



# BODIES CORPORATE NEWS

*Keeping Trustees Informed*

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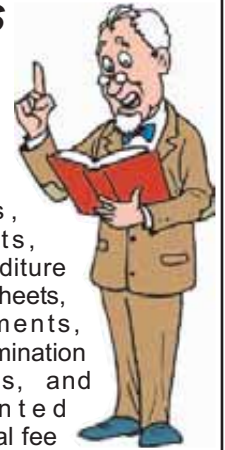
## Trustees, start the new year by obtaining the tools you need to exercise your responsibilities

One would never expect a painter to arrive on site without rollers and brushes, equally we would not place much faith in a carpenter who does not have a tape measure, or hammer. Members of a Body Corporate should surely expect that their elected trustees are in possession of the basic tools, i.e. the Sectional Title Act, the Sectional Plan and the rules. The rules and plans may have been amended over the years, so a trip to the deeds office, and surveyor generals office will reveal the true state of affairs, for your scheme as these offices (usually in the same building) house the officially recognised

documents.

Don't feel intimidated, a visit to these offices is like visiting your local library and having some documents photocopied. The offices are open to the public, and you will need a few rands to have the documents copied. The Sectional Title Act is available from publishers such as Jutas or Butterworths. Trustees, lets start the new year correctly! Please have the tools of your profession on file, and easily accessible. During 2006 Bodies Corporate News will launch additional services for trustees and these include the provision of sectional plans, rules,

and on-line examples of important documents such as amended rules, chairmans reports, income and expenditure statements, balance sheets, cash flow statements, budgets, trustees nomination forms, proxy forms, and additional printed information. A nominal fee for the provision of these documents is unavoidable, however subscribers will benefit from subsidised rates.



## From next issue BCN pays tribute to the late Bob Gauld by publishing some of his articles



**If you are a chair / trustee and have not yet confirmed your contact details, please do so in order to remain on our mailing-list.**

## Sectional Title Amendments -2005

**Management Rules 36, 37, 40, and 46 were amended on the 18<sup>th</sup> of November 2005.**

**Management Rule 36(1)** Deals with the estimated income and expenses schedules that trustees must prepare before every A.G.M, and **Rule 36(2)** highlights that the

expenses should include a reasonable provision for contingencies.

**Rule 36(2)** has been amended and now instructs Trustees to make a reasonable provision for the maintenance of common property.

Clearly the legislature is emphasizing the need for trustees to budget sufficiently for the maintenance of common property. This amendment will, in some cases, place upward pressure on levy contributions, but should also reduce the need to raise special levies.

*Continued on page 2...*

Bodies Corporate News is provided to empower chairpersons / trustees, by enabling them to maximise the property investment of owners in a complex. Our newsletter needs to reach chairpersons or trustees as we offer them free copies. If you received Bodies Corporate News by chance please pass it on to your Body Corporate.



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**Management Rule 37** Requires trustees to prepare financial statements which conform with the generally accepted accounting practice, and which fairly represents the state of affairs of the Body Corporate and its finances and transactions at the end of each financial year.

A sub rule 37(2) has been added and requires that the financial statement tabled at an A.G.M. must now also include:

1. An analysis of the periods of debts and the amounts due in respect of levies, special levies and other contributions;
2. An analysis of the periods and

*the amounts due, owing by the body corporate to creditors, in particular public or local authorities in respect of rates, taxes and charges for consumption of services such as water, electricity, sewage and refuse removal;*

3. *The expiry dates of all insurance policies.*

This sub rule has probably been included to facilitate improved financial management, plus increase transparency in the trustees' financial dealings on behalf of the body corporate. Financial mismanagement is widespread and, trustees are often weak at collecting levies and paying creditors timeously.

On many occasions local authorities have taken court action against bodies corporate because of the non payment of rates and taxes, and in many instances body corporate insurance policies have been allowed to lapse.

This sub rule will provide members with more detailed financial information at their A.G.M. and promote transparency in financial affairs.

**Management Rule 40** concerns the annual audit. All bodies corporate must appoint an auditor, (unless they have less than 10 units, in which case an accounting officer will suffice).

*The amendment stipulates that the accounting officer, or auditor (whichever is applicable) must now sign the financial statements.*

been reduced to 25%.

It is now easier for a mortgagee i.e.: owners of registered mortgage bonds over units, (usually a bank or building society) to request the services of a managing agent.

