

A CRITICAL ANALYSIS OF THE INNOVATIONS INTRODUCED BY THE SECTIONAL TITLES AMENDMENT BILL OF 2010

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1 Introduction

On 17 August 2009 the Minister for Rural Development and Land Reform published the Sectional Titles Amendment Bill (“the Bill”) for public comment¹ accompanied by a Memorandum setting out the objects of the Bill.² This was followed by the Sectional Titles Amendment Bill on 21 June 2010 which altered the previous Bill in only a few minor respects.³ These amendments may be the last before the Sectional Titles Act 95 of 1986 (“the Act”) is broken up into three separate statutes, namely: the Sectional Titles Act; the Sectional Titles Schemes Management Act,⁴ which will incorporate all the governance provisions of the Sectional Titles Act while leaving the survey and land registration provisions in a leaner Sectional Titles Act;⁵ and the Community Schemes Ombud Service Act,⁶ which will provide a dispute resolution mechanism for sectional title and other community schemes.

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¹ GN R 1109 GG 32498 of 17-08-2009

² *Memorandum on the Objects of the Sectional Titles Amendment Bill* in GG 32498 of 17-08-2009 24-31

³ B14-2010 announced in GG 33316 of 21-06-2010. The *Memorandum* appears on page 10 of the Bill. The most substantial changes concern the amendment of s 24 of the Act by cl 7(b) of the Bill and the deletion of cl 10 of the 2009 Bill dealing with an amendment of s 27A of the Act concerning rule-based exclusive use areas

⁴ The Sectional Titles Schemes Management Bill B20-2010 (the draft Bill was published as GN R 1447 in GG 32666 of 30-10-2009) proposes to remove sectional title scheme management from the mandate of the Department of Rural Developments and Land Reform and place it under the control and administration of the Department of Human Settlements. The Bill contains the governance provisions removed from the Sectional Titles Act

⁵ The Schedule to the Sectional Titles Schemes Management Bill, B20-2010 contains the provisions on the Amendment of the Sectional Titles Act 95 of 1986 to complete the split

⁶ The Community Schemes Ombud Service Bill B21-2010 (the draft Bill was published as GN R 1448 in GG 32666 of 30-10-2009). The Bill aims to establish a dispute resolution service in respect of “community schemes” which are defined to include *inter alia* sectional title schemes, share block developments, community schemes governed by home owners’ associations and housing schemes for retired persons

Besides addressing gender equality,⁷ removing obsolete provisions,⁸ making some technical adjustments⁹ and extending consumer protection,¹⁰ the latest amendments propose to eliminate a substantial number of problems encountered in the practical application of the Act and to shed light on unclear facets of the Act. The outcome will go a long way to transforming the Sectional Titles Act into a highly efficient statutory instrument with which the ever-increasing issues facing the sectional title industry could be tackled. It will bring clarity to conveyancers and deeds registry officials on the one hand, and strengthen the position of persons involved in the governance of schemes such as trustees and managing agents on the other hand.

It is almost certain that the proposed amendments will be confirmed by Parliament early in 2011 with very little substantial alteration. The aim of this paper is to highlight the most important changes that will see the light if these proposals become law. Since it seems that the aim of the legislature is to promulgate the Sectional Titles Amendment Act simultaneously with the Sectional Titles Schemes Management Act, it must be noted that the amendments pertaining to governance matters will probably be taken out of the Sectional Titles Amendment Bill and inserted in the Sectional Titles Schemes Management Act. The amendments will be discussed in the sequence in which they appear in the Sectional Titles Amendment Bill.

2 Amendment of the definition of “developer” and “owner”

Paragraph (a) of the definition of “developer” in section 1 provides that, for purposes of section 10 and of section 15B(3)(c), the definition of developer includes the registered owner of the land on which a sectional title scheme is developed, or the holder of a right under section 25 to extend the scheme or his successor in title, as well as an agent of any of these persons or his or her successor, or any other person acting on behalf of any of them. Section 10 deals with the right of pre-emption in favour of tenants which must be honoured by developers upon the sale of units in rental buildings that are converted

⁷ These proposed amendments affect s 14(8), as well as various subsections of s 25 dealing with the right to reserve the right to extend the scheme by the addition of sections, namely 25(1), 25(5), 25(9), 25(10), 25(10)(d), 25(11)(d) and 25(13)

⁸ Examples are the following: the substitution of the definition of “Minister” to refer to the Minister of Rural Development and Land Reform (cl 1(b)); the omission of the reference to “a liquidator or trustee elected or appointed in terms of the Agricultural Credit Act” in para (a) of the definition of “owner” in s 1, because the latter Act has been repealed by the Agricultural Debt Management Act 45 of 2001 (cl 1(c)); the stipulation in the proposed amendment of s 54(2)(c)(i) that one of the seven members of the sectional title regulation board must be a conveyancer nominated by the Law Society of South Africa instead of the Association of Law Societies of the Republic (cl 13); the proposed deletion of ss 60(1) and 60A(1), which contain savings provisions for the registration of a sectional plan and the opening of a sectional title register in respect of a scheme which has been approved by the local authority under the Sectional Titles Act 66 of 1971 (“the 1971 Act”) or under sch 2 to Proc R9 of 1997 GG 17753 of 31-01-1997 (“Proc R9 of 1997”) respectively and for the registration of real rights of extension acquired under the 1971 Act or Proc R9 of 1997 respectively; the substitution of ss 60(6) and 60A(6), by deleting the savings provisions for rules which by unanimous resolution had replaced sch 1 rules under the 1971 Act and sch 2 rules under Proc R9 of 1997. These rules shall lapse and are deemed to be replaced by the prescribed management rules

⁹ Cl 7(a) of the Bill proposes to rectify s 24(4)(b) to refer to s 5(3)(g) instead of s 7(2)(b)

¹⁰ See the proposed insertion of s 25(4A) and the proposed amendment of s 37(1)(b) discussed below at parts 15 and 16

into sectional title schemes. Section 15B(3)(c) deals with the affidavit which a developer must provide to the Registrar on the sale of any such unit that the transfer of the unit is effected under a contract which is not contrary to any provision of section 10. In both these instances the definition of developer included an agent of a developer or his or her successor or any person acting on behalf of any of them.

However, this wide definition did not apply to another substantial component for the protection of tenants in a building wholly or partly let for residential purposes being converted into a sectional title scheme, namely section 4(3). Under this section the developer must notify the tenants that a meeting would be held to inform them of his intention to convert the building into sectional title, furnish them with certain information about the conversion and inform them of their right of pre-emption.¹¹ At the meeting the developer must be available to provide further particulars. The Bill rectifies this position by providing that in these cases the references to “developer” also include his or her agent or the successor in title of such agent.¹²

The amendment of the definition of “owner” may be described as a technical adjustment to remove obsolete provisions in the Act. The amendment involves the omission of the reference to “a liquidator or trustee elected or appointed in terms of the Agricultural Credit Act [28 of 1966]”.¹³ The latter Act was repealed by the Agricultural Debt Management Act 45 of 2001. It is unfortunate that the legislator did not again take a closer look at the definition of “owner” in the Act which is far from clear. Particularly difficult to interpret is the reference in the definition of “owner” to “the person registered as owner *or holder*” (emphasis added). Does this mean that all kinds of registered holders of a sectional title unit such as 99 year leaseholders, holders of long leases, usufructuaries, holders of a personal servitude of use or *habitatio*, or even the holder of a praedial servitude of access over the balcony of a neighbour’s unit are considered owners? It seems more sensible to regard only registered owners as owners of sections and to confer rights and obligations on the holders of registered real rights for as long as they retain the registered right in the unit. They should, for instance, not only have the right to attend general meetings and to vote at such meetings, but also be under an obligation to undertake ordinary repairs with regard to the section and to contribute to the administrative fund for common expenses. However, their rights should terminate on expiry of their term or on termination of the scheme and vest in the reversionary owners.¹⁴

