

A critical analysis of the role of the developer in sectional title developments

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1 Introduction

The introduction of sectional titles in South Africa has opened the door for developers to explore new opportunities in property development and to reap considerable profits in the expanded real estate market. Since sectional title developments can comprise residential units, offices, shops, commercial and industrial units and especially mixed schemes, the opportunities are endless. The developer plays an essential role in the creation process of a new sectional title scheme. Much of the success of a development depends on his performance during these initial stages. Sectional title legislation has to curb developer abuses and protect purchasers and sectional owners against malpractices. However, these measures should aim to balance in an equitable fashion the interests of all the parties concerned.

Because of his or her intimate knowledge of and involvement in the physical development in the early stages, the initial dominance of the developer in the management and administration of the scheme is normal and even desirable. This dominance will gradually shift to new sectional owners as the developer's voting powers wane with the sale of units to outsiders. This also happens where the developer reserves the right to develop the scheme in phases. Between the sale of the last unit in the first phase and the registration of the units in the next phase, the developer will not have any voting rights. Developers are often either unaware or lose sight of this when planning the scheme.¹ In practice, prospective developers are usually lay businessmen without the necessary knowledge of their function in the scheme. They therefore need to be assisted by qualified attorneys and conveyancers with expertise in sectional title matters.

In this article we intend to explore the developer's role and functions in a sectional title development and attempt to give guidelines for procedures to be followed and potential pitfalls to avoid. If necessary, amendments to the Sectional Titles Act will be proposed. A brief discussion of who qualifies as a developer will be followed by an examination of the steps a developer must take to establish a sectional title scheme. Thereupon a developer's role in determining the participation quota, his ability to change the model rules of a scheme, his options in phased development and his role in creating exclusive use areas will be highlighted. Finally, we will focus on the role of the developer in the initial stages of management of the scheme.

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¹ Maree "Freezing the developer's voting powers: a closer look at some effects of phased development" 2006:6 *MCS Courier* 7.

2 *Definition of developer*

In principle the developer must be the registered owner of the land on which the proposed sectional title scheme is to be established or the holder of a right of extension under section 25. A 99-year lease or any other interest in the land will not be sufficient for a person to qualify as a developer. Besides the registered owner,² the holder of a right to develop a scheme in phases and his or her successor in title² and the body corporate, where a building is deemed destroyed in terms of section 48 of the act and a resolution to rebuild has been adopted, also qualify as “developer”.³

Some have suggested that the ownership requirement is too restrictive.⁴ If the development of sectional title schemes are allowed on leasehold land, for example on Durban’s foreshore and in certain parts of Johannesburg and Kimberley, where land is traditionally held under leasehold, it can alleviate housing shortages in these metropolitan areas. However, practical experience in America with leasehold condominiums has not always been positive. Furthermore, it would be very difficult to accommodate the fundamental principles, flowing from the fact that a sectional owner is the true owner of his unit, in a leasehold scheme. Yet, leasehold schemes would not pose any additional problems for the deeds office as lesser real rights are already being registered against the land or a section on the sectional plan.⁵

3 *Developer’s role in the establishment of a sectional title scheme*

The developer plays an indispensable role in the establishment of a sectional title development. Before the Sectional Titles Amendment Act of 1997⁶ developers had to apply to the local authority for approval of the proposed scheme. Now developers can instruct an architect or land surveyor to inspect the property⁷ and inform them of any inconsistencies with applicable town planning schemes and building regulations and whether condonation should be sought from the local authority concerned. If condoned the local authority will issue a certificate to this effect.⁸ The main reasons for reducing the role of the local authority was to streamline the process of establishment, to eliminate excessive bureaucracy and to cut down on soaring costs caused by unnecessary delays.⁹ All of this plays to the advantage of the developer. He can avoid unnecessary expenditure and increase in the price of units, which would affect the marketability of the scheme adversely.

The lucrative industry of conversion of rental buildings to sectional title¹⁰ caused abuse of existing tenants in residential schemes. Therefore, the act subjected developers to additional requirements. The developer must convene a meeting of all les-

² Sectional Titles Act 96 of 1986 s 1(1) *sv* “developer”.

³ s 1(1) *sv* “developer” *par (b)*. *Par (a)* contains two instances where the term “developer” includes also his or her agent, successor in title or any other person acting on the developer’s behalf.

⁴ Van der Merwe I *Sectional Titles, Share Blocks and Time-sharing* (2007) 3-19.

⁵ On the problems encountered in introducing sectional title schemes on leasehold land in Botswana, see Clement Ng’ong’ola “Land problems in some peri-urban villages in Botswana and problems of conception, description and transformation of tribal land tenure” 1992 *Journal of African Law* 140-167.

⁶ s 4(1).

⁷ s 4(5).

⁸ s 4(5).

⁹ Memorandum on the Objects of the Sectional Titles Amendment Bill 9D-97, 30.

¹⁰ See in general Huet and Van der Merwe “La protection des locataires en place lors de la mise en copropriété d’un immeuble résidentiel – étude de droit comparé: France, Etats-Unis d’Amérique, Afrique du Sud” 1993 *Revue de Droit Immobilier* 25-37.

sees in the building to furnish them with information of the proposed conversion.¹¹ The notice of the meeting must be accompanied by a certificate explaining the particulars of the proposed scheme;¹² *inter alia* the description and extent of the land comprised in the scheme; a specified estimate of annual expenditure;¹³ and a copy of the report by an architect or engineer on the physical condition of the building and its suitability for conversion. At the meeting the developer or his representative must give any reasonably required particulars of the proposed scheme and inform tenants about their rights of pre-emption.¹⁴ To further expedite the process of establishment of a sectional title scheme, the act provides that the meeting need not be held if all the lessees in the rental building have stated in writing that they were aware of their rights and that they do not wish to purchase the units they occupy.¹⁵ This must be accompanied by a conveyancer's certificate that such statements have been received in respect of all the units.¹⁶ The draft sectional plan submitted to the surveyor-general must be accompanied by an affidavit by the developer that he complied with the requirements, a copy of the notice of the tenants' meeting and the certificate concerning the physical condition of the building, and where applicable, a certificate from the conveyancer stating that all the tenants have consented, in writing, that they do not wish to purchase their converted units.¹⁷

