

THE RATIONALE FOR THE IMPOSITION OF NON-FINANCIAL OBLIGATIONS ON APARTMENT OWNERS IN A SECTIONAL TITLE SCHEME

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1 Introduction

The principal aims of sectional title schemes are to preserve the physical integrity and the pleasant appearance of the sectional title building and to strive for harmony in an intensified community where the individual units are physically interdependent and the residents are seldom completely homogeneous.¹ Since sectional owners live in close proximity and use common facilities collectively, their extensive ownership entitlements need to be restricted. Accordingly, each owner must surrender a certain degree of freedom that he or she might otherwise enjoy in separate, privately owned property.²

Therefore, in order to enhance the benefits of sectional ownership, sectional owners are burdened with numerous financial and non-financial obligations.³ The extent to which owners are prepared to comply with these obligations will determine the degree of harmony achieved as well as the quality of the sectional title building and the scheme's common facilities and amenities. Striking the ideal balance between individual freedom and the preservation of an intact sectional title building and a harmonious community is often a difficult goal to accomplish.⁴

In this contribution, the various non-financial as opposed to the financial obligations⁵ imposed on sectional owners will be examined. We shall first

¹ MC Kim "Involuntary Sale: Banishing an Owner from the Condominium Community" (1997-1998) 31 *J Marshall L Rev* 429-430; see also CG van der Merwe & L Muñiz-Argüelles "Enforcement of Conduct Rules in a Condominium or Apartment Ownership Scheme" (2006) *Liber Amicorum Festschrift Tugrul Ansay* 247-247.

² CG van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-Sharing Sectional Titles I* (2013) 9-32; see also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 247.

³ Van der Merwe *Sectional Titles* 9-3.

⁴ Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 247-248.

⁵ S 44(1)(b) of the Act provides that a sectional owner "must pay all charges, expenses and assessments that may be payable in respect of his section". The levies collected from owners finance the maintenance and management of the scheme.

consider the obligations that relate to sections and exclusive use areas before examining the non-financial obligations that relate to the common property. The Sectional Titles Act 95 of 1986 (the “Act”) provides the broad regulatory framework and sets the standards for owners’ behaviour. This is complemented by the common law concept of nuisance.⁶ The day-to-day management is, however, provided by the management and conduct rules, which dictate more precisely what is expected from sectional owners living in a particular sectional title scheme. Consequently, it is crucial for purchasers buying units in a sectional title scheme to carefully examine the rules adopted for the scheme.⁷ Although the prescribed management and conduct rules regulate most schemes, the developer and sectional owners have the ability to amend the prescribed rules. This is done by introducing special rules, which might impose additional behavioural obligations on owners with regard to the use and enjoyment of their sections, exclusive use areas and the common property.⁸

After an examination of the content and rationale of each of these obligations, this contribution will conclude that these non-financial obligations are essential for preserving the physical integrity of the sectional title building and social harmony in an intensified sectional title community. The freedoms sacrificed on account of these obligations are the price to be paid for a physically intact building and a contented and harmonious sectional title community.

2 Non-financial obligations pertaining to sections and exclusive use areas

2 1 Introduction

In addition to the various statutory limitations on ownership in general, sectional owners’ use and enjoyment of their sections and exclusive use areas are limited by several non-financial obligations imposed by the Act.⁹ From the outset it is important to note that these obligations are mandatory and cannot be excluded in terms of the rules of the sectional title scheme.¹⁰ In addition to the obligations imposed by the Act, the prescribed management and conduct rules also impose further non-financial obligations burdening the use of sections and exclusive use areas.

In what follows the obligations that aim to preserve the physical features of the building; the maintenance of the harmonious appearance of the scheme; and the social coherence and harmony in the scheme are grouped together. In conclusion, the principles pertaining to the keeping of pets will be examined.

⁶ GJ Pienaar *Sectional Titles and other Fragmented Property Schemes* (2010) 233.

⁷ M Constat & K Bleijs *Demystifying Sectional Title* (2004) 51.

⁸ Ss 35(2)(a) and (b) of the Act; Ss 10(2)(a) and (b) of the Sectional Titles Schemes Management Act 8 of 2011.

⁹ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* 5 ed (2006) 477.

¹⁰ Van der Merwe *Sectional Titles* 8-7.

2.2 Preservation of the physical features of the building

The Act contains various safeguards designed to protect the physical integrity of the building:

First, an owner must permit any person authorised in writing by the body corporate to enter a section or an exclusive use area to inspect or maintain the area in question or to maintain the section or the common facilities inside a section. An owner's constitutional right to privacy¹¹ is protected by the fact that the entry must be authorised,¹² must take place at reasonable hours and on prior notice to the owner save for an emergency.¹³ For instance, where a water pipe has burst it would clearly be to the advantage of the whole sectional title scheme to allow immediate entry without prior notice.¹⁴ Ultimately, the obligation to permit entry to sections and exclusive use areas is essential to preserve the physical condition of the building and common facilities inside the building.

Second, the Act makes provision for implied reciprocal servitudes of subjacent and lateral support;¹⁵ and for the passage or provision of certain services such as electricity, water and sewerage through pipes, wires, cables or ducts.¹⁶ These servitudes are deemed to be incorporated without registration in the sectional title deeds of sectional owners¹⁷ together with the necessary ancillary rights to make these servitudes effective.¹⁸ These servitudes impose an obligation on owners to provide subjacent and lateral support for the other sections and the common property and to allow for the passage of the services mentioned through their sections. A sectional owner is obliged to grant access to the body corporate from time to time during reasonable hours in order to maintain, repair or renew any part of the building or any pipes, wires, cables or ducts in the building, or for emergency repairs necessary to prevent damage to the common property or any other section.¹⁹

Third, a sectional owner is obliged to carry out all work that may be ordered by a competent public or local authority in respect of his or her section.²⁰ A sectional owner is further, in terms of the National Buildings Regulations and Buildings Standard Act²¹ 103 of 1977, not allowed to alter, subdivide or extend his or her section²² without plans and specification being submitted for prior

¹¹ S 14 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

¹² The written authorisation must take the form of an appropriate trustees' resolution, notifying the owner concerned of the aspects requiring attention and his or her responsibility with regard to the matter. See T Maree "Do the Trustees have a Duty to Maintain Sections?" (2007) 24 *MCS Courier Newsletter* 1 2-3.

¹³ S 44(1)(a) of the Act; S 13(1)(a) of the Sectional Titles Schemes Management Act 8 of 2011.

¹⁴ Van der Merwe *Sectional Titles* 8-7 – 8-8.

¹⁵ Ss 28(1)(a)(i) and (b)(i) of the Act.

¹⁶ Ss 28(1)(a)(ii) and (b)(ii).

¹⁷ S 28(2)(a).

¹⁸ S 30.

¹⁹ Ss 28(2)(b), 30 and 44(1)(a).

²⁰ S 44(1)(b) of the Act; S 13(1)(b) of the Sectional Titles Schemes Management Act 8 of 2011 obliges the owner to carry out all work ordered by a competent authority instead of by a competent local or public authority as worded under s 44(1)(b) of the Act, but the substance of the duty is not changed by this amendment.

²¹ Applies equally to land and sectional title units. See Van der Merwe *Sectional Titles* 8-7.

²² The definition of "erection" in s 1(1) of the Act includes the alteration, conversion, extension, re-building, re-erection, sub-division of or addition to, or repair of any part of the structural system of any building.

written approval by the local authority concerned.²³ This obligation is again justified by its goal, namely to prevent damage to the physical integrity of the building by unauthorised alterations to sections.