¹¹ S 4(3)(a) of the Act

¹² Cl 1(a) of the Bill Note that s 4(3)(b) of the Act already mentions the agent of the developer

¹³ Cl 1(c) of the Bill See para (a) of the definition of “owner” in s 1 of the Act

¹⁴ See further CG van der Merwe in CG van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-sharing Volume 1: Sectional Titles* (Service Issue 12, April 2010) 3-26 – 3-27; CG van der Merwe & CS Human “‘Eienaar’ in die 1992 Wysigingswet op Deeltitels met Spesiale Verwysing na Gades Getroude in Gemeenskap van Goedere” (1993) 4 *Stell LR* 311; J Maluleke “The Liability of a Usufructuary for the Payment of Arrear Levies in a Sectional Title Scheme” (2005) March *De Rebus* 42-43

3 Facilitation of unanimous resolutions

Under the current Sectional Titles Act a body corporate may approach the court for relief in instances where it is unable to obtain a unanimous resolution. However, this provision is effectively nullified by the proviso that where the “proprietary rights or powers of any member as an owner are affected adversely, the written consent of such member must first be obtained”.¹⁵ Such a proviso severely restricts the discretion of a judge. This is unnecessary since a judge would in any event have the discretion to consider minority interests.¹⁶ The legislature now seeks to remedy this situation and to leave the entire matter and the balancing of the various interests in the discretion of the court. Instead of making an approach to the court subject to the above proviso, it allows such approach “*notwithstanding* the provisions of subsection (3)(c)”.¹⁷ In my opinion the subsection would read better if the above awkward reference is simply left out of the provision.¹⁸

This proposal illustrates that the legislature is prepared in appropriate circumstances to relinquish the principle of individualism which endeavors to safeguard the proprietary interests of sectional owners at all costs in favour of a more community based approach which place community interests in the foreground.¹⁹ This may be illustrated by two instances in the Sectional Titles Act for which a unanimous resolution is required, namely to direct the body corporate to alienate or lease part of the common property²⁰ or to authorise the body corporate to reserve exclusive use areas in favour of owners by delineation thereof on the registered sectional plan.²¹ In both these instances, the proprietary interests of one or more owners would almost definitely be affected by a unanimous resolution regarding such alienation, lease or registration of further exclusive use areas. It might be in the interest of a particular sectional title community to alienate or lease part of the common property in order to boost the coffers of a financially strapped scheme or to reserve parking spaces on the common property of the scheme as the only measure to rectify the parking chaos in the scheme. In these circumstances the court can balance individual interest against community interests and decide whether it would allow an unreasonable owner to hold the body corporate to ransom. The court seems to be the appropriate forum in which to solve this

¹⁵ S 1(3A) of the Act making the relief sought from the court subject to s 1(3)(c)

¹⁶ See Van der Merwe in *Sectional Titles* 14-50 – 14-51; T Maree “The Right Oil? Proposed Amendments to Sectional Titles Act ease Some of the Problems Areas” (2002) *May De Rebus* 55 56

¹⁷ Cl 1(d) of the Bill. See also G Paddock “New Sectional Titles Bill published for Comment – 26 Proposed Changes” (2009) August *Paddocks Press Newsletter* 4; T Maree “Latest Proposed Amendments to Sectional Title Act: Will these be the Last?” (2009) 34 *MCS Courier Newsletter* 1 2

¹⁸ Subs (3A) would then read:

“If the body corporate is unable to obtain a unanimous resolution, it may approach the court for relief”

¹⁹ See the *Memorandum* 2 1 4:

“By making subsection (3A) subject to subsection 3(c) the opportunity remains for an unreasonable owner to jeopardize a body corporate administration”

²⁰ S 17(1) of the Act

²¹ S 27(2) of the Act

stalemate.²² Once an Ombud Service has been introduced for the settlement of disputes in sectional title schemes, this task may perhaps be transferred to the Ombud Service.²³

4 Clarification of the question whether doors and windows form part of a section or part of the common property

The median line of the dividing floor, wall or ceiling forms the boundary of a section in a sectional title scheme.²⁴ This suggests that in the absence of a contrary indication in the sectional plan, the legal nature of any window, door or other structure which fills any opening in the exterior wall, floor or ceiling is determined by reference to that wall, floor or ceiling. It will therefore depend on the location of the window or door in the wall, floor or ceiling as to whether it forms part of the common property or a section. The exact placement of windows and doors must be measured carefully to determine whether they fall within the median line or not.

Since this approach would lead to irrational results in that windows and doors would be classified divergently from scheme to scheme, the Bill proposes that the median line of a section passes through the centre of exterior windows, doors and other structures²⁵ built into the section's exterior walls, floors and ceilings.²⁶ This means that the interior part of the window up to the median line will be part of the section and the exterior part thereof, part of the common property. The outcome of this is that if for instance the window of a section is broken by accident, the cost of repair of the window will be borne equally by the owner of the section and the body corporate with money from the administrative fund. This amendment would create certainty and facilitate the management of sectional title by trustees and managing agents.²⁷

Because of the high incidence of falling windows in recent years, the Singapore Building Maintenance and Strata Management Act of 2004, stipulates that all exterior windows of a section, being either louvers, casement windows, sliding windows or windows with movable parts, are regarded as part of the section of which they form part²⁸ and are therefore the responsibility of

²² Cf JC de Wet & GA Tatham "Die Wet op Deeltitels" (1972) *De Rebus* 205 208-209, who argue that the court should not be called upon to clear the mess if sectional owners are unable to agree on a course of action. However, the court is currently called upon to, for instance, divide property owned in undivided shares where the co-owners fail to agree on a division. See CG van der Merwe *Sakereg* 2ed (1989) 388-390.

²³ The adjudicator of the Ombud Service would, otherwise than in the case of arbitration, be required to give reasons for his orders, which would therefore have precedential value.

²⁴ S 5(4) of the Act.

²⁵ S 2(1) of the Singapore Building Maintenance and Strata Management Act 2004 (Cap 30C, 2008 Rev Ed) for instance defines a window to include a roof skylight, glass panel, glass brick, louvre, glazed sash, glazed door, translucent sheeting and any other building material which transmits natural light directly from outside a building into a room or interior of the building.

²⁶ The Bill (cl 2) proposes the amendment of s 5(5)(a) to provide:

"[T]hat any window, door or other structure which divides a section from another section, or from the common property, shall be considered to form part of such floor, wall or ceiling"

²⁷ See *Memorandum 2 2*; Maree (2009) *MCS Courier Newsletter* 2.

²⁸ Singapore Building Maintenance and Strata Management Act s 2(9)(a). Under s 9 the Commissioner of Buildings is empowered to prosecute the person responsible for failure to maintain the exterior features of the building, such as windows and that thereby endanger the lives or properties of others.

the owners to maintain. The justification for this is that as these windows are used and controlled by the owners and occupiers, it would be difficult for the body corporate to supervise and control the proper usage and maintenances of these windows. However, to ensure the uniformity of the external building façade, the body corporate is empowered to continue to regulate the design of these external windows.²⁹ By contrast, all other windows located on the exterior wall, such as fixed glass panels, will be regarded as common property unless otherwise described on the sectional plan.³⁰ As these windows are outside their purview and control, the sectional owners cannot be expected to take charge of these external fixed windows.³¹ In my opinion the South African solution is preferable in view of the ease of its application.

