

POLISH APARTMENT OWNERSHIP COMPARED WITH SOUTH AFRICAN SECTIONAL TITLES

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1 Introduction

The aim of this article is to compare the institution of apartment ownership in a former socialist country, Poland, with the institution of sectional titles in South Africa. We shall see that the seed of Polish apartment ownership was already ingrained in the Napoleonic Civil Code adopted in Poland in 1808. By contrast South Africa shunned its historic links with Roman-Dutch law and transplanted the common-law strata title legislation of New South Wales in Australia to regulate the ownership of sections in a multi-unit building in the Sectional Titles Act of 1973. We shall start with some general remarks on the Socialist property system that prevailed in Poland after the Second World War. A brief survey of the legislative history of apartment ownership in Poland and South Africa will then be attempted, followed by a critical evaluation of various aspects of the Polish and South African institutions. On the one hand, South African lawyers would find it interesting to see how apartment ownership was reconciled with socialist ideas and how these ideas still linger on in the most recent Polish legislation on apartment ownership. On the other hand Polish lawyers are given a glimpse of how apartment ownership is regulated in a more sophisticated “second generation” statute.

2 Socialist Property Law

On 1 May 2004 Poland became a member of the European Union. This signaled a new era in Poland’s political, economic and legal development, which had come a long way since post World War II socialist property concepts. After World War II the concept of ownership was modeled on Marxist theory. Three types of property were distinguished, namely social property (vesting in the State, co-operatives and other social institutions such as political parties and workers’ unions), individual property (utilised by natural or juristic persons as a means of production, like businesses, land, plant and machinery) and personal property (private ownership of consumable goods, for example cars and home appliances). Since social

property was favoured, legislation was aimed at limiting the scope of private property, especially through the nationalisation of numerous private enterprises and some land during the 1940s. Social and personal property enjoyed special and full constitutional protection, whereas private property was only protected by several parliamentary statutes. Unlike in other socialist countries, private ownership of land was never completely abolished in Poland.¹

Ownership of apartments was classified as personal property. Although it is difficult to treat apartments as consumable goods, the fact that they could only be utilised for personal use made it possible to include them in this category. Being personal property, an apartment could not exceed the size of a single-family house. This meant that residential units in buildings erected before 1956 could not comprise more than five rooms; for buildings erected after 1956 the usable area of a residential unit could not exceed 110 square meters or, in special circumstances (for example an artist's studio) 140 square meters.² In other socialist countries, the land on which an apartment building was erected belonged to the State. Apartment owners were only granted the right of use in the land. By contrast, in Poland it was permissible to sell units in State owned buildings, thus transferring the ownership of land or the right of perpetual usufruct of land to private individuals.³ Consequently Polish apartment owners co-owned the land on which the building was erected. Marxist concepts of ownership were abandoned in 1989 when the Polish Civil Code was amended to reflect the principles of a free market economy. However, socialist restrictions on the ownership of apartments remained in force until 1994, when the current Ownership of Units Act came into force.

3 Legislative History

3 1 Poland

Apartment ownership had been known in Poland since the adoption of article 664 of the Napoleonic Civil Code in Poland in 1808.⁴ This article allowed individuals to own a storey or part of a storey in a multi-unit building.⁵ However, there is little evidence that it has ever been applied in practice.⁶

¹ See Kurowska *Upowszechnianie prawa własności nieruchomości* (1994) (Katowice Wydawnictwo Uniwersytetu Śląskiego).

² See Kalus *Rechtsveränderungen im Bereich gesonderten Eigentums an Wohnungs- und Geschäftsräumen in Polen* in Ogris & Rechberger (ed) *Gedächtnisschrift Herbert Hofmeister* (1996) (Wien Manzsche Verlags- und Universitätsbuchhandlung) 311-320.

³ See Nowakowski *Prawo rzeczowe zarys wykładu* (1980) (Warszawa PWN) 128-133.

⁴ See further Wolter, Ignatowicz & Stefaniuk *Prawo cywilne zarys części ogólnej* (1998) (Warszawa PWN) 42-49.

⁵ See Cioch & Witezak "Zasada superficies solo cedit w prawie polskim" 1999 *Rejent* no 5 29.

⁶ See Tatariewicz "Mieszkania na własność" 1925 *Gazeta Słowa Warszawska* 409 as cited by Watariewicz "Charakter prawny umowy o ustanowieniu odrębnej własności lokalu" 1999 *Przegląd Sądowy* no 3 94.

The desperate shortage of housing between the First and the Second World Wars led to the comprehensive regulation of apartment ownership in the Ownership of Units Ordinance of 24 October 1934 (OOU).⁷ It immediately gained huge popularity in central Poland, particularly in Warsaw.⁸ Apartment ownership was allowed in sufficiently isolated apartments, storeys or part of storeys (OOU art 1 sent 1) and like in other condominium legislation this was inextricably linked to an undivided share in the common property consisting of the land and the common parts of the building. The common property was managed by a management board, constituted from and elected by the unit owners. The provisions of OOU were applicable not only to residential units, but also to commercial and other types of units.

With the advent of communism and the introduction of socialist ideas, the introductory provisions to the Polish Civil Code of 1964 (PCC)⁹ repealed the Ordinance and replaced it with articles 135-138 of the new PCC. Although ownership of dwellings was not abolished, it lost most of its practical application due to socialist policies relating to land and the management of residential property. A plethora of constantly changing regulatory statutes caused confusion and made the institution less accessible.¹⁰ Apartment ownership was restricted to residential units in small “residential houses” containing between two and four units. Moreover, the size of units was restricted to a certain usable area specified in subordinate legislation¹¹ and units could only be used to satisfy the residential needs of the owner or his family.

The years 1989 and 1990 brought a profound change in the Polish economic and legal systems. Poland shifted from a centrally planned economy to one controlled by market forces. Communism gave way to democracy. Numerous changes to the legal network of regulations and two major amendments of the PCC¹² eliminated most limitations on the creation of apartment ownership. However, the provisions remained fragmented and surrounded by insoluble legal ambiguities. This uncoordinated situation led to the enactment of a new statute — the Ownership of Units Act 1994 (OUA).

⁷ Dz U 34 No 94 item 848.

⁸ Nowakowski “Niektóre problemy budynków z lokalami mieszkalnymi lub użytkowymi” in Soltysinski (ed) *Problemy Kodyfikacji Prawa Cywilnego studia i rozprawy, Księga Pamiątkowa ku czci Prof Z Radwanskiego* (1990) (Poznań UAM) 226.

⁹ Dz U 64 No 16 item 94.

¹⁰ For statutes see Skapski “Odrębna własność lokali jako zagadnienie kodyfikacyjne” in S Soltysinski (ed) *Problemy Kodyfikacji Prawa Cywilnego studia i rozprawy, Księga Pamiątkowa ku czci Prof Z Radwanskiego* (1990) (Poznań UAM) 241-247.

¹¹ See further Ignatowicz “Przyszość odrębnej własności lokali” in Beszyński Rajska (eds) *Rozprawy Z Prawa Cywilnego Księga Pamiątkowa ku czci Witolda Czachorskiego* (1985) (Warszawa PWN) 19-32.

¹² PCC amendment of 31 Jan 1989 Dz U 89 No 3 item 11; PCC amendment of 28 July 1990 Dz U 90 No 55 item 321.

