

# **A Critical Analysis of the Financial and Social Obligations Imposed on Sectional Owners in Sectional Title Schemes, as well as their Enforcement**

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Promoter: Professor CG Van der Merwe

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## **DECLARATION**

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Juann Booysen, April 2014, Stellenbosch

## SUMMARY

Over the years sectional ownership satisfied the psychological need of many South Africans to acquire home-ownership and it is currently estimated that there are more than 780 000 sectional title units throughout South Africa. The concept of sectional ownership consists of three elements, namely individual ownership of a section (residential or commercial); joint ownership of the common parts of the sectional title scheme and membership of the body corporate which governs the sectional title community. Sectional ownership is therefore a unique statutory institution with its own characteristics.

An imperative of every sectional title scheme is to strive for financial stability, happiness and harmony in an intensified, diverse community where the objects of ownership, the individual units, are physically interdependent. The Sectional Titles Act 95 of 1986, as amended, therefore imposes numerous financial and social obligations on sectional owners. These obligations require each owner to give up a certain degree of freedom that he might otherwise enjoy in separate, privately owned property. Ultimately the success of a sectional title scheme will depend upon the necessary co-operation and support of its members for compliance with these obligations. Since non-compliance can destroy the financial stability and social harmony in a sectional title scheme, effective procedures for the enforcement of these financial and social obligations are essential. Accordingly, effective sanctions are a *sine qua non* for a financially viable and socially successful sectional title scheme.

This thesis provides a critical analysis of the various financial and social obligations that are imposed on sectional owners, as well as the measures available for their enforcement. It will become evident that the sanctions in the South African sectional title legislation for non-compliance with these obligations are conspicuously few and far between. It is generally accepted that the Sectional Titles Act 95 of 1986 does not have sharp enough 'teeth' to deal effectively with the non-compliance of these obligations. Consequently, the thesis will also focus on sanctions that are used in foreign jurisdictions to enforce sectional owners' financial and social obligations, with

the aim to identify sanctions that may be adopted in the South African context to render the enforcement of these obligations more efficient and effective. In conclusion it will be recommended that the only manner in which financial stability and social harmony can be restored in a troubled sectional title scheme is to introduce legislation which allows the body corporate as a last resort to exclude a persistent offender who makes it impossible for the other sectional owners to share the sectional owners' community with him or her temporarily from this community.

## OPSOMMING

Met die verloop van tyd sedert die eerste deeltitelwetgewing in 1971 in Suid Afrika ingevoer is, het deeleiendom die droom van menige Suid-Afrikaners verwesenlik om eiendomsreg van 'n eie woning te verkry. Huidige statistieke dui daarop dat daar meer as 780 000 deeltiteleenhede in Suid Afrika is. Drie elemente word in die begrip 'deeleiendom' saamgevat, naamlik individuele eiendomsreg van 'n deel (residensiëel of kommersiëel), mede-eiendomsreg van die gemeenskaplike gedeeltes van 'n skema en lidmaatskap van 'n regs persoon. Deeleiendom is dus 'n unieke statutêre instelling met sy eie ongewone karaktertrekke.

Die belangrikste doelwit van elke deeltitelskema is om finansiële stabiliteit, geluk en harmonie in 'n geïntensifiseerde, diverse gemeenskap waar individuele eiendomseenhede, fisies interafhanklik is, te bewerkstellig. Die Wet op Deeltitels 95 van 1986, soos gewysig, onderwerp deeleienaars daarom aan verskeie finansiële en sosiale verpligtinge wat meebring dat elke deeleienaar 'n sekere mate van vryheid moet prys gee wat hy andersins sou geniet het as hy eienaar was van 'n huis op 'n private erf. Die uiteindelige sukses van 'n deeltitelskema is grotendeels afhanklik van die samewerking en ondersteuning van sy lede wat betref die nakoming van hierdie verpligtinge. Omdat nie-nakoming die finansiële stabiliteit en sosiale harmonie kan versteur word doeltreffende maatreëls vereis vir die afdwinging van hierdie finansiële en sosiale verpligtinge. 'n Deeltitelskema kan slegs met sukses bestuur word indien op doeltreffende sanksies gesteun kan word.

Hierdie tesis fokus op 'n kritiese analise van die verskeie finansiële en sosiale verpligtinge waaraan deeleienaars onderhewig is, en die maatreëls wat aangewend kan word om hierdie verpligtinge af te dwing. Daar sal aangetoon word dat die sanksies in die Suid-Afrikaanse deeltitelwetgewing vir die nie-nakoming van hierdie verpligtinge gans te min, en boonop uiters ondoeltreffend is. Daarom word algemeen aanvaar dat die 'tande' van die Wet op Deeltitels 95 van 1986 nie skerp genoeg is om die nie-nakoming van hierdie verpligtinge doeltreffend te straf nie. Gevolglik sal die tesis ook fokus op sanksies wat in buitelandse regstelsels aangewend word om die finansiële en sosiale verpligtinge van deeleienaars af te

dwing. Die oogmerk hiermee is om buitelandse sanksies te identifiseer wat met vrug in die Suid-Afrikaanse konteks aangewend kan word ten einde die nie-nakoming van hierdie verpligtinge doeltreffend hok te slaan. Ter afsluiting sal voorgestel word dat finansiële stabiliteit en sosiale harmonie in 'n erg ontwrigte deeltitelskema slegs herstel kan word indien wetgewing aangeneem word wat die regspersoon toelaat om 'n deeleienaar wat ondanks waarskuwings dit vir mede-deeleienaars onmoontlik maak om saam met hom of haar in dieselfde deeleiendomsgemeenskap te leef tydelik van die skema te verwyder.

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# Chapter 1: Introduction

## 1 1 General background

According to the common law principle of *superficies solo cedit (omne quod inaedificatur solo cedit)* a landowner is also the owner of any building erected on it.<sup>1</sup> Therefore, it was not possible for any person to own an individual flat as distinct from the entire building because a building was seen as a unit. Consequently, ownership extended over the building in its entirety.<sup>2</sup> The Sectional Titles Act 66 of 1971 (the old Act), however, introduced an entirely new concept in providing for actual ownership of units in a sectional title scheme with various additional rights and obligations.<sup>3</sup> The Sectional Titles Act 95 of 1986 (the Act) maintained the conceptual framework<sup>4</sup> for sectional titles although registration procedures were streamlined and new mechanisms created to deal with some practical problems encountered with the old Act.<sup>5</sup>

Today the concept of sectional ownership consists of three elements, namely individual ownership of a section (residential or commercial); joint ownership of the common parts of the sectional title scheme; and membership of the body corporate which governs the sectional title community.<sup>6</sup> The current estimation is that there are more than 780 000 sectional title units throughout South Africa.<sup>7</sup> There are a number of economic and social reasons why the demand for sectional title apartments in South African cities has increased steadily over the years.<sup>8</sup> For individuals, small families and those who prefer not to be troubled with the upkeep of

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<sup>1</sup> GJ Pienaar *Sectional Titles and other Fragmented Property Schemes* (2010) 22 and CG Van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 *Sectional Titles* (Service Issue 16 May 2013) 1-3.

