

# BCN

*Bodies Corporate News*

**KEEPING TRUSTEES AND OWNERS INFORMED**

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## **Our New Years message** *provided by a BCN reader*

What is a trustee? A trustee is a selfless person who always has his members' interests at heart. One who is principled, ethical and even handed.

A trustee is one who guides and inspires others. Trustees do not enforce; they do not push, but rather pull their members in the right direction. Trustees encourage their members to embrace a communal spirit, and contribute to the well being of neighbours.

Trusteeship involves hard work, studying, reflecting, managing, and most importantly, taking care of the needs of the members. Trusteeship is a major responsibility and a noble task. Trustees' decisions have a direct effect on members, so all decisions have to be taken with care. "Trusteeship requires vision and confidence to stay out of step when everyone else is marching to the wrong tune."

Have some of our trustees lost their moral high ground and succumbed to the hypnotic enticement of power? Has the possession of power blinded them to their faults and their damaging decisions?

What will become of communal society when we have trustees who are morally corrupt? Are these the examples we want for our children? What is the future generation going to be like?

Previously, if there was merely a sniff of unethical behaviour, trustees would be asked to step down or they would resign. And as is known, society, though progressing in all spheres of life, regresses with every new generation.

One shudders to think of what could lie ahead.

There are many great personalities that we can learn from, people who have made a great impact on society. Principled men.

We need to be strong and not let go of our principles, no matter what the cost.



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# Help line

The editor of Bodies Corporate News is unfortunately forced to limit the amount of time spent on the Help line as it has reached the point where it seriously distracts from his prime function, i.e. the production of Bodies Corporate News.

In future the Help Line will only be available to trustees and subscribers on Mondays.

### ACKNOWLEDGMENT

THIS PUBLICATION ACKNOWLEDGES THE CONTRIBUTION MADE TO THE SECTIONAL TITLE INDUSTRY BY TERTIUS MAREE, GRAHAM PADDOCK, MARINA CONSTAS, KAREN BLEIJS, AND THE LATE BOB GOULD, WHO'S PUBLISHED WORK PROVIDES US WITH ADDITIONAL INSIGHT.

## INFORMATION INDEX

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# Electrical Compliance Certificate needed by law

*A recent article in a local magazine claimed that according to a recent court ruling it was not necessary for an Electrical Certificate of Compliance (CoC) to be issued when a property changes ownership unless it is listed as a condition of sale. According to Nicky Versfeld there is confusion surrounding this issue, and she tries to provide some answers.*

It is important for homeowners to know their rights and liabilities and to clear up any misunderstandings. The Electrical Contractors' Association responds as follows:

"Neither the ECA, nor the Department of Labour (responsible for enforcing the Occupational Health and Safety Act (OHASA) and the Electrical Installation Regulations) are aware of any recent court rulings regarding electrical certificates of compliance. There is however a legal opinion in circulation by a high court judge questioning whether OHASA has the necessary authority to regulate practice in respect of residential properties (and the electrical installations on these properties).

The courts have not yet ruled on this issue, and the question remains to be answered. What is known is that the Department of Labour enforces the requirements of the Electrical Installation Regulations with regard to residential properties.

It is important to note that the law provides that a CoC needs to be issued when a property on which an electrical installation exists changes ownership at any time after 1st of March 1994.

The Electrical Installation Regulations

require every user or lessor of an electrical installation (i.e. a premises that is electrified) to have a valid CoC, which is transferable to new owners. There is an exception that if the installation existed before October 1992 and there have been no addition or alteration to that installation, and it has not changed hands since 1 January 1994, then no CoC is required. Once a change of ownership occurs, a CoC is required."

However the OHASA goes further to state that no electrical installation can be sold unless it complies with the prescribed safety requirements. The CoC is the only accepted and endorsed proof of compliance. The document has been formulated by the SABS, with stakeholder input, and accepted by the Department of Labour as being indicative of the safety standards to be applied.

For this reason, the majority of property sale agreements stipulate that a seller will provide the buyer with a valid certificate of compliance. A seller doing so can be comfortable that the electrical installation is safe and compliant, in turn giving the buyer comfort and assurance that all is well with the electrical

installation.

