RECENT AMENDMENTS TO THE SECTIONAL TITLES REGULATIONS

1 *Introduction*

The Sectional Titles Amendment Regulations, 2015 (*GG* 38923 GN R 548 of 30-06-2015) introduced a few important amendments to the Regulations promulgated by GN R 664 of 8 April 1988 (as corrected by GN R 991 of 27-05-1988) as amended. These amendments concerned the Regulations, Annexure I dealing with the various forms to register certain real rights in terms of the Sectional Titles Act 95 of 1986 and Annexure 8 dealing with the management rules for sectional title schemes. These amendments came into operation one month after publication in the *Gazette* namely on 30 July 2015.

2 *Regulations*

Regulation 13, 16C and 28 were amended.

Regulation 13 deals with sectional title registers as contemplated in section 12(1)(*b*) of the act. These registers are opened by means of a sectional title file as set out in form D in Annexure 1 (reg 13(1)). This regulation was amended in two respects with regard to the documents that must be filed in the sectional title file.

First, sub-regulation 13(4)(*a*) is substituted to increase the number of documents that need not be filed in the sectional title file. It now reads that the documents in terms of section 11(3) of the act must be filed with the exception of certificates of registered sectional title, the owner's copy of the title deed of the land, the bond; *the title deed of any real right registered over the land and the certificates of real rights contemplated by sections 11(3)(fB) and 11(3)(fC).* This means that the only documents to be filed are a copy of the sectional plan, a schedule certified by a conveyancer setting out the servitudes and conditions burdening and benefiting the land and other registrable conditions imposed by the developer in terms of section 11(2) and a certificate by a conveyancer stating which rules are applicable to the scheme. The documents that need not be filed referred to in sections 11(3)(*fB*) and 11(3)(*fC*) are certificates of real right for rights of extension of the scheme reserved by the developer in terms of section 25(1) and certificates of real rights of exclusive use imposed in terms of a condition as contemplated in section 27(1).

Second, sub-regulation 13(4A) is substituted by a sub-regulation that requires that the documents, notices and correspondence referred to in sub-regulation (4)(*a*) and (*c*), as well as any certificates, plans, schedules, rules and other documents relating to the scheme as a whole and which must be filed in a sectional title file, must be endorsed with a deeds registry date endorsement upon the lodgement thereof. The documents referred to in sub-regulation 4(*a*) have been discussed above. The documents referred to in sub-regulation 4(*c*) are correspondence relating to the scheme as a whole. The significance of this substitution is that the reference to the documents, notices and correspondence mentioned in sub-regulation (*b*) was deleted. This means that the copy of any notice to the surveyor-general and the local authority of the registration or cancellation of the registration of a sectional plan or of the reversion of land to the land register need neither be filed in the register any longer nor endorsed with a deeds registry date endorsement on registry thereof.

Regulation 16C deals with the person who signs a preparation certificate contemplated in regulation 16B(1). Regulation 16B(1) provides that a power of

[ISSN 0257 – 7747]

attorney, application or consent required for the performance of an act of registration in a deeds registry, and tendered for registration or filing of record in a deeds registry, shall be prepared by a practising attorney, not necessarily practising in the province in which such deeds registry is situate, notary, conveyancer or other person empowered thereto by any act, who shall make and sign a certificate in the undermentioned form in the upper right hand corner on the first page of the document concerned. Regulation 16C provides that such person accepts responsibility for the correctness of certain facts stated in the deeds or documents concerned or which are relevant in connection with the registration or filing thereof. The amended subparagraph (d)(ii)(*aa*) provides that the person in question accepts responsibility that to the best of his or her knowledge and belief and after due enquiry, including but not limited to the examination of supporting documents, has been made, in the case of a document referred to in regulation 16B(1) the necessary authority has been obtained for the signing of such document in a representative capacity on behalf of a natural person, a company, close corporation, church, association, society, trust, other body of persons or an institution, whether created by statute or otherwise. The omission of a reference to the natural person was a gross oversight, since most sectional title transactions relate to natural persons.