5 Elimination of confusion when a scheme is developed on more than one parcel of land which is burdened with a mortgage

The Act provides for a sectional title register to be opened in respect of more than one parcel of land without having to first consolidate such parcels.³² If any such parcel is hypothecated under a registered mortgage bond, the Act requires compliance with section 40(5) of the Deeds Registries Act 47 of 1937 which deals with the substitution of parcels of land and the issuing of certificates where the bonds are cancelled.³³ The Bill acknowledges that the application of section 40(5) causes great confusion, especially with regard to the format and content of the application for registration.³⁴ To eliminate the confusion, the Bill proposes to amend section 11 of the Act to provide that where a bond is registered against one or more parcels of land shown on a sectional plan, all the land shown on the sectional plan may, upon written application of the developer and with the written consent of the mortgagee, be substituted for the land originally mortgaged under the bond. Thus the formal requirements of section 40(5) of the Deeds Registries Act are repeated in the proposed amended Sectional Titles Act. This is subject to an additional proviso that if different parcels of land shown on the sectional plan are burdened with different mortgages, the sectional plan may not be registered unless the bonds are cancelled.³⁵

6 Rectification of the discrepancy with regard to the lodgment and issuing of certificates of real right of extension of schemes and certificates of real rights of exclusive use areas

There is a discrepancy in the Act in that section 11 of the Act does not provide for the lodgment of the certificates of real right of extension of a

²⁹ Building Maintenance and Strata Management Act of 2004 s 37(3) and (4)

³⁰ Building Maintenance and Strata Management Act of 2004 s 2 (9)(b)

³¹ See in general, T Keang Sood *Strata Title in Singapore and Malaysia* 3 ed (2009) 155-156

³² S 4(2) of the Act

³³ See the proviso to s 11(3)(d)(iii) of the Act

³⁴ See *Memorandum* 2 3 1

³⁵ See the proposed amendment of s 11(3)(d) in cl 3(a) of the Bill

scheme and a certificate of real right of exclusive use areas under a condition reserved or imposed by a developer under sections 25(1) and 27(1) of the Act, whereas section 12 provides for the issuing of such certificates by the registrar of deeds. This anomaly is rectified by the inclusion of these certificates as documents that must accompany the application for the opening of a sectional title register and the registration of the sectional plan under section 11(3).³⁶

7 Issuing of certificates of real rights with regard to undivided shares in respect of real rights of extension of schemes and certificates of real rights of exclusive use areas

Section 12(1)(e) and 12(1)(f) of the Act provides that a certificate of real right of extension of a scheme and a certificate of real right of exclusive use areas in respect of a condition reserved or imposed under sections 25(1) and 27(1) respectively, must be issued by the Registrar on the opening of the register.³⁷ This does not take account of the fact that the developer may fractionalise his real right of extension into shares or divide the real right into various rights pertaining to delineated portions of the common property or that a developer could reserve undivided shares in real rights of exclusive use in the scheme.³⁸ These shortcomings are rectified by proposals in the Bill to insert a reference to *certificates of real right* after the words *the certificate of real right* in section 12(1)(e) and 12(1)(f) of the Act.³⁹ This is a technical adjustment of the provisions of the Act to facilitate the implementation of the Act by conveyancers and deeds registry officials. Fortunately, the above amendment to section 11(3) seems wide enough for these certificates to accompany the application for the opening of the sectional title register.⁴⁰

Practical and dogmatic concerns are that the Bill is going too far in proposing the fractionalisation of the rights of exclusive use over the common property. The proposed fractionalisation implies that an exclusive use right with regard to a parking space, a garden area, a backyard and a domestic aid's quarters may be fractionalised into undivided shares in these rights and that certificates of real rights will be issued to the developer and then to holders of these fractions. The first question is whether there is really a need in practice for holding such fractions? Whereas the grant of undivided shares in an exclusive use right to a garden area to two different holders (owners) may be conceivable, I cannot see this happen in practice in the case of parking spaces, backyards and domestic aids' quarters. If one considers further that a mortgage bond, a long term lease or personal servitudes of usufruct, *usus* or *habitatio* may be registered not only over these exclusive use rights under section 27(6) but in terms of the Bill also over undivided shares in these exclusive use rights, the mind starts to boggle. The dogmatic concern is that the fractionalisation

³⁶ This is done by the insertion of paras (fB) and (fC) in s 11(3) of the Act See also *Memorandum 2 3 2*

³⁷ See subparas 12(1)(e) and (f) of the Act

³⁸ See *Memorandum 2 4* with regard to the issuing of certificates of real rights in respect of shares in one of these real rights

³⁹ See cl 4 of the Bill

⁴⁰ The subparagraphs inserted by cl 3(b) refer to "certificate or certificates of real right" in order to provide for the fractionalisations of these rights

of what is already a derivative right takes the subderivation of limited real rights too far. It must be remembered that the common property in a sectional title scheme belongs to the sectional owners in undivided shares and that the recognition of an exclusive use right in the common property rests on the misconception that an exclusive use area is a property entity which can serve as the basis for derivative and subderivative limited real rights. In my opinion the possibility to create subderivative limited real rights in this situation is taking the abstraction too far.

8 Certificate of registered sectional title in respect of a fraction of an undivided share in a unit

The amendment of section 15B of the Act is related to the above. This section provides for the registration of the transfer of ownership and other real rights in a unit in a deeds registry.⁴¹ Although it contains a provision on the acquisition of a certificate of registered sectional title in respect of an undivided share in a unit,⁴² it does not cater for the issuing of a certificate of registered title to the sole owner of a unit in respect of a fraction of an undivided share in a unit.⁴³ The Bill proposes to rectify this *lacuna* by the insertion of subsection 15B(5A).⁴⁴ Therefore an owner can fractionalise or subdivide the ownership of his or her unit into 12 abstract undivided co-ownership shares and sell each of these 1/12th shares to a different co-owner. Apparently there are townhouses in Clifton where titles could be obtained for every month of the year. In such a case, contributions to levies would be based on the size of the undivided shares.⁴⁵

9 Facilitation of the cancellation of a registered sectional plan

Apart from the exceptions mentioned under sections 14(6)⁴⁶ and 17(6)⁴⁷ a sectional plan may currently only be cancelled by order of Court in terms of the

⁴¹ S 15B of the Act

⁴² S 15B(5) of the Act

⁴³ See *Memorandum 2 6*

⁴⁴ See cl 6 of the Bill and *Memorandum 2 6*

⁴⁵ See Department of Rural Development and Land Reform “Briefing by the Department of Rural Development and Land Reform on the Sectional Titles Amendment Bill” (18-07-2010) *Parliamentary Monitoring Group (PMG)* <<http://www.pmg.org.za/report/20100728-deeds-registries-amendment-bill-sectional-titles-amendment-bill-brief>> (accessed 17-02-2010) In such a case the co-owners of the townhouse unit must reach an agreement that the possession of the property would be divided amongst them in such a way

⁴⁶ This section provides that where all the units in the scheme, all real rights of extension and all real rights to exclusive use areas are still registered in the name of the developer and none of these units or rights are encumbered with a mortgage, the developer may request the Registrar to close the sectional title register. On closure of the register the Registrar must notify the Surveyor-General of such closure. On such notification, the Surveyor-General will cancel the original sectional plan and the deeds registry copy thereof

