only an owner?

The simple answer is yes. The reason being that the qualifications for the position of trustee are regulated by the management rules and in terms of section 35(2)(a) of the Sectional Titles Act, the management rules may be amended by way of a unanimous resolution.

The question should however not be if it is possible, but rather if it is advisable.

When the importance of the trustees' duties and responsibilities is taken into consideration, the following factors may contribute to the effective performance thereof:

- Open and speedy communication between members and trustees and among trustees themselves;
- Accessibility and approachability of the trustees;
- Regular trustees' meetings; and
- Involved trustees who are up to date with the affairs of the body corporate and understand the day to day needs of the body corporate.

By requiring that a prospective trustee should also be an occupier, more effective administration of the body corporate may be obtained. However, it is not a given and much more than a "resident trustee" is needed. The key to effective administration remains knowledge and participation.

PRACTICE NOTE:

In the absence of any provision in the Act or the Rules regulating the circulation of minutes of a meeting, it is up to the members of the body corporate to decide upon the procedure.

After circulating it among themselves, trustees may approve and sign the minutes of their trustee meeting.

The minutes of a general meeting must be approved by the members of the body corporate at the following general meeting and it is good practice to include the minutes in the notice of that following general meeting.

All of the above is subject to any directive given by the members in terms of section 39(1).

Louisa de Lange

Die Ontwikkelaar en Huiseienaars

Hoe kan botsende belange versoen word?

Extract from the series
DeeltitelForum,
published weekly in Die
Burger.

Tertius Maree

Wanneer ek ontwikkelaars onder stok kry in DeeltitelForum, waarsku ek altyd dat by soeke na oplossings, 'n gesonde balans gehandhaaf moet word tussen die regmatige belange van ontwikkelaars en diè van kopers.

Ontwikkelaars verdien beskerming omdat hulle die noodsaaklike funksie vervul van behuisingskepping. Kopers, aan die ander kant, moet ook beskerm word weens die onewewigtige magsposisie van die ontwikkelaar en die gepaardgaande potensiaal vir uitbuiting.

My eie posisie is altyd 'tweesydig' indien ek geraadpleeg word omtrent sulke probleme. Tog probeer ek sekere beginsels handhaaf en dit is gewortelde praktyk in my kantoor om 'n kliënt in te lig indien hy of sy na my mening verkeerd is, ongeag wie hy of sy is. Ek streef dus dat 'tweesydig' nie as 'tweegesig' ervaar word nie.

Betrokkenheid by bestuursake van behuisingskemas (deeltitel en huiseienaarsverenigings) is in wese 'n soeke na oplossings ten opsigte van 'n saak wat betrokkenes diep raak, naamlik hul wonings. Oplossings is nie altyd voor die hand liggend nie en diè kombinasie van faktore maak die praktykveld stimulerend en uitdagend.

Baie is al gesê oor 'gewetenlose' ontwikkelaars wat kopers uitbuit en, net soos in elke ander sfeer, is daar sekerlik ontwikkelaars wat die etiket verdien. My ervaring van ontwikkelaars is egter anders en ek het nog nie die ontwikkelaar ontmoet wat by aanvang van 'n projek dit vooropstel om kopers te verkul nie. Ontwikkelaars beplan in die algemeen ook nie om minderwaardige vakmanskap en materiale aan kopers af te smeer nie. Ook nie om gapings te laat in die bestuurstrukture wat aan eienaars gelewer word nie.

Waarom loop dinge dan so dikwels skeef in die werklike lewe?

Myns insiens kan die antwoord gevind word in die volgende faktore:

- Gebrek aan kennis, ondervinding en vaardighede.
- Gebrek aan kapitaal.
- Gebrek aan voortreflike professionele bystand.
- Naiwiteit by kopers.
- Gebrek aan statutêre riglyne oor wat van ontwikkelaars verwag word.

Een van die probleme wat herhaaldelik voorkom en 'n goeie demonstrasie is van genoemde faktore, is die netelige kwessie van verantwoordelikheid vir lopende uitgawes by 'n nuwe, onafgehandelde ontwikkeling. Neem 'n behuisingsoord gebaseer op sogenaamde eie titel as voorbeeld:

'n Aantal huise, sê vyf, is voltooi, verkoop, oordrag van gelewer en word deur die kopers bewoon. Veertig huise moet egter nog opgerig word. Intussen is strate, sypaadjies, dienste en gemeenskaplike fasiliteite en tuine aangelê en, hoewel die ontwikkelaar die vestigingskoste daarvan betaal het, vereis sodanige aanlegte onmiddellike instandhouding in 'n meerdere of mindere mate. Wie is daarvoor verantwoordelik?