3 2 South Africa

South Africa has a mixed legal system combining civilian Roman-Dutch law with British common law. The system is uncodified and modern developments result mainly from case law and legislation. South African property law has remained mainly civilian with only a few English influences. Thus the maxim *superficies solo cedit* was taken over from Roman-Dutch law with the result that separate ownership in buildings or parts of buildings apart from the land was not recognised. Just as in European and American legal systems, legislation was therefore necessary to introduce a system of ownership of sections of a building. The main reason for introducing sectional ownership in South Africa was, as in other countries, to provide urgently needed residential accommodation for persons of all income levels within commuting distance from centres of employment.¹³ Another reason was that the main alternative to sectional ownership, namely share-block company schemes, proved unsatisfactory. Share-block companies are something akin to American Real Estate Cooperatives with a company owning the building and the purchase of share-blocks entitling the purchaser to occupy a flat in the building. The fact that the purchaser's investment is not protected in the case of the insolvency of the share-block company made this a risky and therefore unpopular alternative.¹⁴

The legislative history of sectional titles in South Africa is much more recent than in Poland. The idea was first mooted in the early 1950's and draft bills were introduced in 1956, 1957 and 1964 in the House of Assembly to provide for the registration of title deeds to sections of buildings. Select committees reported favourably on the New South Wales legislation and unfavourably on the practice of share-block schemes. The recommendations of a special commission of enquiry appointed in 1970 led to the promulgation of the first Sectional Titles Act in 1971.¹⁵ In the course of time, voices raised for the adoption of a second-generation statute as in the American States were satisfied by the promulgation of the second Sectional Titles Act in 1986.¹⁶ While leaving the basic structure and the main principles of sectional ownership intact, the new Act streamlined registration and introduced several new mechanisms to cope with modern demands. The Sectional Titles Act of 1986 has been amended several times, most importantly by the Sectional Titles Amendment Act of 1997.¹⁷

¹³ For various reasons for introducing condominium see See Van der Merwe *Apartment Ownership* ch 5 vol 6 in Drobnig & Zweigert (eds) *International Encyclopedia of Comparative Law* (1994) (JCB Mohr Tübingen) 24-29.

¹⁴ For a comparison between share-block and similar schemes and condominium see Van der Merwe *Apartment Ownership* s 489-500; Van der Merwe & Butler *Sectional Titles, Share Blocks and Time-sharing* (1985) 451-454.

¹⁵ Act 66 of 1971.

¹⁶ Act 95 of 1986.

¹⁷ Act 44 of 1997. For a critical evaluation of the innovations introduced by this Act, see Van der Merwe "The Sectional Titles Amendment Act of 1997: A Critical Evaluation" 1998 *THRHR* 170.

The South African legislation has been greatly influenced by the New South Wales Act and to a lesser extent by the German *Wohnungseigentumsgesetz* of 1951 and the Israeli Cooperative Houses Law of 1961. Curiously, the Dutch *Appartementeneigendomswet* was not even consulted. Thus a primarily common-law statute was transplanted into the primarily civilian South African law of property. This has led to an attempt to harmonise the concept of sectional ownership with traditional ideas concerning single and composite property objects, exclusive ownership, traditional co-ownership in undivided shares and the essentials of the body corporate or unincorporated association which manages the scheme's affairs.¹⁸

4 Comparison of Various Aspects of the Polish and South African Legislation

4 1 Object of unit ownership

4 1 1 General

Both the Polish and the South African statute place a unit in an apartment ownership scheme in the same category as a parcel of land.¹⁹ The South African statute classifies it as urban immovable property.²⁰ In both Poland and South Africa the maxim *superficies solo cedit*²¹ according to which everything attached to the soil forms part of the soil, had to be breached by legislation to allow for separate ownership of a unit in a multi-unit building whether used for residential, commercial, industrial or other purposes.²² Both statutes also provide that a unit consists of two elements namely the unit and inextricably linked thereto an undivided share in the common property.²³

4 1 2 Unit

The Polish statute²⁴ defines a unit as a flat, apartment, loft, office or shop which is isolated from other parts of the building by permanent walls as confirmed by a certificate of an official of the Department of Architecture and Building Construction.²⁵ From the definition of "common property" we can deduce further that only parts of the building (or service installations), which serve the exclusive needs of

¹⁸ See most recently Van der Merwe *Sectional Titles* in Joubert (ed) *The Law of South Africa* first reissue vol 24 s 165-171.

¹⁹ OUA art 2 s 1 following art 46 of the Polish Civil Code. See also art 143 PCC.

²⁰ Sectional Titles Act 95 of 1986 s 3(4)

²¹ See for Poland, Kalus "Der Grundsatz superficies solo cedit im polnischen Zivilrecht" in Rechberger (Hrsg) *Wiener Konferenz über Grundbuch und Kataster II. Session* (1998) (Wien Manz) 151-158; Cioch & Witzak 1999 *Rejent* no 5 13-36.

²² OUA art 2 s 1 and Sectional Titles Act 95 of 1986 s 2(b).

²³ OUA art 3 s 1 and Sectional Titles Act 95 of 1986 s 1(1) *sv* "unit".

²⁴ OUA art 2 s 2.

²⁵ See the Construction Act 1994 tj Dz U 00 No 106 item 1126 as amended.

apartment owners, are included in an apartment.²⁶ The South African statute does not define a section by reference to use, but simply and formalistically as a section as shown on the sectional plan,²⁷ which indicates how the building is subdivided into sections and common property. It further provides that the boundary line between a section and another section or the common property is the median line of the dividing walls, floors and ceilings.²⁸ A section is therefore basically a cubic entity formed by the walls, floors and ceilings of a residential apartment or business premises, with the median lines of the floors and ceilings forming the horizontal and the walls forming the vertical boundaries of the section.

Under the Polish statute, units may include, as their constituent parts,²⁹ utility rooms, such as basement or attic cubicles, pantries, and garages regardless of whether these rooms are adjacent to the unit in question or are located somewhere else within the building or an outbuilding within the surveyed boundaries of the parcel of land.³⁰ The units and all their constituent parts must be clearly marked on a plan of subdivision of all the storeys within the building.³¹ Thus an accessory utility room, situated outside the building, must be marked with the same number as the unit on a proper map depicting the land and buildings in the scheme. The South African statute clearly states that a section can also include adjoining parts such as a porch, balcony, atrium or projection³² as well as non-contiguous parts such as laundry rooms, servants' quarters and garages. Like its Polish counterpart the Act also requires that these parts must be accorded the same number as the sections to which they belong.³³ This requirement is aimed at achieving clarity as to the exact boundaries of a given unit and its constituent parts. By studying the plans, a unit owner is able to ascertain the exact size and components of his unit.

The lack of description of the boundaries of a unit has encouraged Polish academic writers to suggest that a unit should not be defined only with regard to walls but by reference to the walls, floors and ceilings that enclose a unit. They concluded that a unit does not include the outer walls, floors and ceilings that isolate an apartment from other units or the common areas. In this regard they followed the example of the American Uniform Common Interest Ownership Act, which defines the boundaries of an apartment as the inner limits of the walls, floors and ceilings of an apartment.³⁴ This is in contrast to the South African statute, which as

²⁶ OUA art 3 s 2.

²⁷ Sectional Titles Act s 1 sv "section".

²⁸ S 5(4).

²⁹ OUA art 47 § 1 and PCC art 2.

³⁰ OUA art 2 s 4.

³¹ OUA art 2 s 5.

³² S 5(5)(b).

³³ S 5(6) and reg 5(1)(k)(iii).

³⁴ UCIOA s 2-102(1).

already indicated, adopts the median line of the walls, floors and ceilings of an apartment as the boundary.³⁵ The academics also followed the UCIOA in their suggestion that all components of service installations including wires and ducts, which serve more than one unit, should be treated as common property even though they are situated inside a unit.³⁶ This avoids the South African dilemma of having to regard supporting pillars and components of service installations inside the median line of a wall not as common property but as part of a section. Both the Polish and South African fixation of isolating units (sections) and parts of sections by walls, floors and ceilings led to the problem of including parking spaces in the cellar of a building as part of units (sections). The Regulations under the South African Act solve this problem by providing that if part of a section cannot be defined by reference to floors, walls and ceilings, such boundaries should be defined in a manner acceptable to the Surveyor-General.³⁷ Permanent beacons supplemented by face-brick lines on the floor to indicate the various parking bays would presumably be acceptable to the Surveyor-General.