<sup>2</sup> Van der Merwe *Sectional Titles* 1-3.

<sup>3</sup> G Paddock *The Sectional Title Handbook* 2ed (1990) vi.

<sup>4</sup> For the conceptual framework of sectional titles see Van der Merwe *Sectional Titles* 1-30(14) – 1-30(16) and Pienaar *Sectional Titles* 58.

<sup>5</sup> For a list of amendments see Van der Merwe *Sectional Titles* 1-30(17) – 1-30(18).

<sup>6</sup> Van der Merwe *Sectional Titles* 2-3; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) 442-443. See also CG Van der Merwe "The Adaptation of the Institution of Apartment Ownership to Civilian Property Law Structures in the Mixed Jurisdictions of South Africa, Sri Lanka and Louisiana" (2008) 19 *Stell LR* 298 311.

<sup>7</sup> Van der Merwe *Sectional Titles* 1-30(12).

<sup>8</sup> To view the increase of the annual statistics that are supplied by the chief registrar see Van der Merwe *Sectional Titles* 1-30(11) – 1-30(12).

large private gardens, sectional title apartments provide the ideal form of accommodation. They are also easily maintained, provide adequate security and are usually conveniently located.<sup>9</sup> Furthermore, apartment ownership encourages efficient building construction and better utilisation of land resources; it satisfies the psychological need of the population for home-ownership; it aims to provide a hedge against inflation by making it possible to purchase an apartment instead of renting it; it realises the sociological goal of a closer social life and additional amenities; it promotes the redevelopment of city centres and contributes to the provision of public housing; and it alleviates the scarcity of residential accommodation by creating an alternative to the traditional options of buying a house or renting an apartment.<sup>10</sup> All of the above mentioned reasons increase the acceptance of living in sectional title apartments and it is highly likely that its popularity will continue to grow in the years to come.

Sectional ownership thus provides residential accommodation and commercial premises to thousands of South Africans today. It is, therefore, important that prospective purchasers and sectional owners have a proper understanding of certain basic concepts involved in sectional title schemes, but it is even more important that they have a thorough knowledge of the rights and especially the obligations pertaining to sectional ownership.<sup>11</sup>

## **1 2 Research problem**

The most important aims of sectional title schemes are to strive for financial stability, happiness and harmony in an intensified, diverse community where the individual units, the objects of ownership, are physically interdependent. Sectional owners, however, use common facilities and they live in close proximity which entails that their ownership needs to be restricted.<sup>12</sup> Therefore, although William Pitt, Earl of Chatham, may have declared that a man's home is his castle, this is not necessarily

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<sup>9</sup> Paddock *Sectional Title Handbook* v.

<sup>10</sup> Van der Merwe *Sectional Titles* 1-10(1) – 1-13. See also CG Van der Merwe, P Mohr & M Blumberg “The Bill of Rights and the Rules of Sectional Title Schemes: A Comparative Perspective” (2000) 11 *Stell LR* 155-156.

<sup>11</sup> Paddock *Sectional Title Handbook* vi.

<sup>12</sup> Van der Merwe *Sectional Titles* 9-32.

true for sectional title schemes.<sup>13</sup> The reason for this is that the imposition of financial and non-financial obligations (in this thesis non-financial obligations will be grouped together under the term 'social obligations') on sectional owners is essential for the efficiency of sectional title schemes.

In terms of the Act a body corporate is required to establish an administrative fund sufficient, in the opinion of the body corporate, to cover its expenses.<sup>14</sup> The sectional owner then has the financial obligation to pay his share of the maintenance and administrative expenses by contributing to the administrative fund, from which the expenses of managing the sectional title scheme, as well as maintaining the common property are met.<sup>15</sup> In this regard the Act makes a distinction between the payment of ordinary levies,<sup>16</sup> special levies,<sup>17</sup> and additional levies.<sup>18</sup> The money collected from these levies is the body corporate's only source of funding.<sup>19</sup>

Bodies corporate do, however, not make financial gains.<sup>20</sup> The contributions received from sectional owners are merely to recover expenses. Repeated failure to contribute to common expenses may, therefore, hamstring timely maintenance and the efficient administration of the sectional title scheme and ultimately wreck the scheme.<sup>21</sup> The proper maintenance, efficient management and ultimately the

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<sup>13</sup> DE Grassmick "Minding the Neighbor's Business: Just how far can Condominium Owners' Associations go in Deciding who can Move into the Building?" (2002) *U. Ill. L. Rev.* 185 185.

<sup>14</sup> S 37(1)(a) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(a)).

<sup>15</sup> S 32(3)(c) of the Sectional Titles Act 95 of 1986 read with s 37(1)(a) and s 44(1)(b); (Sectional Titles Schemes Management Act 8 of 2011 s 11(1)(c) read with s 3(1)(a) and s 13(1)(b)).

<sup>16</sup> S 37(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(2)).

<sup>17</sup> Annexure 8 r 31(4B) and ss 37(2A) and (2B) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(3)).

<sup>18</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)).

<sup>19</sup> The costs of maintenance of the common property rests squarely on the body corporate whereas the costs of maintenance of a section and an exclusive use area rests on the specific owner to which the section belongs or to whom the exclusive use area is allocated. See A Kelley "Maintenance in sectional title schemes" (April 2011) 6-4 *Paddocks Press Newsletter* 1.

<sup>20</sup> Where profit is, however, earned from other income like third party rentals or the running of a laundry business, and this income is above the exemption amount the body corporate will have to pay tax. Taxation is calculated on 28% of interest and income (other than levies) received over and above the exempted amount of R50 000. See s 10(1)(e) of the Income Tax Act 58 of 1962 (as amended).