Apart from the disclosure requirement, the developer must offer a unit for sale in writing to the tenant concerned for 90 days before offering it to any other person.¹⁸ A unit can only be offered to an outsider after the offer has been refused or the applicable period has expired without the lessee accepting it. Where a lessee refused the offer, the developer is not allowed to dispose of the unit during the following 180 days at a more favourable price, unless he has first offered it at the lower price to the lessee and the latter has not accepted the offer within a period of 60 days.¹⁹

A contract of sale concluded by the developer with a person other than the lessee, in contravention of the provision in section 10, is void.²⁰ Both parties must then restore what they have received. The developer is further entitled to claim reasonable compensation for the purchaser's use of the property and compensation for damage caused to the property. In turn, the purchaser may claim from the developer interest on any payment made, reasonable compensation for any expenses incurred for the preservation of the property and for improvements he effected.²¹ A developer who contravenes the provisions in section 10 commits a criminal offence.²²

In addition, the tenant is allowed a period of at least 180 days from the date of his refusal of the offer, or the date of the expiry of his statutory right of pre-emption without that right being exercised, to vacate the premises.²³ The developer is not

¹¹ s 4(3).

¹² s 4(3)(a)(ii).

¹³ *eg* levies and payment of rates and taxes.

¹⁴ s 4(3)(a)(i)(aa) and (bb).

¹⁵ s 4(3)(b). For a criticism of this provision, see § 3.7 *infra*.

¹⁶ s 4(3)(b).

¹⁷ s 7(2)(e) referring to s 4(3).

¹⁸ s 10(1). For a discussion of problems experienced with pre-emption rights see Van der Merwe "Enkele praktykprobleme in verband met die statutêre voorkoopsreg van huurders by die omskepping van 'n huurwoonstelblok in 'n deeltitelskema" 1991 *TSAR* 372; Du Plessis "Die remedies van die huurder by omskepping van huurgeboue in deeltitelskemas" 1996 *Stell LR* 329.

¹⁹ s 10(2).

²⁰ s 10(5)(a).

²¹ s 10(5)(d)(i) and (ii).

²² s 10(6).

²³ s 10(3)(a).

allowed to require the lessee to vacate the unit before that time unless the latter has been guilty of non-payment of rent, inflicted damage to the unit, or has been guilty of conduct which is a nuisance to other occupiers. During the period of grace, the developer may not increase the rent for the unit.²⁴

For all schemes the developer must prepare a draft sectional plan from actual measurements.²⁵ Therefore, the floors, walls and ceilings of sectional units should be substantially completed to ensure accurate results. Unfortunately, the trend has developed to take these measurements when only the foundations of the sections in lateral developments have been laid.²⁶ Although this speeds up the registration process significantly, it opens the door for abuses by unscrupulous developers. The draft sectional plan must then be submitted to the surveyor-general for approval.²⁷ The surveyor-general will not approve a draft sectional plan unless the developer has submitted all the applicable documents²⁸ and the plan has been prepared in accordance with the provisions of the act.²⁹

As a final step in establishing the sectional title scheme, the developer must, after approval of the draft sectional plan, apply to the deeds registry for the registration of the sectional plan and the opening of a sectional title register.³⁰ After registration, the documents which must accompany the application³¹ will be held at the deeds office and will be open to the public. Upon registration, the land and buildings comprised in the scheme shall be deemed to be divided into sections and common property in accordance with the sectional plan.³² The alienation, mortgage or lease of these units may then be registered.³³

Significant progress has been made to streamline the process of establishment of sectional title schemes. Once the building plans have been approved, the developer must decide whether he or she wants to apply to the local authority for condonation of certain irregularities. Financial risks implicit in an unreviewable refusal by the local authority may tempt unscrupulous developers to simply ignore any discrepancy. Unfortunately this would shift the responsibility for the certification of compliance of the scheme to the architect or land surveyor concerned.³⁴

The reduction of the role of local authorities as custodian of the public interest is unfortunate.³⁵ Local authorities should have retained the power to take factors such as the population density, available recreational facilities and the nature and permanency of the units³⁶ into account to decide whether the proposed project was capable of creating a viable and harmonious community of sectional owners. Local authorities could also be given greater control in conversions to sectional title. At the moment, South African developers are under no obligation to rectify any structural

²⁴ s 10(3)(b).

²⁵ s 5(1) and 6(1).

²⁶ For a detailed discussion see Kilbourn "Oh, the innocence of 'actual measurements': the implications of the wording of section 6(1) of the Sectional Titles Act" 1998:10 *Butterworths Property Law Digest* 9.

²⁷ s 7(1).

²⁸ reg 6(4)(a)-(f) read with ss 7(2) and 4(3); see Van der Merwe (n 4) 6-10 – 6-12.

²⁹ s 7(4).

³⁰ s 11.

³¹ s 11(3).

³² s 13(1).

³³ s 15B.

³⁴ Van der Merwe (n 4) 6-13.

³⁵ Van der Merwe "A critical analysis of the innovations introduced by the Sectional Titles Amendment Act of 1997" 1998 *THRHR* 171 183.

³⁶ See the New South Wales Strata Titles Act 68 of 1973 s 37(1)(b)(iii).

defects in accordance with the report of the architect or engineer or to upgrade the building before selling the units. Developers should be forced to partake in urban renewal by physically improving and modernising conversion buildings.

By downgrading the role of local authorities, the scales have been tipped too far in favour of developers at the expense of sectional owners and the general public.³⁷ The amendment of the act to allow developers to avoid the information meeting with tenants is also open to criticism. Tenants as ordinary citizens are not necessarily acquainted with the concepts of sectional title and what a right of pre-emption involves. The act should also include stricter measures to ensure compliance with the actual measurements requirement in lateral sectional title schemes.³⁸ The current wording of the act does not provide for sanctions against dishonest developers who abuse these provisions in order to speed up the registration process.