Fourth, an owner is obliged to maintain his or her section in a state of good repair.²⁴ This obligation may at first glance seem an excessive limitation on the ownership of a section. In principle, the owner of a building should be entitled to demolish it or allow it to fall into disrepair since it is his or her exclusive property. However, the various sections in a sectional title scheme are part of an interrelated and interdependent complex and therefore the state of repair of each section inevitably affects the tone and value of the whole building. If sectional owners are allowed to demolish their sections or to let them fall into disrepair it would immediately affect the integrity and existence of adjoining sections and the building as a whole and diminish the value of every unit in the scheme. Therefore, this positive obligation to preserve the good condition of a section must be seen as a natural extension of the rule of neighbour law that owners are not allowed to do anything on his or her land that would cause unreasonable prejudice to their neighbours.²⁵ Obliging an owner to maintain his or her section in a state of good repair thus maintains the stability of the building for the benefit of the other sections and the common property and prevents a sectional title scheme from degeneration into a slum with consequent depreciation in value to the detriment of all owners and residents concerned.²⁶

The prescribed management rules impose an obligation upon sectional owners not to alter his or her section or exclusive use area which is likely to impair the stability of the building or the use and enjoyment of other sections, the common property or any exclusive use area.²⁷ This obligation reinforces the existing obligations of support discussed above.²⁸ Once again, the end justifies the means – preservation of the physical integrity of the building is of paramount importance.

The prescribed conduct rules impose two obligations on sectional owners with regard to their use of their sections and exclusive use areas. First, it prohibits owners to store any inflammatory material or carry out, or allow to be carried out, any other dangerous act in a section or exclusive use area that may increase the building insurance premiums payable by the body corporate.²⁹ The objective here is to avoid damage to or destruction of the building by fire or other dangerous acts conducted within a section or an exclusive use area. Second, it imposes an obligation on sectional owners to keep their sections

²³ S 4(1) of the National Buildings Regulations and Building Standard Act 103 of 1977.

²⁴ S 44(1)(c) of the Act; S 13(1)(c) of the Sectional Titles Schemes Management Act 8 of 2011; Annexure 8 r 70(a) and (b) of the Act provide that an owner's failure to repair or maintain his or her section or an exclusive use area, if such failure persists for a period of thirty days after a written notice by the trustees or managing agent, empowers the body corporate to remedy such failure and recover the reasonable cost for such repairs and maintenance from the owner.

²⁵ Van der Merwe *Sectional Titles* 8-7 – 8-8(1).

²⁶ Pienaar *Sectional Titles* 235 n 9.

²⁷ Annexure 8 r 68(1)(iii) of the Act.

²⁸ Van der Merwe *Sectional Titles* 8-17.

²⁹ Annexure 9 r 9 of the Act.

free of insects and pests and to permit the trustees, the managing agent, or their employees or agents, to enter their sections from time to time to inspect the section and to take any action as may be reasonably necessary to eradicate such pests. The cost of inspection, eradication of pests, and replacement of any woodwork or other material forming part of the section is borne by the owner of the section.³⁰ This rule is a reiteration of the owner's obligation to keep his or her section in a state of good repair and is designed to prevent the degeneration of the building.

2.3 Maintenance of the harmonious appearance of the sectional title scheme

The purpose of the second category of obligations imposed on sectional owners with regard to their sections and exclusive use areas is to maintain the harmonious appearance of the sectional title scheme.

The Act imposes a duty on sectional owners to keep their exclusive use areas in a clean and tidy condition.³¹ Compliance with this duty by every owner retains the overall appearance of the scheme as a whole.

The prescribed management rules obliges sectional owners not to do anything to their sections or exclusive use areas that are likely to prejudice the harmonious appearance of the building.³² The difficulty in establishing the meaning of the term "harmonious appearance" is compounded by the fact that the official Afrikaans version of the Regulations uses the expression *estetiese voorkoms*, meaning "aesthetic appearance". For example, enclosing a balcony on the ground floor with glass will spoil the harmonious appearance of the building, but will not necessarily prejudice its aesthetic appearance.³³ A second prescribed management rule restricts owners from building on their exclusive use areas, without the prior written consent of the trustees, which may not be withheld unreasonably.³⁴ It is suggested that if the trustees become aware of an unauthorised structure, they should require the sectional owner to apply in writing for the necessary consent. If the sectional owner fails to respond or his or her application is rejected, the trustees should order him or her to remove the structure and, if necessary, apply for a court order requiring the removal of the structure.³⁵ The main reason for imposing this obligation solely in respect of exclusive use areas is to preserve the orderly outward appearance of the sectional title scheme. The trustees may for

³⁰ Annexure 9 r 11.

³¹ S 44(1)(c) of the Act; S 13(1)(a) Sectional Titles Schemes Management Act 8 of 2011; Annexure 8 r 70(a) and (b) of the Act provide that an owner's failure to repair or maintain his or her section or an exclusive use area, if such failure persists for a period of thirty days after a written notice by the trustees or managing agent, empowers the body corporate to remedy such failure and recover the reasonable cost for such repairs and maintenance from the owner.

³² Annexure 8 r 68(1)(iv) of the Act. The official Afrikaans version of the Act uses the expression *estetiese voorkoms*, meaning "aesthetic appearance".

³³ See J Maree "Confusion Regarding the Harmonious Appearance Rule" (2008) 29 *MCS Courier Newsletter* 5 5-6.

³⁴ Annexure 8 r 68(1)(vi) of the Act. Such construction or structure may not be in contravention of the requirements of ss 24 and 25 or other relevant provisions of the Act or the rules of the scheme.

³⁵ T Maree *Sectional Titles on Tap* 1 2ed (2006) 10.12.

example withhold their consent for the erection of a carport, which will be detrimental to the neat appearance of the scheme.

The prescribed conduct rules impose four obligations on sectional owners relating to the use of sections and exclusive use areas. First, an owner must place an adequate waste disposal bin within his or her section or exclusive use area³⁶ in order to regulate the disposal of refuse in an orderly manner, to the advantage of the scheme as a whole and to reduce health risks to owners and occupiers of the scheme. Second, the conduct rules forbid major repairs to any vehicle within an owner's exclusive use area or section.³⁷ This obligation is clearly aimed at maintaining the attractiveness and cleanliness of the exterior parts of the scheme. It also serves to prevent opportunistic owners from seeking to run garages or workshops on their property. Third, the prescribed conduct rules do not allow residents to place or do anything on a balcony, stoep or patio, forming part of the section or exclusive use area, which, in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed from outside the section.³⁸ For example, the placing of a roughly constructed doll's house on an exclusive use area or the erection of a washing line on a balcony would fall foul of this rule. Finally, the conduct rules do not allow a sectional owner to affix any sign, notice, billboard or advertisement on any part of his residential section that is visible from outside the section without the written consent of the trustees.³⁹ This obligation reinforces the principle that an owner may not do anything in his or her section that may jeopardise the external appearance of the building or the orderly appearance of the corridors inside the building. This rule only refers to sections used for residential purposes, and, in the case of sections used for commercial or mixed purposes this rule should be amended accordingly.⁴⁰

2 4 Conservation of social coherence and harmony in the scheme

The focus of the final category of non-financial obligations imposed on sectional owners with regard to their sections and exclusive use areas is the conservation of the social coherence within the scheme.

The Act obliges owners to use their sections or exclusive use areas in such a way as to minimise nuisance to other occupiers within the scheme.⁴¹ The prevention of nuisance is one of the basic rules of neighbour law that requires one to use one's property in a reasonable manner so as not to prejudice others.⁴² The common law concept of nuisance applies even more strictly in an intensified sectional title community.⁴³ The Act fortifies this provision by extending its application to family members, tenants and other occupants of a

³⁶ Annexure 9 r 2(1)(a)-(d) of the Act. See Maree *Sectional Titles on Tap* 1 10.16.

³⁷ Annexure 9 r 3(4) of the Act.

³⁸ Annexure 9 r 5.

³⁹ Annexure 9 r 6.

⁴⁰ Pienaar *Sectional Titles* 243.

⁴¹ S 44(1)(e) of the Act; S 13(1)(e) of the Sectional Titles Schemes Management Act 8 of 2011.