4 1 3 Common property

The Polish statute defines “common property” as land and those parts of the building which do not serve the exclusive needs of individual owners.³⁸ This corresponds with the South African definition, which defines “common property” as the land included in the scheme and such parts of the building as are not included in sections.³⁹ Both statutes thus define “common property” exclusively and not inclusively as is the case with several statutes which contain an exhaustive list of parts of the building that are considered common property.⁴⁰ In 1998 the Polish Supreme Court⁴¹ decided that it was sufficient that a given common area or facility serves the needs of more than one owner and need not necessarily serve the needs of all the owners in the scheme.

In Poland it is generally accepted that foundations, outer walls of a building, roofs, staircases, entrance doors and corridors, constitute common property.⁴² The same is true of chimneys, pipes, ducts and cables.⁴³ The classification of outside balconies, especially those in older buildings dating to the beginning of the 20th century, caused great concern. These balconies were frequently in a poor State of repair and in

³⁵ See Van der Merwe *Apartment Ownership* s 48-49.

³⁶ Doliwa *Prawo Mieszkaniowe: Komentarz* (2003) (Warszawa CH Beck) 696-697. See the United States' UCIOA s 2-102(2).

³⁷ S 5(5)(a) and reg 5(1)(1) under Government Notice R664 in *Government Gazette* 11245 of 8 April 1988 (as amended).

³⁸ OUA art 3 s 2.

³⁹ Sectional Titles Act s 1(1) *sv* “common property”.

⁴⁰ See Van der Merwe *Apartment Ownership* s 50-51.

⁴¹ Decision of 2 Dec 1998 (I CKN 903/97) OSNC 1999 z 6 item 113.

⁴² Doliwa *Prawo Mieszkaniowe* 623.

⁴³ Dzieczek *Wlasnosc Lokali: Komentarz* (2003) (Warszawa Lexis Nexis) 49.

danger of collapsing. Unit owners in an effort to avoid the high cost of repair, argued that outer balconies are part of the outside walls and therefore common property maintainable by the community of owners. In an important judgment in 2002,⁴⁴ the Polish Supreme Court held that balconies that serve the needs of an individual unit owner (as opposed to balconies that serve more than one owner or are merely decorative) cannot be classified as common property. Consequently the unit owner concerned is obliged to repair or even to cover the costs of replacing an old balcony.

The application of the service criterion results in the classification of doors and windows as parts of a unit since they serve the needs of a specific individual unit. Apart from settling the question of responsibility for repairs, this classification created the opportunity for unit owners to replace their old wooden windows with new, plastic double glazed window frames of different designs and colours, sometimes with disastrous consequences for the harmonious appearance of the outside of the building. However, the OUA⁴⁵ obliges owners to co-operate with each other to protect the common good. This might persuade owners to maintain the harmonious appearance of the building when they start replacing their external doors and windows.

South Africa, without the benefit of the service test, has to struggle with the question whether windows and outer doors should be considered part of the “walls” in order to apply the median line test with somewhat impractical results. Another disadvantage of the non-adoption of the “service test” is that all service installations outside the median line have to be defined as common property even though they serve only one particular apartment. This was considered so impractical and inequitable in the case of a heating installation in the loft of an apartment (above the ceiling) that the legislature created an exception in this particular case and made the owner concerned responsible for the maintenance of the installation.

The extent of common property in a building depends in Poland to a large extent on whether or not utility rooms have been assigned to units as constituent parts. An attic or basement divided into cubicles will most likely be shown as a constituent part of units on the plans of subdivision whereas the hallways and stairways leading to the cubicles will be shown as common property. If the basement or attic has no rooms or partition walls, the whole of the basement or attic will be treated as common property. We have already shown that South Africa has solved this problem by allowing less observable boundaries such as face bricks embedded in cement to identify parts of a basement, which forms part of a section.

Finally, it is important to note that the land on which the subdivided

⁴⁴ Judgment of 3Oct 2002 (III RN 153/01) OSNP 2003 z 18 item 423.

⁴⁵ Art 13.

building is erected is regarded as common property under both statutes. Article 46 of the Polish Civil Code provides that the boundaries of the land must be determined by survey maps prepared in accordance with existing survey regulations. The land registers maintained by courts as well as the register of land and buildings are valuable sources of information in this regard.⁴⁶ The fact that land is always part of the common property makes it difficult to reserve parking spaces, garden areas and backyards of ground flats for the exclusive use of unit owners. In South Africa this problem is solved by allowing specifically demarcated portions of the land to supplement apartments as “exclusive use areas”.⁴⁷ If this is not done, parking or garden areas and backyards demarcated on the land would essentially remain common property, which could be enjoyed on a “first come, first served” basis.

4 2 Establishment of unit ownership

4 2 1 *Similarities*

Under both statutes unit ownership may be established by the subdivision of newly constructed buildings or by the conversion of existing buildings to the apartment ownership regime. Apart from the requirement that all newly constructed buildings must comply with public law requirements contained in the Law on Construction of 1994 and various subordinate regulations, the Polish statute contains no special criteria for apartment ownership buildings. By contrast the South African statute requires that such buildings must be of a permanent nature.⁴⁸ This would prevent double storeyed wooden chalets from being submitted to the apartment ownership regime.⁴⁹

In Poland, apartment ownership is commonly created with regard to privatised buildings, which previously belonged to the State or to local authorities. Existing tenants are entitled to a right of pre-emption before the unit is offered to other interested parties. In South Africa tenants in rental buildings, which are being converted to the sectional title regime, are given wide consumer protection. Apart from a right of pre-emption, tenants must be extensively informed about the physical condition of the building and its service installations as well as the main features of living in a sectional title scheme. In addition they are granted a grace period of six months to find alternative accommodation if they do not exercise their right of pre-emption. Both jurisdictions also regulate the conversion of residential cooperative buildings to the apartment ownership regime and the sale of individual units to private purchasers.⁵⁰

⁴⁶ The local authorities maintain the register of land and buildings and supply the land registers maintained by the court with entries as to location, area and survey numbers of land.

⁴⁷ See Van der Merwe “The South African Sectional Titles Act Compared with the Singapore Land Titles (Strata) Act” 1999 *Singapore J Intl & Comp L* 134 143-144.

⁴⁸ Sectional Titles Act s 1(1) *sv* “building”.

⁴⁹ See Van der Merwe *Apartment Ownership* 31.

⁵⁰ See the Residential Co-operatives Act 2000 Dz U 01 No 4 item 27 as amended and the Share-Block Control Act 59 of 1980 s 8(3) and sched 1.

4 2 2 Poland

In Poland, it is fairly common for owners or co-owners to subdivide large private houses into smaller apartment ownership units.⁵¹ This proved a very useful way to subdivide a huge homestead amongst family members or to allow co-owners to retain a physical part of a house owned in common.

Polish unit ownership, peculiarly, may be established through a single act converting the entire building to the condominium regime or by the conversion of units one by one and their sale to purchasers. This leaves the original owner as owner of the unsold units with a share in the common property. He can either create more units by reconstruction of the building or delay further sales of units. Persons to whom units have been sold initially are not parties to the subsequent contracts of sale.⁵² In the case of successive sales, the OUA provides expressly that the shares of new owners in the common property must be calculated in accordance with the originally adopted criteria and that the new owners should be bound by the originally adopted management rules.⁵³

The intention to submit newly built or existing buildings to the apartment ownership regime must be expressed in a notarial deed. This deed must contain the written confirmation of a public official that the units concerned are completely isolated entities and an excerpt of the plan of subdivision, which clearly indicates the boundaries of the units. Thereafter the names of the owners of the units must be registered in the land register maintained by the court and specially created for this purpose. Once the entry is made, a unit becomes a separate immovable entity under the apartment ownership regime.⁵⁴ Like in other European countries, a condominium regime may be created by an appropriate court order on dissolution of co-ownership.⁵⁵ Where such an order is made, the official need no longer confirm that the unit is a completely isolated (although an expert opinion may be requested in case of doubt)⁵⁶ and the unit becomes a separate immovable entity as soon as the court judgment comes into force. The judgment is automatically sent to the court which maintains the land register for the appropriate entry.⁵⁷

As an historical remnant, separate registers are kept for land and buildings. The land register records the registered number of the land, while a separate exclusive apartment ownership register records the registered number for every individual unit submitted to the regime.⁵⁸

⁵¹ See Gniewek *Prawo rzeczowe* (2000) (Warszawa CH Beck) 126-151; Ignatowicz *Prawo rzeczowe* (2000) (Warszawa PWN) 120-145.

