



SHARE BLOCKS

Old Hat or Resurgent Fashion?

Tertius Maree

When sectional titles were introduced in 1971, the intention was to address the shortcomings of the share blocks property-holding format and it was predicted that sectional titles would replace share blocks at a fast rate.

Sectional titles certainly gave property development an astounding injection of energy and it quickly overshadowed share blocks as the preferred development format. Many existing share block buildings were converted and the vast majority of new apartment developments were sectional title schemes. The attraction of sectional titles vis-à-vis share blocks mainly consisted in the possibility of raising mortgage finance, which opened the market to buyers unable to pay cash. The fact that sectional titles conferred real ownership, compared to mere shareholding in a company, was also seen as a compelling argument in the thinking of potential purchasers.

Also, it soon became apparent that the sectional title model was a very flexible development vehicle for purposes other than housing.

In Natal (as it then was) conversion of existing share block schemes to sectional titles was slowed down by three factors, namely (i) the longer history of share blocks in the province, (ii) the high percentage of temporary holiday (share block) accommodation existing there, and (iii) the fact that many share block schemes were based on leasehold, which made such schemes unsuitable for conversion.

The advantages of sectional titles over share blocks as development model became somewhat cliché and went largely unchallenged until recently. The fact that share blocks do offer certain advantages has again been put under the spotlight by the upsurge in so-called 'fractional ownership' of late. It has brought an awareness of the fact that, particularly for leisure accommodation, share blocks present some real advantages. These may be summarised as follows:

- (a) The establishment of the legal sub-structure of a share block scheme is less costly and quicker than for a sectional title scheme.

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- (b) A developer may use the proceeds of sales of shares to develop the scheme, and even to purchase the land or building, which diminishes or sometimes eliminates the need for borrowed development capital, allowing a less costly end product due to the interest factor.
- (c) Registered ownership of the land on which a scheme is established, is not required - a share block scheme may be based on leasehold.
- (d) A single share block scheme may be established on several pieces of land which need not be contiguous.
- (e) Real ownership, such as sectional title ownership, burdens owners with more obligations and commitments than shareholding in a share block company. In respect of leisure accommodation this is often seen as an advantage of share blocks.
- (f) The flexibility of share blocks makes it more suitable for time-share schemes.
- (g) The fact that bond finance is not obtainable for share blocks is perceived by some as a 'selectivity benefit' for existing owners.
- (h) Transfer procedures may be cheaper, particularly when a substantial loan obligation exists.
- (i) By utilising share blocks within a sectional title scheme, complex structures may be achieved which could accommodate divergent interest groups on one piece of land.

Despite certain warnings, the so-called 'fractional ownership' industry appears to be expanding at a rate of knots. In the majority of 'fractional ownership' schemes a combination of share blocks and time-sharing is utilised. Whilst the use of the term 'ownership' is misleading and the legal integrity of some schemes may be doubtful, share blocks do offer the developer and purchasers real advantages in this type of leisure accommodation, and it may be successfully linked to time-sharing arrangements, provided that it is done correctly.

Share blocks have recently emerged as a useful device to facilitate certain developments in compliance with emerging policies and legislation, in terms of which provision must be made for benefits to previously disadvantaged individuals. This is particularly true in respect of rural / agricultural developments, which combine upmarket leisure accommodation with education, training, employment, profit-sharing, and housing benefits for members of local communities. Such schemes present interesting challenges and exciting possibilities for both investment and social development.

It would seem that we have not yet seen the end of the potential role of share blocks as a property-holding format.

Maintenance, including replacement of doors and windows

Ilse Kotze

In accordance with section 5(4) of the Sectional Titles Act, No. 95 of 1985 (the Act), the boundary between a section and another section or the common property is the median line or middle line of the dividing floor, wall or ceiling, as the case may be. The reference to 'wall' poses problems since a wall may also consist of a door and windows, and such features may have been installed on the inside or outside of the median line of the wall. In accordance with the 'blank wall' approach doors and windows, depending upon their positioning in a wall, would either form part of a section or part of the common property. If a door or window is positioned on the inside of the median line it would be part of the section and if positioned on the outside of the median line it would be part of the common property.