**Rule 46** also requires the appointed managing agent to control, manage and administer the common property.

*The amendment to this sentence stretches the scope of responsibility as additional words are added, i.e., and the obligations to any public or local authority by the body corporate on behalf of unit owners.*

These additional words place additional responsibility on managing agents, in that they are now unable to blame trustees for negligence in attending to matters concerning the financial interface between public and local authorities, and the Body Corporate. Managing agents will now be required to scrutinize bills, and even take action when they notice that the water bill has increased dramatically - perhaps as a result of a leak!

This amendment also prevents managing agents from trying to escape accountability and clarifies their responsibility in relation to this essential task.

**Managing Rule 46** was further reformed in that the very conditions of contract termination between a managing agent and the body corporate have been amended.

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*The amended rule stipulates that the initial appointment period is for one year, and thereafter the appointment can be terminated upon a month's written notice by either party.*

Clearly this amendment is geared to ensure that appointees who undertake audits take responsibility for the comments and opinions that they disclose in their audit report.

**Management Rule 46** Applies to the appointment, powers, and duties of a managing agent. Previously a registered mortgagee of 50% of units could insist on the appointment of a managing agent.

*This figure has*



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In the past managing agents were contracted for a year at a time, and if notice was given just prior to, or at an A.G.M. the arrangement continued until the next A.G.M. (Obviously if there was no written arrangement the contract could be cancelled by either party) In essence the old arrangement was annually based, and many bodies corporate were reluctant to terminate the services of a managing agent at the very time they needed them most just prior to and at the A.G.M. We assume that the contract is no longer renewable on an annual basis, and that this amendment should encourage managing agents to improve service levels, which in turn could add upward pressure to their fee structure, and ultimately affect the levy

contributions of smaller schemes.

All the amendments seem to reflect the legislator's desire for improved financial management, and more transparency.

**OTHER AMENDMENTS THAT BECAME LAW IN 2005**

In July 2005 there were 6 amendments to the act itself:

1. The definition of an Exclusive Use Area in 1(1) has been altered in that there is no longer a reference to S27. The removal of this reference means that the definition of an exclusive use area applies to all types of exclusive use areas, not only the type listed in S27. This amendment is an internal technical reference adjustment and trustees should not concern themselves unduly.

2. Section 24(6)d has been amended to allow sections to be increased by 10% (not 5% as was previous) without the consent of mortgagees. In other words an owner can extend his section by 10% (floor area) without having to obtain permission from every mortgagee (i.e. financial institution) that holds bonds over all the other sections in the scheme. This amendment should make the almost impossible task of extending a unit a little easier, however a further amendment to 24(6)d refers to ANY SECTION which causes confusion and needs clarity.

3. Section 25(5a)(a)(b) and (c) is aimed at Developers, and forces them to register the units that they build in new phases within 90 days of completion. This amendment is aimed at developers who place tenants in sections, and collect the rent themselves as the building does not legally exist until it is registered. Only trustees in schemes where new phases are being built should be concerned.

4. Section 27(1) Relates to the rights of exclusive use of parts of common property and Section 27(6) outlined such rights in respect of a mortgage (owner). The amendment now allows the possibility of registering lease contracts and *servitudes of usufruct, usus and habitatio*. This amendment is controversial as it appears to allow outsiders to obtain rights in respect of exclusive use areas.

5. Section S36(7b) has been amended in order to impose stiffer penalties on developers who fail to:  
Call the first general meeting within 60 days;  
Furnish members with a copy of the sectional plan;  
Furnish members with a certificate from the local authority that rates have been paid up to the date of establishment of the body corporate;  
Furnish members with proof of income and expenditure relating management of the scheme from the date of first occupation to the date of establishment of the body corporate.  
Developers now face 2 years imprisonment as opposed to a fine not exceeding R1000.00.  
The punishment now relates to the seriousness of the developers failure to comply.

6. S47(1) has been slightly changed in an attempt to exclude members, who are up to date with their levy payments, from being held liable for the unpaid debts of other members. The amended subsection now refers to members having paid levies *in respect of the same debt prior to the judgement against the body corporate*. This amendment is not as clear cut as it seems as it is an almost impossible task for a judgement creditor to unravel the distinctive parts that make up the whole levy payment, especially when budgeted levy payments do not meet the Body Corporate's actual expenses.

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Continued from page 3

**AMENDMENTS TO THE STANDARD MANAGEMENT RULES**

On the 13th of May 2005 seven amendments were introduced.

SMR 29(1a) and SMR 32(1) have been amended. SMR 29(1a) mandates trustees to negotiate the most beneficial insurance package with their insurer. SMR 32(1) now instructs trustees to lodge amended rules at the deeds office. Surely this was always obvious!

SMR 32(2b) has been amended to

remove an anomaly. The sub-rule now makes it clear that a motion for approval of a non luxurious improvement (with or without amendment) requires a special resolution when voted upon at a general meeting.