⁵² OUA art 4 ss 1 and 2.

⁵³ OUA art 3 s 7 and art 18 s 2.

⁵⁴ OUA arts 7 and 10.

⁵⁵ OUA art 7 s 1.

⁵⁶ Supreme Court judgment of 6 Nov 2002 (III CKN 1372/00) LEX no 75281.

⁵⁷ Bieniek & Marmaj *Wlasnosc Lokali: Komentarz* (2003) (Warszawa CH Beck) 76.

⁵⁸ See Land Register and Mortgages Act 1982 Dz U 82 No 19 item 147 as amended, art 25 and Ordinance concerning the Maintenance of Land Registers and Document Files Dz U 01 No 102 item 1122 §§ 7 27 32 33 49.

Consequently, examination of the register kept for a unit would refer to the register for the land on which a building comprising units is erected and *vice versa*.

4 2 3 *South Africa*

In terms of the Sectional Titles Act, the South African developer must first ensure that his proposed scheme complies with the planning law requirements pertaining to the land and buildings erected on the land.⁵⁹ Then he must consider how to finance the development and particularly in the case of a large scheme, he must decide whether it is necessary or advisable to develop the scheme in phases. Thereafter he must instruct a land surveyor and an architect to prepare the draft sectional plan.⁶⁰ Next he must instruct the land surveyor or architect to investigate whether aspects of the scheme comply with the relevant town planning schemes and building by-laws.⁶¹ If inconsistencies or irregularities are discovered, he must lodge an application with the local authority for condonation.⁶² The land surveyor or architect must then on behalf of the developer submit the draft sectional plan to the Surveyor-General for his approval.⁶³ Finally, the developer must apply to the Deeds Registry for the registration of the sectional plan and the opening of a sectional title register.⁶⁴ Upon registration, the land and building(s) comprised in the scheme are deemed to have been divided into sections and common property in accordance with the sectional plan.⁶⁵ The alienation, mortgage or lease of these units may now be registered as in the case of parcels of land.⁶⁶

The Act requires that the draft sectional plan must be prepared from actual measurements.⁶⁷ This means that the building must be substantially completed before a sectional title register can be opened. Nevertheless, the developer is allowed to sell future units from building plans subject to strict consumer protection measures.⁶⁸

4 2 4 *Evaluation*

Although encountered in some older European statutes,⁶⁹ the plethora of ways in which a condominium regime can be created in Poland, cause

⁵⁹ S 1(1) *sv* "land" and "building".

⁶⁰ S 5.

⁶¹ S 4(5).

⁶² S 4(5)(c)

⁶³ S 4(1) read with s 7(1)

⁶⁴ S 11

⁶⁵ S 13(1)

⁶⁶ S 15B

⁶⁷ S 6(1)

⁶⁸ Under s 26 of the Alienation of land Act 68 of 1981 the developer must keep money received from purchasers in trust to be used only once the unit can be registered in their names. If the scheme is unsuccessful, the money deposited must be returned to the purchasers.

⁶⁹ See Van der Merwe *Apartment Ownership* 30.

unnecessary confusion. In principle only a plan of subdivision and a notarial deed submitting the property to the apartment ownership regime are essential. The fact that a developer is allowed to create an ownership regime in respect of some apartments and not of others in a building aggravates management and creates social disharmony. The subdivision of large houses into apartments and their submission to the apartment ownership regime are to be welcomed. In Amsterdam this led to the clearance of slum areas in the notorious red light district. The tenant protection afforded to existing tenants in a rental building which is being converted to the ownership regime could, as in the South African statute, be supplemented with a period of grace allowing the tenants time to find suitable alternative accommodation.⁷⁰ Finally, the clear demarcation of individual and common areas in a separate apartment ownership register is a wise step to limit future disputes amongst owners as to their rights and obligations with regard to certain areas or facilities in the complex. This corresponds to the South African sectional title registers which are kept separate from the land registers on which transactions in respect of parcels of land are registered.⁷¹

4 3 Participation quota or share value

4 3 1 *Significance*

Both in Poland and in South Africa the share value or participation quota allotted to each unit in the scheme determines a unit owner's share in the common property (and importantly his eventual share in the proceeds of a sale of the land when the scheme is terminated).⁷² It also establishes the value of a unit owner's vote for resolutions in a general meeting of the community of owners and, very importantly, an owner's share in expenses incurred in the management and maintenance of the common property and in the debt of the management body.⁷³

Under the Polish system it seems impossible to avoid a proportionate share in the common expenses. In 1997 the Polish Supreme Court resolved that a unit owner cannot disconnect his unit from the central heating system in the building and install his own private heating system.⁷⁴ The court reasoned that such behaviour would increase the burden on the other owners who would have to pay a higher proportionate share for the heat provided or may have to spend additional money on installing electricity meters. The South African statute solved this problem by authorising the body corporate to install separate meters and to charge unit owners separately for their electricity.⁷⁵

⁷⁰ *Ibid* 177.

⁷¹ See Regulations Schedule s 13 and Annexure 1 Form D.

⁷² See Kalus *Rechtsveränderungen* 311-320.

⁷³ See Sectional Titles Act s 32(3), 37(1)9a) and 47(1).

⁷⁴ Resolution of 28 Aug. 1997 (III CZP 36/97) OSNC 1998 z 1 item 14.

⁷⁵ Annexure 8 rule 33(4).

The Polish courts also seem reluctant to use money collected for a particular purpose for another purpose. In 2001 the Court of Appeal in Warsaw⁷⁶ held that the community of owners may not utilise surplus money collected to cover the costs of heating individual units for the payment of general common expenses. Such money is the exclusive property of the unit owners and the community of owners (body corporate) has no powers in respect thereof.⁷⁷ In terms of the South African management rules, profits and reserves collected for future maintenance may not be distributed amongst sectional owners.⁷⁸

4 3 2 Calculation

In Poland, share value normally is calculated by dividing the total usable floor area of a given unit (together with the floor area of its utility rooms) by the total of the usable floor areas of all the units in the building or buildings.⁷⁹ Since rounding off is not permitted, share values usually are expressed in fractions rather than in decimal points or percentages.⁸¹

If a condominium regime is established simultaneously for all the units in an existing building, the owner or co-owner can allocate quotas to individual units in the constituent deed at his sole discretion without any obligation to disclose his formula.⁸² This narrow exception deprives developers who create a condominium regime by the sale of batches of units in a building from allocating quotas in line with purchasers' expectations.⁸³ However, it seems only fair that the same formula (useable floor area) should be used to allocate the quota for purchasers in initial as well as later sales.

Consequently, the Court of Appeal in Białystok⁸⁴ held that in cases of phased development on a single piece of land, share values are to be calculated by usable area⁸⁵ only when all phases of the development have been completed. In this case purchasers of residential units in a staged development applied for the preparation of a register in which their units and share values calculated on the basis of usable area could be

⁷⁶ Decision of 22 Feb 2001 (I Aca 1309/00) OSA 2002 z 4 item 30.

⁷⁷ The unit owners may naturally decide to put the surplus into the maintenance fund.

⁷⁸ Annexure 8 rule 45.

⁷⁹ OUA art 3 ss 3 and 5. Usable areas are calculated in accordance with the Polish Norm PN - ISO 9836 by surveyors or property valuers. See Baranowski, Cyran & Wiecek *Obliczanie kubatury i powierzchni budynków i budowli wg PN-ISO 9836:1997* (1999) (Warszawa Wacetob). The area of utility rooms is not taken into account if originally calculated shares based on previous legal requirements did not include that area.

⁸⁰ If the inclusion of more than one building seems undesirable, the land may formally be divided into two separate condominium regimes and registered in two separate condominium land registers. The provisions of the Management of Real Estate Act 1997 (tj Dz U 00 No 46 item 543 as amended) which regulate the minimum size of land parcels must be observed.