It is the approach of Tertius Maree that doors and windows form an integral part of a wall and the actual boundary of a wall should follow the median line of these features. This means that doors and windows of sections will always be 50% part of section or private property and 50% common property.

In terms of section 44(1)(c) of the Act an owner is responsible to repair and maintain his section in a state of good repair, whilst the body corporate is responsible to maintain the common property and to keep it in a state of good and serviceable repair in terms of section 37(1)(j) of the Act. Maintenance includes replacement where necessary.

In accordance with the 'blank wall' approach, doors and windows positioned on the inside of the median line, therefore forming part of the section, will be the responsibility of the owner of the section to maintain, whilst doors and windows positioned on the outside of the median line will be the responsibility of the body corporate to maintain.

In accordance with the approach of Tertius Maree, the maintenance of doors and windows on the inside thereof will always be the responsibility of the owner of the section, whilst the maintenance on the outside thereof will always be the responsibility of the body corporate.

If it is necessary for maintenance purposes to replace the doors or window frames of sections, it is suggested that it would be more sensible for the trustees to manage the project, than for each owner to attend to such replacement. The trustees would be able to obtain quotations from different contractors and conclude a contract with a contractor of their choice. One

half of the costs of the project of replacing the doors or window frames should be covered by body corporate funds, whilst each owner will be liable to the body corporate for one half of the costs of the replacement of the doors or window frames of his section. If the body corporate funds are insufficient to cover one half of the costs of the project, the trustees may impose a special levy on owners to recover such costs.

It is possible for the members of the body corporate to adopt special rules (Management Rules or Conduct Rules) to assign the responsibility of maintenance of external doors and windows to the body corporate. The body corporate will then be responsible to maintain, including where necessary to replace the external doors and windows of sections. All costs pertaining to maintenance and replacement will then be covered by the body corporate funds or be recovered from owners by the imposition of a special levy.

It is also possible for the members of the body corporate to adopt special rules (Management Rules or Conduct Rules) to assign the responsibility of maintenance of external doors and windows to individual owners. Each owner will then be responsible to maintain, including where necessary to replace the external doors and windows of his section. The rules should stipulate that if doors or windows require replacing, it should only be replaced with doors or windows according to the specifications approved by the trustees. Each owner will be liable for the costs of maintenance pertaining to the doors and windows of his section.

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Welcome back!
ILSE KOTZE

We at Tertius Maree Associates are very happy to welcome back Ilse Kotze who worked at Tertius Maree Associates from 2004 to 2006. She again forms part of our dynamic, hardworking staff.



More about Ilse

Ilse has been appointed as professional assistant at Tertius Maree Associates. She graduated at the University of the Stellenbosch in 1996 having obtained a B COM LLB Degree. She was admitted as an attorney in 1998 and as a conveyancer and notary in 2002 and has practiced as such. She now specializes in sectional titles.

Ilse can be contacted directly at ilse@section.co.za or telephone (021) 886-9521.

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CONFUSION REGARDING THE HARMONIOUS APPEARANCE RULE

Jacques Maree

When it comes to the aesthetic and harmonious appearance of a building many trustees, owners and even experts have different views. Some equate harmony to aesthetics whilst others are of the view that they are different claiming the something that is aesthetically displeasing will always be inharmonious but not necessarily vice versa.

Let us take the following example:

A sectional title scheme consist of sections on the ground and first floor. The first floor sections all have open balconies. One of the owners on the first floor applies to the trustees to enclose his balcony.

The enclosure of a balcony has bearing on more than one rule but for purposes of this article we shall only consider one such rule that has to be considered, namely the harmonious appearance rule, which is management rule 68(1)(iv):

In addition to his obligations in terms of section 44 of the Act, an owner shall not do anything to his section or exclusive use area which is likely to prejudice the harmonious appearance of the building.

