



TAKE CONTROL OVER BUILDING ALTERATIONS

Tertius Maree

People in general seem to have a strange 'love/hate' relationship with authority, inappropriately petitioning intervention by some entity and, conversely, blaming something which they disagree with on an often faceless body.

An example is previously disadvantaged persons who have recently obtained ownership of their municipal houses. In spite of the fact that they are now owners, they do not always understand that they can no longer call upon the municipality to effect repairs such as broken taps and leaking roofs.

Their lack of understanding of the principles and responsibilities of home ownership may be understandable in view of their having been isolated from the concept of real ownership for a long time.

What is more difficult to explain or justify is the similar ethic amongst home owners who do not fall in the previously disadvantaged category.

An example is the 'us and them' syndrome which is pervasive in the sectional title sphere. According to this there exists a somewhat evil entity, vaguely referred to as the body corporate, which extracts money, makes ridiculous rules, and does nothing. At the same time each owner wants to be king of his castle and do whatever he wants with the dwelling which he has, after all, paid for, but is quick to complain if the trustees have not performed to his personal satisfaction.

What is not yet properly understood by owners is that *they* are the body corporate, *they* are in a position to hire and fire trustees, even to issue instructions to the trustees, and that ultimately *they* are responsible if things go wrong.

To be a sectional title owner requires that certain responsibilities be shouldered. One of them is to be prepared to assume the thankless task to serve as a trustee oneself, but also, as an ordinary owner, to accept the fact that without positive participation, knowing your rules, taking cognizance of and an interest in aspects such as the budget and insurance, and attending general meetings, a body corporate is not likely to function well.

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One area where the concept of authority is often not understood is in respect of building alterations. The pervasive view that, once building plans are approved by the 'authority' (the municipality), everything is hunky dory, is based upon an erroneous understanding of authority in a sectional title scheme. Equally pervasive is the idea that trustees are all-powerful and are able to consent to just about anything, simply by signing something, sometimes merely by giving verbal approval. Even trustees sometimes suffer from this delusion.

The crux of the matter is that responsible authority vests in the owners themselves who must, by democratic process and the prescribed manner, create suitable rules, which the democratically elected trustees must apply and enforce, and according to which the trustees themselves must function.

To get back to building alterations – is it anybody's concern if I should decide to move a window, install a new door, or cover my braai area? Of course it is. If my new window does not constitute an infringement of someone's privacy, the next fellow's alteration, done in pursuance of my bad example, probably will. If my roof over my braai area is an 'innocent' improvement, it does create new common property for which the body corporate becomes responsible, may affect aesthetics, and it is also the thin end of a wedge which could result in a 'disease' of alterations and a difficult and very costly 'rectification program.'

Forget about the idea that your good friend and neighbour, who also happens to be the chairman, is willing to sign a 'consent.' Apart from the fact that any trustees' consent requires (a) due consideration by the board of trustees, (b) a minuted resolution, and (c) the signatures of two trustees, the trustees simply do not have automatic authority to 'consent' to any request which may come their way. The powers of trustees are not derived from some vague notion of authority. Each action by the trustees must be founded upon substantive provisions in the Act and/or the rules. If neither of these two sources contain relevant provisions, it should be assumed that the authority sought does not exist. It must then be considered whether a need exists to warrant the making of a special rule in order to regulate the subject matter in question. If so, an appropriate rule may be carefully drafted, presented for adoption by the members in the prescribed manner and, if adopted, filed of record at the Deeds Registry. Only then will the trustees be endowed with such powers, subject to such procedures as are described in the special rule.

A good and ubiquitous example is the tendency to enclose balconies at buildings near the coast. The need to do so is usually reasonable. The problem

Practice note:

Many Homeowners' Associations amend their Constitutions to provide for the service of documents and obtaining trustees' resolutions via e-mail.

Although many sectional title schemes sometimes make use of e-mails for the above purposes it does not conform to the provisions of the management rules pertaining to the service of documents and written notification. Trustees should consider an appropriate management rule amendment to enable and regulate these matters.

Jacques Maree

is that owners often proceed without due authority and without considering the constraints of aesthetic appearance. Again the abovementioned hydra raises one or more of its heads: The owner thinks that he may do as he pleases because it is his own property and has municipal approval, or it is assumed that the trustees automatically have authority to consent.

Both assumptions' would be wrong.

A pervasive problem in sectional title administration is that, in order to address any particular problem, it may be necessary to consider a variety of provisions in the Act, Management Rules and the Conduct Rules. Nowhere is this more true than in the sphere of building alterations.