Remember that: a homeowner is required to have a CoC for the electrical installation on the premises unless the installation predates 1992 and there have been no additions or alterations and no change of ownership. A seller may not sell (a premises with) an electrical installation unless the installation complies with the prescribed safety requirements. A valid electrical Certificate of Compliance is the most universally accepted and endorsed proof of safety and compliance. If the agreement of sale of a property stipulates that a seller will provide a CoC, this becomes a legally binding obligation on the seller.

Although a CoC is transferable, it is recommended that an inspection of the property be carried out before buying or selling to ensure there are no surprises later on. A seller may claim that no alterations were done to the electrical installation and that their CoC is valid, but the truth is that even minor electrical work such as fitting a ceiling fan, new oven, extractor fan, new light fittings or replacing faulty plugs can render an existing CoC null and void.

Therefore always insist on a valid CoC from



your builder or electrical contractor to avoid unnecessary costs when selling. It happens time and again that a seller who for example has had an electric gate, pool pump or geyser fitted, is disappointed to find that the work done does not pass the electrical inspection. Often he can't locate the original contractor to rectify the work, and as a result the seller is liable for all costs to have the problem fixed.

And don't think this doesn't apply to you because you're buying a new property! So often new properties don't pass the electrical test, and it might be worth your while in the long run to have the property "checked over" by an expert as soon as you take occupation. Locating the developer or the electrician at a later stage and actually getting them to rectify problems could be a daunting task.

Normal wear and tear on electrical installations and new regulations coming into effect since the last CoC was issued could also result in a failed inspection.

Whether you're buying or selling, always insist on a new inspection being carried out by an ECA (SA) accredited member and that an up to date CoC is issued before transfer takes place. That way you'll ensure a hassle-free transfer, that your new home is safe to live in and that you will not be landed with large bills later on.

Always keep a copy of your CoC in a safe place, at home, and don't allow it to end up amongst the paperwork on the transferring attorney's desk. On many occasions sellers (who may have only owned a premises for 6 months) need to pay for a new inspection because they can't find their CoC.

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Now readers can interact, share information and give opinions online. The Editor of BCN will from time to time answer questions.

The blog provides an informal and friendly medium for owners and trustees living in community schemes

# A “fist full” of proxies:

“but are they legal if I am an owner and a caretaker”

**M**uch confusion surrounds the holding of proxies by owners, who are also Body Corporate employees. This is what the Act says:

Management Rule 67(3): *A proxy need not be an owner, but shall not be the managing agent or any of his or her employees, or an employee of the body corporate.*

The rule does **not say** that an employee of the Body Corporate may hold a proxy if he is an owner.

The confusion probably results from the qualifications that are set for the appointment of trustees, and individuals mix up the two criteria.

Management Rule 5(b) states that: *the managing agent or any of his or her employees or an employee*

*of the body corporate may not be a trustee unless he or she is an owner.*

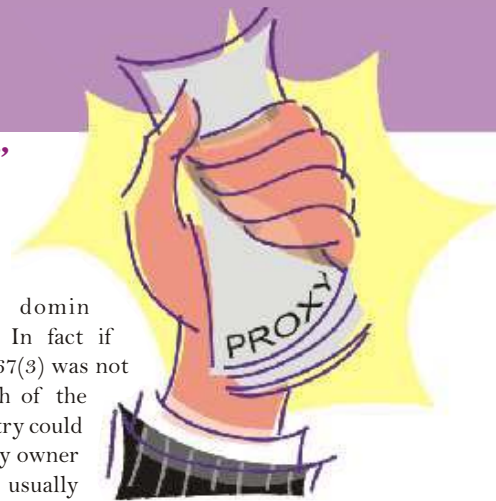
There are obvious reasons as to why an employee of the Body Corporate cannot hold proxies. A body corporate employee (eg: a caretaker) is more exposed to the owners of a complex than any other individual, including trustees.

Trustees usually work full time, and are therefore less conspicuous within the complex than the caretaker. The caretaker has all the time in the world to lobby for whatever cause suits his well being, and quite often an employee works against the very trustees who appointed him. This predicament can result in circumstances where the “tail wags the dog”.

Owners who are also Body Corporate employees are not shy

to arrive at an A.G.M with a “fist full of proxies” and proceed to dominate the meeting. In fact if Management Rule 67(3) was not in the statute, much of the sectional title industry could well be controlled by owner employees who are usually caretakers, security guards, supervisors, secretary's or the handyman. Clearly this was never the legislations intention.