4 *Developer's role in determining the participation quota*

An equitable allocation of the various rights and obligations amongst sectional owners is one of the most important issues to be addressed by the developer when submitting an application for the opening of a sectional title register. Developers often approach this difficult task with a worrying degree of ignorance. They either stick with the suggested method of floor area, because it is the least troublesome, or they approach the problem from the result side, by determining the initial levies according to what they feel is fair.³⁹

The participation quota of a section determines three matters, namely the value of the vote of the sectional owner,⁴⁰ an owner's undivided share in the common property⁴¹ and finally, perhaps of most practical importance, an owner's proportional contribution to the common expenses and his proportional liability for the debts of the body corporate.⁴² The most common formulae used by developers in different jurisdictions around the world for the calculation of the participation quota are: equality, relative size, relative value, and use made of the common property.⁴³

The role of the developer in determining the participation quota of a new scheme is threefold. For residential schemes he must allocate quotas to sections relative to their floor area⁴⁴ and decide whether he wants to submit special rules by which a different value is attached to the vote of the owner of any section and/or his or her liability to contribute to the fund for common expenses;⁴⁵ for non-residential schemes he must allocate the quotas according to his discretion;⁴⁶ and for mixed schemes he must decide the percentage of quotas to be allocated to residential sections and then allocate the quotas to residential and non-residential sections in the aforesaid manner.⁴⁷

³⁷ Van der Merwe (n 35) 193.

³⁸ s 6(1).

³⁹ Maree "Differentiated levy structures and dynamic levy adjustments during the development phase. Are developers able to do the maths?" 2005: 1 *MCS Courier* 10 12.

⁴⁰ s 32(3)(a).

⁴¹ s 32(3)(b).

⁴² s 32(3)(c), 37(1)(a) and 47(1).

⁴³ Van der Merwe "Apartment ownership" in VI *International Encyclopaedia of Comparative Law* "Property and trust" (1994) 57; Maree (n 39) 10.

⁴⁴ s 1(1) *sv* "participation quota" read with s 32(1).

⁴⁵ s 32(4).

⁴⁶ s 32(2).

⁴⁷ s 32(2)(a).

Since developers are entitled to insert special rules whereby a different formula is used to determine the value of the vote and the relative contribution to common expenses, they are not restricted to a fixed formula to determine three vastly divergent matters.⁴⁸ But the special rules they introduce must be reasonable and equally applicable to all owners of units put to substantially the same purpose.⁴⁹ Instead of relative floor area the developer may therefore use equality or par value to determine the value of the vote allocated to the owner of a section. In order to arrive at a fair and equitable formula to allocate relative contributions to common expenses (levies), the service or objective utility test seems to be the only fair basis on which an equitable solution can be attained. The classic example is to base contributions to the maintenance of the lift and the swimming pool on a formula related to the use made of these facilities by each section rather than on the floor area of the particular section.⁵⁰

The act leaves the calculation of the participation quotas for non-residential units in the sole discretion of the developer. On a purposive interpretation of the relevant section based on the Memorandum to the Sectional Titles Act,⁵¹ the act enjoins the developer to employ a different formula than floor area to determine the participation quotas for non-residential units. It is suggested that a formula based on par value or the anticipated income flow of the various units should form the basis for calculating such quotas.⁵² In order to calculate par value the developer can take factors like location, designated use, interior and exterior design, and proximity to facilities into account.⁵³

The fact that South African developers are not allowed to change floor area as the basis whereby a residential owner's share in the common property is determined, is open to criticism because it ignores a disproportionate rise in market value of certain sections through internal modernisation. By contrast, the Uniform Common Interest Ownership Act [UCIOA] requires that, on termination, the unit owners' association selects an independent valuer to determine the fair market value of each unit immediately before the termination of the scheme and to conduct the ultimate distribution of the assets of the scheme on that basis.⁵⁴

Unlike under the UCIOA⁵⁵ the developer need not disclose the formula on which his initial allocation of quotas is based.⁵⁶ This makes later amendments of quotas by the body corporate, for example in the case of a subdivision of a section, consolidation of sections and extension of sections virtually impossible. In order to solve this problem the developer should be required to disclose the formula he uses for the allocation of quotas in non-residential schemes and also the formula he used to

⁴⁸ See also the German *Wohnungseigentumsgesetz* of 1951 § 16 par 1 sent 22 and the American Uniform Common Interest Ownership Act of 1994 s 2-107(a)(i) which allow the developer complete freedom to allocate the various interests in the scheme.

⁴⁹ s 35(3).

⁵⁰ Van der Merwe "The Sectional Titles Act in the light of the Uniform Condominium Act" 1987 *CILSA* 1 16 and Van der Merwe "The allocation of quotas in a sectional-title scheme" 1987 *SALJ* 70 77.

⁵¹ Memorandum on the Objects of the Sectional Titles Bill 1986 [B 75B-86(GA)] 89.

⁵² Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (2006) 460.

⁵³ See Maree (n 39) 10-15 for an attempt to arrive scientifically at an equitable formula.

⁵⁴ UCIOA of 1994 s 2-118(j)(1) and (2); see also Van der Merwe *SALJ* (n 50) 70 80.

⁵⁵ UCIOA of 1994 s 2-107(b)

⁵⁶ Van der Merwe "The South African Sectional Titles Act compared with the Singapore Land Titles (Strata) Act" 1999 *Singapore Journal of International and Comparative Law (SJICL)* 134 150.

introduce special rules to amend the voting rights and owners' proportional contributions to common expenses in residential schemes.⁵⁷

It is unfortunate that the determination of the quota is left to the sole discretion of the developer, without an independent authority considering whether his allotment is equitable.⁵⁸ This can lead to an intolerable situation, especially where developers do not appreciate the significance of participation quotas or do not take the trouble of tailoring special rules to suit the needs of a specific scheme.

