

THE MOST RECENT AMENDMENTS TO THE SECTIONAL TITLES REGULATIONS

1 *Introduction*

The Sectional Titles Amendment Regulations, 2013 promulgated in GG 36241 R 196 of 14 March 2013, amend the Regulations promulgated by GN R 664 of 8 April 1988 as amended. The amendments consist of amendments to the Regulations, Annexure 1 of the Regulations and Annexure 8 of the Regulations. The most interesting amendments are the amendments to Annexure 8, which deals with the prescribed management rules of a sectional titles scheme.

2 *Amendments to the Regulations*

Regulation 15, which deals with the alteration, amendment, substitution or cancellation of a registered sectional plan in terms of section 14(5) of the Sectional Titles Act 95 of 1986, has been amended mainly to improve the structural flow of the regulation. Regulation 15(4) is substituted to indicate that the application for amendment of the registered sectional plan must be lodged by the body corporate or the developer with the registrar. The registrar must then amend the sectional title deed

concerned as required and endorse thereon that the amendment has been effected in accordance with an alteration, amendment or substitution of the registered sectional plan.

Regulation 16B(1), which deals with the preparation of a power of attorney, application, or consent required for the performance of an act of registration in a deeds registry by a practising attorney, notary, conveyancer or other person empowered thereto by any act, has been slightly amended by requiring the signee of the instrument to state his or her full name and surname (instead of his or her surname and initials) in block letters (s 3(a)). The same amendment applies in the case where a practising conveyancer must countersign the certificate if signed by an attorney or notary (amendment of reg 15B(5) by s 3(b)). This technical amendment is finalised by the amendment of regulation 16C(d)(ii)(aa), which now reads that the person who signs a preparation certificate referred to in regulation 16B(1) accepts responsibility for the correctness of the fact that the necessary authority has been obtained for the signing of the certificate in a representative capacity on behalf of a company, close corporation, church, trust or other body of persons or institution. The proviso to this section “unless appointed by special or general power of attorney” is deleted (s 4). This amendment was necessary to bring the situation in line with the amendment of regulation 44A(d)(ii)(a) of the Deeds Registries Act 47 of 1937, which removes the responsibility of the registrar of deeds of examining powers of attorney. (See also Sectional Titles Regulations Board Meeting of 4 Sept 2012 Resolution 4.25.)

Regulation 27 concerns the application of a plan of extension of the common property under section 26 of the Sectional Titles Act. Under section 11(3)(b) of the act the application for the opening of a sectional title register must be accompanied by a schedule certified by a conveyancer setting out the servitudes and conditions of title burdening the land as well as the registrable conditions imposed by the developer. In terms of regulation 27(3) the application must be accompanied by a *substituted* (not amended) schedule where the land to be incorporated into the scheme is subject to conditions that are different from the conditions registered at the opening of the sectional title register. In terms of the additional subregulation 15(4)(a) the substituted schedule must contain all the conditions and endorsements appearing in the existing section 11(3)(b) schedule already filed in the sectional title register, as well as the conditions and endorsements appearing in the title deed of the land that is to be incorporated into the communal scheme. The newly added regulation 15(4)(b) stipulates that the existing and substituted schedules must both be kept in the sectional title register and that the existing schedule must be endorsed to the effect that it had been replaced by the substituted schedule.

The purpose of this amendment of regulation 27 was to regularise the position with regard to the servitudes and conditions of title burdening the two separate pieces of land which now form part of an extended sectional title scheme. Although upon registration of the plan of extension of the common property such plan shall be deemed to be incorporated in the existing sectional plan, the same cannot be said about the two separate pieces of land which now form part of the common property of the scheme. These pieces are not consolidated and therefore the schedules displaying the servitudes and conditions burdening the two pieces of land must be kept separately at the deeds office. Consequently, the existing schedule of servitudes and conditions should not be endorsed to the effect that it has been *replaced* by the substituted schedule but rather that the existing schedule should be *read together* with the substituted schedule.