⁴⁷ This section provides that where the whole of the land comprised in the common property of the scheme is transferred by the body corporate pursuant to a unanimous resolution to alienate the whole of the common property, the title deeds pertaining to all units and the certificates of real rights pertaining to all real rights of extension and to exclusive use areas must be surrendered to the registrar for cancellation. Thereupon the registrar will close the sectional title register and notify the Surveyor-General thereof leaving it to the Surveyor-General to cancel the original sectional plan and the deeds registry copy thereof

Sectional Titles Act.⁴⁸ This does not give recognition to the fact that a sectional plan may also be cancelled upon the destruction of or damage to buildings and upon the disposal on the destruction of buildings as contemplated by sections 48 and 49 without the necessity of a Court Order.⁴⁹ The Bill proposes the amendment of section 14(8) to make it clear that a Court Order is not required for the cancellation of a sectional plan where the buildings are damaged or destroyed under section 48 and 49 of the Act.⁵⁰

10 Extension of sections

Currently, if an owner wishes to extend his or her section, the Act requires the consent of every mortgagee in the scheme to the registration of the sectional plan of extension to the section, if the extension would result in a deviation of more than 10% in the participation quota of any section in the scheme.⁵¹ The rationale for requiring bondholders' consent is that the value of their security could be diminished by the fact that the extension of a section could lead to a devaluation of all the units in a scheme, particularly neighbouring units. The value of neighbouring sections could be reduced due to their light, view, airspace and privacy being impaired and the value of other units in the scheme could decrease due to the amenities and appearance of the scheme being affected and because the common property of the scheme is diminished by the extension of a section.⁵²

Even so, the fact that for relatively minor extensions of a section the consent of all the bondholders must be obtained is still regarded as an expensive and time-consuming obstacle. Bondholders approached for such consent would refer the matter to their attorneys resulting in delays and costs out of all proportion to the total costs of the extension, especially in larger schemes.⁵³ Despite the fact that the limit has been increased from 5% to 10% in 2005,⁵⁴ the conveyancing fraternity still complains that they encounter practical difficulties in obtaining such consents. Their main complaint is that they are not in a position to determine any deviation and that such deviation must be determined either by a land surveyor or an architect.⁵⁵ These concerns are now addressed by the Bill.

In terms of the proposed amendment of section 24(6)(d) an application for the registration of a sectional plan of extension must be accompanied by any sectional mortgage bond to which the section may be subject together with a certificate of a *land surveyor or architect* stating that there is not a deviation of more than 10% in the participation quota of *the relevant* section as a result

⁴⁸ S 14(8) of the Act

⁴⁹ See *Memorandum 2 5*

⁵⁰ Cl 5 of the Bill

⁵¹ S 24(6)(d) of the Act

⁵² See A Hurwitz "Sectional Title – Legal Transactions on Common Property" (2000) 4 *Property Law Digest* 7-9; BES Agar "Extensions of Sectional Titles Scheme: Consent of Mortgagees- An Analysis of the Interpretation of the Chief Registrar of Deeds" (2009) February *De Rebus* 58-59

⁵³ Maree (2009) *MCS Courier Newsletter* 2

⁵⁴ By s 2 of the Sectional Titles Amendment Act 7 of 2005

⁵⁵ See *Memorandum 2 7 2*

of the extension.⁵⁶ If there is a deviation of more than 10%, a certificate by a *conveyancer* stating that the mortgagee of each section in the scheme has consented to the registration of the sectional plan of extension of that section must accompany the application.⁵⁷

A logical proposed change in the wording of the Act is that the deviation of more than 10% must be in the participation quota of *the section in question* and not with regard to the participation quota of *any section*. This means that, as already happens in practice, only the section in question would have to be looked at because the quotas of all other sections would be affected to a lesser extent. Note that the increase of more than 10% applies not to the increase in size or value (in the case of non-residential sections) of the extended section, but in the participation quota of that section. Note further that since the land surveyor and architect are in charge of the preparation of the sectional plan and the determination of the participation quota, by actual measurements, it would not be difficult for them to certify as to the exact extent of the deviation caused by the extension.

In order to address the difficulty of obtaining the consent of bondholders if there is a deviation of more than 10%, the applicant is required to send a notice by registered post to each mortgagee or the headquarters of the mortgagee, where the latter is a financial institution. The notice must contain details of the mortgage bond, the name of the mortgage debtor and the reference number of the mortgage loan if any, the proposed extension in relation to size and location, and the impact on the security of the mortgage creditor concerned as to the diminution of the participation quota allocated to the mortgaged unit.⁵⁸ This is subject to the proviso that if the bondholders do not respond within 30 days of the posting of the notice by registered post, it shall be deemed that the mortgagee does not have any objection to the proposed extension and that he or she consents thereto. This amendment will give owners and trustees the chance to address and legalise illegal and unauthorised extensions which have been neglected in the past due to the difficulties in obtaining bondholders' consent.⁵⁹

One commentator⁶⁰ is of the opinion that this proposal goes too far because it introduces a dangerous precedent moving from the current requirement for a formal voluntary act of consent to an assumption of consent by the bondholder's silent acquiescence. He further argues that this proposal implies that section extensions in excess of 10% are relatively trivial issues, unlikely to affect the interests of bondholders negatively and points out that when the extension is within an exclusive use area, it may not be noticed at all for a considerable time. By the time the trustees and other owners need to address the issue, the extended structure is completed and occupied and it then becomes very difficult either to have the extension removed or legalised. He suggests that there should be a clear prohibition against an owner commencing

⁵⁶ See proposed new subs (6)(d)(i) in cl 7(b)

⁵⁷ See proposed new subs 6(d)(ii) in cl 7(b)

⁵⁸ Proposed amendment of subs (6) by the insertion of subs (6A) by cl 7(c) of the Bill

⁵⁹ See Van der Merwe in *Sectional Titles* 11-12(2) – 11-12(3); Maree (2009) *MCS Courier Newsletter* 2-3

⁶⁰ G Paddock (2009) August *Paddocks Press Newsletter* 4-5

an extension until the body corporate, and all affected bondholders, have consented and all other applicable laws have been complied with. He also suggests that bondholders' consent should be limited to those with bonds over sections from which the proposed extension is visible and that a certificate of a conveyancer should certify that such bondholders' written consent to the extensions has been obtained.⁶¹ Would it not be more accurate to require only the consent of those bondholders directly affected by the extension? An extension which gravely impacts on the harmonious appearance of the scheme might not necessarily be visible from a particular mortgaged unit in a scheme consisting of a number of freestanding units.

The Property Law Committee raised another point in the LSSA news and views section of *De Rebus*. The Committee pointed out that the sectional plan of extension can be approved only once the building extension has been completed. The Committee asked what the legal position is if, after the extension has been completed and the sectional plans of extension approved, a bondholder who is required to consent to the extension refuses to do so. Is the owner then obliged to demolish the additional building work or would he be entitled to occupy and utilise the extension portion of the section without having to pay additional levies on account of the extended portion because the sectional plan of extension cannot be registered due to the refusal on the part of a bondholder?⁶²

The difficulty is that the draft sectional plan of extension must be prepared from actual measurements⁶³ and thus that the bondholder's consent may only be requested once a substantial part of the extension is completed. A possible solution here is that a provisional approval of the extension as it figures in building plans as approved by the local authority must be required from the bondholders concerned, subject to the condition that the extension must be completed in accordance with the approved building plans.

11 Extension of a scheme by the addition of sections

The Bill proposes several amendments to section 25 which provide for the extension of a scheme by the addition of sections.