Both sub-regulations (1) and (2) of regulation 28 were amended by the Sectional Title Amendment Regulations, 2015. Previously sub-regulation 28(1) read that the exclusive use areas referred to in sections 5(3)*(f)* and 25(1) of the act shall, where there is more than one area, be numbered and described in separate paragraphs in the certificate of real rights referred to in section 12(1)*(f)* of the act. This has now been amended to read that the exclusive use areas referred to in section 5(3)(*f*) of the act shall, where there is more than one area, be numbered and described in separate paragraphs in the certificate of real rights of exclusive use areas issued under any provision of the act. The reference to section 25(1) is thus omitted and the reference to the certificate of real right under section 12(1)(*f*) is replaced by a reference to the certificate of real rights of exclusive use areas issued under any provision of the act. This means that the eventual issue of certificates with regard to the reservation of an extension of the scheme by the addition of exclusive use rights only in terms of section 25(1) is more appropriately covered by the provision.

Sub-regulation 28(2) deals with the documents which the registrar must endorse under his or her signature simultaneously with the transfer of a right to an exclusive use area referred to in sections 25(1), 27(3) and 60(3) of the act. The sequence of these documents is structured more coherently, namely:

(a) the certificate of real right issued in terms of section 25(2)(*f*), if such transfer is as a result of a reservation to extend a scheme in terms of section 25(1) of the act; or
(b) the schedule of conditions referred to in section 11(3)(*b*), if such transfer is effected in terms of section 27(3) of the act; or
(c) Annexure A if the exclusive use area has been granted under the Sectional Titles Act, 1971.

The registrar is still required to notify the surveyor-general in respect of the endorsing of the said schedule of conditions, or Annexure A, as the case may be.

3 *Annexure 1*

There are in total 10 amendments to the forms contained in Annexure 1 to the regulations. Interestingly, the footnotes of seven of the forms (C, F, J, O, P, Q and

R) state "description of farm" as an alternative to township/suburb/local authority as the place where the land and building or buildings of the sectional title scheme are situated. This means that provision is made for the establishment of sectional title schemes on farms. Curiously, forms G and H already have this alternative in their relevant footnotes. This may suggest that the recognition of sectional title schemes on agricultural land is in the pipeline and that an accommodation with the conflicting provisions of the Subdivision of Agricultural Land Act 70 of 1970, which requires ministerial consent for the subdivision of farms into uneconomic subdivisions, is on the cards.

Form F of Annexure 1 is amended to make provision for the instance where the developer has reserved for him or herself the right to extend the scheme in terms of section 25(1) by the addition of exclusive use rights only. In such a case the registrar must on application issue a certificate of real right in terms of section 12(1)(*e*) that the developer had reserved for him or herself the right to delineate exclusive use areas on or in specific parts of the land and buildings in terms of section 5(3)(*f*) and to confer the right of exclusive use over such areas upon the owners of one or more units in the relevant scheme. See also the amended form R (*infra*), where the right of extension of the scheme vests in the body corporate in terms of section 25(6).

Form G of Annexure 1 is amended to make provision for the issue of a certificate of real right with regard to exclusive use areas in favour of the body corporate where the right to extend the scheme vests in the body corporate in terms of section 25(6). In such a case the body corporate in terms of section 5(3)(*f*) must have delineated certain exclusive use areas on the draft sectional plan and the registrar must certify that the body corporate was the registered holder of the right to the exclusive use areas in question.

Form I of Annexure 1 is amended to make provision for a person who holds two or more rights to exclusive use areas or undivided shares by one title deed to lodge an application under section 27(7) to obtain a separate title deed in respect of one or more of the rights to exclusive use areas held therein. The applicant must furnish particulars of the real right of exclusive use areas and the exclusive use areas to which the certificates must refer.

Form O is amended to delete reference to an application under section 27(1) for the registration of a sectional plan relating to exclusive use areas and for the issue of a certificate of real right to exclusive use as contemplated by section 27(1). Form O deals with the application for the registration of sectional plans of subdivision of sections, consolidation of sections, extensions of sections, extension of a scheme by the addition of sections and/or exclusive use areas and extension of the scheme by the addition of land to the common property in terms of sections 22(1), 23(1), 24(6), 25(9) and 26(5) of the act and for the issue of certificates of registered sectional title in terms of the provisions of sections 22(5), 23(5) and 25(11) in respect of the sections as shown on the relevant sectional plan of extension, subdivision or consolidation. The only certificate of real right in respect of a right of exclusive use that is now issued is the certificate contemplated by section 25(11).