In all available handbooks, including my own Sectional Titles on Tap, the subject of building alterations are dealt with in a fragmented manner due to the diversity of types of building alterations, each one subject to different provisions.

Because trustees are often not sure about the precise nature of a particular instance, and about the applicable provisions, there is a need to deal with the subject matter in a more structured way, dealing with building alterations under one umbrella, so to speak. This would assist trustees to distinguish between different instances according to valid criteria, to understand the underlying principles, and to make decisions according to the correct provisions of the Act or the rules.

This is what we intend to do in MCS Courier in a serialized format, over the few next months.

ARBITRATION: IS IT WORTH THE EFFORT?

Jacques Maree

I get many queries about how to enforce the provisions of the Act and Rules. In the absence of a special rule that provides for the impositions of fines the only recourse for a disgruntled owner, or the trustees, is to apply for an appropriate court order or refer the dispute to arbitration.

Management Rule 71 states:

- (1) *Any dispute between the body corporate and an owner or between owners arising out of or in connection with or related to the Act, these rules or the conduct rules, save where an interdict or any form or urgent or other relief may be required or obtained from a court having jurisdiction, shall be determined in terms of these Rules.*

The wording of the above sub-rule is confusing and should probably have read “- ... *save where an interdict or any other form of urgent relief may be required.*”

Say for example an owner wants to refer a dispute to arbitration against another owner. The first step would be to send a written notice to the other owner stating what the

dispute is about. If, for example, there is an alleged contravention of a conduct rule the notice should refer to the specific rule. A copy of such notice must be served on the trustees and managing agent (if appointed) as well.

If the dispute remains unresolved after 14 days of the above notice either party may demand that the dispute be referred to arbitration.

Now the parties have to agree on a suitable arbitrator. If they cannot agree within 3 days a written application must be made to the Registrar of Deeds to appoint an arbitrator.

In practice it is almost impossible to adhere to the time requirements of Rule 71 especially pertaining to the 3 days in which the parties must attempt to agree on an arbitrator. In terms of the rule arbitration should be concluded within 21 days after the dispute has been referred. This almost never happens and a dispute can easily take months before it is even heard.

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Arbitration as a method of resolving disputes has often been criticised, mostly because of the high costs involved and delays in having the matter heard. The intention was clearly a good one, that is fast and cheap resolution of disputes.

Where does the process fail? It fails largely because when a dispute arises one or both parties appoint an attorney to represent them. Suddenly there are various documents such as a statement of claim, reply to the statement of claim, replication and matters in limine that go back and forth between the parties. Although one might argue that the purpose of these documents is to clarify matters, it often has the opposite effect. Suddenly technical issues are raised of which the owners were not even aware. All of this causes delays and adds to the costs.

When the final award is issued the costs of representation could easily be more than the costs of appointing the arbitrator.

A good example of reasonably effective dispute resolution can be found in terms of labour dispute resolution where legal representation is limited. An arbitrator at the CCMA has very little knowledge of a particular dispute, sometimes none at all, when he walks into the room to hear a matter. But after about an hour or two, sometimes more, he leaves the room with enough information to issue an appropriate award. In order to issue a fair award he often needs to play an active role in the proceedings and guide the parties, who are mostly unfamiliar with the provisions of relevant legislation, in the right direction

In an ideal sectional title world legal representation could be dispensed with and it may be a good idea for the parties to agree on this issue beforehand. But then the appointment of a suitable Arbitrator becomes vital.

Until such time as an ombudsman is appointed owners and trustees are stuck with two costly and often unsatisfactory methods to resolve disputes.

SPECIAL LEVIES – THE BARE NECESSITIES

Louisa de Lange

Over the last few months we have had several problems with regards to the liability (or in fact the non-liability) of owners for the payment of special levies.

Standard Management Rule 31(4) determines that the trustees may from time to time, when necessary, make special levies upon the owners or call upon them to make special contributions in respect of all such expenses which were not included in the budget. Such special levies may be made payable in one sum or by such instalments and at such time or times as the trustees may determine.

Accordingly, the determination of special levies is an extraordinary measure to raise funds for unforeseen expenses.

A mistake often made by trustees is the assumption that a special levy is apportioned on an equal basis. In truth, a special levy is to be calculated and apportioned to owners according to their participation quotas, the same as with an ordinary levy. Any other formula is illegal and owners will not be liable for the special levy, unless the management rules were amended to provide some other formula.