The first issue that we should take notice of is that the trustees have no specific discretion to determine whether something ‘prejudices’ the harmonious appearance of the building or not. The rule may be construed as presupposing that the issue is clear cut which all of us know is never the case in sectional titles. Should there be a difference of opinion as to whether this rule will apply to a specific alteration it is best to refer the matter to a professional (architect) for his expert opinion.

It has often been argued that management rule 68(1)(iv) imposes an absolute prohibition, that is if an alteration alters the harmonious appearance of the building it is inharmonious and contrary to the provisions of management rule 68(1)(v). In our example the enclosure of one balcony on the first floor, whilst it may appear aesthetically pleasing, will alter and therefore prejudice the harmonious appearance of the entire building. Should all the owners decide to enclose their balconies in exactly the same manner and at the same time the harmonious appearance will not be affected.

In my view this is not the correct interpretation of the rule for reasons that will become apparent. Should this interpretation be followed it will place many bodies corporate in the invidious position of possibly having to take legal action against owners who have made alterations that have affected the harmonious appearance of the building in some way, even if trustees' consent were obtained.

The correct approach, in my view, is to look at the issue from an aesthetic point of view rather than the stringent harmonious test as described above. The enclosure of a balcony, even though it may affect the harmonious appearance of the building, may not necessarily affect the aesthetic appearance of the building.

One reason for the confusion regarding the harmonious appearance rule can be found in the apparent discrepancy in the English and Afrikaans text of the rule, the latter stating:

... mag 'n eienaar nie iets aan sy deel of uitsluitlike gebruiksg gebied doen wat waarskynlik die estetiese voorkoms van die gebou sal benadeel nie.

When there appears to be a conflict between two texts of the same Act one has to look at our rules of interpretation of statutes one of which states that in case of a such a discrepancy or conflict the wording of the signed text shall prevail. The Afrikaans version of the Sectional Titles Act was signed by the State President and we therefore need to focus on the Afrikaans wording of the rule which refers to “estetiese voorkoms” and not “harmonieuse voorkoms” which is the direct translation of the English “harmonious appearance”.

Based on the above I am of the view that the harmonious appearance rule should not be regarded as an absolute prohibition as described above and the question that should rather be considered is whether an alteration prejudices the aesthetic appearance of the building. There is a much wider scope when considering the aesthetic appearance of the building as compared to the harmonious appearance.

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Kan jy deel vir nuwe doel gebruik?

Al die eienaars moet instem sonder om onredelik te wees

Tertius Maree

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

IN 'n onlangse uitspraak van die Kaapse Hooggeregshof in die saak *Cujé-Jakoby teen Kaschub* beantwoord regter Jeanette Traverso sommige vrae waarmee trustees dikwels worstel in verband met die aanwending van 'n deel vir 'n ander doel as waarvoor dit oorspronklik bestem was. Dit het in dié geval oor die omskepping van 'n motorhuis gegaan.

In hierdie verband bepaal artikel 44(1)(g) van die Deeltitelwet soos volg: 'n Eienaar moet, wanneer die doel waarvoor 'n deel bedoel is om gebruik te word, uitdruklik of by implikasie of deur 'n geregistreerde deelplan aangetoon word, sodanige deel nie vir 'n ander doel gebruik of toelaat dat dit vir 'n ander doel gebruik word nie: Met dien verstande dat so 'n deel met die skriftelike toestemming van al die eienaars vir 'n ander doel gebruik kan word.

Die vraag ontstaan onmiddellik wat met die uitdrukking "by implikasie" bedoel word. Hoe sou 'n deelplan "impliseer" wat, byvoorbeeld, die doel van 'n pakkamer of motorhuis is, indien in ag geneem word dat motorhuise in die meeste gevalle nie as sodanig op deelplanne beskryf word nie?

Ongelukkig verskaf die gerapporteerde uitspraak geen ontleding van die uitdrukking nie. Dit verskaf dus nie 'n antwoord nie en werp slegs by implikasie lig op die betekenis daarvan.