5 *Developer's role in imposing conditions and selecting the rules for a scheme*

A developer may use his or her power to impose conditions of title and to select appropriate rules for a scheme to protect his own interests and those of financial institutions and sectional owners in order to promote the marketability of the scheme.⁵⁹ The developer should regulate important matters in the conditions of title on the schedule filed with the sectional plan,⁶⁰ for this can only be changed by an amendment of the sectional plan. For example, if the developer intends to develop a residential scheme for the elderly only, he should include such a provision in the conditions of title and not in the rules of the scheme.

The rules which manage and control the land and buildings⁶¹ must merely be lodged with the sectional plan. In practice most developers only lodge the model management and conduct rules contained in Annexures 8 and 9 of the Regulations⁶² although the act allows the developer to introduce special rules to suit the characteristics of the particular scheme. Section 35(2)(a) allows the developer to change certain⁶³ of the management rules of Annexure 8 when submitting an application for the opening of a sectional title register.⁶⁴ On examination, it is clear that amendment of the most important management rules which form the backbone of a sound management structure is not permitted and that only minor rules such as the rules on the nominations of trustees,⁶⁵ the appointment of alternate trustees,⁶⁶ and certain aspects of the meetings of trustees,⁶⁷ can be altered. By contrast, a developer has complete freedom to substitute, add to, amend or withdraw any conduct rule of Annexure 9,⁶⁸ as long as the change is not irreconcilable with any management rule contained in Annexure 8.⁶⁹ All management and conduct rules must further be reasonable and equally applicable to all sectional owners of units put to substantially the same purpose.⁷⁰ A rule which unduly favours a developer or unduly prejudices a sectional owner or a particular class of sectional owners would be considered unreasonable. Similarly, a management rule entrusting the management of the scheme to the developer for a lengthy period of time or to an associated professional managing

⁵⁷ See *Badenhorst et al* (n 52) 461 and *Van der Merwe* (n 4) 4-17.

⁵⁸ *Van der Merwe* (n 56) 150.

⁵⁹ *Van der Merwe* (n 4) 13-3.

⁶⁰ s 11(3)(b).

⁶¹ s 35(1) and (4).

⁶² GN R664 GG 11245 of 8-04-1988 as amended.

⁶³ reg 30(1).

⁶⁴ s 35(2)(a).

⁶⁵ Annexure 8 r 7.

⁶⁶ Annexure 8 r 9.

⁶⁷ Annexure 8 r 15(1) and (2).

⁶⁸ s 35(2)(b).

⁶⁹ s 35(2)(b).

⁷⁰ s 35(3). See also *Body Corporate of the Laguna Ridge Scheme No 152/1987 v Dorse* 1999 2 SA 512 (D).

agent for excessive remuneration, would not be reasonable.⁷¹ Apart from the above, the power of the developer to enact special rules is subject to a number of other general restrictions.⁷²

The application for the registration of a sectional plan must be accompanied by a conveyancer's certificate stating that the rules prescribed in terms of section 35(2) are applicable and containing any special rules substituted by the developer for those rules as contemplated in that section.⁷³ In *Wiljay Investments (Pty) Ltd v Body Corporate Bryanston Crescent*⁷⁴ the court held that if the developer did not submit any rules with his application, the model rules apply.⁷⁵

The most important advantage of allowing the developer to include special rules for a scheme is that developers have the opportunity to tailor special rules to suit each new project and so determine the character of the scheme. This is specifically called for where schemes of differing sizes and uses are concerned. A set of rules applicable to a small residential scheme will not be appropriate for a large scheme containing both residential and commercial units. The developer, financial institutions, such as building societies, and sectional owners require that their interests be properly protected by special rules.⁷⁶ On the other hand the act limits the powers of the developer to change certain indispensable rules⁷⁷ and precludes him from instigating amendments to the rules while he still holds a majority of the votes in the general meeting.⁷⁸ This ensures that an unscrupulous developer does not abuse his or her influence to override the votes of the minority of sectional owners during the initial stages by including rules which might spoil the harmony in the scheme.

6 *Phased developments*

It happens increasingly that developers choose to reserve for themselves the right to develop schemes in phases in terms of section 25 of the act. Apart from substantial financial and market benefits⁷⁹ phased development affords greater flexibility to developers to develop schemes in synergy with market demands and allows better utilisation of scarce land resources in metropolitan areas. In large schemes, economies of scale could lead to provision of more amenities and facilities.⁸⁰

Under section 25 of the act, a developer may reserve for himself the right to extend a scheme by additional sections by extending the building horizontally or vertically by the addition of new storeys or wings⁸¹ or by adding new sectionalised buildings on an undeveloped part of the common property.⁸² Note that the American option of "convertible building space" whereby a developer can for instance retain

⁷¹ Van der Merwe (n 4) 13-8 – 13-8(1).

⁷² For a detailed list see Van der Merwe (n 4) 13-8(1) – 13-10(4).

⁷³ s 11(3)(e).

⁷⁴ 1984 2 SA 722 (T) 724D.

⁷⁵ This case was decided under s 27(2)(b) of the Sectional Titles Act 66 of 1971 where the model rules were contained in Schedules 1 and 2.

⁷⁶ Van der Merwe (n 4) 13-7.

⁷⁷ s 35(2)(a) read with reg 30(1).

⁷⁸ proviso to reg 30(4).

⁷⁹ For a detailed discussion of these advantages see Van der Merwe (n 4) 12-4 – 12-6 and Heystek and Pienaar "Uitbreiding van 'n deeltitelskema – nog steeds te voorskryfelijk?" 1994 *TSAR* 340 341-342.

⁸⁰ Van der Merwe (n 4) 12-5.

⁸¹ s 25(1)(b) and (c).

⁸² s 25(1)(a). In the United States this possibility is referred to as the "convertible land" option. See s 2-105(8) of the UCIOA.

the top storey of a building for himself as a single unit that can later be divided into smaller sections and common property does not exist in South Africa.⁸³ The Sectional Titles Act does not allow for the division of an existing section into new sections *and* common property.⁸⁴ The only way of accessing the new sections, would be if an outside staircase and balcony are built. Under section 26 the second option of “additional land” by which land is added to the scheme allowing the developer to build a further sectionalised building, is only open to the body corporate and not to the developer. The third option of “withdrawable land” allowing the developer the right to withdraw a piece of the land from the scheme if development of further stages proves not to be financially viable can only be achieved in South Africa if a developer reserves for himself the right on registration to withdraw a portion of the common property from the scheme in the case of certain eventualities in terms of section 17 of the act. A provision would have to be added in the conditions of title of the scheme that all future sectional owners agree to give their written consent for the withdrawal of the portion of the common property in certain circumstances.