Importantly, a special levy is imposed by the trustees and not the members of the body corporate at a general meeting. Therefore a formal trustees' resolution is necessary for a special levy to be valid and enforceable, even if it had been approved at a general meeting.

With both ordinary and special levies, the person who is a registered owner at the time the trustees' resolution is made is the person liable for payment. This poses problems when an owner is in the process of selling his or her unit. A person who sells his or her unit only ceases to be an owner and member of the body corporate on the day the unit is transferred and registered in the name of the buyer. Accordingly, even if a seller signed a contract of sale and a week later a special levy is declared, that seller remains liable for payment (*vis-à-vis* the body corporate) of the full amount of the special levy because on the date the trustees' resolution was made he or she was still the legal owner. This situation would pertain irrespective of any special provisions in the deed of sale, because the body corporate was not a party to such contract. In the absence of a tripartite agreement, the body corporate will be unable to recover the special levy from the new owner. A levy clearance certificate may only be issued once the full amount is paid or secured by the seller.

The effect of an invalid and unenforceable special levy also has implications for recovery of arrear levies. Should there be no formal trustees' resolution to validate the special levy, it cannot be collected from an owner. Should there be no tri-partite agreement in place, payment cannot be extracted in law from the new owner.

Accordingly, trustees should take great care in assuring that the necessary steps are taken to impose a valid and enforceable special levy and to secure the position of the body corporate at the time of transfer.

Practice note:

In terms of section 15B(3)(i) of the Act, the Registrar will not transfer a unit unless a conveyancer's certificate confirming that, as at date of registration, all moneys due to the body corporate have been paid, or a satisfactory agreement providing for the payment thereof has been concluded between the seller and the body corporate. Accordingly it is the duty of the trustees or managing agent to protect the interests of the body corporate by ensuring that all moneys due have been paid or a tripartite agreement was concluded, before issuing a levy clearance certificate.

Louisa de Lange

BEPERKINGS OP HANDELINGE MET DELE

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

Tertius Maree

Die *deel* is die fokuspunt van die deeltitel-eiendomsformaat en is die gedeelte van 'n deeltitelskema wat die uitsluitlike eiendom vorm van die individuele deeltiteleienaar. Die res van die skema word as gemeenskaplike eiendom in onverdeelde aandele deur al die eienaars gehou. Anders as wat dikwels vermoed word, behoort gemeenskaplike eiendom nie aan die regspersoon nie, alhoewel dit deur die regspersoon bestuur word.

Selfs uitsluitlike gebruiksgebiede is nie 'uitsluitlike eiendom' van sekere eienaars nie, aangesien dit steeds gemeenskaplike eiendom is, gekoppel aan besondere regte wat sekere eienaars daarop kan geniet tot uitsluiting van ander.

Maars selfs individuele eienaarskap van dele word beperk, sodat dit nie gelykstaande is aan tradisionele 'huiseienaarskap' soos ons daaraan gewoon geword het nie. Die regte van die individuele eienaar van 'n deel, ten opsigte wat hy of sy daarmee mag doen, word ingrypend beperk deur-

- die bepalings van die Deeltitelwet;
- die bepalings van die reëls;
- die bevoegdheid van die regspersoon om besluite te neem wat die regte van deeleienaars affekteer; en
- die verhoogde toepassing van die burereg, soos laasweek bespreek met verwysing na gevalle van oorlas deur vlieënde gholfballe by 'n gholfoord, en lawaai by 'n gemengde skema.

Om harmonie te handhaaf in 'n deeltitelskema, moet eienaars en bewoners bewus wees van sodanige beperkings op hul doen en late, as synde die prys wat ons betaal om deel te wees van 'n stedelike gemeenskap.

Die Deeltitelwet laat sekere, streng gereguleerde, handelinge met dele toe. Ander aktiwiteite word deur die reëls beheer. Een voorbeeld waarmee lesers van DeeltitelForum reeds goed bekend behoort te wees, is die onwettige uitbreiding van dele wat spruit uit die gedagte dat ek baas is op my eie plaas. Wat ongelukkig nie waar is as dit by deeltitels kom nie.

Vandag fokus ek egter op die ietwat meer seldsame verskynsels van onderverdeling en konsolidasie van dele; twee teenoorgestelde handelinge wat op vergelykbare wyses hanteer word.

Anders as in die geval van uitbreiding, is konsolidasie / onderverdeling nie 'n ernstige ingryping teen die belange van ander eienaars nie. Gevolglik is die regulering daarvan minder streng. 'n Eienaar kan sy of haar deel in twee of meer kleinere dele verdeel en met die aparte dele handel deur dit byvoorbeeld te verkoop of sy of haar deel verenig (konsolideer) met 'n ander deel, wat ook in sy of haar naam geregistreer is, om so 'n groter eenheid te vorm.