⁴² *Sic utere tuo ut alienum non laedes*. See in general Van der Merwe *Sectional Titles* 8-8(1).

⁴³ See in general AJ van der Walt *The Law of Neighbours* (2010) 262-263, 271-279.

sectional title scheme.⁴⁴ In *Body Corporate Wale Street Chambers v Kuhn & O'Brien*⁴⁵ the court found that the use of a storeroom and two adjacent parking bays in an office sectional title scheme to conduct a welding and other metal work business constituted a nuisance. This was held to be against the intended use of storage rooms in an office sectional title scheme, notwithstanding the fact that the respondent who conducted the business described it as a small and fairly trivial business.

The Act further obliges owners to use their sections or exclusive use areas only for the purposes detailed on the registered sectional plan.⁴⁶ Unfortunately, except for the name of the scheme and the manner in which the participation quota is calculated, the intended use of a section or exclusive use area is not easily determined. Little information is given as to whether the units in the scheme are intended for residential, commercial, office or mixed-use purposes. Fortunately, this obligation is further elaborated in a management rule,⁴⁷ which adds that the intended purpose for which a section or exclusive use area must be used may now be inferred from the original approved building plan, the nature of the adopted rules of the scheme and its construction, layout and available amenities. The intended use of sections or exclusive use areas in residential buildings can, at least to a certain extent, be inferred from the heading of the building plans and the construction, layout and available amenities of the scheme.⁴⁸

Sectional owners are therefore obliged not to convert sections intended for residential purposes into commercial premises or *vice versa*. It is not clear whether this obligation only pertains to the broad categories of schemes mentioned above or whether it could be extended to a distinction between different forms of the same category of schemes. For example, it is not certain whether sectional owners may use premises designated for a particular kind of business to conduct another kind of trade.⁴⁹ The justification for this rule is the preservation of a particular sectional title scheme's characteristics by avoiding the disruption of harmony that various uses of sections or exclusive use areas are likely to cause. The harmonious co-existence in a residential scheme is therefore maintained by preventing any disturbance that might occur if owners are allowed to conduct different kinds of commercial activities within their sections.

For the sake of flexibility, the accompanying proviso to the relevant section allows an owner to change the use of his or her section or exclusive use

⁴⁴ Van der Merwe *Sectional Titles* 8-8(1). In *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate* 2003 5 SA 1 (C) the court granted a mandatory interdict against the respondents to cease contraventions of the conduct rules not limited to drug dealing and prostitution (4D and 5A). In the event of non-compliance with the conduct rules, the court granted leave (on the same papers) to apply for an order holding second to fifth respondents in contempt of court and authorising warrants of arrest and imprisonment for periods to be determined by the court (7I-8A).

⁴⁵ WCC 23-04-2008 case no 5982/2007.

⁴⁶ S 44(1)(g) of the Act; S 13(1)(g) of the Sectional Titles Schemes Management Act 8 of 2011.

⁴⁷ Annexure 8 r 68(1)(v) of the Act as amended by GN R 805 in GG 34639 of 28-09-2011.

⁴⁸ See T Maree "Permitted Usage of Sections and Use Areas" (March 2013) 43 *MCS Courier Newsletter* 2 2-3; Van der Merwe *Sectional Titles* 8-17.

⁴⁹ Van der Merwe *Sectional Titles* 8-8(1) – 8-9.

area with the written consent of all the sectional owners.⁵⁰ Any owner, who regards the refusal of consent by another owner as unfairly prejudicial, unjust or inequitable, may within six weeks after the date of such refusal apply to the High Court to have the decision reviewed.⁵¹ If the refusal is found to be inequitable, the court may make such order as it deems fit. This order may include deemed compliance with the requirement of the provision, the amendment of the registered sectional plan or any other order the court deems fit.⁵²

In *Cujè-Jacoby and Another v Kaschub and Another*⁵³ the applicants conducted an on-site rental and cleaning business since 1995 at the Glen Abbey sectional title scheme at the Erinvale Estate in Somerset West. The majority of the unit owners were based overseas and participated in a well-known practice of letting out their vacant units.⁵⁴ The applicants (who owned seven units and rented out a further five units on behalf of other owners), converted three of their garages so as to provide ablution facilities for their staff and the gardener and to provide laundry and ironing facilities and a recreational area for staff. All the sectional owners other than the first respondent had given their written consent⁵⁵ for the change in the use of the garages.⁵⁶

It was commonly acknowledged that the applicants originally did the laundry in a washing machine and tumble dryer in their own unit, but that the noise of the washing machine disturbed the first respondent. The washing machine and tumble dryer were subsequently moved to one of the garages (Garage 14) in 2001. This continued without any complaint from the first respondent until 2005⁵⁷ when the respondent wrote a letter intimating her complaint about the change of use of Garage 14 and proposed that the dispute be resolved by moving the laundry to another garage (Garage 11) and by blocking up the side door to Garage 10. Apparently, she had no further objection to the change of use of the other garages.⁵⁸ At an annual general meeting held on 25 January 2005 the first respondent voted in favour of the change of use of Garages 9, 10 and 12, but voted against the existence of the side door in garage 10. Then in a letter dated 24 October 2005, the first respondent repeated her suggestion that the laundry be moved from Garage 14 to Garage 11 and that the side door be closed. She was, however, not prepared to give an undertaking that if these changes were made, she would withdraw her objection and reserved all her rights even if her proposal was implemented. Understandably, the applicants were not willing to incur significant costs to accommodate the first respondent without any guarantee that it would conclude the matter.⁵⁹

⁵⁰ See proviso to s 44(1)(g) of the Act; S 13(1)(g) of the Sectional Titles Schemes Management Act 8 of 2011.

⁵¹ S 44(2)(a) of the Act read with s 1 "court".

⁵² S 44(2)(b).

⁵³ 2007 3 SA 345 (C) commented on by T Maree "Kan jy Deel vir Nuwe Doel gebruik?" (2008) 29 *MCS Courier Newsletter* 7 7-8; CG van der Merwe "Refusal to Consent to the Change of Use of a Sectional Title Unit" (2008) 71 *THRHR* 692 692-698.

⁵⁴ *Cujè-Jacoby and Another v Kaschub and Another* 2007 3 SA 345 (C) para 3.

⁵⁵ S 44(1)(g) of the Act.

⁵⁶ *Cujè-Jacoby and Another v Kaschub and Another* 2007 3 SA 345 (C) para 4.

⁵⁷ Para 8.

⁵⁸ Para 6.

⁵⁹ Para 7.

Therefore, the applicants applied to the court for an order that consent was deemed to have been given⁶⁰ on the ground that the refusal of the first respondent was “unfairly prejudicial, unjust or inequitable” to them.⁶¹ Having found that the words in question denoted conduct which departed from the accepted standards of fair play and that the word “unfairly” should be equated with the word “unreasonably”,⁶² the court held that the first respondent’s objections to the change of use were fanciful and irrational and that her refusal to consent was prejudicial to the applicants. Consequently, the court ordered that the first respondent was deemed to have given the necessary consent.⁶³

In reaching this conclusion, Traverso DJP indicated that the respondent already consented to the change of use of three of the garages, that neither her security nor her privacy would be impacted by the change in use and that she exaggerated the amount of movement of staff between the washing and the ironing room. Furthermore, the change in use would not affect the value of her property as the availability of an efficient on-site and centralised letting arrangement was likely to make the properties more attractive to prospective owners who wished to occupy the units on a part-time basis. In contrast, the removal of the business to other premises would have had a devastating impact on the business of the applicants and on those people who made use of their services.⁶⁴ Finally, any legitimate objections of the respondent could be met by moving the laundry in Garage 14 to Garage 11 and since the applicants had no objection to this, such an order was made.⁶⁵

In the unreported case of *Bonthuys v Scheepers*⁶⁶ the High Court of the Eastern Cape reversed the decision of the Magistrate’s Court granting consent to a sectional owner in a residential sectional title scheme to run a hairdressing salon in her unit. The appeal of the other owners was allowed because the individual started the business without obtaining the written consent of the other owners and, additionally, because the refusal of thirteen of the sectional owners to grant their consent was not unfairly prejudicial to the applicant.⁶⁷

The same line of reasoning adopted in *Cujè- Jacoby*⁶⁸ was followed in interpreting the words “unfairly” as “unreasonably” and it was found that the prejudice suffered by the other sectional owners far outweighed the prejudice that may be suffered by the applicant. The court reasoned that the construction of a separate entrance for her clients to the hairdressing salon would affect the peace and tranquillity associated with a residential scheme. Moreover, the

⁶⁰ S 44(2)(b) of the Act.