Since the Sectional Titles Amendment Act 11 of 2010, a sectional title scheme can be extended under section 25(1) by the addition of exclusive use areas only. This right of extension must, like the rights to vertical and horizontal extension of the scheme by the additions of sections, be reserved by the developer in a schedule of registrable conditions in terms of section 11(3)(b) of the act which must accompany an application for the opening of a sectional title register. In terms of section 11(3)(fB) the application for the opening of the sectional title register must also be accompanied by the certificate or certificates of real right in respect of any right which has or have been reserved by the developer in terms of section 25(1). Regulation 28(1) stipulates that these exclusive use areas, where there is more than one, must be numbered and described in separate paragraphs in the certificate of real rights which must in terms of section 12(1)(f) be issued by the registrar on registration of the sectional plan and the opening of a sectional title register. Regulation 28(2) is now amended to provide that, simultaneously with the transfer of a right to an exclusive use area referred to in section 25(1), the registrar must make an endorsement on the certificate of real right issued in terms of section 25(1)(d) of the act.

The main problem is that the legislature has not carefully considered and implemented all the consequences of introducing the option in section 25(1) of the reservation of extension of the scheme by the addition of exclusive use areas only. There is in fact a reference to this matter in section 25(2)(b) specifying that the *plan to scale*, which must accompany the application for the registrations of a sectional plan, must indicate the manner in which the common property is to be made subject to the rights of exclusive use areas only. The problem with regulation 28(1) is that at the time of application for the opening of the sectional title register in terms of section 11 the only certificates of real right that can accompany the application and on the opening of the sectional title register be issued to the developer, is a certificate certifying his or her reserved right to add exclusive use areas only to the scheme at a later stage. It is therefore not possible at that stage to number and describe in separate paragraphs the exclusive use areas in the certificates of real rights referred to in section 12(1)(f) of the act. The only certificate which refer to this matter at this stage is the certificate of real right in respect of any right which has been reserved by the developer in terms of section 25(1), thus including the reservation of exclusive use areas only in the scheme in the application for the opening of a sectional title register. There is, furthermore, no reference in section 12(1)(f) to the reservation of exclusive use areas *only* in terms of section 25(1).

This leads to the next problem, namely, that the reference in the amended regulation 28(2) to section 25(1)(d) is incorrect, because there is no section 25(1)(d) in the act. The reference should presumably have been to section 25(10)(d), which refers to the *certificate or certificates* which must accompany the application by the developer to the registrar for the registration of a *plan of extension* and the inclusion of exclusive use rights only in the relevant sectional title register in terms of section 25(9). But this is at a much later stage, namely at the stage where the developer *exercises* the right he reserved in section 25(1) of the act to extend the scheme by the addition of exclusive use areas only. Only with the registration of the sectional plan of extension will the developer be issued with a certificate or certificates of real right in respect of exclusive use only in terms of section 25(11)(c). It is only when the developer transfers these exclusive use areas to purchasers that regulation 28(2) kicks in, and in my opinion the original formulation of regulation 28(2) before this amendment was correct in stipulating that the registrar must then make an endorsement on the schedule of conditions referred to in section 11(3)(b) of the act. Consequently, the amendment of regulation 28(2) cannot be supported. Although the eventual transfer of a right of exclusive use in terms of sections 27(3) and

60(3) as opposed to the transfer of a rights under section 25(1) follows a completely different route before transfer of the exclusive use areas is effected, the endorsement on the schedule of conditions referred to section 11(3)(b) is the correct document on which such transfers should be endorsed.

Where a building is damaged or destroyed within the meaning of section 48(1) of the Sectional Titles Act, section 48(3) stipulates that the owners may by unanimous resolution, or the court may by order, authorise a scheme for the rebuilding and reinstatement of whole or part of the building; (and) for the transfer of the interests of owners of sections which have been wholly or partially destroyed, to the other owners. Regulation 31(1) provides that in case of such an event the body corporate must notify the registrar in the form of Form F of Annexure 1. This notification must in terms of the amended regulation 31(2) be accompanied by a sectional plan (instead of a schedule in terms of section 5(3)(g) of the act) which must exclude any reference to any section or part of a section which has been destroyed, and the affected title of the owner of the unit or holder of any real right together with the consent of the holder of any mortgage bond or holder of any real rights for disposal thereof. Section 5(3) stipulates that a draft sectional plan must have annexed to it a schedule specifying the quota of each section in accordance with section 32(1) and (2) and the total of the quotas of all sections shown thereon. In view of the fact that the old scheme has been replaced by a contracted (shrunk) scheme, it is essential that a sectional plan showing all the features of the contracted scheme authorised by a unanimous resolution or an order of court and not only the distribution of the participation quotas must accompany the notification to the registrar. This has been effected by section 7 of the Sectional Titles Amendment Regulations, 2013.