The development right is reserved in the application for the registration of the sectional plan by means of a condition⁸⁵ in the schedule of conditions accompanying the sectional plan.⁸⁶ A number of additional documents⁸⁷ disclosing particulars about the proposed extension must be lodged together with the usual documents⁸⁸ for the registration of the sectional plan. These include a plan to scale of the proposed extensions; a schedule indicating the estimated participation quotas of all the sections; and particulars of any substantial difference between the materials to be used in the extensions and those used in the existing buildings. On registration of the sectional plan and the opening of a sectional title register, the developer receives a certificate of real right to extend the scheme in the manner proposed in the sectional plan and subject to any mortgage bond registered against the title deeds of the land.⁸⁹

A developer need no longer retain a section in the scheme to proceed with his right of extension.⁹⁰ He must erect and divide the new buildings into sections strictly in accordance with the documents submitted when the right was reserved.⁹¹ Changed circumstances which would make strict compliance impracticable are taken into account, but a prejudiced owner may approach the court for an order of compliance or such other relief as it may deem fit.⁹² The courts seem prepared to allow developers to effect deviations on account of changed market conditions on the ground that no developer would regard it as practicable to build units that are not saleable.⁹³

In practice developers used a loophole in the act to refrain from registering new units in the sectional title register after completion and then to lease the units for their own profit, sometimes without paying the levies associated with these units. However, since 2005 a developer is required to apply for registration of the exten-

⁸³ UCIOA s 1-103(14) and see comment 15 on s 1-103. For a more detailed discussion of the position in South Africa, see Van der Merwe (n 4) 12-14 – 12-15.

⁸⁴ s 21 and 22.

⁸⁵ in terms of s 11(2).

⁸⁶ s 25(1). A dawdling developer is under s 15(6A) given a further opportunity provided the body corporate has not yet been established.

⁸⁷ s 25(2)(a)-(g).

⁸⁸ s 11(3).

⁸⁹ s 25(4) read with s 12(1)(e).

⁹⁰ s 25(5).

⁹¹ s 25(13) read with s 25(2).

⁹² s 25(13).

⁹³ *Knoetze v Saddlewood CC* 2001 1 All SA 42 (SE).

sion immediately after completion of the relevant units and the inclusion of such units in the relevant sectional title register.⁹⁴ Failure to do so within 90 days of completion for occupation renders the developer or his successor in title liable to the body corporate for contributions towards the levy fund.⁹⁵ This in turn means that no levy clearance certificate will be issued unless the levies linked to the particular unit have been paid in full to the body corporate.⁹⁶

The Sectional Titles Act requires that a developer who has reserved a real right to develop a scheme in phases must disclose such right in the deed of alienation to every purchaser into the scheme.⁹⁷ A developer is furthermore required to give particulars of all applicable expenses with regard to the specific part of the common property on which the future phases will be built. These expenses will be borne by the developer from the date of establishment of the body corporate until the sectional plan of extension is registered.⁹⁸ This is because the developer will not be liable to pay levies in respect of this extended part of the common property until a sectional plan of extension is registered,⁹⁹ at which time he will become liable as an owner for levies in terms of the adjusted participation quotas for the new units. Until this occurs, certain costs that are associated with the extension area must be properly allocated between the developer and the body corporate.¹⁰⁰ It has been argued¹⁰¹ that a developer's liability is fixed at the expenses referred to in section 37(1)(a), as well as all expenses in connection with the development of the next phase.¹⁰²

Developers should keep in mind that they will have no voting or management powers in the period between phases.¹⁰³ Their ability to vote on matters affecting the scheme will only be revived once the next phase is registered and they become the owners of all the newly built units. On the whole the provisions of the Sectional Titles Act leave developers with insufficient freedom to develop a scheme as market conditions dictate.¹⁰⁴ For instance, they are bound by the number and size of the buildings and sections to be erected.¹⁰⁵ Furthermore, the developer is only allowed to deviate from the plan to scale if changed circumstances would make strict compliance with the plan impracticable.¹⁰⁶ The court can order proper compliance and damages could be claimed by prejudiced parties in case of a deviation. The more specific the details regarding the subsequent phases are that must be disclosed, the less flexibility is retained by the developer, unless he is able to obtain the approval of the sectional owners to amend the sketch plan, should he decide to make significant changes in the development of future phases.

In our view South African developers should be given greater freedom to develop a scheme in phases in accordance with their financial abilities and current market demands. More of the American options mentioned above, should be made available to South African developers. At the same time sectional owners in the

⁹⁴ s 25(5A)(a).

⁹⁵ s 25(5A)(b) read with s 37(1).

⁹⁶ s 15B(3)(a)(i)(aa).

⁹⁷ s 25(14). Failure renders the deed voidable under s 15(15)(a).

⁹⁸ s 25(2)(e) read with 37(1)(a).

⁹⁹ Maree "A corporate conundrum: duties of a developer in respect of undeveloped common property" 2002:4 *De Rebus* 57.

¹⁰⁰ s 25(2)(e). For a discussion of the ambiguities of this section see Maree (n 99) 57.

¹⁰¹ Maree (n 99) 57.

¹⁰² eg providing for sewerage and entrances.

¹⁰³ For a detailed discussion, see Maree (n 1) 7.

¹⁰⁴ Van der Merwe (n 4) 12-34.

¹⁰⁵ s 25(2)(b) and (c).