<sup>21</sup> Van der Merwe *Sectional Titles* 9-4.

success of a sectional title scheme will thus depend on a steady flow of contributions from the sectional owners to the coffers of the body corporate.<sup>22</sup>

Besides the financial obligations that need to be complied with, there are also numerous social obligations that are imposed on sectional owners in terms of the Act, the model management<sup>23</sup> and conduct<sup>24</sup> rules and the common law neighbour law concept of nuisance. For example, he must keep his section in a state of good repair;<sup>25</sup> not use his section or permit it to be used in such a manner as will cause a nuisance to any occupant of any other section;<sup>26</sup> not use his section or allow it to be used for a purpose injurious to the reputation of the building;<sup>27</sup> not make alterations which are likely to impair the stability of the building;<sup>28</sup> not make alterations which are likely to prejudice the harmonious appearance of the building<sup>29</sup> and, not without the written consent of the trustees, keep any animal, reptile, or bird in his section.<sup>30</sup> Furthermore, he must use and enjoy the common property with due consideration of the rights of other occupants;<sup>31</sup> not park or leave any vehicle standing on the common property without the written consent of the trustees;<sup>32</sup> not place or do anything on any part of the common property which in the discretion of the trustees is aesthetically displeasing or undesirable when viewed from the outside;<sup>33</sup> and not deposit or throw any rubbish, including dirt, cigarette butts or food scraps on the common property.<sup>34</sup>

A happy and harmonious sectional title scheme will be one where the members cooperate and comply with the social obligations of a particular scheme. Less severe

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<sup>22</sup> CG Van der Merwe & L Muñis Argüelles “Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme” (2006) 16 *Duke Journal of Comparative and International Law* 125 126.

<sup>23</sup> Annexure 8 of the Sectional Titles Act 95 of 1986.

<sup>24</sup> Annexure 9.

<sup>25</sup> S 44(1)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(c)).

<sup>26</sup> S 44(1)(e) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(e)).

<sup>27</sup> Annexure 8 r 68(1)(i) of the Sectional Titles Act 95 of 1986.

<sup>28</sup> Annexure 8 r 68(1)(iii).

<sup>29</sup> Annexure 8 r 68(1)(iv).

<sup>30</sup> Annexure 9 r 1(1).

<sup>31</sup> S 44(1)(d) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(d)) .

<sup>32</sup> Annexure 9 r 3 of the Sectional Titles Act 95 of 1986.

<sup>33</sup> Annexure 9 r 5.

<sup>34</sup> Annexure 9 r 7.

or unintentional breaches of social obligations are susceptible to gentle reprimand and friendly admonition, but more serious offences and chronic offenders might cause grave disharmony.<sup>35</sup> Therefore, to obtain peace and harmony, the Act, the model management and conduct rules and the common law neighbour law principles impose certain obligations which restrict a sectional owner's use and enjoyment of his section, exclusive use area as well as the common property, and penalise any contraventions. In addition the developer and the body corporate may also amend the model management and conduct rules or enact special rules to cover specific matters pertaining to a particular scheme.<sup>36</sup>

At present many sectional title schemes find themselves in a chaotic financial position. The main reasons for financial instability are, firstly, that some sectional owners find themselves in financial difficulty and therefore are unable to pay their regular monthly levies and, secondly, because of a recent tendency for some sectional owners to refuse to pay levies.<sup>37</sup> Such defaulters fail to recognise the financial obligations of communal living and see the body corporate as an alien body to which no allegiance is owed. Consequently, the financial affairs of these bodies corporate become chaotic which clearly indicates that the margin for allowing arrears in levies is extremely narrow.<sup>38</sup> At the end of the day one wants to avoid a situation where the sectional owners can be held personally liable for the debts of the body corporate.<sup>39</sup>

In South Africa the problem of diminished funding facing bodies corporate has also become part of a larger socio-economic problem. In order to bring home ownership within reach of the emerging middle class, a high percentage of mortgage credit is supplied by financial institutions (mostly banks) knowing that, most often, employers automatically credit mortgage repayments to the account of the mortgage creditor. The owners are, however, not made aware of their financial obligations resulting in the fact that they do not account for it in their financial planning. The unfortunate

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<sup>35</sup> Van der Merwe *Sectional Titles* 9-3.

<sup>36</sup> In terms of ss 35(2)(a) and (b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 10(2)(a) and (b)).

<sup>37</sup> See H Delpont "Sectional Title Unit Owners' Liability for Payment of Body Corporate's Debts" (2005) 26-2 *Obiter* 404 404-405 for more specific reasons why sectional owners do not pay their levies.

<sup>38</sup> Van der Merwe *Sectional Titles* 9-5.

<sup>39</sup> S 47 of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 15)).



result is that, although mortgage repayments are up to date, arrear contributions and charges owed to the body corporate remain unpaid from the outset and the amount of these charges increase from month to month thus creating a spiralling effect. Consequently, bodies corporate struggle to perform their maintenance and administration functions properly. The only way to enable these bodies corporate to perform their functions is thus to depend on the willingness of the non-defaulting sectional owners to contribute more to cover the shortfalls. This financial interdependence can lead to the deterioration of the buildings and eventually slum conditions in the building and surrounding areas, where financial institutions are no longer prepared to grant loans. In the interest of all involved in sectional title schemes it is, therefore, important that bodies corporate act swiftly and decisively against levy defaulters. Sectional owners should also be warned of the consequences of their failure to pay necessary contributions.<sup>40</sup>

Furthermore, despite the numerous social obligations mentioned above sectional title living still triggers aggression and rage in South Africa today. There are reports that vehicles have been scratched or even set alight; a young man shot dead in a disagreement with a neighbour; pets have been poisoned; and gunshots fired.<sup>41</sup> Assaults are also on the increase and people of all ages are abused both emotionally and physically. A more subtle form of harassment is becoming common. For example, to take revenge on an annoying neighbour, stairs are stomped loudly or furniture is moved around during all hours of the day. Moreover, some sectional owners even invite as many of their unruly friends as possible to a private party which goes on till late at night.<sup>42</sup>

From the above, it is evident and somewhat alarming to see that non-compliance with financial and social obligations by sectional owners is a common occurrence in the South African sectional title context. Consequently, due to the fact that non-compliance with these obligations can destroy the financial stability and social harmony of a sectional title development, effective procedures for their enforcement

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<sup>40</sup> See *Body Corporate of Geovy Villa v Sheriff, Pretoria Central Magistrate's Court, and Another* 2003 1 SA 69 (T) paras 6 and 7 and Van der Merwe & Muñis Argüelles (2006) *Duke Journal of Comparative and International Law* 126-127.

<sup>41</sup> M Constas "Sectional Title Rage" (March 2008) 3-3 *Paddocks Press Newsletter* 1 4.

