

The Developer's Eroding Voting Powers

It is a common occurrence that, when a new sectional title scheme is developed, decision-making and management is at first dominated by the developer and that such powers and functions gradually devolve upon the other owners and an elected board of trustees. This is as it should be, in view of the diminishing involvement of the developer in the yet uncompleted scheme and the new owners' relative inexperience in matters sectional title at the early stages.

The voting powers of a person are closely related to the number of units held by him or her in the scheme. Accordingly the decision-making predominance of the developer will automatically reduce as units are sold off to purchasers. In the majority of cases this process occurs harmoniously, with the reducing role of the developer coming to a natural end upon the sale of his last unit.

However due to the fact that the interests of residential owners and that of the developer are not always in precise harmony, problems may arise during the development phase. The relative inexperience of the owners, their lack of solidarity and ineffective functioning as a group, coupled with the perceived strong position of the developer, sometimes result in an uncertain balance of power and unnecessary disputes. This situation may be aggravated by any delays in arranging the first general meeting, which is often unavoidable if timeous provision has not been made to get everything in order. Here the developer's attorney plays a pivotal role.

Conflicts of interest sometimes elevate to the point of litigation, which is unfortunate and usually unnecessary, provided that both the developer and the owners are well-informed during the development phase.

A usually unforeseen difficulty which faces a developer when a scheme is developed in phases, is the fact that his voting rights are being eroded as one phase is being sold out and may in the interim be diminished to nothing. When all units in the first phase have been sold and the second phase has not yet been completed, he would not own any units and would have no votes at a general meeting, and would accordingly have no direct influence upon management decisions. Even if a few units in the first phase are retained, the developer's voting powers would be significantly eroded. Although his extension rights would be fully protected, these rights would not endow him with any voting powers at general meetings. The only statutory exception would be when the owners should wish to alienate a portion of the common property, in which case the vote of the developer is required for the necessary unanimous resolution, irrespective of the fact that he may not at that time be an owner of a unit. A developer is accordingly in a position to veto any decision to alienate common property, even if he has no remaining voting rights.

Developers are often surprised by the fact that they should suddenly find themselves without any voting rights upon the sale of their last unit in a particular phase of a scheme, having expected that their voting dominance would endure until the end of development. The legal position is, however, that their voting rights are revived upon registration of the next phase in the development. This situation, which may cause developers some inconvenience, should be kept in mind during the planning stages of the scheme.

If a developer should wish to stabilise his voting right throughout the phases of the development, a solution is available by utilising his ability to make special Management Rules. Why is this solution so seldom used? I have come to the conclusion that the principle reason is the fact that developers are not aware of the situation and that there is a possible solution. It is obviously the easiest

merely to adopt the standard rules as contained in the Regulations to the Act. Very often the standard rules are completely inappropriate for a particular scheme, in which case the eventual owners of units are left with intractable problems to hone the inherited, unsatisfactory, rules into something more appropriately adapted to the needs of the scheme. Insufficient attention to the rules may likewise be to the detriment of the developer, as explained above.

One reason why proper consideration of the rules is neglected during the development phase is the fact that the average conveyancer, acting on behalf of a developer, may have insufficient expertise in drafting rules and is in any event usually not compensated for spending many hours drafting special rules.

If the rules were focussed upon more during the development phase, it would have been realised that amended rules, incorporating a 'sunset clause' could be effectively utilised to stabilise the developer's voting rights.

Such amended rules would be a temporary deviation from the participation quota basis of allocating voting rights. In this regard the provisions of sections 32(4) and 35(3) must always be kept in mind, namely that any deviation from the participation quota standard must be disclosed in deeds of sale and that all amended rules must be reasonable.

Rules are often a neglected 'stepchild' of developers and their attorneys and I favour amendments to the Act to require that a detailed prospectus of the proposed scheme be provided, including a certificate by an attorney that the suitability of the rules has received due consideration, as part of registration procedures for sectional title schemes. Such a model would focus proper attention on the suitability of the rules and would operate to the benefit of both developer and purchasers.

Tertius Maree BA, LLB, LLM

* * *

Ex Africa semper aliquid novum

THE SECURITY VALUE OF LEVIES

Many a frustrated trustee would raise his or her eyebrows in disbelief if they should be told that levies are one of the most secure assets in the South African financial landscape, provided that the sectional title scheme to which the levies relate is managed properly.