¹⁰⁶ s 25(13).

initial phases are entitled to know what the developer has in mind for a piece of the common property which they own in undivided shares. Developers have to insure that the value of the sectional owners' investment are not jeopardised by infringing expansions and poor planning on their part.¹⁰⁷ A proper balance should be kept between a developer's need for flexibility to expand the scheme according to market demands, on the one hand, and sectional owners' interests in sufficient disclosure to enable them to make an informed choice on whether to buy into the first phase of an expandable scheme.¹⁰⁸

7 *Establishment of exclusive use areas by the developer*

A sectional owner is not entitled to appropriate any part of the common property for his own exclusive use.¹⁰⁹ However, developers soon recognised the need for certain portions of the common property to be allocated to individual sectional owners as *inter alia* parking bays, gardens, and storerooms.¹¹⁰

The Sectional Titles Act 66 of 1971 made no provision for the creation of exclusive use areas on the common property. Therefore, developers employed mechanisms such as notarial leases, servitudes and the amendment of the rules of the scheme to establish exclusive use areas for themselves.¹¹¹ In view of numerous malpractices which sprouted from the lack of regulation, the Sectional Titles Act of 1986 contains stringent rules for the registration of exclusive use areas. However, this method appeared to be so costly that the establishment of exclusive use areas by the developer in the rules of the scheme was reintroduced in 1997.¹¹² One now has to distinguish between genuine registered exclusive use areas and non-genuine exclusive use areas established under the rules.

The developer can establish genuine exclusive use areas when applying for the opening of the sectional title register and the registration of the sectional plan.¹¹³ He can also establish these before establishment of the body corporate as long as no further exclusive use areas are created.¹¹⁴ The application to the registrar must be accompanied by the sectional mortgage bonds, the written consent of the bondholders and the certificates of real right referred to in regulation 29. The registrar will then issue certificates of real right for the exclusive use areas, subject to any sectional bond against the land. The architect or land surveyor must delineate the proposed exclusive use areas on the draft sectional plan¹¹⁵ with a clear indication of the purpose for which the exclusive use areas are to be used¹¹⁶ and a unique number

¹⁰⁷ Heystek and Pienaar (n 79) 345.

¹⁰⁸ See Van der Merwe "Nuwe gesigspunte oor die ontwikkeling van 'n deeltitelskema in fases" 1987 *TRW* 43 52-53.

¹⁰⁹ s 44(1)(d).

¹¹⁰ For more detailed discussions see Van der Merwe (n 4) 11-14(1) and Mostert "The regulation of exclusive use areas in terms of the Sectional Titles Act 95 of 1986: an evaluation of the existing position and suggested alternatives" 1997 *Stell LR* 324; see also *Body Corporate of the Solidatus Scheme No SS23/90 v De Waal* 1997 3 *All SA* 91 (T).

¹¹¹ Van der Merwe (n 4) 11-14(1); Paddock *Sectional Title Handbook* (1990) 56; Woudberg 1 *Basic Sectional Title* (1999) 36.

¹¹² s 27A.

¹¹³ s 27(1) and s 60(3). The developer can also under s 27(1A) establish such rights at any time before the body corporate is established provided it does not constitute further exclusive use rights.

¹¹⁴ s 27(1A).

¹¹⁵ s 5(3)(f).

¹¹⁶ s 27(1)(a).

for each exclusive use area.¹¹⁷ The developer will normally sell the areas together with sections¹¹⁸ and cede them to the owner of a unit by means of a unilateral notarial deed.¹¹⁹ A change of the purpose of the exclusive use area can only be effected with the written consent of all the sectional owners¹²⁰ which may not be refused unreasonably.¹²¹

Before 2003 the developer was required to cede any extant exclusive use areas to the body corporate with transfer of the last unit.¹²² Since many developers ignored this and kept dealing with remaining exclusive areas for their own profit, the act now provides that on termination of the developer's membership, any right to an exclusive use area still registered in his name, automatically vests in the body corporate.¹²³

We have already mentioned that the malpractices perpetrated by developers were eliminated by the relevant provisions of section 27 of the Sectional Titles Act of 1986. Firstly, developers can no longer sell exclusive use areas to outsiders, but must transfer them to sectional owners.¹²⁴ Secondly, the developer has to allocate an exclusive use area to an owner and cannot lease it to owners or outsiders.¹²⁵ Thirdly, holders of exclusive use rights are required to contribute to rates, taxes, insurance premiums and maintenance costs with regard to their exclusive use areas – these costs are not borne by the general administrative fund.¹²⁶ Finally, the developer can no longer retain exclusive use areas as a nest egg after leaving the scheme; extant exclusive use areas will automatically vest in the body corporate.¹²⁷

The cheaper and less cumbersome establishment of exclusive use areas in the rules of a scheme on application for the opening of a sectional title register was reintroduced in 1997.¹²⁸ Rights thus established are merely personal rights which cannot be mortgaged.¹²⁹ The special rule must include a layout plan to scale which clearly indicates the locality of exclusive use areas, specifies the purpose of each exclusive use area, allocates a distinctive number to each¹³⁰ and a schedule showing the allocations to owners.¹³¹

Apart from creating mortgageable real rights, the establishment of exclusive use areas under the 1986 act provided certainty and eliminated many of the malpractices of developers. However, developers complain that the registration procedure under section 27 is too strict, expensive and time consuming and that they are prevented from creating further exclusive use areas before the body corporate is established. This is unfortunate, since it may well prove necessary to add additional exclusive

¹¹⁷ reg 5(1)(k)(v).

¹¹⁸ For a general discussion on the dealings with exclusive use areas see Mostert "The alienation and transfer of rights of exclusive use in sectional title law" 2002 *Stell LR* 265 269-278; Van der Merwe (n 4) 11-18 – 11-22.

¹¹⁹ s 27(1)(b).

¹²⁰ Annexure 8 r 68(1)(v) read with s 44(1)(g).

¹²¹ s 44(2)(a). See also *Cujè-Jakoby v Kaschub* 2007 3 SA 345 (C).

¹²² repealed s 27(1)(b).

¹²³ s 27(1)(c).

¹²⁴ s 27(1)(a), 27(3) and 27(4)(a).

¹²⁵ s 27(1)(a).

¹²⁶ s 37(1)(b).