Tensy die ontwikkelaar die probleem voorsien en behoortlik daarvoor beplan het, is dit 'n grys gebied. Neem nou verder in ag dat die ontwikkelaar op dië tydstip tipies onder groot geldelike druk verkeer en terselfdertyd 'n groot mate van vryheid geniet om besluite te neem, en dit kan verstaan word waarom hy dalk swig voor die versoeking om die onbeplande uitgawes eenvoudig op die skouers van die huiseienaarsvereniging, en dus die eienaars, te laai.

Die probleem is dat die situasie ongereguleer is en dit tydens die beplanningsfase die aandag van die ontwikkelaar ontsnap.

In die deeltitelsfeer het die wetgewer 'n vae gewaarwording van die probleem getoon deur in artikel 25(2)(e) te vereis dat 'n ontwikkelaar, wanneer hy 'n reg tot ontwikkeling van verdere fases voorbehou, moet aandui welke uitgawes deur hom gedra sal word. Die bepaling skiet egter ver tekort en doen beide ontwikkelaars en kopers 'n onreg aan deur nie meer duidelike riglyne te stel nie.

In die sfeer van huiseienaarsverenigings is die posisie selfs meer onduidelik en is statutêre riglyne gans afwesig.

Die probleem manifesteer altyd as 'n uiters ingewikkelde een maar, indien dit in die beplanningstadium voorsien was, is die oplossing dikwels eenvoudig.

Ek bepleit hoegenaamd nie dat elke faset van behuisingontwikkelings deur wetgewing gereguleer moet word nie. Die meganisme wat ek voorstel, naamlik wetgewing wat die uitreik van 'n gestruktureerde prospektus vir ontwikkelings vereis, is relatief eenvoudig en een wat kopers en ontwikkelaars sal bevoordeel. Sodanige prospektus sal die aandag van 'n ontwikkelaar vroegtydig vestig op sleutelaspekte wat in sy beplanning opgeneem moet word, en sal aan kopers 'n duidelike prentjie bied oor wat hulle van die ontwikkelaar te wagte moet wees en nie moet wees nie. Dit sal egter net 'n werklikheid word deur druk vanaf huisverbruikers.

Die nuwe belastingbedeling waarvolgens deeltiteleienaars individueel aangeslaan word vir munisipale belasting, het die tyd aangebring dat huisverbruikers moet saamspan om hul belange te beskerm en te bevorder. In die deeltitelsfeer kan dië doelwitte bereik word deur die lidmaatskap van NASTO (National Association of Sectional Title Owners) aktief uit te bou. Die verandering ten opsigte van munisipale belasting het daartoe gelei dat NASTO nou landswyd as 'n volwaardige belastingbetalersvereniging kan begin optree. Meer inligting hieromtrent in latere afleverings van Deeltitelforum.

* * *

ASK THE EDITOR:

Dear Editor

In my view, minutes that have not been signed (as a true copy of event), is not valid, nor worth the paper it is written on. Even if it is approved (and recorded in the minutes) at the next meeting, how can it be proven which minutes were approved if it is not signed, especially after 10 years?

Regards

K Coetzee

Dear K Coetzee,

Minutes, in my opinion, must be submitted at the following meeting to be approved (with or without amendments). After approval the minutes should be signed by two trustees.

Minutes are 'documents' and in accordance with management rule 27 all 'documents' must be signed by two trustees or one trustee and the managing agent. If the signatures are absent, the document may be invalid as a means of proving the existence and content of a resolution.

This does not mean that a resolution so recorded is not binding: The resolution stands but the minutes will be irregular and as such will not constitute evidence in a court. If possible, this omission should be corrected when discovered, or alternatively a person who wants to rely on a certain resolution in a court case, will have to submit extraneous evidence with regards to the existence and content of such a resolution. Trustees are therefore strongly advised to ensure that all minutes are approved and then signed as confirmation of such approval.

Editor

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