



PRE-INCORPORATION CONTRACTS

Are managing agents on thin ice?

Tertius Maree

Developers often attempt to enter into contracts prior to establishment of a body corporate. Such contracts usually relate to services of some kind to the body corporate, a typical example being a contract appointing a managing agent.

It is possible that the validity of many of such contracts are open to challenge.

Prior to establishment of a body corporate, a developer has no standing in law to conclude a binding contract on behalf of the body corporate yet to be formed. This is not only a principle of common law, but is also affirmed by section 47(2) which stipulates that a body corporate is not bound by any contract made by the developer.

Subsequent to establishment (the date of first transfer) the developer has no authority to conclude such contract. Although the body corporate is now a legal entity, capable of concluding contracts, the developer is no more than a single member of a board of trustees and cannot act alone in binding the body corporate. Until the first general meeting when trustees are elected for the first time, the board of trustees consists of the developer and all registered owners and in order to bind the body corporate to a valid contract, the following is required:

- (a) a duly minuted trustees' resolution approving the agreement of appointment and authorising two trustees to conclude the agreement on behalf of the body corporate; and
- (b) signing of the agreement on behalf of the body corporate by the two authorised trustees.

Ostensibly Management Rule 50(2)(iv) is in conflict with the position as set out above. This provision relates to the mandatory agenda of the first general meeting and stipulates as an agenda item:

- (iv) *subject to section 47(2) of the Act, the taking of cession of such contracts relating to the management, control, and administration of the building as may have been entered into by the developer for the continual management, control, and administration of the building and the common property, and in respect of which the developer shall be obliged to submit such contracts to the meeting.*

Inside This Issue:

- How private is an Annual General Meeting
- Leaking or burst pipes shirking the responsibility
- Solly Molefe
- DeeltitelForum
- Practice Note

This provision is often understood to mean that, in order to ensure continuance, mere submission of the relevant contracts to members at the meeting is sufficient. Sometimes members would be required to 'ratify' such contracts, which is then done by ordinary vote. Such procedures do not take account of the principles of law referred to above, nor the fact that Management Rule 50(2)(iv) itself states that it is subservient to section 47(2) which renders pre-incorporation contracts ineffective vis-à-vis the body corporate.

Management Rule 50(2)(iv) is misleading, and perhaps flawed, in a further respect, namely its reference to the '*taking of cession*' of contracts entered into by the developer. A contract entered into by a developer prior to establishment, is in law not deemed to exist. A contract which does not exist, cannot be ceded.

How must Management Rule 50(2)(iv) then be applied and what could be done to ensure that, for example, a contract with a managing agent is binding upon a body corporate? The developer has two options:

1. Prior to establishment of the body corporate, a contract may be entered into by the developer in his own name, (not on behalf of the body corporate), but clearly stating the intention to cede the contract to the body corporate at its first general meeting. Reference should be made to both section 47(2) and Management Rule 50(2)(iv) and it should contain a resolute condition that, if the body corporate should refuse to take cession of the (developer's) contract, it will lapse.

In this regard it should be noted that, whereas a decision to appoint a managing agent is normally a function of the trustees, it is not so in respect of pre-incorporation agreements, acceptance of which is specifically assigned to the members at the first general meeting.

At the first general meeting, the contract must then be presented to the members for approval of the cession thereof, and, if so approved, the cession must be concluded by signing of a cession contract by two trustees (again authorised by a trustees' resolution) and by the managing agent.

2. Subsequent to the first transfer, the developer may procure a contract (on behalf of the body corporate) authorised by a trustees' resolution, as described above. All registered owners are trustees at this point in time and must therefore participate in the resolution, which must be a simple majority resolution by the trustees. If necessary, a trustees' meeting may be avoided if the signatures of all owners to a written resolution is obtained, as contemplated in Management Rule 24. A (new) contract must then be concluded and the body corporate represented therein by two trustees, as required in terms of Management Rule 27.

The developer is able to secure the appointment in scenario 1 by obtaining an appropriate power of attorney from each purchaser, authorising the developer to exercise his vote. In scenario 2 no such powers of attorney may be procured as a trustee cannot vote through a proxy.

* * *

HOW PRIVATE IS AN ANNUAL GENERAL MEETING?