⁶¹ S 44(2)(a).

⁶² *Cujè-Jacoby and Another v Kaschub and Another* 2007 3 SA 345 (C) para 10.

⁶³ Paras 12, 15, 16.

⁶⁴ Paras 11-14.

⁶⁵ Para 15.

⁶⁶ ECD 17-09-2007 case no CA 303/2006 commented on by M Botha “Is Consent by the Trustees of the Body Corporate of the Sectional Title Scheme to Conduct Business in a Residential Unit, Sufficient? Lessons from Body Corporate of Algoa Bay and 13 others v Scheepers” (2008) 12 *Property Law Digest* 3 3-8.

⁶⁷ See in general Botha (2008) *Property Law Digest* 5; Van der Merwe (2008) *THRHR* 697; Van der Merwe *Sectional Titles* 8-12.

⁶⁸ 2007 3 SA 345 (C) para 10.

evidence at hand did not indicate any value added to the scheme but rather suggested an adverse effect on the other owners.⁶⁹ It was stressed that the personal circumstances of the applicant, namely that she lost her job because the salon she worked for closed down and that she struggled to maintain a four-year-old child, did not justify a departure from the established scheme.⁷⁰

The two pertinent obligations in terms of the prescribed management rules to preserve the social coherence in the scheme are first an obligation on sectional owners not to use their sections or exclusive use areas, or allow them to be used, for any purpose injurious to the reputation of the building.⁷¹ “Reputation” can have a moral connotation and can also refer to the prestige or status of a certain building.⁷² Thus, where a section or exclusive use area is used for immoral purposes (for example prostitution), this would certainly affect the reputation of any sectional title scheme. However, the reputation of a luxury sectional title scheme may also suffer if the owners were to hang their washing on the balconies.⁷³ The ultimate aim of this obligation is to protect the social coherence of the scheme and the financial investment of sectional owners.

Second, an owner is under an obligation not to contravene or permit the contravention of any law, by-law, ordinance, proclamation, regulation, or the conditions of any license with regard to the occupation of the building or the carrying on of business in the building. In terms of this rule, an owner must not contravene the conditions of title⁷⁴ applicable to his or her or any other section or exclusive use area.⁷⁵ This rule thus obliges sectional owners to be aware of and abide by any law or license condition that affects the residential or commercial use of his or her unit and any conditions of title that apply to his or her section and exclusive use area.⁷⁶

For example, it is an offence under section 20 (1A)(a) of the Sexual Offences Act 23 of 1957 for any person 18 years or older to have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward. Furthermore, licenses are required to conduct certain kinds of business in the building.⁷⁷ The patent goal of this obligation is to prevent illegal and undesirable activities from being conducted in individual sections or exclusive use areas, which in turn will assist in achieving the overarching aim of safeguarding the social standing and harmony of the scheme.

⁶⁹ *Bonthuys v Scheepers* ECD 17-09-2007 case no CA 303/2006 para 15.

⁷⁰ Para 16. The Sectional Titles Schemes Management Act 8 of 2011 (which is not yet in operation), allows an application to a regional ombud instead of the High Court to have the refusal overturned. This is a more cost effective solution and will deliver swifter results.

⁷¹ Annexure 8 r 68(1)(i) of the Act.

⁷² Maree *Sectional Titles* 10.9.

⁷³ Van der Merwe *Sectional Titles* 8-16 – 8-17.

⁷⁴ In terms of s 11(3)(b) of the Act conditions of title are contained in a conveyancer’s certificate filed as an annexure to the sectional plan at the Deeds Registry.

⁷⁵ Annexure 8 r 68(1)(ii) of the Act.

⁷⁶ G Paddock *Sectional Title Survival Manual* 6 ed (2008) 10-34.

⁷⁷ Licenses are required for the following businesses: the sale or supply of perishable foodstuffs; the provision of certain types of health facilities or entertainment; and the hawking of meals or perishable foodstuffs. See schedule 1 of the Businesses Act 71 of 1991.

The prescribed conduct rules oblige sectional owners to obtain the written consent of the trustees to keep any animal, reptile or bird in his or her section. The trustees may not unreasonably withhold their approval and when granting such consent may prescribe any reasonable condition on breach of which their approval may be withdrawn.⁷⁸

2.5 Special note on the keeping of pets

Since the keeping of pets is one of the most contentious and problematic issues in sectional title schemes, this part of the contribution will conclude with a discussion of case law on this topic.⁷⁹ Restrictions on the keeping of animals in residential schemes are designed to minimise nuisance being caused to neighbouring residents.

In *Nahrstedt v Lakeside Village Condominium Ass'n Inc*⁸⁰ the Californian Supreme Court decided that a virtual outright ban on pets was not unreasonable and could be enforced against the owner of three cats even though the animals remained inside the unit at all times, did not make noise or cause unpleasant smells, and was not a nuisance to other residents. The court denied Nahrstedt's relief on the following grounds:

“[a]s a matter of law... the recorded pet restriction... is not arbitrary, but is rationally related to health, sanitation and noise concerns legitimately held by residents.”⁸¹

An absolute prohibition on the keeping of pets within a section runs counter to the sectional owner's true ownership of his or her section and should be justified only in exceptional circumstances. Nonetheless, the trustees have the power to limit the number of pets per section or the kind of pets allowed.⁸² Any sectional owner who feels aggrieved by a refusal of the trustees to allow him or her to keep a particular pet can approach the court for a declaratory order that the written consent of the trustees has been unreasonably withheld.⁸³ Fortunately, South African courts have ruled that the wording of this conduct rule implies that the trustees are obliged to consider each case or application for the keeping of pets on its own merits, thereby allowing a degree of flexibility.⁸⁴

*Body Corporate of the Laguna Ridge Scheme No 152/1987 v Dorse*⁸⁵ dealt with the rule that granted the trustees discretion to grant or refuse permission

⁷⁸ Annexure 9 r 1(1)-(3) of the Act.

⁷⁹ Van der Merwe *Sectional Titles* 8-18(1).

⁸⁰ 878 P.2d 1275, 1278-79 (Cal. 1994) (en banc). For a detailed discussion of this case see A Arabian “Condos, Cats, and CC&Rs: Invasion of the Castle Common” (1995-1996) 23 *Pepp L Rev* 1 1-11.

⁸¹ *Nahrstedt v Lakeside Village Condominium Ass'n, Inc.* 878 P.2d 1275, 1278-79 (Cal. 1994) (en banc) 1290. In addition, it was noted by the court that Nahrstedt's complaint did not allege any facts showing that the burden of the restriction outweighed its benefits; 1291. Finally, the restriction did not violate public policy because no state or federal provision confers a right to keep household pets in condominiums; 1290-1291.

⁸² J Paddock “The Three P's: Pets, Parking and Difficult People” (29-06-2009) *Paddocks Press Newsletter* <<http://www.paddocks.co.za/paddocks-press-newsletter/jennifer-paddock-the-three-ps-pets-parking-and-difficult-people-in-sectional-title>> (accessed 24-08-2014).

⁸³ Annexure 9 r 1(1) of the Act.