⁸¹ Tertelis *Zarządzanie finansami wspólnoty mieszkaniowej - t. I* (2001) (Warszawa CH Beck) 67.

⁸² OUA art 3 s 6.

⁸³ Dzięczek *Własność Lokali* 47-48.

⁸⁴ Order of 23 Sept 2003 (II Ca 544/03) OSAB 2004 z 1 item 19.

⁸⁵ OUA art 3 s 5. The share in the common property is determined as the ratio between the usable area of a given unit and the usable areas of all the units in all the buildings.

registered. In rejecting the application, both the court of first instance and the court of appeal argued that since the development consisting of buildings A, B, C, D and E, all to be erected on a single piece of land linked by the same set of utility ducts and an overall architectural design, are not brought into the condominium regime simultaneously, the developer does not have the discretion to decide which quotas to allot to each new unit brought into the regime. Since phases B to E of the project were not completed, it was impossible to identify the usable areas of all the units in all the future buildings. In particular, the court pointed out that areas shown on construction plans may vary from the actual areas of the completed buildings and that there was no guarantee that the developer will in fact erect all the planned segments. He may for instance decide to decrease the size of his project if market demand for the units peters out or increase it if sales in the first phase are exceptionally successful. Therefore only share values based on the usable area of the first phase (and not share values based on the proposed usable areas of all the units in all the future proposed buildings) could be entered into the register at the time that the application was brought. These share values would have to be reallocated in the register as soon as new units are added in the next phases.

The Sectional Titles Act draws a distinction between residential and non-residential schemes with regard to the calculation of the participation quota. In a residential scheme, the participation quota is calculated as under the Polish statute by the floor area formula. It is arrived at by dividing the floor area correct to the nearest square meter of the particular section by the aggregate floor area of all the sections in the scheme correct to four decimal places. In calculating the floor area, all parts of the section including any adjoining balcony or non-contiguous garage, must be taken into account.⁸⁶ In non-residential schemes the determination of the participation quotas is left to the discretion of the developer.⁸⁷ He is not bound by relative floor area but can take into account other factors such as relative value, location and composition of a section (for example whether it has a balcony or lock-up garage). In the case of a mixed scheme consisting of residential and non-residential units, the developer must indicate the total quotas allotted to each segment of the scheme for example 40% to residential and 60% to non-residential units. The quota for each individual unit must then be allocated in the aforesaid manner.⁸⁸

4 3 3 *Amendment of quota*

The Polish statute OUA⁸⁹ provides that once share values have been

⁸⁶ S 1(1) *sv* "participation quota" and s 32(1).

⁸⁷ S 32(2).

⁸⁸ S 32(2)(a).

⁸⁹ Art 3 s 7.

calculated and registered, they may only be amended in a contract signed by all the unit owners.⁹⁰ The Sectional Titles Act allows a developer to make special rules by which different values are attached to an owner's vote or his liability for common expenses.⁹¹ The body corporate may subsequently effect a similar amendment provided that the written consent of an owner adversely affected by such change is obtained. This would prove extremely difficult in practice since one or more owners would always be disadvantaged by a change in share values and would not easily consent to such disadvantage. Polish academics advocate a change in share values on the ground that it may lead to unfair treatment of certain members.⁹²

4 3 4 *Evaluation*

By choosing usable floor area as the predominant criteria by which share values are calculated, the Polish statute avoided the problems encountered in other jurisdictions which grapple with the question of whether the floor area of all the constituent parts of an apartment should be given equal weight. Thus the Israeli statute provides that the floor areas of balconies are only taken into account if the rules of the scheme so provides.⁹³ The prohibition against rounding off of share values means that a fairer result is achieved in the Polish system than in other statutes which allow a more liberal rounding off of quotas. However, the basic criticism against using the floor area of an apartment to calculate share values remains. In general in mixed condominium schemes consisting of commercial units on the lower floors and residential units on the upper floors, the cubic area of commercial units are frequently much greater on account of higher walls than the cubic area of a residential unit with the same floor area situated in a higher storey. Furthermore, it is generally accepted that one criterion, floor area, is too rigid to allocate fairly the interests involved in the divergent matters regulated by share value. In respect of contributions to maintenance costs, for example, it is accepted that the use made by a particular owner of a particular common facility (for instance a lift) should to some extent be reflected in the share of the maintenance cost of the facility. Thus it is not fair that the owner of the ground floor should pay the same contribution for the maintenance of the lift as the owner of the top floor who uses the lift much more frequently.⁹⁴

In most jurisdictions where the developer or co-owners are afforded the discretion to allocate share values, an independent valuer is normally appointed to assess the fairness of the allocation and periodic

⁹⁰ OUA art 3 s 7.

⁹¹ S 32(4).

⁹² Dzięciek *Własność Lokali* 47.

⁹³ Israeli Land Law s 57(b).

⁹⁴ See the Italian Civil Code art 1123-1125.

reappraisals are undertaken to ensure that the allocation is in line with changing circumstances.⁹⁵ In terms of the American UCIOA, the developer is compelled to disclose his formula for allocating quotas and is not allowed to allocate quotas in a way which favours his own interests.⁹⁶ formulas for allocation facilitates the reallocation of quotas in the case of the extension of units or the contraction of the scheme when parts of the building are seriously damaged.

4 4 Powers with regard to a unit

Once a unit has been registered as a separate entity, it is regarded as a distinct property entity subject to private ownership. Such ownership is protected by both the Polish and South African Constitutions⁹⁷ and the rules of neighbour law contained in the Polish Civil Code⁹⁸ and South African case law.⁹⁹

An apartment owner can possess, use and enjoy the fruits, alter and dispose of the unit.¹⁰⁰ However, ownership is not absolute. The Polish Civil Code expressly limits the powers inherent in ownership by rules of socio-economic justice, statutory provisions and the economic purpose of the property concerned.¹⁰¹ The rules of socio-economic justice prevent use for the purpose of exercising unjustified control over another person.¹⁰² Again, the economic purpose of a residential unit would prevent it from being used as a restaurant or a bakery.¹⁰³ Similarly, South African law does not allow a sectional owner to exercise his rights in a manner that inconveniences neighbouring owners or in a way that constitutes an abuse of rights. In addition, the South African statute specifically limits ownership of a section by implied reciprocal servitudes for subjacent and lateral support and for the passage or provision of certain services such as water, electricity and sewerage through pipes, cables or ducts.¹⁰⁴

Apart from these general limitations on the ownership of a unit (section), both statutes impose certain specific obligations on apartment owners. Under both statutes an owner is obliged to bear the expenses connected with the upkeep of the unit (section), to maintain the unit

⁹⁵ Van der Merwe *Apartment Ownership* 60-61.

⁹⁶ S 2-107(d).

⁹⁷ Polish Constitution of 2 April 1997 (Dz U 97 No 78 item 483) art. 21; The Constitution of the Republic of South Africa of 1996 s 25.

⁹⁸ Art 143 specifically prohibits activities which, according to the views of the local community, unreasonably affect the use and enjoyment of neighbouring apartments.

⁹⁹ See eg *Regal v Superslate (Pty) Ltd* 1963 1 SA 102 (A).

¹⁰⁰ Ignatowicz (*supra* n 49) 72-73; Van der Merwe *Sectional Titles, Share Blocks and Time-sharing* vol 1 *Sectional Titles* 8-3.

¹⁰¹ Art 3 s 7.

¹⁰² *Ibid* 76. In the field of lease, an example would be the termination of the lease at an inopportune time for the lessee, eg because of severe illness of the lessee or a member of his family.

¹⁰³ Cf Sectional Titles Act s 44(g) which contains the same prohibition but allows a change of use with the written consent of all the owners.

¹⁰⁴ Sectional Titles Act s 28.

(section) in an adequate state of repair and to allow, at the demand of the management board, access to his unit (section), whenever it is necessary to repair or maintain the common property, or under the Polish statute when new installations are to be added to the building.¹⁰⁵ Unit owners are also obliged to abide by the house rules, for example with regard to noise at night, the keeping of animals and the prohibition on storing large objects (for example old refrigerators or ovens) in basement or attic cubicles.