But one could well ask the question, are owners rights compromised if he/she is an employee of the Body Corporate? The answer is “no”. An owner employee can still attend an A.G.M and vote like anyone else. He or she can even give their proxy to another owner if they themselves cannot attend a general meeting. An owner employee can also be a trustee.



They simply cannot hold proxies for other owners.

The use of proxies is intended to provide absent owners with a voice at a general meeting. They are not provided for the purpose of power manipulation, nor should they be actively solicited by power hungry individuals who want to dominate procedure to suit their own ends.

## Contentious issues

Why should owners in ground floor units of phase 1 pay towards levies on the lifts being installed in phase 2 of the development?

DJ Wilshire asks the following question:

*Our complex consists of two separate buildings and was built in two phases.*

*Phase 1 was built in 1994 with 18 units and no lift. Phase 2 was built in 2004 with 12 units and with a lift. The owners of Phase 1 have no occasion to use the lift in Phase 2 other than social.*

*There is argument as to whether or not the lift is considered “common property” and who is responsible for the lift expenses. Phase 2 units were sold with the lift as part of the facilities and could be considered part of the sales agreement, although nothing is mentioned therein.*

*Is it correct that all owners, both Phase 1 and Phase 2, must contribute towards the lift expenses?, or should only those owners who*

*purchased Phase 2 units with the expectation of the use of a lift, be responsible?*

**F**irstly let us mention that lifts are not part of sections nor are they exclusive use areas. They are common property. By way of a Special Resolution the Body Corporate may amend the rules, changing the value of an owners contributions regarding sections.

Section 32(4) of the Sectional Title Act refers to this predicament. We provide details of what is printed in the Act:

*Subject to the provisions of section 37(1)(b), the developer may, when submitting an application for the opening of a sectional title register, or the members of the body corporate may by special resolution, make rules under section 35 by which a different*

*value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 37(1)(a) or 47(1) is modified: Provided that where an owner is adversely affected by such a decision of the body corporate, his written consent must be obtained: Provided further that no such change may be made by a special resolution of the body corporate until such time as there are owners, other than the developer, of at least 30 per cent of the units in the scheme: Provided further that, in the case where the developer alienates a unit before submitting an application for the opening of a sectional title register no exercise of power to make a change conferred on the developer by this subsection shall be valid unless the intended change is disclosed in the deed of alienation in question. The power to amend the formula*

*for the calculation of levies rests in the developer, and after establishment of the body corporate, in the body corporate. In order to avoid the developer exerting an undue influence on body corporate decisions at an early stage of the life of the body corporate, a body corporate may only exercise this option once at least 30% of the units have been transferred to persons other than the developer.*

The Act apparently grants the body corporate some flexibility to make adjustments to the formula according to which levies are calculated. The procedure is not as simple as obtaining a straightforward special resolution. Prior to a decision in the Natal Provincial Division of the High Court, this special mechanism has, for all practical purposes, been regarded as out of reach for the majority of schemes.

The normal method prescribed to amend the levy formula, is by way of amending the **Management Rules** which requires a unanimous resolution. The legislator must have realized that a topic as potentially controversial as an adjustment to the method of levy allocations was unlikely to achieve unanimity amongst members. A special deviation was therefore made that only required a **special resolution** to amend **this particular** management rule.

Unfortunately this gratification appears to have been retracted

subtly by the proviso that

*“where an owner is adversely affected by such a decision of the body corporate, a written consent must be obtained.”*

This provision seems to, in effect, re-introduce the need for unanimity, if the levy formula is adjusted. It is inevitable that some owners will pay less and others more. In this sense, some individuals will always be adversely affected by any change to the levy formula, and their consent would be necessary to make the change effective. Surely it is unrealistic to expect

that such consent will be given, as this would completely undermine the intended objective to facilitate the amendment of the Management Rules.

Nonetheless, a law should not be interpreted in a manner which renders it meaningless or counter-productive. Appropriately, a better interpretation of Section 37 would be that written consent is **only** required if an owner is **unfairly** or **unreasonably** disadvantaged by the proposed amendment.

Other interpretations of the Act will render it ineffective, as it is very unlikely that any owner will consent to an amendment to the levies formula which will result in an unfavourably perceived allocation of costs against him.