⁸⁴ Maree *Sectional Titles* 10.15.

⁸⁵ 1999 2 SA 512 (D). For a recent comment on this case see A Civin & R Pereira “‘Paws’ Before Signing on the Dotted Line: Body Corporates and the Keeping of Pets in Sectional Titles” (2015) *De Rebus* 34-35.

to keep pets in the units or common property of a scheme. When the trustees refused to grant permission to an elderly woman to keep a dog in her flat she challenged the refusal by taking the trustees to court. The court held that each request for permission to keep an animal had to be considered on its own merits and the decision of the trustees had to be based on the facts and circumstances relevant to the particular case.⁸⁶ It appeared that there was never a danger that the respondent's small dog could cause a nuisance, as it did not bark and was never allowed to wander freely around the common property.⁸⁷ The court found that the decision of the trustees to refuse permission for the pet to be kept on the premises was influenced by policy considerations such as the fear of creating a precedent, rather than the pertinent question of whether the presence of this particular dog in the respondent's apartment could possibly constitute a nuisance. The court found that their decision was grossly unreasonable and warranted the inference that they failed to apply their minds to the matter. On this basis, the trustees' decision was reviewable under the common law.⁸⁸ The matter concluded when the court found it proper to substitute the trustees' decision with its own and ordered that the elderly woman should be allowed to keep the dog in her apartment.⁸⁹

In *Buffelsdrift Game Reserve Owners Association v Holkom*⁹⁰ a few owners kept domestic animals for several years without consent despite a provision in the constitution of the home owners' association that consent from the management committee was required. The court held that the home owners' association by its conduct had waived its right to seek legal recourse to prevent the owners from keeping animals on their properties.

3 Non-financial obligations pertaining to the common property

3.1 Introduction

Whereas sectional owners obtain individual ownership of their sections, the common property in the scheme is owned in undivided co-ownership shares in accordance with the provisions of the Act.⁹¹ The extent to which a sectional owner owns and may use and enjoy the common parts of the scheme depends on the size of his or her section relative to that of the other sections in the sectional title scheme.⁹² In practice, it is difficult to divide the use and enjoyment of land and the common parts of the buildings in accordance with a participation quota system based on size in residential schemes and the quota allotted by the developer in non-residential schemes. Therefore, the Act incorporates a general principle whereby a sectional owner must: "use and enjoy the common property in such a manner as not unreasonably to interfere

⁸⁶ 1999 2 SA 512 (D) 520F-I.

⁸⁷ 521F & 522A-C.

⁸⁸ 522D-F & 522H-I.

⁸⁹ 523E-G.

⁹⁰ ZAGPPHC 07-07-2014 case no 58258/2013.

⁹¹ S 2(c) of the Act.

⁹² S 16(1) of the Act; see also s 32(3)(b); S 11(1)(b) of the Sectional Titles Schemes Management Act 8 of 2011.

with the use and enjoyment thereof by other owners or other persons lawfully on the premises”⁹³

Each sectional owner is thus entitled to substantially the same rights of use and enjoyment of the common property. This is irrespective of whether his or her undivided share is of equal size or not since a higher participation quota as such, cannot confer special or greater rights of use.⁹⁴

The obligation to use and enjoy the common property in such a manner so as not to interfere with the concurrent rights of other lawful owners and residents⁹⁵ accords with the principles of neighbour law, which dictates that sectional owners are obliged to allow other sectional owners or occupiers to use and enjoy the common property in a reasonable way.⁹⁶ To determine the parameters of reasonable usage four guidelines are employed.⁹⁷ Firstly, no sectional owner may prevent another owner or lawful occupant from using any part of the common property for lawful purposes (e.g. using the lifts, lawn or swimming pool). Secondly, no sectional owner may appropriate for him- or herself the exclusive use of any part of the common property. Consequently, he or she cannot erect a washing line or carport or a doll’s house for his daughter on the common property. Thirdly, a sectional owner may not unilaterally decide to redecorate any part of the common property, for instance a common games room or gym area. Finally, no sectional owner may use the common property for an abnormal purpose or in an unusual way. Abnormal or unnatural usage of common property occurs where parts of the common property are utilised in a manner contrary to its nature or accepted usage, for instance where the scheme’s lawn is used for playing a rugby or soccer match.⁹⁸

In addition to the general rule against interfering with the reasonable use of the common property by other sectional owners and lawful occupants, the further non-financial obligations imposed in the Act as well as the management and conduct rules with regard to the use of the common property can be grouped into the same three categories as encountered in the use of sections and exclusive use areas.

3.2 Preservation of the physical features of the building

First, the implied reciprocal statutory servitudes imposed by the Act on each section in favour of the common property, and in favour of each section over the relevant portions of the common property, as discussed above, apply to the same extent in respect of the common property. Under these servitudes sectional owners must allow the body corporate access to his or her section and exclusive use area to maintain, repair or renew any part of the building or any pipes, wires, cables or ducts in the building, or for emergency repairs

⁹³ S 44(1)(d) of the Act; S 13(1)(d) of the Sectional Titles Schemes Management Act 8 of 2011.

⁹⁴ Van der Merwe *Sectional Titles* 8-23.

⁹⁵ S 44(1)(d) of the Act; S 13(1)(d) of the Sectional Titles Schemes Management Act 8 of 2011.

⁹⁶ Pienaar *Sectional Titles* 244.

⁹⁷ Van der Merwe *Sectional Titles* 8-23.

⁹⁸ 8-23 – 8-24.

necessary to prevent damage to the common property or any other section or sections.⁹⁹ The impetus for this obligation is, as already indicated, to preserve the physical features of the building.

Second, in terms of the prescribed conduct rules, an owner must not mark, paint, drive nails or screws into, or otherwise damage, or alter, any part of the common property without the written consent of the trustees.¹⁰⁰ Exceptions are, however, made in respect of the installation of any locking device; safety gate; burglar bars; other safety device; or any screen or other device to prevent the entry of animals or insects. Even though the rule confers a right on owners to install such items, they may only do so after the trustees have provided written approval of the nature and design of the device and the manner of its installation.¹⁰¹ This rule was undoubtedly formulated to allow owners to improve their security and prevent disturbance by insects and other pests.

In terms of another prescribed conduct rule, as in the case of a section or exclusive use area, an owner must not store any inflammatory material on the common property. The owner should furthermore not perform or permit the performance of any other dangerous act in the building or on the common property which will or may increase the cost of insuring the common property.¹⁰² The rationale for this obligation is to prevent the building being damaged or destroyed by fire or other dangerous acts conducted on the common property.

3 3 Maintenance of the harmonious appearance of the sectional title scheme

The preservation of an orderly outward appearance of the sectional title scheme is mainly catered for in the prescribed conduct rules. First, an owner is obliged to maintain a waste disposal bin on the common property, in such location as is approved by the trustees.¹⁰³ Refuse placed in the bin must be securely wrapped and completely drained.¹⁰⁴ Furthermore, the bin must be placed within the designated area at such times as are prescribed by the trustees¹⁰⁵ and after the refuse has been collected, the bin must be returned promptly to the section or exclusive use area concerned.¹⁰⁶ The aim of this obligation is to regulate the disposal of refuse in an orderly manner and to prevent owners from placing their refuse in a haphazard manner on any other part of the common property to the detriment of the neat appearance of the scheme.

Another conduct rule prevents an owner from depositing, throwing, or allowing to be deposited or thrown, any rubbish on the common property.¹⁰⁷ This obligation also prevents the attractive outside appearance of the sectional title scheme from being prejudiced.

⁹⁹ S 28(2)(b); See also s 44(1)(a) of the Act; S 13(1)(a) of the Sectional Titles Schemes Management Act 8 of 2011.

¹⁰⁰ Annexure 9 r 4(1) of the Act.

¹⁰¹ Annexure 9 r 4(2).

¹⁰² Annexure 9 r 9.