The first proposed amendment concerns the possibility of extending the scheme by the addition of exclusive use areas only. Currently the Act provides for the extension of a scheme by the addition of sections and exclusive use areas. The extension of a scheme by the addition of exclusive use areas is only provided for in the case where the addition of rights to exclusive use areas is incidental to or linked to the extension of the scheme by the creation of new sections in such a scheme. The Bill therefore proposes to amend the heading

⁶¹ See also J Paddock "Q and A with Jennifer Paddock" (2009) September *Paddocks Press Newsletter* 15 who suggests that the collection of consents from mortgage creditors may be simplified by requesting general consents from major banks which hold bonds over sectional title units in the scheme

⁶² See Property Law Committee of the LSSA "LSSA News and Views" (2009) November *De Rebus* 15

⁶³ S 24(3) read with s 6(1) and s 1 "draft sectional plan"

of section 25⁶⁴ and several other subsections⁶⁵ to cater for the extension of a scheme by the addition of exclusive use rights only, without simultaneously adding further sections. This would allow developers to postpone the creation of exclusive use areas to a later phase of the development, for instance the division of the basement of the scheme into garages construed as exclusive use areas.

The second proposed amendment allows developers or their successors in title to extend the period of time in which a right of extension under section 25 must be exercised. Section 25(1) requires that the schedule of registrable conditions, by which the right to extend the scheme is reserved,⁶⁶ must stipulate the period of time within which the scheme will be extended. If the extension is not completed within the term stipulated, the right to extend the scheme lapses and vests in the body corporate.⁶⁷ The Bill now proposes the amendment of section 25(1) to allow the developer to extend the time during which he may exercise his right to extend the scheme. Such extension must be agreed upon by unanimous resolution of the body corporate and bondholders before the expiry of the stipulated period by way of a bilateral notarial deed.⁶⁸ The fact that a unanimous resolution of the body corporate is required would make it difficult to reach an agreement for an extension of time. Since the right to extend would automatically vest in the body corporate once the right of the developer has lapsed, the body corporate would not easily be persuaded to extend the time for completing the right of extension if it could profit from the right of extension of the scheme.

In the third proposed amendment, the Bill allows the developer the right to extend the scheme not only by the erection of an additional building or the addition of a newly built vertical or horizontal extension of an existing building, but also to exercise his or her right of extension with regard to an existing building.⁶⁹ This opens the door for developers to utilise what the

⁶⁴ The proposed amendment of the heading reads as follows:

“Extension of schemes by addition of sections and exclusive use areas or by addition of exclusive use areas *only*” (emphasis added)

See cl 8(a) of the Bill

⁶⁵ S 25(1) of the Act is, for instance, proposed to be amended by the addition of the following phrase at the end of the section:

“[O]r to delineate exclusive use areas on or in specified parts of the land and buildings in terms of section 5(3)(f) and to confer the right of exclusive use over such areas upon the owner or owners of one or more sections”

Further sections which are proposed to be amended are s 25(2)(b), 25(5), 25(9), 25(10)(d) and 25(10)(dA) (ii) (which provide for the issue of certificates of real right for exclusive use areas created in this manner), 25(11)(b)-25(11)(c) and 25(13). See cls 8(a), 8(b), and 8(f)-8(m) of the Bill; *Memorandum 2 8 1*. Note that this amendment would necessitate the amendment of regs 5(1)(m), 25(2), 28(1) and (2) and Annexure 1 Forms G and O

⁶⁶ S 11(3)(b) read with s 11(2) of the Act

⁶⁷ S 25(6) of the Act. See also *SP & C Catering Investments (Pty) Ltd v The Body Corporate of Waterfront Mews 2010 4 SA 104* (SCA)

⁶⁸ See cl 8(b) of the Bill; *Memorandum 2 8 2*

⁶⁹ This is achieved by the deletion of the words “a further” before buildings in s 25(1)(a) and the deletion of the words “to be erected” after buildings in s 25(2)(a), (b) and (d). See cl 8(b) and 8(c) of the Bill; *Memorandum 2 8 3*

Americans call the option of “convertible building space”.⁷⁰ This involves, for instance, that a developer subdivides 18 storeys of a 20-storeyed building into sections, common property and exclusive use areas; but leaves the two top storeys as one large section subject to his or her reserved right to subdivide this section at a later stage in the above-mentioned manner. Currently a developer can only achieve this result in a roundabout way, by utilising the provisions on subdivision to subdivide the one large section into smaller sections.⁷¹ Since the provisions on subdivision do not permit the subdivision of a section into sections and *common property*, the practical problem of reaching the sections can only be overcome in a very impractical way, namely by building common steps and a common balcony in front of the entrances to the newly created sections on the two top floors.⁷²

The final amendment of section 25 concerns the requirement of section 15B(3) that a conveyancer’s and a clearance certificate must be produced to the Registrar on transfer of a unit or an undivided share in a unit. The conveyancer’s certificate must certify that the body corporate has certified that all moneys due to the body corporate have been paid or that provision has been made to the satisfaction of the body corporate for the payment thereof.⁷³ If provision has been made for the separate rating of sectional title units as is now required in terms of the Local Government: Property Rates Act 6 of 2004,⁷⁴ which came into operation in June 2009, an additional clearance certificate must certify that all rates and moneys due to the local authority have been paid.⁷⁵ However, no such certificates are required when the cession of an exclusive use area or a right to extend the scheme in terms of section 25 is contemplated. This state of affairs is prejudicial to the body corporate and the local authority as it makes cession of a right to exclusive use areas and rights of extension possible, without ensuring that moneys due to the body corporate and the local authority have been duly paid by the holders of such rights.

⁷⁰ See Uniform Common Interest Ownership Act (2008 edition) s 2-110 and comment 5 which gives the following illustration:

“For example, a declarant of a five-story office building common interest community may have purchasers committed at the time of the filing of the common interest community declaration but a lack of purchasers for the upper two floors. In such a circumstance, the declarant could designate the upper two floors as a unit, reserving to himself the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers.”

It must be noted that a South African developer would not have the same freedom to divide the reserved parts of the building in accordance with market demands. A South African developer would have to follow his proposed plan of extension as required under s 25(2) and would only be allowed to deviate from those specifications if changed circumstances render completion of the scheme according to the proposed specifications impracticable.

⁷¹ Ss 21 and 22 of the Act

⁷² Since such an improvement to the common property would not be instigated by the body corporate the provisions on non-luxurious improvements contained in Annexure 8 rule 33(2) of the Sectional Titles Regulations published in GN R 664 in GG 11245 of 08-04-1982 as amended would not be applicable.

⁷³ S 15B(3)(a) of the Act

⁷⁴ See in general J Webber & FV Gattoo “Sectional Title Rates Clearance Certificates – Municipal Property Rates Act” (Winter 2009) *Real Estate Matters* 2 <<http://www.cliffedekkerhofmeyr.com/news/files/CDH-Real-Estate-Matters-Winter-2009.pdf>> (accessed 22-02-2011)

⁷⁵ S 15B(3)(b) of the Act

This defect is proposed to be remedied with regard to the cession of a right of extension by the insertion of subsection 25(4A).⁷⁶ Unfortunately, this subsection mentions only conveyancer's certificates and does not cover clearance certificates as required by the local authority.⁷⁷ Furthermore, this subsection covers only the cession of rights of extension under section 25 and not the cession of rights to exclusive use areas. It has further been proposed that section 15B(3) should require that the certificate furnished by the body corporate to the conveyancer must be in writing and cater for the lodgment of the certificate at the deeds registry and not with the conveyancer.⁷⁸ This proposal is based on regular reports of conveyancers who have registered transfers without obtaining written certificates to the benefit of their clients and the detriment of all other owners in the scheme.