Form R is amended to make provision for the issue of certificates of real rights to exclusive use areas only to the body corporate where the right to extend the scheme vests in the body corporate under section 25(6). In such a case the body corporate is entitled to delineate exclusive use areas on or in specific parts of the land and buildings in terms of section 5(3)(*f*) and to confer the right of exclusive use over such areas upon the owners of units in the scheme.

Form AI is amended to make additional provision for the application by the joint owner of a unit, the joint owner of a right to an exclusive use area or the joint holder

of a right referred to in section 25(1) in terms of section 15B(5) for the issue of a certificate of real right with regard to his or her undivided share in respect of the unit, exclusive use area or the right referred to in terms of section 25(1).

4 *Annexure 8: management rules*

4.1 General

The Sectional Titles Schemes Management Act 8 of 2011 amended the Sectional Titles Act by repealing the management provisions of the Sectional Titles Act 95 of 1986 and substantially re-enacting these provisions in the Sectional Titles Schemes Management Act. This left a leaner Sectional Titles Act containing only registration and survey provisions to be administered by the department of rural development and land reform, the successor of the department of land affairs. The administration of the Sectional Titles Schemes Management Act was simultaneously transferred to the department of human settlements (formerly the department of housing). The Sectional Titles Schemes Management Act promulgated in 2011 has not yet come into operation mainly due to the fact that its administration was linked to the administration of the Community Schemes Ombud Service Act 9 of 2011, which is in the process of being implemented. Once these two 2011 statutes have come into operation the administration of the prescribed management rules of Annexure 8 and the prescribed conduct rules of Annexure 9 will also be transferred to the department of human settlements and monitored by the chief ombud of the community schemes ombud service. Consequently, the present amendments to the management rules of Annexure 8 will perhaps be the last time the department of rural development and land reform will have a hand in amending these rules. (See in general Van der Merwe "Third generation sectional titles" 2012 *TSAR* 611-649.)

The amendments to the prescribed management rules for sectional title schemes are the most interesting amendments contained in the Sectional Titles Amendment Regulations, 2015. These amendments relate to nominations for the election of trustees, the right of sectional owners to attend trustee meetings, the levy of additional levies from owners by the trustees and the responsibility of holders of exclusive use areas to maintain their exclusive use areas.

4.2 Nomination of trustees: management rule 7

The first change concerns the nomination of trustees regulated by prescribed management rule 7. It rectified an error by changing the reference made to non-existent sub-clauses (1) and (2) of rule 64 to sub-clauses (a) and (b) and then added another proviso to the effect that an owner who is in breach of rule 64 may not nominate any person as trustee.

Rule 7 was first amended by the Sectional Titles Amendment Regulations, 2013 (*GG* 36241 R 196 of 14-03-2013), to 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" 2013:4 *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. Rule 7 was therefore 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 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).

The present amendment of 2015 now added another proviso, namely that a person who is in arrears with the payment of his or her levies or remains in breach of the conduct rules despite written warning to comply in terms of rule 64(a) and (b) may not nominate a person for election as a trustee. Consequently, a person in breach of rule 64 may neither be nominated nor appointed as trustee nor nominate another person as trustee.

Similar to the South African position, in Singapore an embargo is placed on the election to the executive owners' council of any trustees who are in arrears with the payment of their contributions or any other moneys owed to the management corporation in respect of their lots. If they are still in arrears on the third day before the election they are not eligible to be members of the council. (See s 53(7)(*a*)-(*c*) of the Singapore Building Maintenance and Strata Management Act 47 of 2004.) However, this act does not go so far as to place an embargo on the person in arrears to nominate a person for the executive council.

4.3 Right of sectional owners to attend trustee meetings: management rule 15

Sub-rule (5) was inserted by GN R 1422 of 31 October 1997 to read as follows: "(5) An owner shall be entitled to attend and speak at any meeting of the trustees, but shall not in his or her capacity as such, be entitled to vote thereat."

This sub-rule is now substituted by regulation 6(b) of the Sectional Titles Amendment Regulations 2015 to read as follows: "(5) An owner shall be entitled to attend, on invitation, any meeting of the trustee(s), but shall not in his or her capacity as such be entitled to vote thereat."