'n Goeie begrip van die beginsels hier ter sprake word meer kritiek in die lig van die bepalings van artikel 44(2) van die Deeltitelwet, waarvolgens 'n eienaar wat meen dat enige weiering van toestemming deur 'n ander eienaar "onredelik benadelend, onregverdig of onbillik" is, binne ses weke 'n aansoek tot die Hooggeregshof kan rig om die afwykende gebruik te ratifiseer. Die hofsaak is dan ook ingevolge laasgenoemde bepaling aanhangig gemaak.

Die feite in die saak is soos volg: Die applikant was die eienaar van sewe wonings in die deeltitelwoonbuurt Glen Abbey in Erinvale, Somerset-Wes, en het 'n verdere vyf wonings namens die eienaars bestuur as deel van 'n verhuringspakket wat ook die skoonmaak van die wonings ingesluit het. Ingeslote by die pakket was ook sekere was-en-strykdienste. Vier motorhuise is deur die applikant omskep om dié dienste te kan uitvoer.

Alle eienaars behalwe een het die nodige toestemming ingevolge artikel 44(1)(g) verleen. Gevolglik was die applikant verplig om kragtens die bepalings van artikel 44(2) 'n aansoek tot die Hooggeregshof te rig om dié afwykende gebruik te magtig.

Die respondent (beswaarmaker) het die aansoek teengestaan. Grondliggend tot haar beswaar was blykbaar die oorlas wat veroorsaak word deur die geraas van die wasmasjiene vanuit een van die betrokke motorhuise. Sy het ook beswaar gemaak omdat die nabygeleë aanwesigheid en beweging van die skoonmaakpersoneel 'n veiligheidsrisiko vir haar skeep en ook inbreuk maak op haar reg op privaatheid.

As verdere argument het sy aangevoer dat die afwykende gebruik van motorhuise die eenheidswaardes in die woonbuurt (skema) sal benadeel.

Sy het reeds vroeër toestemming verleen tot die veranderde gebruik van drie van die motorhuise en het aan die applikant voorgestel dat die waskamer in die vierde verskuif word na 'n ander motorhuis waar dit nie 'n steurnis sou veroorsaak nie.

Sy was egter nie bereid om te onderneem om haar beswaar terug te trek indien dit wel gedoen word nie.

Die applikant was nie bereid om die verskuiwingskoste aan te gaan sonder 'n waarborg dat die beswaar teruggetrek sou word nie, en was dus genoodsaak om die hofaansoek te rig.

Die hof moes, volgens die bewoording van artikel 44(2), bepaal of die beswaarmaker se weiering om toestemming te verleen "onredelik benadelend, onregverdig of onbillik" was en het tot die gevolgtrekking gekom dat dié woorde verstaan moet word as synde optrede wat afwyk van aanvaarde norme van billike optrede.

Regter Traverso het bevind dat die beswaarmaker haar argumente oordryf, dat die veranderde gebruik en die aktiwiteite wat daarmee gepaard gaan nie onredelik inbreuk op haar privaatheid maak nie, dat dit nie 'n verhoogde veiligheidsrisiko skeep nie en dat die beskikbaarheid van dienste deur die applikant gelewer, eerder sal neig om eenheidswaardes te verhoog as om dit te verlaag.

Die beswaarmaker was ook onredelik om nie te onderneem om haar besware terug te trek indien die applikant haar voorstel aangaande die verskuiwing van die wassery aanvaar nie.

'n Faktor wat oënskynlik ook deur die regter in ag geneem is, is dat die beswaarmaker self haar motorhuis as 'n waskamer gebruik het.

Die regter het dus bevind dat die weerhouding van die beswaarmaker se toestemming neerkom op gedrag wat vir doeleindes van artikel 44(2) as "onredelik benadelend, onregverdig of onbillik" beskryf kan word. Die bevel is toe uitgereik dat sy geag word haar toestemming te gee het.

Die beswaarmaker is verder gelas om die koste van die aansoek te betaal.

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NASTO

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(by trustees of bodies corporate)

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