<sup>42</sup> Van der Merwe *Sectional Titles* 9-32(1) – 9-33 and Constas (March 2008) *Paddocks Press Newsletter* 4.

are essential. Therefore, the implementation of effective sanctions is a *sine qua non* for a viable and harmonious sectional title scheme.<sup>43</sup>

### **1 3 Research hypotheses and methodology**

The main research hypothesis is that strict compliance by sectional owners with financial and social obligations is essential for the maintenance of the common property, the preservation of the physical features of the building or buildings, the preservation of the harmonious appearance of the scheme from the outside and the preservation of the social harmony within a sectional title scheme. Ultimately, the smooth governance of sectional title schemes will depend on effective procedures for the enforcement of the financial and social obligations imposed on sectional owners. This thesis will, however, highlight the fact that the sanctions provided for in the Act, the model rules and the common law concept of nuisance are limited and mostly fall short in enforcing these obligations in practice. Therefore, it is generally accepted that the Act does not have teeth that are sharp enough to deal effectively with non-compliance with financial and social obligations in sectional title schemes.<sup>44</sup>

Financial instability and conflict in sectional title schemes can, however, be avoided by giving the Act sharper teeth to enforce sectional owners' financial and social obligations. This can be done by following a simple three step approach. Firstly, the importance of these obligations in the sectional title scheme context must never be underestimated. Secondly, the various financial and social obligations must be properly identified and understood and their weaknesses must be recognised in order to make valuable remarks for its rectification. Finally, there must be efficient and effective procedures for the enforcement of these obligations in order to achieve the financial stability and social harmony envisaged by the imposition of these obligations. I am strongly of the opinion that the measures of enforcement contained in the Act, the model rules and the common law concept of nuisance are not sufficiently robust to achieve the results envisaged by the imposition of these obligations. To rectify this weakness comparative studies will be conducted to suggest alternative sanctions to solve this problem.

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<sup>43</sup> Van der Merwe *Sectional Titles* 9-7.

<sup>44</sup> 9-39.

Legislation that will feature most constantly is the Act. The Act was amended by the Sectional Titles Amendment Act 66 of 1991; the Sectional Titles Amendment Act 7 of 1992; the Sectional Titles Amendment Act 15 of 1993; the Sectional Titles Amendment Act 44 of 1997; the Sectional Titles Amendment Act 29 of 2003; the Sectional Titles Amendment Act 7 of 2005; and lastly the Sectional Titles Amendment Act 11 of 2010. However, over the years complaints were made about the operation and management of sectional title schemes, tardy collection of levies, unfair allocation of levies and unsuitable rules promulgated for schemes. In 2004 the Department of Land Affairs, therefore, appointed consultants with the following remit: to separate the provisions of the Act which pertain to registration and survey matters from those that pertain to governance and administration matters and to propose a mechanism for the resolution of disputes in sectional title schemes. This eventually led to the promulgation of the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA), which separated registration and management matters by repealing the management provisions of the Act and re-enacting these provisions in the STSMA, as well as the Community Schemes Ombud Service Act 9 of 2011 (the CSOSA) which introduced a new dispute resolution mechanism to replace arbitration in terms of the Act.<sup>45</sup> Both these acts will be administered by the Department of Human Settlements, formerly the Department of Housing, and will only come into operation at a date fixed by the President by proclamation in the Government Gazette which will necessarily be after regulations under these acts have been enacted.<sup>46</sup> Even though the latter two acts are not yet in force I will constantly refer to them in order to indicate the most important differences with the Act, as well as to identify what the position in the near future will be.

As mentioned above, this thesis will also be based on comparative studies. The foreign jurisdiction that will feature most frequently is the Australian state of New South Wales. The position in New South Wales is of utmost importance as South Africa has modelled its sectional titles legislation on the New South Wales'

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<sup>45</sup> Annexure 8 r 71 of the Sectional Titles Act 95 of 1986 sets out the procedure to be followed for the statutory arbitration in sectional title schemes.

<sup>46</sup> See in general Van der Merwe *Sectional Titles* 1-44 – 1-45 and CG Van der Merwe "Third Generation Sectional Titles" (2012) 4 *TSAR* 611 611-612 .

Conveyancing (Strata Titles) Act 17 of 1961.<sup>47</sup> It is also important to note that the New South Wales legislator has divided its strata title legislation into two separate acts, with one act dealing with survey and land registration matters while another act focuses on the management of strata schemes (sectional title schemes).<sup>48</sup> The United States of America's Uniform Common Interest Ownership Act of 2008 (the UCIOA) will also feature constantly as an example of modern sophisticated legislation stemming from a first world country. It will be suggested that some salient solutions provided in the UCIOA could be transplanted into the South African legislation. These foreign jurisdictions (and others not mentioned above) will only be referred to when they are relevant to the position in South Africa and when they offer alternative solutions and sanctions that may render the enforcement of financial and social obligations more efficient and effective.

#### **1 4 Chapter overview**

The thesis consists of eight chapters. This introductory chapter gave us a general background of sectional ownership and its practical importance in South Africa. Furthermore, it explained the objectives of the dissertation, the methodology which will be used to achieve the objectives, the reason why comparative studies are undertaken and a brief discussion of the arrangement of the chapters, which will be set out and explained below.

Chapter 2 will focus on the basic concepts that will form the foundation of this thesis.<sup>49</sup> The aim is to give the reader an overview of the most important concepts that will be encountered in the discussion of the financial and social obligations of a sectional owner and their enforcement, in order to avoid a detailed discussion of these concepts in later chapters which will interrupt the flow of the thesis. These concepts include the following: sectional ownership versus land ownership;<sup>50</sup> the

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<sup>47</sup> This Act was repealed and replaced by the New South Wales Strata Titles Act 68 of 1973. The latter Act was renamed the Strata Schemes (Freehold Development) Act 68 of 1973 which, together with the Strata Schemes (Leasehold Development) Act 219 of 1986, deals with development related matters pertaining to schemes in New South Wales. Management and dispute resolution mechanisms in schemes are dealt with in the Strata Schemes Management Act 138 of 1996.

<sup>48</sup> Strata schemes are now regulated in New South Wales by the Strata Schemes (Freehold Development) Act 68 of 1973 and the Strata Schemes Management Act 138 of 1996.

<sup>49</sup> See 2 2 below.

<sup>50</sup> See 2 2 1 below.

threefold legal relationship the purchaser enters into when a unit is transferred to him;<sup>51</sup> a 'unit', 'section', 'common property' and 'exclusive use areas';<sup>52</sup> 'sectional owner';<sup>53</sup> 'participation quota';<sup>54</sup> 'rules';<sup>55</sup> sectional title community;<sup>56</sup> and the levy or contribution owed by sectional owners to the body corporate.<sup>57</sup> In unpacking these concepts, the way each concept fits into the general theme of the thesis will also be explained. As part of this search for underlying principles, the content and purpose of relevant legislation, namely the Local Government: Municipal Property Rates Act 6 of 2004 (the Property Rates Act) and the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) will be explored as well as the impact these acts have, particularly on the financial obligations of sectional owners.<sup>58</sup>

Chapter 3 deals with sectional owners' financial obligations in sectional title schemes. The chapter will start off with a discussion of the contributions to the administrative fund<sup>59</sup> and the mandatory reserve fund in terms of section 3(1)(b) of the STSMA.<sup>60</sup> We have already seen above, at 1 2, that sectional owners are responsible for the payment of different kinds of levies, namely: ordinary levies;<sup>61</sup> special levies;<sup>62</sup> and additional levies.<sup>63</sup> The difference between these kinds of levies will be discussed and analysed<sup>64</sup> before detailing when contributions become payable and who is responsible for the payment of levies when a unit is transferred to a purchaser.<sup>65</sup> It shall also be shown that besides the payment of levies owners are also personally liable for the debts of the body corporate.<sup>66</sup> Lastly, the chapter will endeavour to answer whether aggrieved sectional owners may withhold the

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<sup>51</sup> See 2 2 2 below.