The change is that an owner's fundamental right to attend trustee meetings is removed. An owner may now attend trustee meetings *only on invitation*. Furthermore, even if invited, the owner is no longer allowed to speak at trustee meetings. This brings the South African position more or less in line with the position in New South Wales and Singapore. In New South Wales an owner or company nominee of a corporate unit owner may attend a meeting of the executive committee (trustees) but may address the meeting only if authorised by an ordinary resolution of the executive committee (NSW Strata Schemes Management Act, Sch 3, cl 14). In Singapore an owner is also entitled to attend the meeting of the management council (trustees) but may address the meeting only with the permission of the council (Building Maintenance and Strata Management Act 47 of 2004, Second Schedule, par 5(1) and 5(2)).

In my opinion the legislature has in this instance restricted democratic participation by owners in the day-to-day management of the scheme in the interest of efficiency. The reason why owners have since 1997 been allowed to attend and

speak at trustee meetings was to render the acts and decisions of trustees more transparent and to make it harder for autocratic trustees to side-line owners with genuine grievances and to control sectional title schemes as their fiefdoms. It gave any owner the opportunity to attend trustee meetings, to speak his or her mind, to supply information and to sort out misunderstandings. As all owners are automatically part of the management structure and have a personal and financial interest in the scheme, they should be given the chance to voice their opinions not only at general meetings but also at trustee meetings. However, while being conducive to transparency, the attendance and opportunity of owners to speak at trustee meetings can stifle the efficiency and effectiveness of the meeting if owners for the most part misuse this opportunity to air their grievances. This can be avoided by a strong chairperson who uses the power of his or her office to censure discussion by the owners on topics that are not on the agenda and on topics that are irrelevant. (See Van der Merwe in Van der Merwe and Sonnekus I *Sectional Titles, Share Blocks and Time-sharing – Sectional Titles* (loose leaf updated Service Issue 19 of October 2014) 14-136.)

4.4 Increased levies: management rule 31

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 (*GG* 36241 R 196 of 14-03-2013) deleted sub-rule (4A) of rule 31. Sub-rule 31(4A) was inserted by GN R 1264 of 28 November 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 next annual general meeting. This gap arises due to the fact that levies are determined for one year only and that no more levies fall due after the end of the financial year. New levies will be determined and become payable only 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, sub-rule 31(4A) provided that, after the end of the financial year, owners remain liable for the continued payment of the levies as previously determined, until new levies are determined by the trustees within 14 days after the annual general meeting takes place. In addition, the sub-rule authorised the trustees to increase these interim contributions due by the owners by a maximum of 10 per cent to take account of the anticipated increased liabilities of the body corporate.

Regulation 6(c) of the Sectional Titles Amendment Regulations, 2015, revived the deleted sub-rule 31(4A) by the insertion of sub-rule 31(4Aa) with the following changes to the last part of the deleted rule concerning the amount of the increase. First, the increase by a maximum of 10 per cent was formulated to refer to an increase "by a maximum of 10 per cent excluding capital expenditure". Apart from the fact that the term capital expenditure is not defined in the act or regulations and may refer to capital expenditure on maintenance work, the meaning of an increase "by a maximum of 10 per cent excluding capital expenditure" is also confusing, as it could mean either that no capital expenditure may be included in the increase or that it may be added to the levies over and above the 10 per cent increase. (See also Maree "Latest rule amendments: trustees take note!" 2015:7 *MCS Courier* 2-4.)

Second, in terms of the new sub-rule the increase shall be ratified or changed after the annual general meeting by the trustees once the body corporate has approved or amended the schedule of income and expenditure. This seems to allow no discretion on the part of the trustees to ratify the increase when it is approved by the general

meeting or to amend it in accordance with the amendment adopted by the general meeting (*cf* Maree (2015) 3).

4.5 Maintenance of exclusive use areas: management rule 70

Regulation 6(d) of the Sectional Titles Amendment Regulations, 2015 substituted rule 70(b) for the following rule with the words in italics indicating the substitutions:

> "If an owner fails to maintain adequately *any improvement* on any area of the common property allocated for his or her exclusive use [and enjoyment], and any such failure persists for a period of thirty days after the giving of written notice to repair or to maintain given by the trustees or the managing agent *as the case may be*, [on their behalf,] the body corporate shall be entitled to remedy the owner's failure and to recover *subject to section 37(1)(b)* the reasonable cost of doing so from such owner."