3 *Minor amendments of Annexure 1*

Section 8 of the Sectional Titles Amendment Regulations, 2013 amends Annexure 1 of the Regulations containing the various forms in a few minor respects. Section 8(a) and (d) substitute the certificate in most of the forms by a certificate which now must state the full name and surname (instead of the initials and surname) in block letters. Section 8(b) and (c) amends the footnotes to Form F to indicate which rights under section 25(1)(a), (b) and (c) are reserved, and the footnotes to Form H in some minor respects respectively. The most important amendment to the forms in Annexure 1 is the amendment to Form I by section 8(e). This form has been amended to make provision not only for co-owners of a unit but also for co-holders of a right of exclusive use and the co-holders of a right to extend the scheme in terms of section 25(1) to apply for a certificate of registered sectional title, a certificate of real right to an exclusive use area or a certificate of real right to a right in terms of section 25(1) in respect of a *share* in the unit, right of exclusive use or right in terms of section 25(1).

4 *Amendments of Annexure 8*

The most interesting amendments contained in the Sectional Titles Amendment Regulations 2013 concern the amendments to Annexure 8, which contains the prescribed management rules pertaining to sectional title schemes. The amendments relate to two matters, namely the nomination of persons for election as trustees (rule 7) and the removal of trustees from the office of trustee (rule 13) and the thorny issue of contributions to the administrative fund under section 37(1) and the liability of the body corporate under section 47 of the Sectional Titles Act (rule 31).

The Sectional Titles Amendment Regulations, 2013, now place an embargo on the nomination and election of owners as trustees if they are in arrears with the payment of their levies. In practice, levy defaulters from time to time gained control of the trustees, manipulated decision-making and even managed to block resolutions to institute levy recovery actions against themselves. (See Maree “Latest rule amendments” 2013: April *MCS Courier Newsletter* 1-2.) Therefore trustees who are themselves in arrears or persist in breaching the rules of the scheme are not in a position to take effective action against other defaulters. The trustees should set the example to the other owners in honouring their financial and social commitments to the body corporate (see Sectional Titles Regulations Board Meeting of 4 Sept 2012, Resolution 4.31). Rule 7, which deals with nominations of trustees, has therefore been amended by the addition of a second proviso which stipulates that no person who is in breach of management rule 64(a) and (b) (not rule 64(1) and (2) as it is erroneously referred to in the Amendment Regulations) may be nominated or elected as trustee (s 9(a)). Management rule 64(a) prevents owners who are in arrears with the payment of their levies from voting on ordinary resolutions at a general meeting, whereas rule 64(b) places the same embargo on owners who persist in breaching any *conduct rule* notwithstanding *written* warning by the trustees or managing agent to refrain from breaching such rule. These owners may therefore not be nominated or elected as trustees. Since persons nominated and elected to the board of trustees are always natural persons, it may be presumed that the wording of the new rule is wide enough to disqualify a person who is the representative of a company or other juristic entity which owns a unit from being nominated or elected as trustee if the company or other entity is in arrears with the payment of levies (*cf* Maree 2).

Sectional Titles Amendment Regulations, 2013 section 9(b) seeks to complement the embargo on the nomination and election of trustees who are in arrears with the payment of their levies and persist in breaching the conduct rules of the scheme. Paragraph (g) is added (not *substituted* as worded in section 9(b)) to rule 13, which deals with the removal from office of trustees. This addition now stipulates that a trustee must cease to hold office “if he is in arrears for more than 60 days with any levies and contributions payable by him, in respect of his unit or exclusive use area (if any) and if he fails to bring such arrears up to date within 7 days of being notified in writing to do so”. This will ensure that if any trustee once elected falls in arrears with levy payment, he or she will be removed from the office of trustee. (See also Sectional Titles Regulations Board Meeting of 4 Sept 2012, Resolution 4.32.) The legislature has omitted to provide the same in the event of a breach of conduct rules. Thus, in contrast to the purpose of the new proviso to rule 7, a trustee who persists in the breach of conduct rules will accordingly not automatically cease to hold office as trustee (see also Maree 2).