12 Right of extension of scheme and right to exclusive use areas defined as right to immovable property instead of urban immovable property

The Act currently classifies the right of extension of a scheme and the right to an exclusive use area as a right to “urban immovable property” (emphasis added). The reason for this was that the Mutual Building Societies Act 24 of 1965 and the Building Societies Act 82 of 1986 only made provision for the mortgage of loans on urban immovable property. These statutes have since been repealed and loans for the acquisition of immovable property are regulated by the National Credit Act 34 of 2005.⁷⁹ Since the latter Act deals in general with “immovable property” it is important for the sake of legal certainty, to reconcile the provisions of the Sectional Titles Act with the provisions of the National Credit Act and therefore the relevant provisions of the Act⁸⁰ are proposed to be amended to refer to the right to extend a scheme and the right to an exclusive use area as rights to immovable property.⁸¹ These two new rights created under the Sectional Titles Act should be classified as *sui generis* rather than new types of personal or praedial servitudes. Interestingly, the Act provides that the right to extend the scheme is for all purposes deemed to be immovable property which “admits to be mortgaged”⁸² while the right to an exclusive use area is for all purposes deemed to be immovable property “over which a mortgage, bond, lease contract or personal servitude of usufruct, *usus* or habitation may be registered”.⁸³

⁷⁶ See cl 8(g) of the Bill; *Memorandum 2 8 5* See also Maree (2009) *MCS Courier Newsletter* 3-4

⁷⁷ See Webber & Gattoo “Sectional Title Rates Clearance Certificates – Municipal Property Rates Act” *Real Estate Matters* 2

⁷⁸ See G Paddock (2009) August *Paddocks Press Newsletter* 5

⁷⁹ In terms of s 1 of the Act “mortgage” is defined as “a pledge (sic) of immovable property that serves as security for a mortgage agreement” and “mortgage agreement” is defined as “a credit agreement that is secured by a pledge (sic) of immovable property”

⁸⁰ S 25(4)(a) and 27(6) of the Act

⁸¹ See cl 8(f) and 9(d) of the Bill; *Memorandum 2 8 4*

⁸² S 25(4)(a) of the Act

⁸³ S 27(6) of the Act

13 Exclusive use areas

Currently, section 27(1) makes the registration of exclusive use areas depicted in a sectional plan optional in that the developer may impose a condition upon registration of the sectional plan by which the exclusive use areas are transferred to owners in the scheme. This creates an untenable position whereby only parts of a sectional plan may be registered.⁸⁴ The proposed amendment of section 27(1)⁸⁵ will make the registration and transfer of exclusive use areas depicted on the sectional plan obligatory. This will make it impossible to partially register a sectional plan.⁸⁶

Section 27(4)(b) provides that if an owner ceases to be a member of the body corporate, any right to an exclusive use area still registered in his or her name vests in the body corporate, free from any mortgage bond. However, in practice an exclusive use area may also be burdened with a registered lease, usufruct, *usus* or *habitatio*. The proposed amendment of section 27(4)(b) brings clarity by providing that on cessation of membership of the body corporate, the exclusive use area will vest in the body corporate, not only free from any mortgage bond, but also from a registered lease, usufruct, *usus* or *habitatio*.⁸⁷ This would make the position of registered mortgage creditors and holders of personal servitudes with an exclusive use right as object very precarious.⁸⁸ On the *prior in tempore* principle this of course would not happen if the right of exclusive use is ceded to another owner in the scheme.

Section 27(5) makes provision for the cancellation of an exclusive use area delineated on the sectional plan with the written consent of the mortgagee who has registered a mortgage against the exclusive use area. However, no provision is made for the consent of the holder of a registered lease, usufruct, *usus* or *habitatio* against an exclusive use area to the cancellation of the exclusive use area. The Bill proposes to rectify this by an amendment of section 27(5) requiring the written consent of the mortgagee and the holder of a registered real right on the exclusive use area for the cancellation of the exclusive use area. The amended provision requires a notarial deed of cancellation entered into by the *holder of such right* and the body corporate for the cancellation of the exclusive use area.⁸⁹ This might cause confusion as “the holder of such right” may refer not only to the holder of a right of exclusive use, but also to the holder of a registered lease or personal servitude against the exclusive use area. For the sake of clarity the phrase “holder of such right” should be substituted with the phrase “holder of a right of exclusive use” making it clear that the notarial deed of cancellation must be entered into by the holder of the right of exclusive use or the holder of a derivative right on the right of exclusive use (like a mortgage, lease or personal servitude) and the body corporate. The amendment of section 27(5) is inconsistent

⁸⁴ See *Memorandum 2 9 1*

⁸⁵ Substituting the “may” for a “must”

⁸⁶ See cl 9(a) of the Bill; *Memorandum 2 9 1*

⁸⁷ See cl 9(b) of the Bill; *Memorandum 2 9 2*

⁸⁸ Their only remedy would be a delictual claim against the previous owner for damages suffered on account of the loss of their rights

⁸⁹ See cl 9(c) of the Bill; *Memorandum 2 9 3*

with the amendment of section 27(4)(a) where the rights of bondholders and personal servitudes over an exclusive use area are extinguished without much ado, whereas under section 27(5) their written consent (presumably against payment of some compensation) is needed to cancel the registered right of exclusive use.

Finally, section 27A authorises the developer or the body corporate to make rules whereby exclusive use areas are established. These non-genuine or rule-based exclusive use areas must be distinguished from genuine or registered exclusive use areas depicted on the registered sectional plan. For the establishment of rule-based exclusive use areas, the Act requires *inter alia* a schedule indicating the *members* to which a right of exclusive use and enjoyment of the common property are allocated. This implies that whenever ownership of a sectional title unit changes the rules of the scheme which contain the schedule of allocation must also be amended. To eliminate the need to amend the rules containing the schedule, the 2009 Bill proposed substituting the reference to “member” with a reference to “owner”, meaning that the schedule must indicate the “owner” to which the right is allocated.⁹⁰ It has been pointed out, correctly, that the replacement wording for section 27A does not achieve the desired outcome. It is proposed that instead of simply replacing the word “member” with “owner”, the amendment of section 27A should have read as follows:

“include a schedule indicating to which section or sections each such part is allocated for the use and enjoyment of the owner or owners of such section from time to time.”⁹¹

It is important to note that the above amendment of section 27A has been omitted in the 2010 Bill.

14 The registration of a servitude or restrictive condition with regard to the common property

Section 29(3) requires that the written consent of every bondholder must be lodged with the Registrar for the registration of a servitude (such as a servitude of access), or a restrictive agreement over land in the scheme which is burdened with a mortgage. The wide reference to “every bondholder” has been interpreted as applying to all bondholders over sectional title units as well as over rights to exclusive use areas. Since the land in the scheme belongs to the sectional owners in undivided shares and the creation of a servitude over the land diminishes the value of such shares, it is understandable that the written consent of every holder of a sectional mortgage bond is required. However, it is not so obvious how the holder of an exclusive use right over part of the land is affected by the registration of a servitude or restrictive agreement over the land and therefore why written consent of his or her bondholder is required. Be that as it may, the *Memorandum* indicates that since new bonds are registered on a daily basis over units and exclusive use areas, it becomes

⁹⁰ See cl 10 of the 2009 Bill; *Memorandum* 2 10 attached to the 2009 Bill

⁹¹ See G Paddock (2009) August *Paddocks Press Newsletter* 5

virtually impossible to obtain the consent of every such bondholder.⁹² The Bill therefore proposes to limit the consent required to those bondholders that exist on the date of execution of the notarial bond to create such servitude or agreement. It also proposes that these consents must be obtained and filed in the protocol of the notary instead of lodgment with the Registrar.⁹³ This will undoubtedly reduce the crisis and facilitate and speed up the task of conveyancers and the Registrar in this regard. In order to avoid a plethora of bonds registered between the date of execution of the notarial deed creating the servitude or restrictive agreement, it is proposed that such notarial deed must be registered within three months after its execution.