¹⁰³ Annexure 9 r 2(1)(a).

¹⁰⁴ Annexure 9 r 2(1)(b).

¹⁰⁵ Annexure 9 r 2(1)(c).

¹⁰⁶ Annexure 9 r 2(1)(d).

¹⁰⁷ Annexure 9 r 7.

An owner is not allowed to park or permit non-residents to park any vehicle on the common property without the written consent of the trustees.¹⁰⁸ Allowing owners or their visitors to park their vehicles at random on the common property will cause chaos and conflict in the scheme.

An owner must ensure that his or her vehicles, and the vehicles of his or her visitors and guests, do not drip oil or brake fluid on, or in any other way deface the common property.¹⁰⁹ In addition, an owner is not permitted to dismantle or effect major repairs to any vehicle on any portion of the common property.¹¹⁰ The aim of this obligation is again the preservation of the aesthetics of the scheme.

Another conduct rule prevents an owner of a section used for residential purposes from placing or doing anything on any part of the common property, including balconies, patios, stoeps and gardens which, in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed from the outside of the section.¹¹¹ The aim of this obligation is to preserve the harmonious external appearance of the building.

An owner of a residential section must also not place any sign, notice, billboard or advertisement of any kind on any part of the common property, which is visible from outside the section, without the written consent of the trustees.¹¹² This obligation covers the affixing of nameplates or other signs on the outside walls adjoining their units or in the entrance of the building, which could have a detrimental effect on the neat appearance of the corridors or the attractive outward appearance of the building.

A final obligation pertaining to the common property is that owners must not, without the written consent of the trustees, erect their own washing lines, nor hang any washing or laundry or any other items on any part of the building or the common property so as to be visible from the outside or from any other sections.¹¹³ The purpose of this obligation is yet again to ensure that the attractive external appearance of the scheme is not impaired.

3 4 Conservation of social coherence and harmony in the scheme

The obligation under the Act to use and enjoy the common property in such a manner as not to unreasonably interfere with the use and enjoyment thereof by other owners or other persons lawfully on the premises¹¹⁴ is reinforced by the obligation under the prescribed management rules not to use the common property in a way or for a purpose that is injurious to the reputation of the building.¹¹⁵ This obligation would presumably prevent sectional owners from entering the common property indecently clothed or from obstructing the driveway with bins, bicycles or other objects. Consequently, it would be

¹⁰⁸ Annexure 9 r 3(1).

¹⁰⁹ Annexure 9 r 3(3).

¹¹⁰ Annexure 9 r 3(4).

¹¹¹ Annexure 9 r 5.

¹¹² Annexure 9 r 6.

¹¹³ Annexure 9 r 8.

¹¹⁴ S 44(1)(d); S 13(1)(d) of the Sectional Titles Schemes Management Act 8 of 2011.

¹¹⁵ Annexure 8 r 68(1)(i) of the Act.

advisable for sectional owners to obtain the trustees' consent before they do anything on the common property that may impair the reputation of the scheme.¹¹⁶

Another prescribed management rule obliges an owner to refrain from contravening any law, by-law, ordinance, proclamation or statutory regulation, or the conditions of any license affecting the occupation or the carrying on of business in any part of the building that is defined as common property.¹¹⁷ Consequently, sectional owners must abide by any law or license condition that affects his or her residential or commercial use of any part of the common property. A license is required to conduct certain kinds of businesses in any common parts of the building, which includes the sale or supply of perishable foodstuffs; the provision of certain types of health facilities or entertainment; and the selling of meals.¹¹⁸ The prohibition to carry out any illegal and unwanted activities on any part of the common property protects the lawful order and social harmony in the scheme.

As in the case of a section, an owner is not allowed to keep pets on the common property without the written consent of the trustees, which consent may not be unreasonably withheld and may be granted subject to certain conditions.¹¹⁹ Thus, the keeping of horses in an environment friendly rustic sectional title scheme at the boundaries of a city is subject to the consent of the trustees. Reasonable conditions could include a requirement that the owner must immediately clean up any mess made by the pet on the common property, or a requirement that the pet is kept on a leash at all times when in common areas.

From the above, it is clear that most of these obligations prevent the common property from being used unreasonably by the owners of the scheme. We have, however, seen that seemingly unreasonable use of the common property may in some cases be permitted with the written consent of the trustees.¹²⁰

4 Non-financial obligations imposed by neighbour law

Aside from the provisions of the Act and the prescribed management and conduct rules, the obligations of sectional owners with regard to the use of their sections, exclusive use areas and the common property are also regulated by intensified common law principles of neighbour law.¹²¹ The dense living and usage conditions prevailing in most sectional title schemes require a greater sensitivity in the exercise of usage rights towards neighbours on the one hand, and a greater tolerance towards the exercise of usage rights of neighbours on the other hand.¹²² The principle of reasonable use enunciated

¹¹⁶ Van der Merwe *Sectional Titles* 8-27.

¹¹⁷ Annexure 8 r 68(1)(ii) of the Act.

¹¹⁸ See schedule 1 of the Businesses Act 71 of 1991.

¹¹⁹ Annexure 9 r 1 of the Act.

¹²⁰ Van der Merwe *Sectional Titles* 8-27.

¹²¹ See in general Van der Walt *Neighbours* 244-246; 262-270; 272-279; 291-296.

¹²² Pienaar *Sectional Titles* 248.

in the Act, at least with regard to the use of the common property,¹²³ should thus be interpreted in terms of common law neighbour law principles.¹²⁴

The purpose of neighbour law is to harmonise the interests of neighbouring land and apartment owners by balancing the exercise of their conflicting entitlements in an equitable manner.¹²⁵ Sectional owners must therefore exercise their entitlements in respect of a section, an exclusive use area and the common property reasonably, and, on the other hand, neighbouring sectional owners must tolerate this within reasonable bounds.¹²⁶

Neighbour law is based on the notion that sectional title property must be used in such a way to avoid unreasonable prejudice to neighbouring owners or occupiers.¹²⁷ This is encapsulated in the Roman maxim *sic utere tuo ut alienum non laedas*.¹²⁸ Any annoying or unreasonable activity, which interferes with or causes actual damage to a neighbour's health, well-being or comfort while occupying his or her unit or the common property, is regarded as a nuisance.¹²⁹

It is a question of fact and often a matter of degree whether the conduct of the sectional owner is sufficiently serious to constitute a nuisance.¹³⁰ The crucial test is whether a normal person, finding himself in the position of the plaintiff, would be expected to tolerate the interference concerned.¹³¹ This test is an objective one and has to be applied in the light of the prevailing circumstances.¹³² In terms of case law, several factors can be taken into account to ascertain whether a sectional owner's intrusive conduct is objectively reasonable:¹³³

First, the conduct concerned must be repetitive or continuous, since a single action of short duration must normally be tolerated, except if there is a reasonable expectation that the activity will be repeated.¹³⁴ Second, the objectionable conduct must, according to the prevailing social views of the community (*secundum bonos mores*), be objectively unreasonable.¹³⁵

The test employed is further "not [that] of the perverse or finicky or over-scrupulous person, but [that] of the normal man of sound and liberal taste

¹²³ S 44(1)(d) of the Act; S 13(1)(d) of the Sectional Titles Schemes Management Act 8 of 2011.

¹²⁴ Pienaar *Sectional Titles* 248.

¹²⁵ *Gien v Gien* 1979 2 SA 1113 (T) 1123E.

¹²⁶ Pienaar *Sectional Titles* 249.

¹²⁷ *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 120G.

¹²⁸ Van der Merwe *Sectional Titles* 8-5; see also Van der Walt *Neighbours* 245-247, 250, 252, 259, 263, 272, 274-276.

¹²⁹ *East London Western Districts Farmer's Association v Minister of Education and Development Aid* 1989 2 SA 63 (A) 67H-J.

¹³⁰ *Dorland v Smits* 2002 5 SA 374 (C) 383B.