What does proper management have to do with the security value of levies ? Two things:

- If levies are not determined correctly according to prescribed procedures, they may not be recoverable. For this reason trustees must be alert to the formal requirements and should obtain legal advice where any uncertainties exist.
- The recoverability of levies are ultimately linked to the value of units in the scheme. Accordingly, if the scheme is allowed to degenerate physically and in respect the owners' adherence to the rules, units will decline in market values and their values as security for debt.

It is widely accepted that a registered mortgage bond is the strongest hold which a creditor may have on immovable property, and generally this is so, but only in respect of 'traditional' property rights, not sectional title property.

The provisions which endow sectional title levies with their exceptional security value are properly tucked away in a part of the Sectional Titles Act dealing with technical registration matters which are not normally considered by trustees who are more concerned with the administrative aspects of the legislation. To make matters worse, the Sectional Titles Act is about to be split in two separate acts under different departments of State. along the line of division between registration and administration aspects of sectional title schemes.

The provision I refer to is s 15B(3)(a), which is very well known to conveyancers and managing agents. It effectively prevents the registration of transfer of a unit without a certificate by a conveyancer that the body corporate has certified to him or her that all moneys due to the body corporate by the transferor in respect of the unit to be transferred, have been paid. This aspect is strictly monitored by Registrars of Deeds and all transactions without such certificates are duly rejected.

This requirement stands irrespective of any claim to the proceeds of the sale by a bank or other entity holding a mortgage bond over the property. This aspect was clearly emphasised by the Supreme Court of Appeal in the case of *First Rand Bank v Body Corporate of Geovy Villa* in 2004, where it was held that such preference even applied in the case where an owner is sequestered, establishing that the payment of levies must be regarded as part of the costs of sequestration, which must be paid before other debtors, including banks, have any claim on the proceeds.

Trustees may therefore rest assured that, whatever may be due to the body corporate in the form of levies, will eventually be recovered, provided that correct procedures have been followed and the collecting attorney knows what he is doing.

This may be scant comfort for bodies corporate which have immediate and ongoing financial needs in order to pay monthly expenses and perform periodic maintenance.

The solution to this problem is a matter which will be discussed in MCS Courier at a later date.

Tertius Maree BA, LLB, LLM

FINES: ARE HOMEOWNERS' ASSOCIATIONS LOSING THE PLOT?

This article is written in response to a query received from an owner regarding my previous article about nuisance caused by dogs. The heading refers to a homeowners' association but this could also easily apply to any sectional title body corporate.

Mr X lives in upmarket security estate consisting of several hundred freestanding erven houses on them. As in many other developments of this nature the houses are clustered to make them more affordable and for security purposes. The entire development is surrounded by security fencing with security guards patrolling the roads. Apparently the duties of the security officers include the issuing of fines to owners and occupiers, upon instructions from the estate manager.

All owners are members of the homeowners' association with a constitution and rules binding upon them.

The rules of the estate specify that owners, when guilty of a breach of the conduct rules, shall be warned on the first occasion whereafter a fine may be issued. Should the owner wish to appeal the imposition of a fine he may refer the matter to the trustees.

Another rule states that owners and occupiers must ensure that their pets do not cause a nuisance.

On a specific day a security guard pitched up at Mr X's door and handed him a final warning for a nuisance caused by his dog. No specifics such a date and time of the nuisance, where it occurred or the identity of the complainant is provided to Mr X. Upon receipt of the warning he questions the guard who only states that the warning was issued upon instructions of the estate manager.

A month later workers are doing landscaping right next to the green area adjacent to Mr X's house. His dog initially starts barking at the workers but, upon realising the disturbance, Mr X's domestic help locks the dog up in the house. Later that day security arrives demanding payment of a fine of R 500 for nuisance caused by the dog. The guard confirms again that he was ordered to collect the fine from the estate manager who, when walking around, apparently heard the dog barking at the workers. Further specifics are once again requested but none provided.

Both incidents took place during daytime on a weekday.

Naturally Mr X refuses to pay the fine. In terms of the rules the trustees now have the following options:

- (1) Sue the owner to pay the fine.
- (2) De-activate the owner's access card and refuse entry to the estate.