<sup>52</sup> See 2 2 3 below.

<sup>53</sup> See 2 2 4 below.

<sup>54</sup> See 2 2 5 below.

<sup>55</sup> See 2 2 6 below.

<sup>56</sup> See 2 2 7 below.

<sup>57</sup> See 2 2 8 below.

<sup>58</sup> See 2 3 below.

<sup>59</sup> S 37(1)(a) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(a)).

<sup>60</sup> See 3 2 below.

<sup>61</sup> S 37(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(2)).

<sup>62</sup> Annexure 8 r 31(4B) and ss 37(2A) and (2B) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(3)).

<sup>63</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)).

<sup>64</sup> See 3 2 and 3 3 below.

<sup>65</sup> See 3 4 below.

<sup>66</sup> See 3 5 below.

payment of levies<sup>67</sup> and whether they are entitled to a refund of contributions lawfully levied upon them and paid.<sup>68</sup>

The lesser measures for the enforcement of financial obligations will then be the topic of discussion in chapter 4.<sup>69</sup> These measures include the following: levies and special levies are recoverable in court;<sup>70</sup> the defaulting owner is held responsible for all costs of recovery<sup>71</sup> and interest on arrears;<sup>72</sup> suspension of voting rights of defaulting owners;<sup>73</sup> an embargo on nomination and election as trustee;<sup>74</sup> an embargo on the alienation of a unit unless all arrears have been paid;<sup>75</sup> attachment of movables and rental income of the defaulter;<sup>76</sup> emolument attachment orders, garnishee orders and administration orders issued;<sup>77</sup> and sequestration of the defaulter.<sup>78</sup> The chapter will illustrate that some of these measures are moderately successful in forcing solvent defaulters to pay their contributions but that most of them have been proved unsuccessful in practice. Consequently, this chapter will also consider whether the Act should not be strengthened to enforce the financial obligations imposed on sectional owners. For this reason I will make suggestions, partly based on comparative studies.<sup>79</sup>

Chapter 5 will deal with the most severe measure for the enforcement of sectional owners' financial obligations, namely the attachment and sale in execution of sectional title units. One of the crucial questions in this regard is whether the embargo provision in section 15B(3)(a)(i)(aa) of the Act, which restrains the registrar from registering transfer of a unit until the conveyancer produces a clearance certificate, can be construed as a tacit lien, charge or preferent right in favour of the body corporate, effectively ranking the body corporate higher than that of the

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<sup>67</sup> See 3 6 below.

<sup>68</sup> See 3 7 below.

<sup>69</sup> See 4 2 below.

<sup>70</sup> See 4 2 1 below.

<sup>71</sup> See 4 2 2 below.

<sup>72</sup> See 4 2 3 below.

<sup>73</sup> See 4 2 4 below.

<sup>74</sup> See 4 2 5 below.

<sup>75</sup> See 4 2 6 below.

<sup>76</sup> See 4 2 7 below.

<sup>77</sup> See 4 2 8 below.

<sup>78</sup> See 4 2 9 below.

<sup>79</sup> See 4 3 below

mortgagee.<sup>80</sup> The chapter will further illustrate that there are certain obstacles that await the mortgage creditor when it comes to the attachment and sale in execution of sectional title units.<sup>81</sup> In this regard I shall examine the constitutionality of the execution procedure against mortgaged units in terms of section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 and rule 45(1) of the Uniform Rules of Court,<sup>82</sup> as well as the impact of the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) to mortgaged units that are sold in execution.<sup>83</sup> Lastly, the relationship between the clearance certificate under section 15B(3)(b) of the Act, and section 118 of the Systems Act and the Property Rates Act will be examined.<sup>84</sup>

In chapter 6 the focus of the thesis will shift to the social obligations that are imposed on sectional owners with regard to their sections, exclusive use areas and the common property.<sup>85</sup> We shall see that these social obligations are partly based on common law neighbour law principles<sup>86</sup> but that they mostly stem from the provisions of the Act and the prescribed model rules. It shall also be shown that even though the Act forms the basis of a sectional title scheme, it is mainly the management and conduct rules that determine how the sectional owner must behave. Furthermore, we shall see that some flexibility is to be found in the ability to amend the prescribed rules with special rules which place further obligations on a sectional owner's use and enjoyment of his section, exclusive use area and the common property. The chapter will then conclude with the argument that social obligations are essential to preserve the tranquility and harmony of a sectional title scheme in view of the peculiar physical features of the building and the unique community of owners gathered almost permanently within the confines of the scheme.<sup>87</sup>

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<sup>80</sup> See 5 2 below. See also in general CG Van der Merwe "Does the restraint on transfer provision in the Sectional Titles Act accord sufficient preference to the body corporate for outstanding levies" (1996) 59 *THRHR* 367 367-387 ; Van der Merwe *Sectional Titles* 9-11; and Badenhorst *et al The Law of Property* 488.

<sup>81</sup> See 5 3 below.

<sup>82</sup> See 5 3 2 below.

<sup>83</sup> See 5 3 3 below.

<sup>84</sup> See 5 4 below.

<sup>85</sup> See 6 2 and 6 3 below.

<sup>86</sup> See 6 4 below.

<sup>87</sup> See 6 5 below.