The above shows that the restrictions placed on the ownership of a unit are more severe than restrictions placed on the ownership of a house. The stricter rules of nuisance and the necessity for house rules can be explained by the fact that apartment owners live in an intensified community, which needs stricter regulation to ensure harmony. The fact that all the apartments are structurally interdependent justifies the positive obligation placed on owners to keep their apartments in a state of good repair and to allow representatives of the management council to enter their apartments to effect necessary repairs.¹⁰⁶

4 5 Powers with regard to the common property

The common property is owned jointly by all the owners.¹⁰⁷ The common property is not physically divided amongst owners in proportion to their share values. Instead, each owner is entitled to use the whole of the common property in a reasonable manner with due consideration for the rights of other owners and not in a way unduly onerous to them. This entails *inter alia* that an owner shall not prevent another owner or occupier from using parts of the common property for lawful purposes, appropriate any part of the common property for his own exclusive use, unilaterally decide on work to be done on the common property¹⁰⁸ or use the common property for an abnormal purpose.¹⁰⁹ Moreover, unit owners must cooperate in protecting their mutual interests and participate in the costs connected with the maintenance of the common property.¹¹⁰

Whereas Polish house rules usually prohibit the disposal of garbage on the common areas, the South African conduct rules regulate the use of the common property fairly extensively. An owner must retain a receptacle for refuse on the common property. He is not allowed (without the written consent of the management board), to park or leave vehicles on the common property or to mark, paint, drive nails into or otherwise damage any part of the common property. Finally, he shall not

¹⁰⁵ OUA art 13 ss 1 and 2; Sectional Titles Act s 32(3) read with ss 37(1)(b) and 44(1)(a) and (c).

¹⁰⁶ See further Van der Merwe *Sectional Titles* 8-14-8-17.

¹⁰⁷ Sectional Titles Act ss 2(c) and 16(1).

¹⁰⁸ Eg, the redecoration of the façade of the building.

¹⁰⁹ Eg, using the common swimming pool for a swimming contest or the communal meeting room for a political gathering.

¹¹⁰ See OUA art 13; Drozd "Prawa i obowiązki właścicieli lokali" 1995 *Rejent* no 3 9-23.

deposit or throw any rubbish, including dirt, cigarette butts or food scraps on the common property.¹¹¹

4 6 Legal transactions with units

Both statutes allow an owner several dispositions in respect of his unit. He may create an encumbrance (for example a mortgage), alienate his unit by selling it or leaving it in his will to his heirs, and lease or lend it out.¹¹² Interestingly, the Polish Civil Code allows an owner to renounce his ownership of the unit.¹¹³ The rationale is that the possibility to renounce ownership is one of the entitlements inherent in ownership. Consequently, the owners who are unable to afford the upkeep of an apartment may simply renounce his or her ownership of the apartment.¹¹⁴ Upon renunciation the local authority with jurisdiction of the place where the immovable property is situated becomes the new owner and is thus liable for all the debts connected with and encumbrances on the unit. However, this liability is limited to the value of the property, calculated on the basis of the property's state of repair at the date of acquisition and its market value at the date of realisation of a debt at the instance of a creditor of the unit owner. Local authorities may in some circumstances be disadvantaged by this situation, but after an amendment of article 179 PCC in 2004,¹¹⁵ the consent of a State official for renunciation by an owner is no longer required. The rationale for the amendment was that requiring the consent of the State official unnecessarily fettered an owner's extensive right of ownership. In addition the South African statute contains detailed provisions on subdivision and consolidation of units, alienation and lease of parts of the common property, the extension of sections, the extension of the scheme by the addition of land, the establishment of exclusive use areas on the common property and phased development.¹¹⁶

4 7 Enforcement of obligations

The South African statute contains no swift remedy to compel a defaulting owner to comply with his financial and social obligations. If he fails to pay his monthly levies, he is made liable for all legal costs and expenses incurred in recovering arrears and interest on outstanding amounts. In addition, the defaulting owner is not entitled to vote on ordinary resolutions proposed at general meetings. The Act provides that no transfer of a unit may be registered unless a conveyancer certifies that

¹¹¹ For these and other conduct rules, see Sectional Titles Regulations (GN R664 of 8 April 1988 as amended) Annexure 9.

¹¹² Sectional Titles Act s 15B.

¹¹³ PCC art 179.

¹¹⁴ See Skowronska-Bocian *Kodeks cywilny, tom 1, pod. Red. K. Pietrzykowskiego* (2004) (Warszawa CH Beck) 506-507.

¹¹⁵ Amendment of art 179 Dz U 03 No 49 item 408.

¹¹⁶ Sectional Titles Act ss 17 21-23 24 26 27 and 25 respectively.

all claims by the management corporation have been satisfied.¹¹⁷ The practical effect of this is that a preferent claim is created in favour of the management corporation against the proceeds of the sale of a defaulting owner's unit. The Supreme Court of Appeal has correctly refused to rank this preferent claim above the security right of a first mortgage creditor.¹¹⁸ The management board may give written notice to any owner who fails to repair or maintain his section. If the owner thereafter persists in such failure for a specified period, the management board can effect the repairs itself and recover the costs from the owner.¹¹⁹

The Polish statute OUA¹²⁰ contains a very strict sanction for unit owners who do not comply with their financial and social obligations. When a unit owner does not pay his share of the maintenance costs for a prolonged period of time, when he flagrantly and persistently violates the accepted house rules of the scheme, or when he, through his improper conduct, makes life intolerable for other owners, the community of owners can resolve to approach the court for an order that the unit be sold by the bailiff in execution proceedings.¹²¹ If this is done, the offending owner also loses his right to a dwelling guaranteed by the local authority concerned.

One criticism against a similar draconian sanction in the German, Austrian and Swiss statutes¹²² is that it is unduly harsh and not easily reconcilable with the idea that a unit owner acquires full ownership of his unit. The further sanction that the offender would also lose his right to a dwelling in the district could have unjustifiably severe social and economic consequences.¹²³ The most effective mechanism for enforcing financial obligations is to create special court proceedings by which claims can be enforced cheaply and swiftly. In South Africa the provisions of the Small Claims Court Act can be amended so as to allow management boards to enforce their claims in this forum.¹²⁴ In addition, the management corporation should hold an automatic legal hypothec ("superlien") on apartment units ranking above first mortgages for the recovery of six months' arrears in levies.¹²⁵ To curb excessive anti-social behaviour, exclusion from the apartment for up to two years may be considered.¹²⁶

¹¹⁷ Regulations Annexure 8 rules 31(5) and (6), 64(a) and Sectional Titles Act s 15B(a)(i)(aa).

¹¹⁸ *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA).

¹¹⁹ Annexure 8 rule 70.

¹²⁰ Art 16.

¹²¹ OUA art 16 ss (1) and (2).

¹²² See Van der Merwe *Apartment Ownership* 106-107.

¹²³ See further Hryckow "Licytacyjna sprzedaż lokalu w trybie art. 16 ustawy z dnia 24 czerwca 1994 r. o własności lokali uwagi krytyczne" 2000 *Rejent* no 1 141-149.

¹²⁴ See the Singapore Land Titles (Strata) Act of 1987 (cap 158 1988 Rev Ed) s 42(14).

¹²⁵ See the United States' Uniform Common Interest Ownership Act § 3-116; Winokur "'Meaner, Liener' Community Associations: the 'Super Priority' Lien and Related Reforms under the Uniform Common Interest Act" 1992 *Wake Forest L Rev* 353.

¹²⁶ See Van der Merwe *Apartment Ownership* s 258 discussing the position in terms of the Dutch and Spanish statutes. Cf *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate* 2003 5 SA 1 (C).