It appears, for obvious reasons, that the second option is the method of choice. Who will not cough up a R 500 fine when refused access to his home?

Is this fair, and what recourse does Mr X have?

The procedure in the issuing of a fine deserves further scrutiny. Firstly the identity of the complainant should always be divulged. Complaints from owners who wish to stay anonymous should be ignored, the simple reason being that an owner lodging a complaint might have to testify in court and if he or she wants to remain anonymous is unlikely that he or she will. Another reason is that in the instance of nuisance the personality of the complainant might be the key as to whether a nuisance was actually caused or not. Mr X is therefore entitled to have the identity divulged in order to investigate whether the complaint conforms to the objective *reasonable man* test.

Should the fines be issued on instructions of the estate manager based on his personal observation and not after a complaint was received, I am of the view that he would be abusing his power. When the police drive past a raucous party at 2 o' clock in the morning should they stop and order the partygoers to be quiet without receiving a complaint? I don't think so.

The same applies in case of the estate manager. Did the barking dog cause a nuisance to him? Does he stay there and is he entitled to peace and quiet? I am not convinced. He can only act upon a complaint received from an owner or occupier.

The principle is simple. My dog may be barking all day long. If all the owners in the vicinity are either away or they do not perceive it to be a nuisance then a nuisance is not caused. The manager cannot fine an owner because the conduct of the dog could *potentially* be a nuisance to another owner.

The fact that the dog only barked for a short period of time, was later contained, and the fact that it took place on a weekday during daylight hours all indicate that the fine may have been issued unfairly.

The last aspect, and probably the most worrying, is the matter of enforcement. I am not convinced that the homeowners association may prevent access to the estate under such

circumstances, especially if the owner has not been afforded an opportunity to state his case in an appropriate forum. Even then I am not convinced especially if the owner denies any wrongdoing. It is very likely that Mr X will be successful should he apply for a spoliation order. The homeowners' association could then be exposed to a claim for damages and/or costs.

This is a clear example of an abuse of power. The procedure of issuing fines for nuisance appears to be a shambles and blatantly unreasonable. The practice of refusing access to transgressors is nothing more or less than mere bullying tactics.

Jacques Maree BComm; LLB

* * *

May a Sectional Title Scheme be developed on two or more pieces of land?

A sectional title scheme may be developed on one piece of land or on two or more contiguous pieces of land that are notarially tied and buildings consisting of sections and common property may be erected on all or any of such pieces of land.

A sectional title scheme may also be developed on two or more non-contiguous pieces of land, provided that buildings consisting of sections and common property may only be erected on one of such non-contiguous pieces of land. Any buildings erected on the other non-contiguous piece of land should be common property or may consist of exclusive use areas, but may not consist of sections. The further buildings erected on the non-contiguous piece of land may for example consist of a community centre, dining hall and other common property recreational facilities, or it may be frail care centre, clubhouse or parking arcade. The non-contiguous piece of land may also be an open area such as a common property park, a playground or parking area in respect of which the parking bays may be allocated to owners as their exclusive use areas.

This conclusion follows from the provisions of section 4(2) of the Sectional Titles Act, which reads as follows:

A scheme may relate to more than one building more than one building situated, to be erected or being in the process of erection on the same piece of land, or on more than one piece of land whether contiguous or non-contiguous: Provided that the building or buildings to be divided into sections shall be situated only on one such piece of land or on two or more such contiguous pieces of land registered in the name of the same person and which have been notarially tied.

Ilse Kotze BComm; LLB

Ex Africa semper aliquid novum

* * *

AGTERSTALLIGE HEFFINGS EN WANBETALERS

Die Burger – Saterdag 02.08.2009

Die wanbetaling van heffings en die versuim van trustees om doeltreffende stappe te doen om agterstallige heffings in te vorder, hou ernstige gevolge vir deeltitel-gemeenskap in. Dit sluit in:

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

- Beplande projekte word afgelas of vertraag, met stygende koste-implikasies.
- Instandhouding word ondermyn, wat lei tot die sigbare agteruitgang van geboue en verhoogde instandhoudingskoste.
- Niebetaling of laat betaling van die regspersoon se skulde met nadelige gevolge, waaronder die moontlikheid dat die regspersoon se skuldeisers regstreeks teen eienaars mag optree.
- Die noodsaaklikheid om, wanneer geld tekorte ondervind word, 'n ongewilde spesiale heffing as noodmaatreeël op te lê, wat moontlik weer eens nie deur die wanbetalers betaal sal word nie.
- Wanbetalers word gesubsidieer deur daardie eienaars wat hul heffings gereeld betaal.
- Ontevredenheid, gebrek aan harmonie en ondermyning van respek vir die reëls en die trustees.
- Finansiële probleme kan oorgaan in 'n onkeerbare spiraal van verval.
- Wanbestuur kan lei tot die aanstelling van 'n administrateur, met gevolglike koste-implikasies.
- Verlies aan eiendoms waarde.

Die verhaling van agterstallige heffings is nie bloot 'n kwessie van oorhandiging aan 'n prokureur nie. Suksesvolle verhaling is afhanklik van die aanwesigheid en behoorlike daarstelling van sekere sleutelemente, die handhawing van sekere grondbeginsels en die toepassing van die korrekte prosedures. Indien nie op hierdie aspekte ag geslaan word nie, sal 'n veldtog om onbetaalde heffings te verhaal, skipbreuk ly.

Sleutelfaktore is soos volg:

1. **Die begroting:** 'n Begroting, behoorlik opgestel en korrek goedgekeur, is die grondslag van heffingsaanspreeklikheid. Indien 'n begroting nie goedgekeur is of korrek goedgekeur is nie, sal wanbetalers nie deur hofaksies tot betaling gedwing kan word nie.
2. **Korrekte toedeling:** Nadat 'n begroting goedgekeur is, moet die netto beraamde uitgawes daarin aan eienaars toegedeel word. Dit moet in alle gevalle volgens deelnemingskwotas geskied, tensy 'n ander formule opgestel is volgens die bepalinge van artikel 32 (4).

3. **Trusteebesluit:** Die rekenkundige berekening van toegedeelde heffings word ingevolge artikel 37 (2) geformaliseer deur 'n trusteebesluit, wat die toedeling bevestig volgens 'n voorbereide heffingskedgeule.

Sonder 'n trusteebesluit is geen heffings, waaronder spesiale heffings, betaalbaar en opeisbaar nie. Dit is dus belangrik dat die besluit behoorlik genotuleer word om dit moontlik te maak om vasstelling van die heffings in 'n hof te bewys.

4. **Behoorlike hantering van heffings by oordrag van 'n eenheid:** Die kritieke toestand wat ontstaan wanneer 'n eenheid oorgedra word, moet doeltreffend gehanteer word by wyse van 'n drieledige ooreenkoms; anders sal die nuwe eienaar nie vir betaling van heffings aanspreeklik wees voordat nuwe heffings vir die daaropvolgende boekjaar vasgestel word nie.

5. **Korrekte hantering van jaareindes:** Dit is 'n fout om te aanvaar dat heffings outomaties deur eienaars betaalbaar is vir die tydperk tussen die formele boekjaar-einde totdat nuwe heffings vasgestel word ná aanvaarding van die daaropvolgende begroting. Spesiale stappe is nodig om voorsiening te maak vir die gaping in die finansiële kalender, by gebreke waaraan heffings ten opsigte van daardie tydperk nie in 'n hof verhaalbaar sal wees nie.

Die feit dat 'n regs persoon se prokureur in die verlede sodanige heffings sonder probleme kon vorder, is geen waarborg dat dit in die toekoms so sal geskied nie.

6. **Korrekte vasstelling van rentekoers:** Tensy die prosedures ten opsigte van vasstelling van 'n rentekoers gevolg word, sal dit nie moontlik wees om rente, anders as moratore rente, van wanbetalers te verhaal nie.

Trustees moet toesien dat 'n uittreksel van hul notule met die trusteebesluit ten opsigte van die geldende rentekoers aan die invorderingsprokureur beskikbaar gestel word wanneer die skuld vir invordering oorhandig word.

7. **Doeltreffende hofprosedures:** Skulde deur lede wat deur die regs persoon aan 'n prokureur oorhandig word vir invordering, moet in 'n landdroshof met regsbevoegdheid gevoer word, met behoorlike aandag aan deeltitelveristes, grondwetlike aspekte en verskeie ander toepaslike wetsbepalings.