15 Contributions to administrative fund

Section 37 does not oblige the developer to pay the cost attributable to the maintenance and administration in respect of common areas subject to future development rights as provided for in section 25. This is to the detriment of the body corporate that must pay these expenses.

This problem is addressed by the insertion of subparagraph (ii) into section 37(1)(b) which reads as follows:

“to require from a developer who is entitled to extend the scheme in terms of a right reserved in section 25(1), to make such reasonable additional contribution to the fund as is estimated necessary to defray the cost of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution for the provision of electricity and water and other expenses and costs in respect of and attributable to the relevant part or parts.”⁹⁴

It should be noted that section 1 of the Local Government: Property Rates Act 6 of 2004 includes in the definition of “property”, registered immovable property, including, in the case of a sectional title scheme, a registered sectional title unit and registered real rights of extension and to exclusive use areas. Under section 25 of the Act the real rights of extension and to exclusive use areas, like sectional title units, must be rated individually.⁹⁵ Previously, assessment rates were levied in respect of the land on which a sectional title scheme was established with the body corporate being liable for payment of the municipal assessment rates. The body corporate, in turn, collected the assessment rates on a pro-rata basis from the individual owners and holders of a right of extension and exclusive use rights by way of levies.⁹⁶ However, under the Act rates and taxes and contributions for the provision of electricity and water attributable to the reserved area of the common property in respect of which a right of extension exists, will be owed by the developer to the municipality and not to the body corporate. However, the developer will still

⁹² See *Memorandum 2 10*

⁹³ See the proposed amendment to s 29(3) in cl 10 of the Bill

⁹⁴ Cl 11(a) of the Bill; *Memorandum 2 11 1*

⁹⁵ In order for municipalities to rate a right of extension, a separate valuation must be performed by a qualified valuator, taking into account the purchase price that the right would realise if sold in the open market by a willing seller to a willing and able purchaser. Currently, only the City of Tshwane Municipality has notified the Pretoria Registrar that it can fully comply with the requirements of the Act

⁹⁶ See also Webber & Gattoo “Sectional Title Rates Clearance Certificates – Municipal Property Rates Act” *Real Estate Matters 2*

owe the body corporate the cost of insurance and maintenance of the common property and certain other expenses for which the developer must make reasonable additional contributions to the administrative fund operated by the body corporate.⁹⁷ The synergy of the above argument is, however, disturbed by the fact that the local authorities are presently rating only sections and not rights of extension under section 25 or exclusive use rights under section 27 or 27A of the Act.

The Act and the prescribed management rules contain confusing statements as to when levies are payable. Section 37(2) provides that levies shall be due and payable on the passing of a resolution to that effect by the trustees of the body corporate. By contrast, prescribed management rule 31(3) stipulates that within fourteen days after each general meeting the trustees must advise each owner in writing of the amount payable by him or her in respect of the approved annual budget, whereupon such amount shall become payable in instalments, as determined by the trustees. The Bill proposes to bring clarity as to the date when levies become due and payable by stipulating that liability for budgeted contributions accrues from the passing of a resolution to that effect by the trustees of the body corporate and are recoverable from the persons who were owners of units at the time when such resolution was passed.⁹⁸

The Bill added a proviso to this provision, namely that upon the change of ownership of a unit, exclusive use areas and real rights of extension, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of ownership. The fact that the new owner will automatically become liable for his or her share of the annual levies as from the date of registration of transfer, will eliminate the need for the parties to enter into a tripartite agreement with the body corporate at the time of change of ownership in order to ensure the continued flow of budgeted contributions to the administrative fund.⁹⁹

The Bill further proposes to legalise the levying of special contributions. Previously, “special levies” were ignored by the Act and matters related to unbudgeted contributions were regulated in prescribed management rule 31(4). This subsection authorises the trustees “to make special levies” (sic) or to call upon the owners to make special contributions for unbudgeted expenses and to make such “levies and contributions” payable in one sum or by such instalments and at such time or times as the trustees shall think fit. Over the years it has become an established practice for trustees of bodies corporate to levy special contributions from sectional owners. The amendment proposed in the Bill confirms this practice and legalises a practice which has existed for a number of years. The proposed inserted subsection (2A) reads that any special contribution shall be due on the passing of a resolution in this regard

⁹⁷ Note that although the common property belongs in undivided shares to the sectional owners, the body corporate is responsible for the maintenance and insurance of the common property utilising funds contributed by the owners to the common administrative fund. The difficulty is to find a basis on which the body corporate owes moneys to the local municipality for rates and taxes and the cost of electricity and other services available on the common property as opposed to those available to the individual units

⁹⁸ Cl 11(b) of the Bill

⁹⁹ See Maree (2009) *MCS Courier Newsletter* 4

by the trustees and may be recovered from the persons who were owners of units at the time when such resolution was passed.¹⁰⁰ The fact that section 37(2A) was not made subject to the same proviso as section 37(2) means that the new owner will not automatically become liable for the portion of the special levy that was not yet paid on the transfer of the unit. It seems fair that the result should apply where the special levy was made payable in one sum, but it is questionable whether this should also be the case where the special levy was made payable in instalments and all instalments were not paid at the time of transfer of the unit.

The Bill then proceeds to give a definition of “special contribution” in the newly inserted subsection (2B) of section 37 instead of inserting the definition in section 1 of the Act. The Bill defines “special contribution” as any contribution not budgeted for at an annual general meeting to be levied upon owners during the ensuing year.¹⁰¹ Apart from the fact that the reference should have been to the current instead of the ensuing year, this provision leaves too wide a discretion with the trustees with regard to the imposition of special levies. The authority of the trustees in this regard should have been limited to unbudgeted contributions in circumstances where the body corporate needs additional income to satisfy claims against it and such income cannot reasonably be budgeted for at the next annual general meeting.¹⁰²

16 Use of exclusive use areas frozen

Section 44(1)(g) stipulates that a section must be used for the purpose as shown expressly or by implication on the sectional plan. This section does not stipulate the same for exclusive use areas which have their intended purpose clearly illustrated by the fact that in terms of the regulations these areas must be uniquely numbered on the sectional plan. Therefore, for example, the figures G1, Y1 and P1 indicate that a specific garden area, backyard or parking space structured as an exclusive use area has been ceded to the owner of section 1.¹⁰³ Because there is no provision that these areas must be used according to their intended use, it does happen that exclusive use areas are used for purposes for which they were not intended, for example garages being used for residential purposes or parking spaces for storing goods.¹⁰⁴ As with sections, the Bill proposes to limit the use of exclusive use areas to the purposes as shown on the registered sectional plan.¹⁰⁵ Also as with sections, this is subject to the proviso that these areas may be used for another purpose with the written consent of all the sectional owners.