Although the saying goes ‘rules are there to be broken’, non-compliance with the various social obligations can destroy the physical features of the building or buildings, the harmonious appearance of the scheme as well as the social harmony of a sectional title scheme. The ability to address non-compliance requires effective measures for enforcing owners’ social obligations.<sup>88</sup> This will be the focus of chapter 7. Firstly, the special sanctions provided for in the model rules of Annexure 8 and 9 will be under discussion.<sup>89</sup> Secondly, the remedies available outside the confines of the Act will be dealt with.<sup>90</sup> Here we shall reflect on the use of interdicts to prevent disturbances in breach of social obligations.<sup>91</sup> We shall also tackle the question as to whether or not it is possible to obtain an eviction order against a sectional owner who persistently contravenes the social obligations of a particular scheme.<sup>92</sup> This section will then conclude with a brief examination of the rarely used remedy to keep the peace in terms of the Criminal Procedure Act 56 of 1955.<sup>93</sup> Thirdly, we shall examine the use of alternative dispute resolution mechanisms available in South Africa to solve disputes arising from non-compliance with social obligations.<sup>94</sup> The alternative dispute resolution mechanisms that will be discussed include negotiation,<sup>95</sup> conciliation,<sup>96</sup> arbitration<sup>97</sup>, mediation<sup>98</sup> and the new and exciting sectional title ombud dispute resolution service which is governed by the CSOSA.<sup>99</sup> From our discussion it will become evident that the sanctions contained in the model rules and remedies outside the confines of the Act provide the body corporate with even less effective sanctions than is the case with the enforcement of the financial obligations. This chapter will therefore also focus on sanctions that are used in foreign jurisdictions to enforce owners’ social obligations, with the aim being to identify alternative sanctions that may be adopted in the South African context to render the enforcement of social obligations more efficient and effective.<sup>100</sup> The comparative study will evaluate the efficiency of various minor sanctions in

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<sup>88</sup> Van der Merwe *Sectional Titles* 9-7.

<sup>89</sup> See 7 2 below.

<sup>90</sup> See 7 3 below.

<sup>91</sup> See 7 3 2 below.

<sup>92</sup> See 7 3 3 below.

<sup>93</sup> See 7 3 4 below.

<sup>94</sup> See 7 4 below.

<sup>95</sup> See 7 4 2 below.

<sup>96</sup> See 7 4 3 below.

<sup>97</sup> See 7 4 4 below.

<sup>98</sup> See 7 4 5 below.

<sup>99</sup> See 7 4 6 below.

<sup>100</sup> See 7 5 below.



legislation and in model or amended by-laws and rules of a particular sectional title scheme<sup>101</sup> and conclude with an analysis of two more drastic remedies based on the principle that the only manner in which harmony can be restored in a troubled sectional title scheme is to exclude a constant offender permanently<sup>102</sup> or temporarily<sup>103</sup> from the scheme.

The concluding chapter, chapter 8, will consist of a critical analysis of the legislation, case law and academic analysis in the legal literature discussed in each of the chapters. The conclusion will, however, mainly focus on the argument that the Act should be given more effective mechanisms of recourse to enforce the financial and social obligations imposed on sectional owners. The main argument will be that the possibility of temporary exclusion, due to its deterrent character, provides the most effective measure for the enforcement of financial and social obligations in sectional title schemes.

## **1 5 Value of research**

The thesis will prove to be novel and original and will constitute a significant contribution to knowledge in this field since it will provide clarity on the financial and social obligations imposed on sectional title owners. Secondly, it will identify problem areas in this sphere of the law and show how important it is for the efficient running of sectional title schemes that these financial and social obligations are understood, and enforced efficiently and effectively. Lastly, this thesis will also identify alternative sanctions that are used in foreign jurisdictions, which may be incorporated in the South African sectional title context, to give the Act greater ability to successfully enforce these obligations. Therefore, I believe that this thesis would not only make a contribution to the academic field of sectional titles, but that it may also provide food for thought for the legislator. The thesis will also provide attorneys and other legal practitioners, managing agents and trustees with valuable information and guidelines to identify and solve sectional title issues pertaining to the enforcement of the financial and social obligations of sectional owners.

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<sup>101</sup> See 7 5 2 below.

<sup>102</sup> See 7 5 3 2 below.

<sup>103</sup> See 7 5 3 3 below.

## **Chapter 2: Basic Concepts and Relevant Legislation**

### **2 1 Introduction**

Any useful discussion of this topic requires a proper understanding of the following basic concepts: sectional ownership versus land ownership; the threefold legal relationship the purchaser enters into when a unit is transferred to him; a 'unit', 'section', 'common property' and 'exclusive use areas'; 'sectional owner'; 'participation quota'; 'rules'; sectional title community; and the levy or contribution owed by sectional owners to the body corporate.

The aim of this chapter is therefore to give an overview of the most important concepts that will be encountered in the discussion of the financial and social obligations of a sectional owner and their enforcement. This will avoid a detailed discussion of these concepts in later chapters which will interrupt the flow of the thesis. In unpacking these concepts, the way each concept fits into the general theme of the thesis will be explained. The examination of underlying principles will include an investigation of the content and purpose of other relevant legislation, namely the Local Government: Municipal Property Rates Act 6 of 2004 (the Property Rates Act) and the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), to show the impact these acts have, particularly on the financial obligations of sectional owners.

### **2 2 Basic concepts**

#### **2 2 1 Sectional ownership versus land ownership**

Sectional ownership differs from traditional land ownership. Land ownership involves a vertical division of land into farms or erven according to a general plan or an ordinary sub divisional diagram, while sectional ownership involves a three-dimensional vertical and horizontal division of the sectional title land and the building into sections and common property according to a sectional plan. Furthermore, the boundaries of erven on ordinary diagrams are defined with reference to beacons and

co-ordinates while boundaries on a sectional plan are defined with reference to parts of buildings, namely: walls; floors; and ceilings.<sup>1</sup> The Sectional Titles Act 95 of 1986 (the Act) does, however, allow for boundaries to be defined in a manner 'prescribed' where they cannot be defined by a physical feature such as a floor, wall or ceiling.<sup>2</sup>

According to the traditional definition of ownership an owner is allowed absolute powers in dealing with his property. An owner's absolute powers are, however, subject to the limitations imposed by public and private law. Therefore, modern ownership does not allow an owner unfettered freedom to use and enjoy his property.<sup>3</sup> Even land ownership is much less absolute than in the past due to restrictions imposed mainly by modern planning and environmental law and the constitutional limitations placed on the ownership of land.<sup>4</sup>

Furthermore, certain peculiar features of sectional ownership merit the imposition not only of stricter social obligations on a sectional owner but also social obligations of a different kind. Put differently, these features justify more intensive restrictions on the powers and entitlements of a sectional owner with regard to his section, exclusive use area and the common property. These peculiar features include the following. Firstly, the object of sectional ownership is title to a part of a destructible building, whereas, the object of land ownership is title to a part of indestructible land. Secondly, the various apartments in a sectional title building are structurally interdependent and not structurally individualised as in the case of freestanding houses on separate plots of land. Thirdly, community life in a sectional title scheme is much more intensified compared to the community life of neighbouring landowners. Lastly, sectional owners form a virtually permanent community which is only terminated on the dissolution of the sectional title scheme.<sup>5</sup> Although this might

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<sup>1</sup> CG Van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 *Sectional Titles* (Service Issue 16 May 2013) 5-3.