4 8 The community of owners

The interests of apartment owners in a scheme are indivisibly linked under both systems in a system of community of owners. Article 6 of the OUA provides that all the owners of units in subdivided buildings erected on a single parcel of land automatically form a community. This community is created by operation of law as soon as the first unit is isolated as a separate entity and sold to a party other than the original owner. It is indissoluble as long as separate ownership of units exists and ceases to exist when all the units are once again owned by one person.¹²⁷

Although not a company, the South African management body (the body corporate) has full legal capacity. Polish jurisprudence eventually acknowledged that a community of apartment owners should be treated as a “defective juristic person” governed by the general provisions of the PCC on juristic persons.¹²⁸ In legal applications the management body need not cite the names of all the unit owners, but is merely required to identify the name and address of the community in question. However the community cannot acquire rights for itself but only for and on behalf of the individual owners proportionate to their share in the common property.¹²⁹

Under both statutes the community of owners does not enjoy the advantage of limited liability but each owner remains liable for the debts of the community in proportion to his share in the common property.¹³⁰ The unlimited liability of the community is desirable, since its funds are meant to be spent on the management of the scheme and the maintenance of the common property. The liability is, however, subsidiary rather than *in solidum*¹³¹ since the owners can only be called upon to pay once the funds of the community (body corporate) have dried up. The fact that the owners are only liable for their proportionate share prevents the financially sound unit owners from having to pay the entire debt connected with the common property with only a right of recourse against the other unit owners.¹³² However, because of the financial interdependence of unit owners, the fact that some owners are unable to pay their assessments may put the financial stability of the whole scheme at risk.

¹²⁷ OUA art 6; Sectional Titles Act ss 36-38. See also Naworski “Status prawny wspólnoty mieszkaniowej” 2002 *Monitor Prawniczy* n 13 594.

¹²⁸ PCC art 331. See also Radwanski *Prawo cywilne część ogólna* (2003) (Warszawa CH Beck) 196-197.

¹²⁹ Bieniek & Marmaj *Własność Lokali* 59-60; Naworski 2002 *Monitor Prawniczy* 598. See also Nazar “Status cywilnoprawny wspólnoty mieszkaniowej” 2000 *Rejent* no 4 128.

¹³⁰ OUA art 17; Sectional Titles Act s 47.

¹³¹ Drozd 1995 *Rejent* no 3 18. See also Frackowiak “Instytucje prawa handlowego w kodeksie cywilnym” 2003 *Rejent* no 6 25-29.

¹³² Bieniek & Marmaj *Własność Lokali* 86-87.

4 9 Management of common property

The Polish statute contains default provisions on management which only comes into play when unit owners fail to agree on a management model. An agreement may be entered into either at the time of subdivision of the building or at a later stage.¹³³ It must be executed in notarial form, binds successive owners and can only be modified by a resolution expressed in a notarial protocol entered into the land records for the scheme.¹³⁴

In the absence of a contractual arrangement, the common property must be managed in accordance with the provisions of the OUA¹³⁵ which contains different models for small and large communities. Small communities of less than seven units¹³⁶ are governed by the general provisions of the Polish Civil Code on co-ownership¹³⁷ which oblige co-owners to co-operate in the management of common property.¹³⁸ Decisions concerning *ordinary* management actions are taken by the majority of co-owners calculated in accordance with share values whereas decisions concerning *extraordinary* management actions require a unanimous resolution.¹³⁹ If consensus cannot be reached, co-owners whose shares amount to at least 50% of the total share value may approach the court to break the stalemate situation.¹⁴⁰ Whether particular acts fall under ordinary management depends on the nature of the contemplated action and the common property in question. Normally, actions connected with the day to day enjoyment, use, and maintenance of the common property are within ordinary management, while major repair works, renovations and other works requiring substantial funds or causing a substantial change in the use or purpose of common property, are treated as extraordinary management.¹⁴¹

The provisions of the Polish statute applicable to larger communities have similarities with the uniform South African provisions. Both statutes require the election of a management board referred to as trustees in the South African Act. In terms of the Polish statute a professional manager¹⁴² may be elected instead of a board, whereas the South African statute allows for the appointment of a managing agent

¹³³ OUA art 18 s 2. *Dziczek Wlasnosc Lokali* 121-122 states that this is the preferred management model

¹³⁴ OUA art 18 s 2a. Ordinance concerning the Maintenance of Land Registers and Document File 50.

¹³⁵ Art 18 s 3.

¹³⁶ These units could be either subdivided units or units that are still to be committed to the regime by the developer. The Polish Supreme Court resolved on 9 December 1999 (III CZP 32/99) OSNC 2000 z 6 item 104 that new units created by the original owner would only be taken into account once the required works of reconstruction have been completed.

¹³⁷ Arts 195-221.

¹³⁸ Art 200.

¹³⁹ Art 201.

¹⁴⁰ Art 199.

¹⁴¹ See Doliwa *Prawo Mieszkaniowe* 743-747.

¹⁴² It is not entirely clear how the role of this "statutory manager" differs from the role of the manager elected in terms of the management model reached by agreement. See Kozinska "Status prawny zarzadu wspolnoty mieszkaniowej - zagadnienia wybrane" 2003 *Rejent* n 12 115-116; Drozd "Zarząd nieruchomością wspólna według ustawy o własności lokali" 1995 *Rejent* no 4 23.

who is regarded as a mere employee of the body corporate. Under both statutes, members of the management board (trustees) must be natural persons, but they need not be members of the community. To retain a personal interest in efficient management, however, the South African statute requires that the majority of the trustees must be owners or spouses of owners. The members (or the entire management board under the Polish statute) may be removed or suspended at any time by a majority resolution.¹⁴³

In principle ordinary management actions may be executed independently by the management board or the trustees. In fact, the Sectional Titles Act confers the powers and duties of the body corporate on the trustees subject to the provisions of the Act, the provisions of the rules and to any restriction imposed by the general meeting.¹⁴⁴ The Polish statute requires a majority resolution as well as a special authorisation to act as proxy for the owners for matters falling outwith the scope of ordinary management.¹⁴⁵ These matters include the determination of the salary of the manager or the management board, agreement on the annual budget, calculation of contributions for management and maintenance of the common property, a change in the use of the common property, the purchase of land by the association and an alteration of the share values of unit owners.¹⁴⁶ If the required resolution for extraordinary management actions cannot be reached, the management board may apply to the courts for a decision.

It is interesting to note that the Polish statute requires a majority resolution for the consolidation of two or more separate units and the subdivision of one unit in the case of large communities but a unanimous resolution for such actions in small communities.¹⁴⁷ The Sectional Titles Act requires only the consent of the trustees for such actions and specifies that such consent should not be unreasonably withheld.¹⁴⁸

In both jurisdictions the management board (trustees) must convene a general meeting of owners at least once a year. The main function of the annual general meeting is to decide upon a yearly budget, to assess the work of the management board and (in Poland) to decide on the remuneration of the board members. In Poland a special general meeting must be convened on the request of owners whose share values represent at least one tenth of the total share value.¹⁴⁹ In South Africa, a special general meeting can be convened at any time the trustees think fit and must be convened following a written request of owners representing at least 25% of the total quotas or a mortgage creditor holding mortgages over at least 25% of the total number of units.¹⁵⁰

¹⁴³ OUA art 20 ss 1 and 2; Annexure 8 r 13(e).

¹⁴⁴ S 39.

¹⁴⁵ OUA art 21-22

¹⁴⁶ OUA art 22 para 3.

¹⁴⁷ OUA art 22 s 4. See also Bieniek & Marmaj *Wlasnosc Lokali* 98-99.

¹⁴⁸ S 21.

¹⁴⁹ OUA art 31.