¹⁰⁰ Cl 11(c) of the Bill; *Memorandum 2 11 2*

¹⁰¹ Cl 11(c) of the Bill; *Memorandum 2 11 3*

¹⁰² See also G Paddock (2009) August *Paddocks Press Newsletter* 5 The words “a necessary, unbudgeted contribution” should be inserted in the definition

¹⁰³ Reg 5(1)(k)(v) of the Sectional Titles Regulations

¹⁰⁴ See *Memorandum 2 13*

¹⁰⁵ See the amendment to s 44(1)(g) by cl 12 of the Bill

A *lacuna* here is that the limitation of use to the express or implied purpose applies only to registered exclusive use areas,¹⁰⁶ and not to non-genuine or rule-based exclusive use areas although the purposes for which these areas are intended to be used must also be indicated clearly on the layout plan to scale which must be included in the rule by which specific exclusive use areas are created.¹⁰⁷ Another related practical question is whether an owner is allowed to enclose an open balcony which is indicated as part of his or her section on the sectional plan with a brick wall in order to create an additional bedroom. Since such an act would normally affect the harmonious appearance of the building it is submitted that an amendment of the sectional plan by means of a unanimous resolution would be required.

17 Conclusion

The Amendment Bill of 2009 and its sequel in 2010 have gone a long way to tidy up loose ends in the Act, to remove historical remnants and to suggest modern amendments to facilitate the operation of the Act and to clarify points of uncertainty. One major future tidying up process would be a clarification of the relation between the relevant provisions of the Act and the Local Government: Municipal Property Rates Act 6 of 2004 and the Local Government: Municipal Systems Act 32 of 2000. It can justifiably be questioned whether section 51 of the Sectional Titles Act which deals with the valuation of land and buildings and the recovery of rates by local authorities has not now been superseded by the above-mentioned Acts and should therefore be repealed. All references to rates and taxes paid by the body corporate to the municipality should be deleted.¹⁰⁸ Moreover, the provisions of section 15B(3) relating to body corporate and clearance certificates on the transfer of a unit or a real right of extension reserved under section 25 or the right to an exclusive use area under section 27 are fairly messy and should be restructured for the sake of clarity. Another shortcoming is that the Act restricts the transfer of rights of exclusive use to sectional owners¹⁰⁹ without placing the same restriction on the lease and the creation of personal servitudes on such exclusive use rights. Moreover, the repayment of moneys borrowed by the body corporate should be secured by a cession *in securitatem debiti* of unpaid existing and future levies instead of by a negotiable instrument or the hypothecation of unpaid contributions.¹¹⁰ The reference to *local authorities* in the Act which is outdated should also be substituted by a reference to *municipalities* and municipalities should be defined in section 1 of the Act.

The main shortcomings of the Bill are the following: the overfractionalisation of rights of exclusive use; the fact that the consent of registered holders of a lease or a personal servitude over an exclusive use right is not required;

¹⁰⁶ The amendment states that the purpose must be shown expressly or by implication *on or by a registered sectional plan*. See also Annexure 8 rule 68(1)(v) of the Sectional Titles Regulations

¹⁰⁷ S 27A (b)(ii) of the Act

¹⁰⁸ See, for example, s 37(30)(d) of the Act

¹⁰⁹ See s 27(10)(a), 27(3) and 27(4)(a) of the Act

¹¹⁰ Cf s 38(f) of the Act

the proposed insertion of the definition of “special levies” in section 37(2B) instead of in section 1 of the Act which contains the other definitions; the fact that the new owner is not made liable for outstanding instalments on special levies after a unit has been registered in his name; and the non-qualification of the wide discretion of trustees to impose special levies.

Another area of concern is that the Amendment Act did not bring clarity with regard to the fund for administrative expenses. Presently, one of the functions of the body corporate is the following:¹¹¹

“To establish for administrative expenses a fund sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the common property (including reasonable provisions for future maintenance and repairs)...”

The problem with this provision is that it leaves the quantum of the administrative fund in the discretion of the body corporate which means that the quantum may be subject to the not uncommon desire of owners to keep levies as low as possible. I suggest that a more objective standard should be applied to determine the quantum of the administrative fund and that the initial words of this provision should be replaced by the following:

“To establish an operational fund which is reasonably sufficient to cover the cost of the repair ...”

In addition, the fund for future maintenance and repair should not be hidden between brackets but should be converted into an independent fund for future maintenance by burdening the body corporate with the following additional function:

“To maintain a reserve fund, which is reasonably sufficient to cover the cost of future maintenance and repair of the common property.”

An important consequence of this proposed amendment is that any owner would be able in future to approach the High Court for a *mandamus* or the Ombud Service for an order that the budget for the operational or the reserve fund was not reasonably sufficient. This could contribute considerably to the future solvency of bodies corporate.

Finally, to ensure sound and fairer treatment of diverse groupings, governance in larger sectional title and mixed-use schemes, it is suggested that South Africa should adopt a two-tiered management structure for larger sectional title schemes based on the Singapore model consisting of a main body corporate and two or three subsidiary bodies corporate.¹¹² This would be particularly appropriate for mixed-use sectional title schemes consisting of residential, commercial and office components, but also for large non-residential schemes consisting of office and retail units, for residential schemes consisting of different buildings or of tower blocks and low-rise units or buildings with lifts and without lifts and for non-residential schemes for the same purpose occupying physically distinct blocks, for example two office blocks in the same scheme. The advantages of such a structure are that

¹¹¹ S 37(10)(a) of the Act

¹¹² See CG van der Merwe & G Paddock “Two-tier Governance for Mixed-use and Large-scale Sectional Title Schemes” (2008) 125 *SALJ* 573

it would allow a fairer allocation of expenses amongst the various subsidiary components and would lead to the more harmonious governance of different interest groups. Such a structure should be restricted to schemes with a total bulk of 5 000 square meters and a maximum of five subsidiary bodies corporate. It would require the delineation of the bulk of each component of the scheme as limited common property on the sectional plan with the first sheet indicating the number of subsidiary bodies corporate included in the scheme. The scheme would thus be divided into general common property areas and limited common property areas with a main body corporate controlling the general common property and the subsidiary bodies corporate controlling their particular limited common property component in the scheme. The subsidiary bodies corporate would have the same powers and functions of the main body corporate in respect of their own components of the scheme. They would elect their own trustees, conduct their own general meetings, prepare their own budgets, have their own reserve fund and allocate their own expenses and service charges, promulgate their own conduct rules and regulate their own exclusive use areas. All new large schemes would be compelled to adopt a two-tier structure and there would be a period of grace for large schemes to convert to the two-tier structure.

SUMMARY

The Sectional Titles Amendment Bill of June 2010 proposes to address gender equality, remove obsolete provisions, make technical adjustments, extend consumer protection and eliminate a substantial number of problems encountered in the practical application of the Act.

The most important amendments relate to an adaptation of the definitions of “developer” and “owner”; the facilitation of unanimous resolutions; the clarification of whether doors and windows form part of a section or part of the common property; the rectification of the discrepancies pertaining to certificates of real right of extension of sections and of exclusive use areas; the fractionalisation of undivided shares in units; the extension of sections and of schemes by the addition of sections; contributions to the administrative fund and the legalisation of special levies; and a freeze on the use of exclusive use areas. This will transform the Sectional Titles Act into a highly efficient statutory instrument to tackle the ever-increasing issues facing the sectional title industry, bring clarity to conveyancers and deeds registry officials, and strengthen the position of trustees and managing agents involved in the governance of schemes.

However, the relation between the relevant provisions of the Act and the Local Government: Municipal Property Rates Act 6 of 2004, needs tidying up. Further main issues of concern are the overfractionalisation of rights of exclusive use; the fact that the new owner is not made liable for outstanding instalments on special levies after a unit has been registered in his or her name; the non-qualification of the wide discretion of trustees to impose special levies; the unclear division of the fund for administrative expenses into an operational and a reserve fund budgeted for at each annual general meeting and the non-adoption of a two-tiered management structure for larger and especially mixed-use schemes.