Louisa de Lange

Recently we had an enquiry as to whether an owner may tape the proceedings at an annual general meeting of the body corporate and if so, to what extent such recording may be used and distributed. Standard Management Rule 34(1)(b) determines that the trustees shall cause minutes to be kept of all meetings of the body corporate in a minute book of the body corporate kept for that purpose. SMR 34(3) determines that on the written application of any owner or registered mortgagee of a unit, the trustees shall make all minutes of their proceedings and the minutes of the body corporate available for inspection by such owner or mortgagee.

This provision is in accordance with the provisions of the Promotion of Access to Information Act, No 2 of 2000 as well as section 32(1)(h) of the Constitution of South Africa.

Accordingly trustees have a duty to keep records of proceedings at a general meeting in the form of minutes and such minutes are open for inspection by various persons with interests in the affairs of the body corporate.

Furthermore SMR 67(1) states that votes at a general meeting may be cast either personally or by proxy, whether on a poll or on a show of hands and SMR 67(3) determines that a proxy need not be an owner. Accordingly a proxy may be an outsider and such person shall be entitled to attend the general meeting at which he or she is to vote.

In terms of SMR 54(2) it is possible for the holders of registered mortgage bonds and the managing agent (if applicable), to attend a general meeting of the body corporate and to speak at such meetings, but shall not, in their respective capacities as such, be entitled to vote thereat.

It seems as if the Sectional Titles Act, No 95 of 1986, provides for various "outsiders" to attend body corporate meetings and to inspect the body corporate's records. The golden thread is however that these outsiders must have legitimate interests in the affairs of the body corporate.

Section 14(d) of the Constitution of South Africa, determines that everyone has the right to privacy, which includes the right not to have the privacy of their communication infringed upon.

Practice Note:

Standard Management Rule 67(1) determines that votes at a general meeting may be cast either personally or by proxy, whether on a poll or on a show of hands. Unfortunately there is no provision as to the limitations as to how many proxies an owner or other person may hold. Should a body corporate wish to limit the number of proxies a single owner may hold, the Management Rules must be amended in the manner prescribed in section 35(2)(a) of the Sectional Titles Act.

Louisa de Lange

Would a recording infringe anyone's right to privacy? The motive of the owner for wanting to make a recording and distribute it, as well as the class of persons to whom it is distributed are factors that might indicate whether the right to privacy was infringed or any other right of another person was violated and whether the recording was unlawful.

Transparent management is an important component in sectional titles administration and a tape recording of proceedings may enhance the credibility of the trustees. The very fact that trustees would want to prohibit an owner to record the proceedings may look suspicious.

A recording may also be advantageous in the sense that it would promote effective debating, rather than to negate it.

It is in any event advisable that trustees record proceedings themselves for later reference, and to inform the members thereof. Should an owner want to make his own recording, we would advise that he or she should at least inform the trustees of his or her intention.

Accordingly an owner may tape the proceedings at the annual general meeting of the body corporate. The recording would not be unlawful nor infringe upon the right to privacy if the proceedings at the general meeting of a body corporate is recorded and distributed to the owners or other persons with a legitimate interest in the affairs of the body corporate: Provided that the recording is distributed for the purpose of an in connection with the administration of the sectional title scheme.

In conclusion, it is important to remember that the meeting is ultimately subject to the provisions of the Management Rules and the discipline of the chairman.

* * *

LEAKING OR BURST PIPES: SHIRKING THE RESPONSIBILITY

Jacques Maree

I get inundated with queries regarding leaking or burst pipes, especially with regards to the responsibility of the body corporate in such instances. I assume the reason for the aforementioned is the uncertainty that exists regarding the interpretation of section 37(1)(p) of the Act pertaining to the functions of bodies corporate which states:

A body corporate referred to in section 36 shall perform the functions entrusted to it by or under this Act or the rules, and such functions shall include subject to the rights of the local authority concerned, to maintain and repair (including renewal where necessary) pipes, wires, cables, and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property.

According to the above, if a pipe services more than one section, the body corporate is responsible. Likewise if the leak is located over the common property, irrespective of the fact that it may service one section.

Take the example of a leak emanating from a flat above into a flat below. I know of many bodies corporate that would simply deny any responsibility for repairs or damage caused by the leak. Their reasoning being that the leak does not occur on or effect common property. They claim that it is a private dispute between the owners and consequently turn a blind eye.

They do not take into account that the leak might have occurred in a pipe that services more than one section.