<sup>2</sup> S 5(5)(a) of the Sectional Titles Act 95 of 1986.

<sup>3</sup> For a discussion of how sectional ownership changed common law ownership see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) 445-446.

<sup>4</sup> Van der Merwe *Sectional Titles* 8-21.

<sup>5</sup> For the various peculiar features of sectional ownership see Van der Merwe *Sectional Titles* 8-21 and CG Van der Merwe "The Adaptation of the Institution of Apartment Ownership to Civilian Property Law Structures in the Mixed Jurisdictions of South Africa, Sri Lanka and Louisiana" (2008) 19 *Stell LR* 298 307.

imply a special type of ownership it still remains genuine ownership and therefore sectional ownership should be placed on the same footing as the ownership of land.<sup>6</sup> There are two further reasons why sectional ownership should be treated as genuine ownership and not merely as a limited real right. Firstly, when draconian provisions, contained in the rules of a sectional title scheme, are incompatible with genuine ownership of an apartment, the courts should always have the power to invalidate such provisions. Secondly, one of the main reasons for introducing sectional ownership was to satisfy the psychological and social needs of people to have their own homes. If sectional ownership and land ownership are not placed on the same level, this aim will be defeated.<sup>7</sup>

## **2 2 2 Threefold legal relationship**

For a clearer understanding of the rights and obligations of sectional owners who are part of a sectional title community, it is important to explain the threefold legal relationship a sectional owner enters into when he is registered as a sectional owner of a unit in a scheme.<sup>8</sup>

Registration of a unit in the sectional titles register in the name of a particular person means that he becomes owner of the relevant section (residential or commercial), joint owner in undivided co-ownership shares with the other sectional owners of the common parts of the scheme<sup>9</sup> and a member of the body corporate consisting of all the persons in whose names units are registered.<sup>10</sup> All three of the abovementioned elements are inextricably linked in the institution of sectional ownership.

These elements cannot be disposed of separately which means it is impossible to sever and alienate one's share in the common property while retaining ownership of a section and membership of the body corporate.<sup>11</sup> Therefore, these elements can

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<sup>6</sup> Van der Merwe *Sectional Titles* 8-21 - 8-22.

<sup>7</sup> 8-22.

<sup>8</sup> See in general Van der Merwe *Sectional Titles* 2-3; Badenhorst *et al The Law of Property* 442-443; and Van der Merwe (2008) *Stell LR* 311.

<sup>9</sup> S 2(c) of the Sectional Titles Act 95 of 1986.

<sup>10</sup> Ss 36(1) and (2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 2(1)-(3)).

<sup>11</sup> Van der Merwe *Sectional Titles* 2-3.

only be alienated, burdened or otherwise dealt with as an entity.<sup>12</sup> Furthermore, the fact that they are inextricably linked means that these elements naturally have a reciprocal influence on each other.<sup>13</sup>

Individual ownership of a section and joint ownership of the common parts of the premises pertain to the law of property while membership of the body corporate falls under the law of associations. However, we have seen, at 2 2 1, that sectional ownership is a unique statutory institution with its own peculiar characteristics which means that it would inevitably be in conflict with some of the traditional dogmas and principles relating to the law of things<sup>14</sup> and the law of associations.<sup>15</sup>

Various financial and social obligations are placed on sectional owners, not only with regard to their sections but also with regard to the common property. Furthermore, bodies corporate determine the amount of money to be raised yearly<sup>16</sup> for the efficient maintenance and management of the common property. Due to the fact that sectional owners automatically become members of bodies corporate upon registration of their units, they are not only liable to pay their proportionate contribution but are also required to ratify, with or without amendment, the annual financial estimates prepared by the trustees.

### **2 2 3 Unit, section, common property and exclusive use areas**

It is important to explain how the physical parts of the land and buildings in a sectional title scheme are divided into units, sections, common property and exclusive use areas. The distinction between sections and common property is important because a sectional owner is in general allowed more entitlements with regard to his section than with regard to the common property. Again, a sectional

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<sup>12</sup> Ss 16(3) and 36(2) of the Sectional Titles Act 95 of 1986.

<sup>13</sup> CG Van der Merwe “*Apartment Ownership*” in *International Encyclopaedia of Comparative Law* Vol VI “*Property and Trust*” (1994) s 5-48 and Van der Merwe *Sectional Titles* 2-3.

<sup>14</sup> For a detailed discussion of the main differences between traditional co-ownership and the community of the common parts of the sectional title scheme see Van der Merwe (2008) *Stell LR* 309-310. See also in general Van der Merwe *Sectional Titles* 2-3 – 2-4 and Van der Merwe *Apartment Ownership* s 5-49.

<sup>15</sup> For an explanation of the differences between membership of the body corporate and ordinary voluntary associations see Van der Merwe (2008) *Stell LR* 312. See also in general Van der Merwe *Sectional Titles* 2-3 – 2-4 and Van der Merwe *Apartment Ownership* s 5-49.

<sup>16</sup> S 37(1)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(e)).

owner is responsible for the repair and maintenance of his section,<sup>17</sup> while all the owners have to contribute to the administrative fund to repair and maintain the common property in a good condition.<sup>18</sup> The distinction between common property and exclusive use areas is also important for our purpose due to the fact that although exclusive use areas are considered part of the common property, the holders of exclusive use areas are responsible for the maintenance of the areas under their control<sup>19</sup> and to keep these areas in a clean and neat condition.<sup>20</sup>

The most important entity created by the Act is called a unit.<sup>21</sup> From the outset it is important to note that a unit should not be confused with a section.<sup>22</sup> A unit is a composite entity consisting of a section together with its undivided share in the common property, apportioned in accordance with the participation quota of the section.<sup>23</sup> In addition to the creation of this new kind of composite entity, the Act has also created a new kind of composite ownership consisting of the ownership of a section combined with a co-ownership share in the common property.<sup>24</sup> If one, therefore, uses the expression ‘the owner of a section’ one must remember that this must be combined with the co-ownership share in the common property to indicate the composite kind of ownership with which the unit is owned.<sup>25</sup>

As mentioned above, at 2 2 2, the component parts of a unit are indivisible.<sup>26</sup> This entails that legal transactions encompass the entire unit and, therefore, separate transactions cannot normally be concluded in respect of the section and its undivided share in the common property.<sup>27</sup> The two components may not, for example, be sold

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<sup>17</sup> S 44(1)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(c)).

<sup>18</sup> S 37(1)(a) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(a)).

<sup>19</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)).

<sup>20</sup> S 44(1)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(c)).