¹³¹ Badenhorst *et al The Law of Property* 112.

¹³² *Vogel v Crewe* 2003 4 SA 509 (T) 512E.

¹³³ See in general Badenhorst *et al The Law of Property* 111-113; Pienaar *Sectional Titles* 251.

¹³⁴ *Gien v Gien* 1979 2 SA 1113 (T) 1123E.

¹³⁵ *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 4 SA 188 (D) 192; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 111, 112, 114, 116 and 117; *Kirsh v Pincus* 1927 TPD 199; *Gien v Gien* 1979 2 SA 1113 (T); *Dorland v Smits* 2002 5 SA 374 (C) 384A-C; *Vogel v Crewe* 2003 4 SA 509 (T) para 4. See also CG van der Merwe & M Blumberg "For Whom the Bells Toll – A Solution in Neighbour Law" (1998) 9 *Stell LR* 351 352-353.

and habits”.¹³⁶ Consequently, plaintiffs who are abnormally or extraordinarily sensitive or neurotic will not be entitled to relief even though they may personally suffer substantial discomfort and inconvenience.¹³⁷ For example, a woman who suffers from acute attacks of migraine would not be able to complain about ordinary noises made by children playing in an adjoining apartment.¹³⁸

Furthermore, aspects such as the location of an apartment or unit in the building, the nature of the scheme as residential, commercial or mixed-use, the customs of the residents and the question whether the health of the neighbour may be affected are important in the determination of the reasonableness of the activities carried out within neighbouring apartments.¹³⁹

Moreover, the harm suffered by the plaintiff must be weighed against the benefit and utility of the activity to the sectional owner. If the harm suffered were disproportionately serious in comparison with the trivial benefits gained by the activity, the interference would be considered unreasonable. Conversely, substantial benefits derived from a particular activity could render an activity that causes minor harm reasonable in the circumstances.¹⁴⁰

In addition, the motive of a certain activity may determine its objective reasonableness. If the activity is motivated solely by an intention on the part of a sectional owner to harm his neighbour (*animo vicino nocendi*), this fact may render an otherwise lawful activity so unreasonable that it need not be tolerated.¹⁴¹ Banging on the walls with the sole intention of interrupting piano lessons conducted in a neighbouring apartment would be considered wrongful and thus unreasonable.¹⁴² In this context the expression “abuse of rights” is often used.¹⁴³

Another important factor that may be taken into account is the question of whether the same goal could have been achieved by the sectional owner by measures less harmful to the plaintiff. Therefore, where precautionary measures are used to limit harm, the less likely it is that a particular activity will be considered unreasonable. Thus a disturbance which could have been prevented or at least diminished by the sectional owner carrying on the activity at a different time, in a different manner, in a different part of his or her section, or with greater care is more likely to be considered unreasonable

¹³⁶ *Prinsloo v Shaw* 1938 AD 570 575; see also *Leith v Port Elizabeth Museum Trustees* 1934 EDL 211 213; *Die Vereniging van Advokate (TPA) v Moskeeplein (Edms) Bpk* 1982 3 SA 159 (T) 163; *Vogel v Crewe* 2003 4 SA 509 (T) para 4.

¹³⁷ *Leith v Port Elizabeth Museum Trustees* 1934 EDL 211 214; *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 4 SA 188 (D) 192.

¹³⁸ *Cf Du Toit v De Bot, Du Toit v Zuidmeer* 1883 2 SC 213.

¹³⁹ *Nelson Mandela Metropolitan Municipality v Greyvenouw* CC 2004 2 SA 81 (SEC); *Laskey v Showzone* CC 2007 2 SA 48 (C).

¹⁴⁰ *Dorland v Smits* 2002 5 SA 374 (C) 384D-385C/D.

¹⁴¹ *Kirsh v Pincus* 1927 TPD 199; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 107-108; *Gien v Gien* 1979 2 SA 1113 (T) 1121.

¹⁴² *Cf the English case of Christie v Davey* [1893] 1 Ch 316.

¹⁴³ See in general Pienaar *Sectional Titles* 253; Van der Walt *Neighbours* 282-285.

than a disturbance that it is not possible to mitigate against.¹⁴⁴ For example, a musician living in a sectional title scheme can play his guitar during the day instead of the late hours of the night and he can reduce the noise made by not using an amplifier.

If a sectional owner inherits a certain state of affairs that is injurious to his neighbours, the practicability of preventing harm to his neighbour is also taken into account in assessing the reasonableness of his or her continuance of the activity in question. The sectional owner is only expected to take steps “reasonably practicable” in the circumstances. The courts do not regard unavoidable harm as unreasonable provided reasonably practicable measures are taken.¹⁴⁵

After assessing the factors that are relevant in a particular situation, the court has to balance all probabilities and decide whether the sectional owner’s activity was reasonable in the circumstances or whether the plaintiff could not be expected to tolerate such conduct.¹⁴⁶ In the context of a sectional title community the following activities are likely to constitute an actionable nuisance if conducted in a section, an exclusive use area or on the common property:¹⁴⁷

- causing excessive noise;¹⁴⁸
- the emission of an unreasonable quantity of smoke, fumes or smells;¹⁴⁹
- carrying on a business in a residential scheme without the necessary consent;¹⁵⁰
- hurling stones, balls or other objects into a section or onto an exclusive use area;¹⁵¹
- allowing leaves or roots to intrude into neighbouring exclusive use areas;¹⁵² and
- the leakage of fluids from a neighbouring section or exclusive use area.¹⁵³

¹⁴⁴ *Ingelthorpe v Sackville-West* 1908 EDC 159 161; *Herrington v Johannesburg Municipality* 1909 TH 179 199; *Starfield and Starfield v Randles Bros and Hudson* 1911 WLD 175 180; *Gibbons v SAR&H* 1933 CPD 521 531–535; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 103; *Die Vereniging van Advokate (TPA) v Moskeplein (Edms) Bpk* 1982 3 SA 159 (T) 164; see also Van der Merwe & Blumberg (1998) *Stell LR* 355-356.

¹⁴⁵ *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 11-112 and 116-118; *Vogel v Crewe* 2003 4 SA 509 (T) para 6.

¹⁴⁶ Cf *Gien v Gien* 1979 2 SA 1113 (T).

¹⁴⁷ See in general Pienaar *Sectional Titles* 252.

¹⁴⁸ Cf *Leith v Port Elizabeth Museum Trustees* 1934 EDL 211; *Prinsloo v Shaw* 1938 AD 570; *Die Vereniging van Advokate (TPA) v Moskeplein (Edms) Bpk* 1982 3 SA 159 (T); *Laskey v Showzone CC* 2007 2 SA 48 (C) regarding excessive noise in urban areas.

¹⁴⁹ Cf *Botha v Andrade* 2009 1 SA 259 (SCA).

¹⁵⁰ Cf *Nelson Mandela Metropolitan Municipality v Grevenouw CC* 2004 2 SA 81 (SEC).

¹⁵¹ Cf *Allaclas Investments (Pty) Ltd v Milnerton Golf Club* 2008 3 SA 134 (SCA).

¹⁵² Cf *Kirsch v Pincus* 1927 TPD 199 and *Malherbe v Ceres Municipality* 1951 4 SA 510 (A).

¹⁵³ Cf *Van der Merwe v Carnarvon Municipality* 1948 3 SA 613 (C); *Regal v African Superslate* 1963 1 SA 102 (A).

5 Evaluation

On closer examination, it will become apparent that non-financial obligations imposed on sectional owners are as essential as financial obligations to preserve the following unique characteristics of a sectional title scheme.

First, the object of sectional ownership is not indestructible land as in the case of landownership, but apartments that form part of a destructible building. In fact, the very existence of a section in a sectional title scheme depends on the preservation of the floors, walls and ceilings of the section that form the boundaries of that particular section.