They also fail to take Management Rule 69 into account which states that when an owner fails to maintain his section in a state of good repair the body corporate, after giving 30 days notice to such owner and upon his failure to effect the repairs, may effect the repairs and recover the reasonable costs from doing so from the owner. It would therefore appear that the body corporate has a responsibility to oversee that sections are properly maintained. It is an important responsibility because failure to enforce management rule 69 could lead to deterioration of unit values.

I would suggest that, when an owner reports a leak, the trustees take the initiative to see that repairs are effected timeously. They should, as soon as reasonably possible, appoint a leak detection company to detect the leak.

There are plenty of such companies that specialise in leak detection. Some are even quite sectional title savvy. The company must be instructed to ascertain the following:

- (1) The location of the leak.
- (2) The cause of the leak (was it a burst pipe?).
- (3) If the leak emanates from a pipe, does such pipe service more than one section.

Once the company has determined the above one can pinpoint responsibility. Furthermore if the leak is caused by a burst pipe the body corporate may claim from insurance.

The costs for appointing such company are minimal if compared with the costs of potential damage if action is delayed or nothing done about the leak. I suggest that the body corporate pay the initial costs of the company, alternatively to agree with the effected owners that whoever is ultimately responsible for the repairs covers such costs.

SOLLY GAORUTWE MOLEFE

Solly Molefe is founder / Director of Setsmol Housing Education & Training and client to Tertius Maree Associates. He had the following to say about himself and his involvement in Housing Education:

Born in Soweto – Johannesburg. Matriculated at Mapetla High School – 1984 and completed my Secondary Teacher's Diploma in 1987.

Due to lack of teaching post by then, he had to relocate to Limpopo Province at Polokwane. Firstly, taught at Mohlakaneng for one year and moved to Seshego High and taught matriculants – 1988 to 1998.



After the scrapping of Group Areas Act, he bought a newly built house in a coloured dominated area – Westernburg 2 km away from Pietersburg. The developer who owned the project took advantage of my lack of knowledge in housing; He showed me a stand where they are going to build my house and housing plans. After the house was completed, I was shocked – the size of the house was smaller than the original plans, there were two houses built on my stand and still being charged the same amount.

I did not know how to challenge the developer with the issues.

In 1999 I relocated to Johannesburg and joined a housing company on contractual basis. It was at this stage where I realized how important housing education is. My contract expired at the end of 1999.

In 2000 I joined Services Seta whereby I attended a business management course and became a skills development facilitator. I started Setsmol Housing Education & Training in 2002 and obtained accreditation from Services Seta. Recently I studied abroad in The Netherlands – Erasmus University / Lincoln Institute of Land Policy – Land Management and Informal Settlement Regularization Course.

Registered as an approved Debt Rehabilitator – NCR
The National Credit Act is one of the remedial tools that protects consumers from reckless lending, over indebtedness and rehabilitation which I believe is long overdue.

Setsmol was established to assist people with making informed housing decisions and provide housing knowledge. The drive behind establishing Setsmol was due to my past experiences especially with the developer in Westernburg.

I thought to myself – How many people are being unfairly treated in the process of accessing home ownership? I consulted various stakeholders and communities at grass root level about housing education which confirmed that there is a dire need for this education.

During 2004 I was elected by the Department of Housing SA to develop Housing Consumer Education which is now included in the Breaking New Ground Housing Policy. This was an achievement and an indication that I'm at the right place at the right time.

I won the Housing Person of the Year 2006/7 award and this made me work harder and resulted in my developing the Borrower Education Workshop which targets individuals who access mortgage bonds – the workshop is intended to eliminate defaulting and promotes sustainable homeownership as an investment, alleviation of poverty & creation of wealth.

During my career I assisted in promoting Women in Housing & Construction Organization, joined Anglo Platinum as a Housing Training Manager. The challenges at this mining company was to assist and develop strategies that can address housing issues – converting hostels into family units, providing affordable housing to low & middle income groups. Most people were not knowledgeable about home ownership and I introduced housing education as a standard program.

Since inception, of Setsmol, I held workshops conducted in various private companies – Mining, Banks, Wholesalers, and Government Organizations with a view of empowering people through our housing education programs.

During the journey there were some challenges, especially starting and running a business without capital. Presently Setsmol is self funding and outsourced by various companies.