This approach was affirmed by the High Court when it was held that, in order to establish whether a person has been adversely affected, **all surrounding circumstances** should be considered, and **not only** whether the owner has to pay more in the form of levies.

## Owners warned of asbestos risks

Property Argus Johan Schronen, Property writer

“Are you a landlord breaking the law without knowing it?” reads the heading of a four-page document issued recently by the Indawo subsidiary, Asbestos Assessment Services (ASS).

ASS is on a campaign to make property owners, tenants, contractors, managing agents and others aware that a 2002 tightening up of the 1993 Occupational Health and Safety Act requires that the owner of any industrial or commercial building has to undertake an asbestos risk assessment every two years (using a registered assessor), keep an asbestos register and update it bi-annually, and present and contractor working on his premises with a SHE (a safety and health environment specification), setting out the measures that have to be taken if any asbestos on site is to be moved or tampered with.

Graham Hartle, sales director for ASS, explained that the legislation had come about

because it is now known that the cement binders in asbestos sheeting will begin to deteriorate once it has been exposed to heat, cold, moisture, wind and other factors over time.

“When this happens,” said Hartle, “the fibres in the asbestos are released into the air. If these are inhaled by humans they can cause asbestosis, an incurable lung disease, or other lung complications.

“Any property owner with asbestos on his premises now has two options if he is to comply with the law and protect those using his building. He can either remove all asbestos or replace it with a non-harmful material, for example, metal roofing, or he can encapsulate it with paints or other materials so that the fibres are contained.

“In the long run this, too, will be only a temporary measure in the end all asbestos has to go.” Hartle said asbestos had been widely used on roofs, gutters, partitions,

flooring and insulation.

Indawo, realizing that a massive transformation challenge awaits Cape property owners with asbestos in their buildings, has established three companies to specialize in this field.

They are ASS (one of the few government-registered assessors in the Cape), Safety and Health Consultants Western Province, which helps clients in preparing a plan for contractors to comply with in executing work, and Cape Group Construction, which specializes in the removal of asbestos and the installation of new materials.

Peter Jack, CEO of Indawo, has pointed out that the taking out of asbestos cannot be handled by any contractor who feels inclined to bid for such work.

“The law requires that the contractor is registered and approved by the Department of Labour in Pretoria and has trained and equipped his staff, all

of whom have to wear personal protective clothing such as safety suits, masks and gloves while on site,” Jack said.

“Furthermore, the asbestos taken out has to be disposed of at a designated site,” he said. He added that, among Cape landlords, there was a growing realization that this legislation was not going to go away and would be enforced.

Jack said his company had, as a result, handled some 25 remove and replacement contracts in the past 12 months.

Paddy Herbert, marketing director of Propell Levy Finance, said that Propell would advise the bodies corporate which it serves of the need for an asbestos register and, if necessary, replacement work.

For further information on the issue, contact Hartle on 021 941 5000.



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## POWER MEASUREMENT

# ASK THE EDITOR

Try to  
Rob will answer your questions

*Many requests for information are received. Regrettably, we are only able to answer several in this column.*

**Q** We want to open a bank account for our Body Corporate and the bank has asked us, in terms of FICA, for a copy of our constitution. They could not specify whether this is the Act, the Conduct Rules, the Management Rules, or all three. What do they require as our Management Rules alone are 26 pages, and at 50c a copy...!?

Rose Gravenor  
Coledo Body Corporate

**A** Good question - there is a great deal of confusion surrounding the documentation that the banks require in order to open accounts, and comply with FICA legislation. In the past it was relatively easy for individuals, and organisations to open bank accounts, without clear identification of the clients and their addresses, so money laundering was prevalent. FICA

legislation now requires that banks hold documentation that proves the identification of the account holders. The banks counter-staff know that **Close Corporations** must submit a **founding statement**, they also know that **Companies** must provide a **certificate of incorporation**. But when it comes to other legal entities such as Clubs, Associations and Bodies Corporate, their instructions are somewhat vague and they use words such as constitution or founding documents when requesting paperwork. Most clubs and associations have a constitution so they seem to pass through the loop without much event. All the documents mentioned so far generally comprise of many pages of paperwork, so bank counter staff expect large quantities of paper to accompany the opening of an account. Most bodies corporate use their managing agents trust account so they do not walk the

gauntlet when their scheme wants to open a bank account. It is the self managed schemes who experience problems as neither the banks, nor the trustees seem to know what paperwork should accompany an application to open an account - the blind leading the blind.