¹²⁷ s 27(1)(c).

¹²⁸ Sectional Titles Amendment Act 44 of 1997, s 21 introducing s 27A in the act.

¹²⁹ s 27A(a).

¹³⁰ s 27A(b)(i).

¹³¹ s 27A(b)(ii) and (c).

use areas. It is fairly settled that this restriction applies only to genuine and not also to non-genuine exclusive use areas.¹³²

Although the speedier and less expensive mechanism to establish exclusive use areas in the rules of a scheme is to be welcomed, the relevant section does not specify whether the areas are established by an addition to the management or conduct rules. This is important since management rules can be amended by unanimous resolution whereas the amendment of conduct rules requires a special resolution only.¹³³ The importance of exclusive use areas coupled with their potential to cause conflict between sectional owners, count against their establishment in conduct rules.¹³⁴ The requirement that the rules creating non-genuine exclusive use areas shall include a schedule indicating to which member each such area is allocated,¹³⁵ suggests that this type of exclusive use area attaches to owners of units, rather than the units themselves.¹³⁶ Whenever a unit is transferred, this area must somehow be transferred with it and the applicable rule amended. Clearly this could not have been the intention of the legislature. It would make more sense to link exclusive use areas to individual units.

8 *Management during initial stages*

Effective management ensures the durability of a scheme and is of vital importance to both sectional owners and financial institutions with an interest in the scheme.¹³⁷

The act provides for two administrative organs, namely the general meeting of the body corporate where management decisions are taken, and the board of trustees to execute these decisions. As owner of all units not registered in someone else's name,¹³⁸ and thus the holder of the majority vote, the developer plays a crucial role in the management and administration of the scheme.

The developer must call the first general meeting within 60 days of the date on which the body corporate comes into existence.¹³⁹ As a deterrent for non-compliance, failure renders him guilty of an offence.¹⁴⁰ This provision is intended to get the management of a sectional title scheme off the ground as soon as possible.¹⁴¹ The written notice¹⁴² of the meeting must contain a copy of the agenda and details of the items on the agenda. The act contains a prescribed list of minimum items to be discussed at the first general meeting.¹⁴³ At the meeting the developer must provide the body corporate with a certificate of the local authority stating that all rates due, up to the date of the establishment of the body corporate, have been paid¹⁴⁴ and render proof of expenditure in respect of the management of the scheme from the date of first occupation of any unit, until the date of the establishment of the body corpo-

¹³² For a detailed discussion of the problems with s 27(1A) see Maree "An untidy backyard: seeking order in exclusive use areas" 1998:10 *De Rebus* 31-32.

¹³³ s 35(20(a) and (b)).

¹³⁴ Van der Merwe (n 35) 191.

¹³⁵ s 27A(c).

¹³⁶ Maree (n 132) 32.

¹³⁷ Van der Merwe (n 43) 141.

¹³⁸ s 34(1).

¹³⁹ s 36(7)(a).

¹⁴⁰ s 36(7)(b) as amended by s 5 of the Sectional Titles Amendment Act 7 of 2005.

¹⁴¹ Van der Merwe (n 4) 14-37.

¹⁴² Annexure 8 r 50(1).

¹⁴³ Annexure 8 r 50(2).

¹⁴⁴ s 36(7)(a)(ii).

rate.¹⁴⁵ Any insurance policies made before the first meeting must also be placed before the meeting for consideration.¹⁴⁶

The main aim of the first general meeting is to establish an efficient management structure as soon as possible. It is clear from the matters on the agenda, as well as the obligations of the developer, that the legislator wanted to create certainty and avoid abuses or tardiness on the part of the developer.¹⁴⁷

The developer also plays an important role in the board of trustees saddled with the day-to-day running of the scheme. The act provides that all owners shall be trustees with the developer acting as chairperson from the date of establishment of the body corporate until the first general meeting. At this point they will retire, but they, including the developer, will be eligible for re-election.¹⁴⁸ It is customary for the developer to request the nominations for trustees some time prior to the first general meeting by means of a letter circulated to all owners who can vote at the meeting. Although the developer will be able to control the election of the trustees as long as he owns the majority of the units, he will in principle be treated the same way as any other sectional owner.¹⁴⁹

So far no provision has been made in South African legislation to negate the possible negative effects of majority rule.¹⁵⁰ This is especially problematic during the stages where the developer still holds the majority vote and is able to control decisions of the general meeting, appoint all the trustees and determine the levies by ensuring that the budget for the following year is approved, even if these actions are against the will of the minority.¹⁵¹ Furthermore, while the developer controls the board of trustees, an associate of the developer can be appointed as managing agent under a lucrative long-term contract.¹⁵²

The ability of affronted owners to approach the court for relief is hampered by the provision that a body corporate may only institute proceedings against the developer if so resolved by special resolution.¹⁵³ The 75% majority target is usually unattainable in a newly established scheme with the developer still retaining the majority of the votes. Fortunately, the court decided in *Wimbledon Lodge v Gore NO*¹⁵⁴ that a developer may not use his voting powers to veto such a resolution, and that his or her vote should therefore be disregarded.

The United States' Uniform Common Interest Ownership Act recognises the practical value of leaving the control of the association in the hands of the developer during the initial period. However, it attempts to hasten owners' participation and to increase owners' experience in association matters¹⁵⁵ by a gradual transition of

¹⁴⁵ s 36(7)(a)(iii).

¹⁴⁶ Van der Merwe (n 4) 14-39.

¹⁴⁷ Van der Merwe (n 4) 14-40.

¹⁴⁸ Annexure 8 r 4(2)(3) and 18.

¹⁴⁹ Van der Merwe (n 4) 14-7.

¹⁵⁰ For an in-depth discussion of the management provisions contained in apartment ownership legislation of other jurisdictions regarding minority protection, see Van der Merwe (n 43) 141-165.

¹⁵¹ Badenhorst et al (n 52) 473.

¹⁵² Van der Merwe (n 4) 14-58.

¹⁵³ s 36(6)(e).

¹⁵⁴ 2002 1 All SA 218 (C).