I strongly believe Housing Education & Training should be compulsory to all housing delivery initiatives so that there is mutual understanding between various stakeholders and especially consumers, who don't understand the rights, contractual obligations, accountabilities, roles and responsibilities attached to sustainable home ownership. I have encouraged community participation through education and my aim is to achieve a mind-set shift away from being "locked up" in a historic culture of non-payment inherited from the previous dispensation, towards responsibility in home-ownership based on knowledge and understanding of home-ownership as a tool to create wealth.

My slogan is "DO IT RIGHT THE FIRST TIME!"

* * *

IS WATERDIGTE BALKONNE 'N MITE?

Vakmanskap van gehalte,
instandhouding die antwoord
Tertius Maree

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

SEKER die algemeenste instandhoudingsprobleem wat woonsteleienaars ondervind, is die hoofbrekens wat lekkende balkonne en dakke, veral plat dakke, gee.

So algemeen is dié probleem dat 'n leser my onlangs gevra het of dit werklik moontlik is om 'n waterdigte balkon te bou.

Ek het self hieraan begin twyfel, veral weens die reëlmaat waarmee trustees van deeltitelgeboue my aangaande lekkende balkonne raadpleeg.

My doel is nie om die trustees van raad te dien oor die tegniese aspekte van waterdigting nie, maar om hulle te adviseer oor hoe om dit administratief te hanteer en wie na gelang van omstandighede vir die herstel- en instandhoudingskoste verantwoordelik gehou kan word.

Die problematiek hiervan is op sigself nie eenvoudig nie, hoofsaaklik vanweë die dwaalspoor geskep deur die Solidatus-uitspraak, wat ek reeds in DeeltitelForum bespreek het.

Weens die voorspelbare reëlmaat van die probleem van lekkende balkonne en plat dakke (veral gedurende die Kaapse winter), het ek op 'n onlangse deeltitelseminaar met 'n kundige op dié gebied, mnr. Paul Koning, gesels.

Sy boek *The Waterproofing of Buildings* is toonaangewend in dié bedryf. Hy het 'n eksemplaar daarvan verruil vir 'n eksemplaar van my Engelse weergawe van *Kits Deeltitel Oplossings*.

Ek het gevind dat hoewel die inhoud van Koning se boek tegnies van aard is, dit interessant en maklik leesbaar is. Ek kan aanbeveel dat trusteeerade van geboue met waterbedigtingsprobleme dié boek aanskaf om die agtergrond van die probleme na te gaan en die doeltreffende oplossing daarvan. Ingelig kan hulle sinvol met aannemers onderhandel en besluite neem.

Met verwysing na die swak reputasie van waterdigting van geboue in Suid-Afrika, merk die skrywer op dat die volgende faktore bydra tot die onbevredigende standaard wat algemeen aangetref word:

- gebrek aan behoorlike opleiding en skaarsheid van opgeleide vakmanne, gepaardgaande met 'n kommerwekkende afname in gehaltevakmanskap;
- bouprojekte wat binne 'n te beperkte tydsraamwerk voltooi moet word;
- druk op aannemers om binne 'n onrealistiese begroting te werk;
- gebrekkige voorbereiding van die onderlaag;
- ontoereikende ontwerp;
- onvoldoende aandag aan detail; en
- afskeep van die nodige instandhouding.

Dit is beduidend dat swak waterdigtingsprodukte een van die faktore is wat die skrywer nie noem nie. Inderdaad is byna alle produkte deesdae van goeie gehalte.

Wat wel waar is, is dat 'n verskeidenheid produkte beskikbaar is en dat 'n gepaste een gekies moet word vir die besondere doel waarvoor dit benodig word.

So is 'n akrielprodukt nie geskik om onder teëls te gebruik nie, aangesien dit sal verbreek. Ander produkte is weer nie teen ultravioletbestraling bestand nie en moet met teëls bedek word.

Sekere produkte is bestand teen die deurdringing van plantwortels, ander nie. Sementagtige produkte moet nie oor 'n betonblad aangewend word nie, aangesien dit geneig is om te kraak.

So identifiseer die skrywer nie minder nie as 16 materiale en bespreek hy elkeen se besondere eienskappe. Aan die einde van die boek is 'n nuttige opvou-skedule waarin verskillende produkte en toepassings in tabelvorm uiteengesit word.

Die skrywer wys daarop hoe belangrik dit is dat die waterbedigting aanvanklik reg aangepak word. Gedurende die konstruksiestadium is dit betreklik goedkoop om die werk behoorlik te doen. In vergelyking daarmee is die koste om swak werk later te laat herstel, baie hoog.