With regard to the amendment of rule 31 pertaining to the liability of owners to make contributions to the administrative fund in terms of section 37(1)(a) of the act, the Sectional Titles Amendment Regulations, 2013, section 9(c), deletes subrule (4A) of rule 31. Rule 31(4A) was inserted by GN R1264 of 28 September 2008 to make provision for funds at the time between the end of the financial year and the date when the new levies are determined by the trustees after the annual general meeting. This gap arises due to the fact that levies are determined for one year only; no more levies fall due after the end of the financial year. New levies will only be determined and become payable after the next annual general meeting, which leaves a vacuum of about three to four months before the new levies are determined and can be claimed from unit owners. To fill this gap in the financial calendar, rule 31(4A) provided that, after the end of the financial year, owners remain liable for continued payment of the levies as previously determined, until new levies are determined by the trustees within 14 days after the annual general

meeting. In addition, the subrule authorised the trustees to increase these interim levies by not more than 10 per cent, if necessary.

As mentioned, this well-designed provision has been deleted by the Sectional Titles Amendment Regulations, 2013, section 9(c), and replaced by (not *inserted after subrule (4A)* as worded in the Amendment Regulations) a new subrule 31(4B) that allows trustees to raise special levies in respect of all expenses as are mentioned in rule 31(1) and which are not included in rule 31(2). Such levies and contributions may be made payable in one sum or by such instalments and at such time or times as the trustees shall deem fit. Possible reasons for the replacement of rule 31(4A) are the fact that the ability to impose special levies was belatedly given recognition in the act itself by the insertion of section 37(2A) and (2B) in the Sectional Titles Act by the Sectional Titles Amendment Act 11 of 2010 and the consideration that the ten per cent limit imposed for an increase in levies to fill the gap may sometimes prove to be insufficient (see also Maree 3).

The legislature already tried to make subrule (4A) redundant by the insertion of rule 31(2A) by the Sectional Titles Amendment Regulations, 2011 by GN R820 of 28 September 2011. Rule 31(2A) provides that in the event that the financial year-end and the annual general meeting of the body corporate do not coincide the budget shall coincide with the financial year of the scheme. This means that the gap between the financial year-end and the financial year of the scheme is bridged time-wise but not necessarily money-wise. If the money budgeted for the ensuing year does not cover the expenses for the entire financial year of the scheme, this means that the trustees may still make provision for special levies to be collected from owners if the budget has not catered for the entire financial year of the scheme. This is in accordance with the provision in the added subrule (4B) that the “trustees may from time to time, when necessary, make special levies upon the owners or call upon them to make special contribution in respect of all such expense as are mentioned in rule 31(1) above (which are not included in any estimate made in terms of rule 31(2))”. This accords with the definition of “special contribution” in section 37(2B) of the act as meaning “any contribution levied under section 37(1)” (which describes the various contributions that can be levied for the ensuing year) other than contributions which arise from the approval of the budget at an annual general meeting of a body corporate, set to be levied upon the owners during the ensuing financial year.

Now that the issue of special contributions is regulated in the act, it is suggested that the focus should be on the provisions of the act and that rule 31 should be tapered to coincide precisely with the provisions of the act. It is also suggested that “special contribution” should be redefined as any additional *necessary* contribution, which is expressed in the added rule 31(4B) to the administrative fund levied upon owners during the ensuing financial year other than contributions budgeted for the ensuing year at an annual general meeting of the body corporate. (See also Van der Merwe “Third generation sectional titles” 2012 *TSAR* 611 625.) This definition will limit the power of the trustees to levy unbudgeted contributions to circumstances where the body corporate needs additional income to satisfy claims against it and such income could not or cannot have been or be budgeted for at the previous or next general meeting (see also Paddock “New Sectional Title bill published for comment – 26 proposed changes” 2009: 8 *Paddocks Press Newsletter*).

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