The first comment on this substitution is that the provision covers only the adequate maintenance of *an improvement* of an area of the common property allocated for the holder's exclusive use. This therefore seems to cover only improvements such as a carport erected on an exclusive-use parking bay, a tap installed on a garden exclusive-use area and a wall built to close off an exclusive-use garden area; it does not cover the maintenance of the exclusive-use area as such, for instance the maintenance of the cement floor of a parking bay or the floor of a balcony which serves as an exclusive-use area for two sections on the second floor of a sectional title building. This consequence conflicts with *Body Corporate of the Solidatus Scheme No SS 23/9- v De Waal* 1977 3 All SA 91 (T).

The second comment is that rule 70(b) conflicts with section 44(1)(*c*) of the Sectional Titles Act 95 of 1986, which provides that an owner must repair and maintain his section in a state of good repair and, "*in respect of an exclusive use area, keep it in a clean and neat condition*" (my italics). The holder of an exclusive-use area is therefore obliged to keep his or her exclusive-use area clean and neat, but does not have an obligation to repair and maintain it. Due to the fact that the maintenance obligation is contained in a rule, the provision in the Act must trump the provision in the rule.

The third comment is that the proviso to section 37(1)(*b*) of the act apparently does ascribe a maintenance obligation to the holder of an exclusive-use area. In terms of this proviso the body corporate must require from the holders of exclusive-use areas to make such additional contributions to the administrative fund as is estimated to defray the costs of, among other things, maintenance of such areas. This clearly indicates that if there is no obligation to repair there is at least a financial obligation to compensate the body corporate for the expenditure to defray the cost of maintenance undertaken by the body corporate. Note that section 37(1)(*b*) does not restrict maintenance to improvements to exclusive-use areas but covers every kind of maintenance required.

The only way to solve this conundrum is to amend section 44(1)(*c*) to read that an owner *and the holder of an exclusive-use area* must repair and maintain his or her section *and exclusive-use area respectively* in a state of good repair and, in respect of an exclusive-use area, keep it in a clean and neat condition. This will bring section 44(1)(*c*) in line with section 37(1)(*b*) and rule 70(b). This will mean that the primary obligation to repair and maintain an exclusive-use area will be on the holder. However, in the event that the holder fails to maintain the exclusive use area appropriately, the last part of rule 70(b) will kick in. After due warning by the trustees or the managing agent, the body corporate could do the necessary repairs

in the interest of the harmonious appearance of the scheme and recover reasonable costs from the holder of the exclusive use area. This corresponds with the recent decision in *De la Harpe v Body Corporate of Bella Toscana* (case no 10088/2013 (KZD) (unreported)) in a dispute between the body corporate and the holder of an exclusive-use garden area. The court ordered the holder of the exclusive use area to repair or to demolish a dilapidated wall which formed part of the exclusive-use area and to repair or rebuild the wall in compliance with the National Building Regulations and Building Standards Act 103 of 1977 (par 48).

A final comment concerns the replacement of the phrase "on their behalf" with the phrase "as the case may be". Although it is unclear on whose behalf the trustees or the managing agent gave the notice to the defaulting owner or holder of the exclusive use area in the past, it has generally been accepted that it was on behalf of the body corporate. The effect of the replacement of the phrase "on their behalf" is therefore that the trustees or the managing agent at present could give the notice on his or her own behalf. This is unacceptable as far as the managing agent is concerned, because the latter is not an officer of the body corporate and has no right to represent it in any action other than under a specifically delegated authority. My suggestion is therefore that the reference to the managing agent should be scrapped and the phrase "on their behalf" changed to "on behalf of the body corporate". Consequently, the last part of rule 70 should read as follows:

> "and if any such failure persists for a period of thirty days after the giving of written notice to repair or maintain given by the trustees *on behalf of the body corporate*, the body corporate shall be entitled to remedy the owner's failure and to recover *in terms of section 37(1)(*b*)* the reasonable cost of doing so from such owner."

CG VAN DER MERWE
University of Stellenbosch