Under both the Polish and South African statutes, votes at general meetings are in principle calculated according to the share values (participation quota) of units. In South Africa, voting is initially by a show of hands, but any owner may ask for a poll at any time (even after the votes have been counted) whereby the quota determines the value of each vote.¹⁵¹ In Poland the owners may, by a majority, resolve that the vote of every owner shall have equal value in a given case, that is, one unit, one vote. Also, if the total of the share values in the common property does not equal one, or the majority of shares in common property belong to one person, owners whose share values in the common property amount to at least one fifth of the total share value are likewise entitled to demand voting on a “one unit, one vote” basis.¹⁵² Under the Polish statute, votes may be cast by signing a proposed written resolution by casting a vote at a general meeting or by a mixture of both. The South African statute allows the adoption of resolutions by signing a written resolution only to facilitate the adoption of unanimous and special resolutions (75%) for certain matters.¹⁵³

Under the Polish statute each unit owner is entitled to appeal against the validity of a resolution within six weeks of its adoption. The court will then decide whether the resolution contravenes statutory provisions, an agreement reached between the owners, the rules of reasonable management or otherwise has an unduly adverse effect on the interests of the applicant concerned.¹⁵⁴ The South African legislation contains no such express provision, but the validity of a resolution may be challenged under the general law pertaining to associations.

In the case of mismanagement, the owners in Poland and South Africa may vote to replace the manager or the members of the board.¹⁵⁵ However, for damage caused by mismanagement, they would have to resort to general PCC provisions of the Polish Civil Code and South African case law on contractual and delictual liability. In addition, in cases where no management board has been elected or appointed or where a management board does not fulfill its duties properly, any owner may approach the court for the appointment of a judicial administrator. The court has the power to remove such an administrator as soon as the reasons for his appointment have ceased to exist.¹⁵⁶

4 10 Termination

The Polish statute does not contain express provisions on the termination of a unit ownership scheme. As long as individual units

¹⁵⁰ Annexure 8 rule 53.

¹⁵¹ Annexure 8 rule 60(1).

¹⁵² OUA art 23.

¹⁵³ S 1(1) *sv* “special resolution” and “unanimous resolution”.

¹⁵⁴ OUA art 25.

¹⁵⁵ OUA art 20 s (2).

¹⁵⁶ OUA art 26; Sectional Titles Act s 46.

have different owners, a community of owners exists and common property may be identified. If either a natural or a juristic person becomes the owner of all the units, by, for example, purchasing them, the community of owners and common property cease to exist. However, the units are still separate immovable entities, capable of being registered separately in the land register and the owner may sell them at any time or devise individual units to chosen heirs. Although in theory it would be possible to “unify” the separate units and close the unit land registers, in reality this would be costly and impractical. The owner would lose the flexibility as far as dealings with his real property are concerned.

By contrast the Sectional Titles Act contains detailed provisions on the reconstruction or termination of a sectional title development in the case of damage to or obsolescence of the buildings in the scheme.¹⁵⁷

5 Conclusion

The recent Polish statute on Apartment Ownership has gone a long way towards shedding the Socialist trademarks of landed property and placed commerce in apartments squarely in the market place. Unfortunately the purity of Polish condominium is somewhat blemished by the retention of some outdated remnants from earlier pre-Socialist concepts. One example is that the owner of an apartment block need not convert the whole of the building to apartment ownership simultaneously, but can retain some of the apartments in co-ownership to be reconstructed and sold later. This leaves the management of the building in a disorderly state and creates uncertainty on the part of initial purchasers who would like to know what the physical state of the completed building and facilities would be and how many proprietors would share in the cost of management and maintenance. A provision that such purchasers should receive adequate information in this regard in their contracts of sale could mitigate this uncertainty.¹⁵⁸ The all or nothing approach of the South African statute is preferable.

Another remnant of antiquated condominium statutes in Poland is reflected in the diversity of management systems applicable. Whereas there is perhaps room for providing a less formal management structure for small condominium residential schemes consisting of ten or less units, the prescription of the rules of co-ownership for the management of small schemes seems antiquated. The main reason why the *Stockwerkeigentum* of medieval times fell into disrepute was precisely because they lacked a proper management structure. In this regard the adoption of a uniform management structure as in South Africa would avoid uncertainty and thus facilitate efficient management.

The ability to appoint a professional manager under the Polish statute is very wise. In South Africa the presumed assumption is that because of

¹⁵⁷ Ss 48 and 49.

¹⁵⁸ See eg the UCIOA s 4-102.

their personal interest in the scheme the trustees will put more effort and time into efficient management. However, since trustees receive no remuneration and have to work for love and charity, it has proved difficult to find skillful and committed persons to serve as trustees.

The meager Polish provisions on damage to the building and on reconstruction or termination of the scheme also need modernisation. Especially outdated commercial schemes are often in need of a quick termination and entire renovation followed by a new subdivision of the buildings into thriving new economic units in order to meet future commercial challenges.

Finally, the draconian Polish sanction of losing the opportunity to be awarded alternative accommodation in the same district in case of conduct warranting exclusion from the scheme, goes against the grain of endowing apartment ownership with the status of real or genuine ownership.

OPSOMMING

Hierdie bydrae vergelyk die bepalings van die Suid-Afrikaanse Wet op Deeltitels met die bepalings van die Poolse ekwivalent. Deeleiendom in Pole reik terug na 1808 toe die Napoleontiese Wetboek as wetboek vir Pole aanvaar is. Die akute woningsnood tussen die twee Wêreldoorloë het gelei tot die afkondiging van 'n Ordonnansie op Wooneenhede in 1934. Met die koms van Kommunisme is hierdie Ordonnansie vervang deur vier ontoereikende artikels in die nuwe Poolse Burgerlike Wetboek van 1964. Deeleiendom is beperk tot eenhede in residensiële huise met 'n vasgestelde ruimte per huisgesin. Die demokratisering van Pole lei tot die promulgasie van 'n nuwe Wet op die Eiendom van Eenhede in 1994. Sowel hierdie Wet as die Wet op Deeltitels, omskryf 'n eenheid as die somtotaal van 'n deel en 'n proporsionele mede-eiendomsaandeel in die gemeenskaplike eiendom. Ingevolge die Poolse Wet kan slegs gedeeltes van die gebou wat vir private gebruik afgesonder is, deel wees van 'n deel. Met hierdie algemene omskrywing vermy die Poolse Wet baie van die probleme met die toepassing van die Suid-Afrikaanse Wet wat 'n deel omskryf as die kubieke eenheid omring deur mure, plafonne en vloere tot by die middellyn daarvan. In Pole bestaan die grootste persentasie van deeleiendom uit die omskepping van groot privaat huise of geprivatiseerde geboue wat voorheen aan die staat of plaaslike owerhede behoort het. Net soos in Suid-Afrika, het vorige huurders of eienaars 'n voorkeepsreg. Beide statute vereis dat die aparte eenhede as sodanig in die Akteskantoor geregistreer word. In Pole kan deeleiendom op verskeie maniere vestig. Hierdie moontlikheid en die feit dat aparte registers vir grond en geboue bestaan, lei tot talle probleme. Die Poolse berekening van die deelneemingskwota deur slegs bruikbare vloeroppervlakte in aanmerking te neem en geen afronding toe te laat nie, lewer oënskynlik billiker resultate as in Suid-Afrika. Omdat deeleienaars anders as gewone huiseienaars saamgebondel word in een kompleks, bevat beide statute beperkings op die vrye uitoefening van eiendomsreg. Die Poolse reg beperk die uitoefening van eiendomsreg deur die reëls van sosio-ekonomiese geregtigheid, wetsbepalings en die ekonomiese doel van die objek van eiendomsreg. As een van die bevoegdhede inherent aan eiendomsreg, erken die Poolse reg die bevoegheid om van 'n woonstel ontslae te raak indien 'n eenaar nie in staat is om sy woonstel te onderhou of sy maandelikse bydraes te betaal nie. Wat die afdwing van verpligtinge betref, volg die Poolse Wet die streng bepalings van die Duitse Wet en laat die deelnemingsbestuur toe om die woonstel te verkoop indien 'n eenaar saamleef in die kompleks ondraaglik maak. Die betrokke plaaslike owerheid word verder onthef van enige verpligting om vir huisvesting vir die oortreder te sorg. As gevolg van die groot aantal bestuursopsies wat in Pole gevolg kan word, heers daar wanorde in die bestuur van talle deeleiendomskomplekse wat tot 'n mate deur die aanvaarding van 'n streng geregleerde deeleiendombestuurstelsel in Suid-Afrika vermy word.