Sodanige spesiale aspekte is nie altyd vanselfsprekend of algemeen bekend nie, en trustees moet toesien dat die taak om agterstallige heffings in te vorder, opgedra word aan 'n prokureur wat daarmee goed vertrou is.

Een daarvan is die moontlike tussentrede deur 'n bank. 'n Ander is die feit dat 'n regs persoon daarop geregtig is om koste op prokureur-en-kliënt-skaal te verhaal – iets waardeur die regs persoon benadeel kan word as 'n behoorlike eis daarvoor nie in die dagvaarding vervat word nie.

Benader elke nuwe invorderingsaksie asof dit verdedig sal word. Alles moet uit die staanspoor korrek gedoen word om koste te voorkom. Die onlangse Greenacre-uitspraak van die appèlhof handel juis hieroor.

* * *

Private Improvements on Common Property: *Who may Consent ?*

Due to growing uncertainties regarding the reliable supply, and particularly the imminent tariff increases, of electricity, there has been an upsurge in interest in solar heating systems.

A trustee in a sectional title apartment block in Claremont reports that one owner has applied to install a solar heating system on the roof, which is common property. Whilst the trustees are not opposed, they are uncertain as to what kind of consent is required. They have been advised that Management Rule 33 applies and that the erection of the system would probably amount to a non-luxurious improvement, for which a special resolution is required.

I do not agree that MR 33 applies in instances where an improvement or alteration to the common property is sought for a single owner such as in the present case. MR 33 relates to improvements on common property effected by the body corporate, driven by the trustees.

Keep in mind too that having a hot water installation on common property is nothing unusual and may in fact be the rule rather than the exception.

But yes, the fact of the matter is that no owner has a right to make any changes to, or to place improvements, structures or other fixtures on the common property. Although the Act does not contain any explicit directive in this regard, it is an inescapable conclusion of the provisions of the Act and the rules, as it relates to the nature and usage of common property. One provision in particular which confirms this, is Standard Conduct Rule 4.

Conduct Rule 4(2) stipulates certain exceptions to the principle that an owner may not alter any part of the common property, by providing that, with the trustees' consent, an owner may install items such as burglar proofing to the exterior of his or her section.

SCR 4(2) makes no mention of hot water installations.

Accordingly my recommendation would be that trustees proceed as follows:

Firstly, trustees should consider the reasonableness of the request and whether the need to install a water heating system is a real one and whether doing so would have any detrimental effect worth considering. If any other owner will be affected, it would be a good idea to procure his consent in principle in advance.

A special (amended) rule must be drafted and adopted by the members. Because SCR 4 already deals with alterations to common property, it would be a convenient and logical point to insert an amendment to deal with the issue.

Before proceeding, it would be a good idea to consider whether any further issues, such as air conditioners, TV aerials or Dishes, etc., should also be

Ex Africa semper aliquid novum

catered for in the amended rule, in order to avoid having to go through the same exercise again at some future date.

A draft amendment to SCR 4(2) must then be carefully prepared, to include these further items in respect of which trustees will be authorised to grant their consent. It will be a good idea to include a clause to enable trustees to impose reasonable conditions. The rule amendment will have to be adopted by special resolution.

After having given due notice of the proposed resolution, the matter will then be submitted for the members' consideration and voting at the general meeting. If duly adopted, the amended rule must then be filed at the Deeds Registry after which the owner may, in terms of the new rule, apply to the trustees for their consideration and consent, subject to whatever conditions they may impose.

In the case of a hot water installation it will not be necessary to impose a condition in respect of maintenance of the unit, as this has already been catered for in SMR 68(1)(vii). However, other kinds of installations will not be covered by this and it would be preferable, as 'belts and braces' to include a condition in the amended rule itself that the owner will be responsible for its maintenance.

A further aspect which should be provided for is its removal upon becoming dysfunctional or if not properly maintained.

Unfortunately the Act and standard rules are somewhat inadequate regarding small alterations to common property, for which there is often a need. This could result in unauthorised alterations proliferating on the common property, which could later become very difficult to control. Trustees should pre-empt this problem and introduce suitable rules to regulate these matters, such as discussed above.

Tertius Maree BA, LLB, LLM

* * *