¹⁵⁵ See comment 5 to UCIOA of 1994.

control from the developer to unit owners.¹⁵⁶ It also provides for developer control of the association to expire after a period of two years.¹⁵⁷

The management of a new sectional title scheme is completely in the hands of the developer and the original owners during the initial period. This is probably desirable in the view of the developer's intimate knowledge and involvement with the project and the relative ignorance of new owners.¹⁵⁸ These powers and functions will gradually shift to new unit owners, as the developer's voting powers decreases with the transfer of units to new owners.

It is commendable that the act forces the developer to hold the first general meeting within 60 days after the establishment of the body corporate to get the scheme off the ground.¹⁵⁹ Legislation is, however, needed to limit the almost unrestricted power of the developer in these initial stages to ensure that the minority of unit owners are represented on the board of trustees and that the developer's vote is always limited, regardless of the voting power afforded to him by his share in the scheme.¹⁶⁰ Even so, these legislative provisions should not be so restrictive as to hamper the efficient management of the scheme. Apart from attempting to limit the degree of developer control, these provisions should also seek to ensure that a viable management structure is established in the initial stages of the scheme which would allow for a smooth transition in the control and management of the scheme from the developer to the new owners.

9 Conclusion

The ever-increasing demand for sectional title buildings highlights the crucial role of developers in the establishment and management of sectional title schemes. The main criticism against the Sectional Titles Act is that it does not adequately balance the competing needs of developers, purchasers, credit institutions and other parties involved.¹⁶¹ On the one hand more flexibility is needed for developers to develop schemes according to their financial ability and market demands unhampered by too strict statutory regulation making them wary of embarking on new projects. On the other hand, developer freedom should be balanced by sound measures of consumer protection.¹⁶² The act already provides for the protection of tenants where a rental building is converted to sectional title,¹⁶³ and of purchasers into the initial stages of a development in phases.¹⁶⁴ However, effective minority protection is still wanting during the initial stages when the developer still holds the majority of votes.

The Uniform Common Interest Ownership Act requires a detailed public offering statement prepared by the developer before offering any unit for sale.¹⁶⁵ This statement must contain all the details of the said scheme, including the types and number

¹⁵⁶ UCIOA of 1994 s 3-103(e) and (f). The act requires that within 60 days after the conveyancing of 25% of the units, at least 25% of the members of the interim board must be elected by members other than the developer. After 50% of the units have been transferred, at least 50% of the members are to be so elected.

¹⁵⁷ UCIOA 1994 § 3-103(d) and (e).

¹⁵⁸ Maree (n 1) 7.

¹⁵⁹ s 36(7)(a).

¹⁶⁰ Badenhorst et al (n 52) 473.

¹⁶¹ Van der Merwe *CILSA* (n 50) 1 46.

¹⁶² Van der Merwe *CILSA* (n 4) 3-24.

¹⁶³ See § 3 above.

¹⁶⁴ See § 6 above.

¹⁶⁵ s 4-102.

of units, available amenities, projected monthly common expenses, any warranties given by the developer, and development rights reserved by the developer.¹⁶⁶ If the South African Sectional Titles Act is to make similar provisions for the protection of potential purchasers, it is submitted that the items to be disclosed should be limited so as not to make the duty of disclosure too onerous and costly.¹⁶⁷ Such disclosure will also prevent purchasers from pleading ignorance in disputes with developers.

More should be done to make developers aware of their significant role in the sectional title industry. Close attention should be given not only to the physical aspects of the scheme but also to their role in creating a viable and harmonious community of owners. Developers should avoid the temptation of treating all schemes alike. Each project is unique and therefore requires, amongst other things, its own set of rules and formulae for allocating participation quotas and exclusive use areas. Developers should make an effort to satisfy the special needs of each individual scheme. As seen above the developer's role in the initial management stages is crucial to create a sound management structure and to avoid future financial crises and internal disputes. It is only then that developers and the public truly can exploit the numerous opportunities inherent in the sectional title industry.

SAMEVATTING

KRITIESE EVALUERING VAN DIE ROL VAN DIE DEELTITELONTWIKKELAAR

Die statutêre aanvaarding van deeltitels het die Suid-Afrikaanse eiendomsmark die afgelope paar dekades wesenlik beïnvloed. Dit het deure oopgemaak vir ontwikkelaars om nuwe moontlikhede te ondersoek en noemenswaardige winste te maak in die nuwe uitgebreide eiendomsmark. As in ag geneem word dat 'n deeltitelontwikkeling uit residensiële eenhede, kantore, supermarkte, industriële en gemengde eenhede kan bestaan, is dit duidelik dat die moontlikhede oneindig is.

Die ontwikkelaar speel 'n sleutelrol in die oprigting van 'n deeltitelskema. Die sukses van die skema hang grootliks af van sy rol tydens hierdie fase. Ongelukkig misbruik onetiese ontwikkelaars soms hul magte ten koste van potensiële kopers en deeleienaars. Dus moet deeltitelwetgewing voorsiening maak vir beskermingsmaatreëls om hierdie wanpraktyke hok te slaan. Nogtans moet 'n balans gehandhaaf word deur die belange van al die betrokke partye te beskerm.

Dit gebeur dikwels in die praktyk dat voornemende ontwikkelaars nie oor die nodige kennis en vaardighede beskik wat deur die wet vereis word nie. Dit is vanselfsprekend dat statutêre bepalings vir die oprigting en administrasie van deeltitelskemas van geen waarde is as ontwikkelaars nie ingelig word oor hul rol in hierdie verband nie.

In hierdie artikel word die rol en funksies van die ontwikkelaar in 'n deeltitelontwikkeling ondersoek en riglyne gegee vir prosedures wat gevolg en potensiële slaggate wat vermy moet word. Verder word bepaal of daar ruimte vir verbetering in die Suid-Afrikaanse deeltitelwetgewing is.

¹⁶⁶ s 4-103.

¹⁶⁷ See in this regard Roberts "Uniform Condominium Act – new flexibility for developers" 1984 *Journal of Missouri Bar* 182.