SMR 59(2) serves to clarify the assumption that an acting chairman elected at a specific general meeting does not need to be a member and could in fact be an outsider such as a managing agent or other suitable person. This situation can arise when the chairman is ill or away on holiday and trustees do not feel confident enough to chair the meeting themselves.

SMR 68 (1)(vi) instructs trustees to consider any infringements to S24 and S25 and other relevant provisions of the act or the rules before granting consent to members, for the erection of or improvement to or the placing of a structure, on an exclusive use area. This amendment is primarily aimed at curbing a growing tendency to regard extensions as mere improvements on exclusive use areas.

SMR 71 confirms that an owner declaring a dispute with the body corporate need only serve notification on the trustees and managing agent (if applicable) and not on all of the other owners. The rule was further amended by the addition of sub rule 8 which confirms that it is possible to join several parties in the arbitration process.

Some amendments seem to indicate that the legislators



are out of touch with the reality on the ground. The future prospect of separating the consumer aspects of the act and placing them under the Department of Housing rather than under the Department of Land Affairs is to be welcomed.

*The editor acknowledges the work done by Tertius Maree and Alastair Lomas-Walker in helping him to compile last years amendments.*

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# ASK THE EDITOR

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Rob will answer your questions

Many requests for information are received, most are answered when you phone our help-line 086 757 7882 (9:00am - 4:30 pm). A few are answered within the pages of this magazine.

**Q** At our AGM, a question was raised regarding the powers of trustees versus the powers of owners. Is there a simple way of describing the hierarchy of that control?

**A** The hierarchy is simple. The controlling body of a Sectional Title scheme is the body corporate, which is made up of all the owners. The owners appoint two or more trustees at each and every AGM. In turn, the trustees may appoint a managing agent, and must do so if requested by a majority of owners.

The body corporate inherits its functions and powers from sections 37 and 38 of the Sectional Titles Act, and from some of the rules. Subject to directions and restrictions imposed by the members of the body corporate, these functions and powers are passed to the trustees. This is clearly illustrated by section 39(1) of the Act:

### 39 Functions and powers of bodies corporate to be performed or exercised by trustees

(1) The functions and powers of the body corporate shall, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules.

Simply stated, the owners have the power. They choose their trustees and have the power to direct and restrict them.

Confusion is often caused by selective reading of prescribed management rule 26, part of which states:

### The Functions, Powers and Duties of

### Trustees Powers

26.(1) Subject to any restriction imposed or direction given at a general meeting of the body corporate, the powers of the trustees shall include the following:

(a) to appoint for and on behalf of the body corporate such agents and employees as they deem fit in connection with-

(i) the control, management and administration of the common property; and

(ii) the exercise and performance of any or all of the powers and duties of the body corporate;

In reading this rule, many people overlook 26(1)(a) and proceed directly to 26(1)(a)(i) & (ii). Try reading it that way - it changes the meaning!

Owners and trustees who read sections 36, 37, 38 and 39 of the Act, and management rules 25, 26 and 28 will see that the real power is vested in the body corporate, but is exercised by the trustees. In summary:

- The body corporate has all the powers.
- The trustees inherit some power, but are subject to direction and restriction.
- The managing agent has advisory and support roles only.

Daily, calls are received about trustees fining owners; approving an application to convert a garage into living space; amending rules and approving the operation of a business from a townhouse. All within four hours on a typical Monday morning, none within the powers of trustees!

Other recent examples concern

trustees leasing-out common property for more than ten years; approving the installation of a cell phone mast on a block of flats; changing the position of entrance gates; re-routing driveways and installing extra security, all without the required authority of the owners.

In every case, the trustees, believing that they were acting within their powers and authority, are protected by management rule 12 that indemnifies trustees who act in good faith. Bad faith or gross negligence removes that indemnity.

It is easy to understand the origins of the confusion about the allocation of power. As long as owners allow trustees to call themselves the Board of Trustees, the confusion will continue. The term implies authority and power. Letters signed "By Order of the Board" perpetuate the myth.

The success or failure of a sectional scheme depends partly upon the quality of its trustees and managing agent. Both work better if supported by an active, involved body corporate that does not abdicate from the powers given to it by the Act.

*The answer to this question was so well worded in an article by the late Bob Gauld that we sought permission to print his article as our answer. In future issues we will pay tribute to Bob Gauld by publishing a series of his articles.*

**Does your Body Corporate need a loan or bridging finance for maintenance projects or lift repairs?**

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# Block Busting: It's real

## WHAT CAN TRUSTEES DO TO AVOID THEIR SCHEME BEING HIJACKED

The concept lies in the principal of destroy, rule, and rebuild whilst maximising profits.