Die skrywer bespreek kwessies soos die verskillende tipes onderlae en die voorbereiding daarvan, die geval, dreinerings, diffusie van waterdamp deur materiale, kondensasie, watertanks, swembaddens, planthouers en ander strukture op plat dakke, uitsettingslaste en die invloed van wind.

Dan wy hy 'n hoofstuk aan die beginsels van detaillering, wat blyk een van die belangrikste aspekte van waterbedigting te wees. Byvoorbeeld: Hoe om 'n waterdigtingsmembraan af te end, is selfs belangriker as hoe om dit reg te lê. Hierdie hoofstuk is goed voorsien van foto's en sketse wat die verkeerde én korrekte toepassingsmetodes illustreer.

In die praktyk ontstaan die meeste waterlekke dan ook weens die gebrekkige aandag aan die fyn afwerking by afvoerpype deur mure, voortjies, deurdrumpels, keermure, skoorstene en ander geboude strukture op balkonne en dakke.

Watter leek sou byvoorbeeld kon raak hoe lewensbelangrik die inbou van 'n eenvoudige dreineringspypie deur 'n balkonmuur is en tot welke ernstige gevolge die geringste afwyking van die korrekte plasing van die pyp en die waterdigtingsmateriaal wat daarby aansluit, kan lei?

Die skrywer se deurlopende tema is: "Doen dit die eerste keer reg!"

Hy is ervare genoeg om te weet in werklikheid geskied dit nie altyd so maklik nie. Dus skenk hy aandag aan die herstel van gebrekkige waterdigtingstelsels.

Geen waterdigtingstel wat aan die elemente blootgestel is, kan onbepaald sonder instandhouding hou nie. Dit is die harde werklikheid, selfs al verklaar die vervaardigers van sekere produkte dat instandhouding nie vereis word nie.

Die norm in Suid-Afrika, weens die voorkoms van hoë ultravioletbestraling, is om die membraan met een laag of meer lae pikbevattende aluminiumverf te bedek.

Die verwerk móét van tyd tot tyd hernieu word. Hóé dikwels, sal afhang van die weersomstandighede, maar dit behoort ten minste elke vyf jaar gedoen te word.

Pikbande met aluminiumfoelie daarop vasgeheg lewer ook goeie resultate.

- Bestel *The Waterproofing of Buildings* van G.P. Koning by ☎ 021 703 9544 of e-pos: gpkoning@mweb.co.za

* * *

NASTO

Response Form

(by trustees of bodies corporate)

PARTICULARS OF BODY CORPORATE:

NAME :
SS NUMBER :
NUMBER OF UNITS :
PHYSICAL LOCATION :
POSTAL ADDRESS :
E-MAIL ADDRESS :
CONTACT PERSON Name :
Capacity :
Tel No :
Fax No :

Does your membership include one or more persons who have skills in one or more of the following fields-

- Taxation
- Municipal legislation and procedures
- Legislative procedures
- Accounting and administration
- Sectional title law
- Housing development

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

COMMENTS:

Please return this form to tertius@section.co.za or Fax No 021 886 9502 or PO Box 12284, DIE BOORD, 7613

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
- 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
- Addenda to certain material in Volume 1.

* * *

MCS Publications

ORDER FORM

Please deliver by ordinary post the indicated number of copies of:

<input type="checkbox"/>	Kits Deeltitel Oplossings @ R225,00 / book	<input type="text" value="R"/>
<input type="checkbox"/>	Sectional Titles on Tap Vol 1 @ R245,00 / book	<input type="text" value="R"/>
<input type="checkbox"/>	Sectional Titles on Tap Vol 2 @ R225,00 / book	<input type="text" value="R"/>
	Total	<input type="text" value="R"/>

at my specified postal address:

Title	<input type="text"/>
Initials	<input type="text"/>
Surname	<input type="text"/>
Postal Address in RSA:	<input type="text"/>
Telephone	<input type="text"/>
Email	<input type="text"/>

Payment by direct / electronic deposit.

1. Deposit into account:
MCS CONSULTING
Nedbank - Branch Code 107-110
Acc No 1071 336 223
2. Fax proof of payment to 021 886 9502 or
e-mail to rosie@section.co.za

Adding Value in the Sectional Title Industry