Om dit te kan doen, is die skriftelike toestemming van die trustees nodig. Inderdaad word die diskresie van trustees omskryf deurdat bepaal word dat hul toestemming nie sonder goeie rede weerhou mag word nie. Dit is egter belangrik dat die trustees alle

relevante aspekte van die beoogde transaksie oorweeg, en waar nodig, voorwaardes oplê. Hier is 'n paar sulke aspekte:

- Dit is nie moontlik om in die proses van onderverdeling die totale vloeroppervlak te verklein nie. Anders gestel, is dit nie deur middel van dië proses moontlik om nuwe gemeenskaplike eiendom, soos gange of portale te skep nie.
- Trustees moet geen aansoek oorweeg sonder die voorlegging van, ten minste, 'n sketsplan wat die voorgestelde veranderinge uitbeeld. Die toestemming moet dan verleen word met verwysing na die sketsplan, sodat geen misverstande later daaromtrent kan ontstaan nie.
- Die toestemming moet voorwaardelik wees aan die latere voorlegging van 'n goedgekeurde bouplan en nakoming van enige verdere statutêre vereistes.
- Indien onsekerheid bestaan omtrent die effek van bouveranderinge op diestrukturele integriteit van die gebou, moet 'n ingenieursverslag verkry word en indien nodig, moet die bouwerk deur 'n ingenieur gemonitor word.
- Die begin- en einddatum van die bouprojek moet ooreengekom, en op 'n redelike wyse afdedwing word.
- Die tye van die dag en week waartydens bouwerk mag geskied, moet vasgelê word ten einde oorlas aan ander bewoners te beperk.
- Die verwydering van bourommel en herstel van skade aan gemeenskaplike eiendom moet gereguleer word.
- Nakoming van alle voorwaardes van die toestemming kan verseker word deur bepaling van 'n paslike boudeposito.

Na voltooiing van die bouwerk, moet 'n landmeter aangestel word om 'n gewysigde deelplan voor te berei en te laat goedkeur deur die Landmeter-generaal. Dië plan sal vergesel wees van 'n gewysigde bylae met deelnemingskwotas. Die enigste veranderinge aan deelnemingskwotas sal egter wees ten opsigte van die nuwe deel of dele wat nou ontstaan het, waarvan die gesamentlike deelnemingskwotas onveranderd bly. Die kwotas van ander eienaars word nie geraak nie. Die rede hiervoor is dat , soos vroeër genoem, dit nie moontlik is om vloeroppervlaktes te verander deur die proses nie.

Dit is natuurlik moontlik dat die effektiewe vloerspasie van die verboude dele mag verander weens die verwydering of aanbring van binnemure. Aangesien vloeroppervlak egter van die middellyn van grensmure gemeet word, bly die amptelike vloeroppervlak onveranderd.

Na goedkeuring van die gewysigde deelplan, moet die onderverdeling of konsolidasie ook in die Aktekantoor geregistreer word. Hiervoor is, onder andere, die toestemming van verbandhouders oor die geaffekteerde eenhede nodig. Weens dië vereiste is dit belangrik dat 'n eienaar wat van voorneme is om 'n konsolidasie- of onderverdelingsprojek aan te pak, vroegetydig regsadvies inwin om te bepaal presies hoe met sodanige verbande gehandel sal word, anders kan die ondernemende eienaar homself vasloop in moeilike en duur probleme op 'n gevorderde stadium van die projek.

NASTO

Response Form

(by trustees of bodies corporate)

PARTICULARS OF BODY CORPORATE:

NAME :
SS NUMBER :
NUMBER OF UNITS :
PHYSICAL LOCATION :
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CONTACT PERSON Name :
Capacity :
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Does your membership include one or more persons who have skills in one or more of the following fields-

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- Housing development

and who are prepared to serve regionally and/or nationally?

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Reminder!

Sectional Titles on Tap Volume 2, now on tap!

Sectional Titles on Tap Volume 2

First there was: Sectional Titles on Tap Volume 1

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.

The Afrikaans version, Kits Deeltitel Oplossings, is also available.

Now: **SECTIONAL TITLES ON TAP VOL 2 (Wirobound)**

This volume must be used as a **supplement** to volume 1 and contains:

- Table of Resolutions and Consents required in terms of the Act and the rules
- Standard Management Rules
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