Let's assume that Mrs Jones lives in a block of 12 units. Mrs Jones together with six other elderly owners occupy seven of the twelve units. The other five are occupied by tenants who pay rent to absent landlords. Most new tenants don't regard the rules and 30 of them occupy the five flats and cause a nuisance by continually playing loud music, partying, and parking in bays reserved for others. Mrs Jones is totally frustrated and even suspects that illegal activities are rife as many people come and go during the night. The situation arose as a result of deteriorating circumstances which began when Mrs Jones and the other owners were unable to contribute towards cost of maintaining their building. The structure began to deteriorate and absent owners could no longer attract quality tenants. Mr X watched the state of affairs from a distance and excitedly purchased a unit when an opportunity arose. He then rented his one bedroom section to six prostitutes who in turn attracted drug dealers and

undesirable visitors.

The situation further deteriorated when Mrs Jones took to drink and placed five locks on her newly acquired security door. In the meantime Mrs Jones' best friend suffered a heart attack as she could not cope with the stress of living in declining circumstances.

Mr X then purchased her unit for a give-away price and rented the unit to six drug dealers who further contributed to the demise of a once valued piece of real estate.

Owners cars were broken into and stolen, folk even

urinated on the common property and most of the remaining elderly residents (who now only occupy five of the 12 units) wanted out at any cost. Mrs Jones however had nowhere to go as she was not happy with the partners that her children had married and would not sell. She remained at the forefront of conflict protecting the scheme and her investment until her eventual demise (as a result of high blood pressure). Mr X then purchased her unit for a song and within a year he owned the majority of units. His henchmen / tenants soon reduced the building to a "no-go area" and the municipality were forced to cut the electricity and water supply as a result of non-payment. Mr X was then able to purchase the last units for next to nothing and was now in total control. Mr X had accumulated a fortune through his rental activities and paid a considerable amount to service municipal arrears and reconnect services. He then began to evict his tenants through strong-arm tactics (given that he had evidence of their illegal activities) and then has the 12 units totally renovated. He then sells the whole scheme for R6,2 Million and earns himself a tidy sum of R2,1 Million as profit.

Of the seven original owners who lived in the scheme only five are still alive and live in granny-flats with their children. They had lost most of their life savings as they sold their units for less than they had paid for them and used their limited funds to create granny-flats by extending their children's homes.

Trustees can learn from the experiences that Mrs Jones faced.

1. If owners cannot afford to maintain their complex they should try to sell up, and move on before the situation deteriorates to the point of no return.
2. The younger generation whose parents live in Sectional Title Schemes need understand that their parents are not necessarily secure just because they own property and can cope with basic expenses.
3. Younger adults whose parents live in Sectional Title Schemes should become involved in their parents predicament to the extent that they play a role in overseeing / tracking and even intervening on their parents behalf by an active involvement in the finances of their parents body corporate.
4. Trustees should never compromise when it comes to including maintenance costs within their levy payment regime.



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# Letters *received from readers*



Dear Editor,

As a managing agent, I have been asked by trustees on three occasions, to take legal action, in terms of the Sectional Titles Act, to recover funds due to the Body Corporate from an owner.

On the two previous occasions, the owners paid up without a judgement being taken, and in both cases the Bodies Corporate concerned incurred no legal costs whatsoever.

In this case, I chose a well known firm of attorneys that specialise in debt collection. They were instructed to take the necessary legal action to recover a debt of R 7 000 from a certain owner. My specific written instruction to the attorneys was "In terms of the regulations to the Sectional Titles Act of 1986 (as amended), all legal costs in this action must be for the account of the owner."

The matter proceeded accordingly with the attorneys duly obtaining a default judgement and a writ of execution.

There were some delays from the Sheriff's office in exercising the attachment of goods and the attorneys asked if they could receive a payment against their fees incurred to date. Foolishly, they were paid R 1 000 by the Body Corporate, fully anticipating that this would be recovered.

As it happened, the owner decided to pay up. The Body Corporate received the capital amount of the debt plus interest and the attorneys recovered R 3 000 of their fees from the owner. Then the fun started.

The attorneys sent the Body Corporate an account for a further R 3 200 in legal fees. Despite pointing out

the specific instruction and the wording of the Act, the attorneys refused to budge, claiming that I did not understand the manner in which legal fees were charged. What to do? I telephoned a number of people in the industry, lawyers who write for the Sectional Title magazines etc. They all said the same, that this was absolute rubbish, totally incorrect and I must not pay. None of which helps when you have a legal eagle breathing down your neck for its money!