Second, the apartments of a sectional title building are not structurally individualised but structurally interdependent. This means that the very existence of the sections is dependent on the continued physical existence of all of the sections in the scheme.

Third, the community life in a sectional title scheme is much more intensified than the community life of a group of neighbouring landowners. In high-rise sectional title buildings, sectional owners have neighbours on either side and above and below. This feature has been judicially recognised in *Body Corporate of Albany Court and 17 Others v Nedbank*¹⁵⁴ where Gautschi AJ stated:

“The interdependence of owners within a single building or complex logically requires co-operation, and compliance with and subservience to the will of the majority.”¹⁵⁵

Fourth, the legislature intended that the community of unit owners established in terms of the Act should be more or less permanent and should only be terminated on compliance with the strict conditions set for the dissolution of a sectional title scheme namely:

- where the building is physically destroyed;
- where the owners unanimously resolve that the building is regarded as destroyed;
- and where the court on application of an interested party¹⁵⁶ finds it just and equitable that the building is deemed to be destroyed and makes an order to that effect.¹⁵⁷

These basic features of sectional ownership merit the imposition of stricter non-financial obligations on sectional owners, which vary in character from those typically associated with neighbouring landowners. Put differently, these features justify more intensive restrictions on the powers and entitlements of a sectional owner with regard to his or her section, exclusive use area and the common property. This does not mean that sectional ownership is degraded to a lesser limited real right or a “nebulous something” as suggested by Professor De Wet in the early days of sectional ownership.¹⁵⁸ While sectional

¹⁵⁴ 2008 JOL 21739 (W).

¹⁵⁵ Para 20.

¹⁵⁶ As specified in s 48(4) of the Act; S 17(4) of the Sectional Titles Schemes Management Act 8 of 2011.

¹⁵⁷ S 48(1) of the Act; S 17(1) of the Sectional Titles Schemes Management Act 8 of 2011. See Van der Merwe *Sectional Titles* 16-6 – 16-7.

¹⁵⁸ JC de Wet & F St GA Tatham “Die Wet op Deeltitels” (1972) *De Rebus* 205 205.

ownership has different features, it is still genuine ownership and should be placed on the same footing as the ownership of land.¹⁵⁹ This was judicially confirmed by Gautschi AJ in *Body Corporate of Albany Court and 17 Others v Nedbank*.¹⁶⁰

“[T]he powerful right of ownership of an immovable property is not an absolute right. Indeed, the very essence of the [Sectional Titles] Act is to render many of the interests of owners of units in a sectional title scheme subservient to the will of the majority. Certain of the normal rights of an owner, for instance the right to keep pets or make building alterations, may be curtailed by the rules imposed by the majority.”¹⁶¹

Therefore, the non-financial and social obligations discussed above are necessary to maintain the basic framework of sectional ownership. Because a section forms part of a destructible building, the social obligations aimed at maintaining the section in a good condition¹⁶² are necessary to prevent destruction or damage to the walls, floors and ceilings that form the physical boundaries of each section in the building. Furthermore, destruction to the building is avoided by the provisions that sectional owners:

- must carry out all work that may be ordered by a competent public or local authority;¹⁶³
- must not make alterations which are likely to impair the stability of the building,¹⁶⁴ and
- must not store any inflammatory material nor carry out any other dangerous act in the building or on the common property.¹⁶⁵

The structural interdependence of sectional title units, which makes the very existence of sections dependent on the continued preservation of all the sections in the scheme, is reinforced by the non-financial obligation embodied in the reciprocal servitudes of subjacent and lateral support.¹⁶⁶ Furthermore, there is an obligation to allow authorised persons to enter a section to investigate the physical condition of a section and to repair items that might impair the physical integrity of other sections or the sectional title building as a whole.¹⁶⁷ The latter obligation is further strengthened by the duty to keep a section free of insects and pests and to allow authorised persons to enter the section from time to time to inspect the section and to take any action reasonably necessary to eradicate such pests and to repair damaged woodwork within the section.¹⁶⁸

We have also seen that the aim of several of the non-financial obligations mentioned above is to maintain the social harmony in the intensified sectional title community. This applies not only to the obligations applicable to

¹⁵⁹ Van der Merwe *Sectional Titles* 8-21 – 8-22.

¹⁶⁰ 2008 JOL 21739 (W).

¹⁶¹ Para 20.

¹⁶² S 44(1)(c) of the Act; S 13(1)(c) of the Sectional Titles Schemes Management Act 8 of 2011.

¹⁶³ S 44(1)(b) of the Act; S 13(1)(b) of the Sectional Titles Schemes Management Act 8 of 2011.

¹⁶⁴ Annexure 8 r 68(iii) of the Act.

¹⁶⁵ Annexure 9 r 9.

¹⁶⁶ Ss 28(1)(a)(i) and (b)(i) of the Act.

¹⁶⁷ Ss 44(1)(a) and 28(2)(b); S 13(1)(a) of the Sectional Titles Schemes Management Act 8 of 2011.

¹⁶⁸ Annexure 9 r 11 of the Act.

individual sections, but also to those applicable to exclusive use areas and the common property. In this context the stricter application of the common law principles of nuisance in the sectional title sphere, which is reinforced by the obligation against nuisance in the Act,¹⁶⁹ plays an important role. Moreover, the obligations imposed on sectional owners in terms of the prescribed management and conduct rules, as well as special rules adopted for particular schemes, performs an important function in regulating the affairs of the intensified community of owners in an orderly fashion.

Finally, the legislature intended to establish a generally permanent community of sectional owners that is reinforced by the obligations to preserve the physical integrity of the building and the harmony in the scheme. This corresponds with the main purpose of sectional titles schemes, namely to provide affordable housing to as large a segment of the population as possible to promote social, economic and ultimately political stability. One of the main objectives for the introduction of apartment ownership in post-war Europe, which suffered from a severe housing shortage, was to satisfy the psychological and social need for individuals to own their own home. By placing sectional ownership and house ownership on the same level, the dream of home ownership is placed within the reach of an ever-growing number of citizens.¹⁷⁰

The various non-financial obligations imposed on sectional owners in relation to their sections, exclusive use areas and the common property are thus essential to preserve the physical features of the sectional title building and the tranquillity and harmony of a sectional title scheme in view of the peculiar physical features of the building and the unique community of owners living within the confines of the scheme. Consequently, the surrender of freedoms inherent in the non-financial obligations imposed on sectional owners is a fair price to be paid for a well-preserved building and a contented and harmonious sectional title community.

SUMMARY

The principal aims of sectional title schemes are to preserve the physical integrity and the pleasant appearance of the sectional title building and to strive for harmony in an intensified community where the individual units are physically interdependent and the residents are seldom completely homogeneous. Therefore, sectional owners are burdened with numerous financial and non-financial obligations in terms of the Sectional Titles Act 95 of 1986, the prescribed management and conduct rules and the common law concept of nuisance. This contribution examines the various non-financial obligations imposed on sectional owners relating to their sections, exclusive use areas and the common property. The examination of the content and rationale of each of these obligations indicates that the imposition of non-financial obligations on sectional owners are essential for preserving the physical integrity of the sectional title building and social harmony in an intensified sectional title community. Consequently, the surrender of freedoms inherent in the non-financial obligations imposed on sectional owners is a fair price to be paid for a well-preserved building and a contented and harmonious sectional title community.

¹⁶⁹ S 44(1)(d); S 13(1)(d) of the Sectional Titles Schemes Management Act 8 of 2011.

¹⁷⁰ CG van der Merwe "Is Sectional Ownership True Ownership?" (1992) 3 *Stell LR* 131 136; CG van der Merwe "The Adaptation of the Institution of Apartment Ownership to Civilian Property Law Structures in the Mixed Jurisdictions of South Africa, Sri Lanka and Louisiana" (2008) 19 *Stell LR* 298, 308-309; Van der Merwe *Sectional Titles* 8-22.