In most cases, and after much debate, the frustrated trustee leaves the bank empty handed and will attempt to search for his body corporate's constitution. Inevitably the trustee realizes that they do not have a constitution, and that the bank surely means "their rules". Which rules? In desperation the trustees usually provide the management rules, and conduct rules. The bank on the other hand are then able and willing to open an account as they have dozens of pages of paperwork, the more the merrier! Fact is, most sectional title schemes have the identical management and conduct rules as they are simply photocopied from the standard Act. In reality the

banks have not satisfied the need to identify their client. Truth is, that the banks should be requesting a form W from their clients. A form W is "**The certificate of establishment of body corporate in terms of the provisions of section 36(1) of the Sectional Titles Act of 1986.**" But there is a problem. Will the average bank clerk accept a form W? After all it's only a ½ page document, and the banks prefer dozens of pages. Clearly there is need for some banks to acquire a greater understanding of what a sectional title scheme actually is, and in the meantime trustees should just keep on photocopying.

*The registrar of deeds issues form W to the developer of the scheme when the first unit is registered, and keeps a copy in his files. The form W is official verification of the name, and SS number of a scheme. Copies can be obtained from the Deeds office.*

## SIGNING OF DOCUMENTS

*Tertius Maree*

*Management Rule 27 states:*

*No document signed on behalf of the body corporate, shall be valid and binding unless it is signed by a trustee and the managing agent referred to in rule 46 or by two trustees or, in the case of a certificate issued in terms of section 15B(3)(i)(aa), by two trustees or the managing agent.*

A document is a piece of paper that provides information and includes the following:

- ▶ All notices issued by the trustees in their official capacity including notices of general meetings.
- ▶ All cheques issued on behalf of the body corporate.
- ▶ Minutes of trustees' meetings.
- ▶ Minutes of general meetings.
- ▶ Certified extracts of minutes.
- ▶ Levy clearance certificates.
- ▶ Contracts concluded on behalf of the body corporate including the appointment of a managing agent.
- ▶ All statutory declarations issued on behalf of the body corporate.
- ▶ Chairman's report.
- ▶ All documents and deeds required for registration purposes including notarial deeds.

All the above documents, and all other documents that represent an action by the trustees, must be signed by two trustees, or one trustee and the managing agent, except in the case of a levy clearance certificate which must be signed by two trustees or the

managing agent. Management Rule 27 stipulates that all documents signed in contravention of the rule is invalid.

Usually the trustees and managing agent have no problem regarding the signing of documents. However, in the case of notices of general meetings, such documents are often sent to owners without the required signatures thereon. I am of the opinion that notices of general meetings must be signed by two trustees, or one trustee and the managing agent, even though the High Court has not yet decided on the issue.

Non-compliance with the requirements of Management Rule 27 in relation to the notices of general meetings does not give an owner the authority to withhold his or her levies. Such an owner will have to approach the High Court to have the meeting and resolution set aside.

A similar instance is when the trustees gave permission to an owner to keep a pet. If the requirements of Management Rule 27 had not been complied with, the trustees cannot merely rely on such defect to rescind their consent. They will have to approach the High Court for an appropriate order.

In order to avoid serious problems it is advisable that the trustees comply with the provisions of Management Rule 27.



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- Structural repairs
- Sealing
- Waterproofing
- Window cleaning

**CAPE TOWN OFFICE**  
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## SECTIONAL TITLE INSURANCE

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Looks solid but what is it  
actually covering?



Looks solid but what is it  
actually covering?

This year, take a hard look at  
your Sectional Title insurance before  
you have to shell out

At a glance, Sectional Title property insurance policies can often appear very similar. Look a little closer though and you'll see that Corporate Sure's tailor-made package offers you far more.

Underwritten by Santam Ltd, compliant with the Sectional Titles Act and with competitive and stable rates, Corporate Sure is the most comprehensive residential and office block Sectional Title insurance policy available.

Call C-Sure Underwriting Managers or your broker and make sure you've got 2007 covered.



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