The attorneys themselves suggested that I have the account "taxed" i.e. assessed, by a third party. On agreeing to this, they then advised me that it would cost another R 1000 to do so!

Eventually I found a solution. I approached the Law Society of the Northern Provinces and discussed the matter with them. They asked for an affidavit and copies of all the papers. They then stated that they would arrange for the account to be assessed as long as the attorneys agreed, which they did. They also sent me a new account for R 16 200 in fees! No explanation given but obviously adopting bullying tactics.

After some months, the assessment was carried out and the assessor refused to allow the attorneys another cent in fees above what had already been paid. HOORAY!

However, the assessment cost the Body Corporate the princely sum of R 208, which was gladly paid, but no ruling was made on whether the attorneys should

refund the Body Corporate the R 1 000 legal fees that they had already paid. I am still waiting for an answer on this one.

I also understand that the matter has been forwarded to the Disciplinary Committee of the Society. So maybe justice will prevail.

The question remains, what exactly does regulation 31 (5) of the Sectional Titles Act mean? It clearly states: "An owner shall be liable for and pay all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies, or any other amounts due and owing by such owner to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act."

Hopefully, this tale will be of assistance to other managing agents or Trustees facing a similar problem.

*B R Townsend - Managing Agent*



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# Common problems in sectional title complexes Marina Constas

Let's look at the most common issues which emerged from my sessions with the public. There appears to be a great deal of confusion surrounding garages and carports, and whether people own them as exclusive use areas or not. Many owners are also of the mistaken belief that if a wall surrounds your garden it automatically means that you own that garden. Once the matter is investigated it could be found that the garden is in fact common property. Extensions and enclosing balconies is another major issue in our complexes. Trustees are giving permission for these major changes when they have no authority to do so. Funnily enough, I visited friends the other day who had just bought a unit in a Sectional Title complex. They proudly showed me a balcony which was soon to be enclosed and become a playroom for their young son. The trustees, I was told, must just get a letter, and permission would be granted. Obviously this cannot be the case but as those of you who live in a complex know, there are

always those who treat the Sectional Titles Act as a guideline. It is not a guideline it is prescriptive.

Another common issue relates to extensions. The problem does not lie in obtaining a special resolution from the body corporate, but rather in the process to be followed afterwards. Many owners are so happy to receive permission in the form of the resolution that they forget the next steps. An architect or land surveyor must redraw the sectional plan, amend the participation quotas, and request approval from the Surveyor General's office. The registrar of Deeds must then register the sectional plan of extension and make the appropriate endorsement on the title. That is actually the expensive part. Owners who extend must be compelled to completely comply with Section 24 of the Act.

Parking problems also ranked high on the list of queries. It was explained that common property parking areas could easily be allocated as exclusive use areas utilizing Section 27A of the Sectional Titles Act by creating exclusive use areas through the rules of the complex. It became apparent that many owners disregard the rule that parking in certain areas of a complex is unlawful. Often it helps to mention Model Conduct Rule 3(2) which says that the trustees can request the towing away of vehicles illegally parked on common property at the vehicle owner's expense. The only practical problem is that most towing companies are reluctant to get involved.

The latest amendments to the Act and Regulations emphasize the importance of filing a copy of Management and Conduct Rules at the Deeds office. In fact now the auditor of the complex must confirm at the AGM that the rules have been filed. Many shocked trustees left our office after learning that their conduct rules regarding pets are unenforceable as they had not followed the correct procedures to amend them in the first place, and they had not been filed at the Deeds office.

In another matter an owner bemoaned the fact that the law does not assist trustees in collecting arrear levies. We challenged this. I have personal knowledge that our legal system works whether it's just a summons that is needed, or whether we have to attach a unit. If an owner doesn't pay, he must be handed over to attorneys with no delay. It is inconceivable that an owner can owe the Body Corporate over thirty thousand rand. How was this allowed to happen? This brings me to the question of whether an owner who is in arrears with his levy should be allowed to be a trustee? The answer should be an unequivocal no. And why? Because the trustee who owes money is not easily going to hand himself, or any other debtor in the complex over to be sued.

Until owners and trustees understand what they are buying into, there will continue to be disputes in complexes. Trustees have a duty to act responsibly or be compelled to do so by the other owners.

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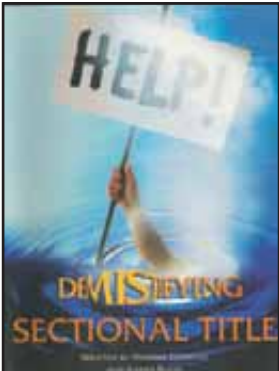

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