<sup>21</sup> CG Van der Merwe “The Sectional Titles Act in the light of the Uniform Condominium Act” (1987) 20 *CILSA* 1 4.

<sup>22</sup> T Maree *Sectional Titles on Tap* Volume 1 2ed (2006) 2.3.

<sup>23</sup> S 1(1) of the Sectional Titles Act 95 of 1986 sv “unit”.

<sup>24</sup> Van der Merwe *Sectional Titles* 1-30(14).

<sup>25</sup> G Paddock *Sectional Title Survival Manual* 6ed (2008) 1-2 – 1-3.

<sup>26</sup> Van der Merwe *Sectional Titles* 3-3.

<sup>27</sup> S 16(3) of the Sectional Titles Act 95 of 1986.

or mortgaged separately<sup>28</sup> and the insured value of a section is deemed to cover its share in the common property.<sup>29</sup>

Furthermore, the Act treats a unit in the same way it does a parcel of 'land'<sup>30</sup> and no longer as 'land and urban immovable property' as was the situation under the Sectional Titles Act 66 of 1971 (the old Act). Units are now deemed to be land and, therefore, ownership of a unit can be registered in a deeds registry; which means that the Deeds Registries Act 47 of 1937 and regulations now apply *mutatis mutandis inter alia* with regard to the filing and registering of documents, save as otherwise provided in the Act, any other law or if the context indicates otherwise.<sup>31</sup> Furthermore, when it comes to the sale of units, including instalments sales, the Alienation of Land Act 68 of 1981 will also be applicable.<sup>32</sup>

A section is the separate and private property of a registered sectional owner in a sectional title scheme.<sup>33</sup> The Act simply and formalistically defines a section as 'a section shown as such on a sectional plan'.<sup>34</sup> This means that each section in a sectional title scheme is the section as indicated on the sectional plan with reference to its floors, walls and ceilings and distinguished by a separate number.<sup>35</sup> The sectional plan must also show the floor area of each section to the median line of its boundary walls.<sup>36</sup> Moreover, it is expressly provided that the common boundary between any two sections or between a section and the common property is the median line of the dividing floors, walls or ceilings as the case may be.<sup>37</sup> Therefore, a section can be defined as a cubic entity which is formed by the walls, floors and ceilings of a residential section or non-residential unit, with the median lines of the

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<sup>28</sup> Maree *Sectional Titles on Tap* 2.4.

<sup>29</sup> S 16(4) of the Sectional Titles Act 95 of 1986.

<sup>30</sup> S 3(4).

<sup>31</sup> S 3(1).

<sup>32</sup> See s 1 of the Alienation of Land Act 68 of 1981. See also Van der Merwe *Sectional Titles* 3-4.

<sup>33</sup> Maree *Sectional Titles on Tap* 2.1.

<sup>34</sup> S 1(1) of the Sectional Titles Act 95 of 1986 sv "section".

<sup>35</sup> S 5(3)(d).

<sup>36</sup> S 5(3)(e).

<sup>37</sup> S 5(4).

floors and ceilings forming the horizontal and the walls forming the vertical boundaries of the section.<sup>38</sup>

Apart from these main components sections can include an adjoining stoep, porch, balcony, atrium or projection if shown as part of the section on the sectional plan.<sup>39</sup> Furthermore, a section can also consist of parts of the building or buildings which are not contiguous to the main components of a section.<sup>40</sup> Examples of such non-contiguous parts of the building or buildings may include rooms such as laundries, storerooms, domestic aid's quarters or garages which are not in close proximity to the main component.<sup>41</sup> The Act, however, requires that these parts must be accorded the same number as the sections to which they belong.<sup>42</sup> The aim of this requirement is to achieve clarity with regard to the exact boundaries of a particular unit and its constituent parts.<sup>43</sup>

It is important to note that even though a section is the exclusive and private property of the registered sectional owner there are still limitations that apply to this ownership. Furthermore, the limitations that are placed on private ownership in terms of neighbour law apply more rigorously when it comes to sectional title property. This is not only because of the close proximity in which sectional owners live, but also because the conduct of a sectional owner is subject to the provisions of the Act and the rules of the scheme.<sup>44</sup>

The floor area of a residential section is used for calculating the participation quotas of sectional owners, which then again determines the levies payable by them.<sup>45</sup> There are also various social obligations that are placed on sectional owners with regard to their sections.<sup>46</sup> These social obligations are set out in the common law doctrine of nuisance, the Act and the prescribed model rules.

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<sup>38</sup> CG Van der Merwe & M Habdas "Polish Apartment Ownership Compared with South African Sectional Titles" (2006) 17 *Stell LR* 165 170.

<sup>39</sup> S 5(5)(b) of the Sectional Titles Act 95 of 1986.

<sup>40</sup> S 5(6).

<sup>41</sup> Van der Merwe *Sectional Titles* 3-10(2). See also Van der Merwe *Apartment Ownership* s 5-120.

<sup>42</sup> S 5(6) and reg 5(1)(k)(iii) of the Sectional Titles Act 95 of 1986.

<sup>43</sup> Van der Merwe & Habdas (2006) *Stell LR* 170.

<sup>44</sup> Maree *Sectional Titles on Tap* 2.2.

<sup>45</sup> For the different kinds of levies see 3 2 and 3 3 below.

<sup>46</sup> See 6 2 below.



Common property can be defined either inclusively or exclusively. An inclusive definition enumerates the corporeal parts of the scheme while an exclusive definition includes all parts of the scheme except those physical parts which form part of a section.<sup>47</sup>

The Act follows the exclusive definition by providing that the term common property comprises the land included in the scheme; the physical parts of the building that do not form part of a section; and the land referred to in section 26.<sup>48</sup>

All land included in the scheme is part of the common property. Thus the soil underneath the building, the land that still needs to be developed and the air space around and above the building would be part of the common property.<sup>49</sup> Furthermore, all improvements on the land, excluding sections, but including exclusive use areas are also classified as common property.<sup>50</sup> More than one piece of land may be included in a scheme, and, in the case of two or more pieces of land, the different pieces can be non-contiguous provided that the building or buildings to be divided into sections must be situated on the same piece of land, or, in the case of more than one piece of land, such pieces must be contiguous and notarially tied in the applicable deeds registry.<sup>51</sup>

Common property also consists of such parts of the building or buildings as are not included in a section. These parts normally comprise of the outer shell of sectionalised buildings including roofs and foundations; all means of access to sections such as entrances, lifts, stairways and passages; installations for common services; and separate buildings if shown as common property on the sectional plan.<sup>52</sup>

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<sup>47</sup> Van der Merwe *Sectional Titles* 3-11.

<sup>48</sup> S 1(1) of the Sectional Titles Act 95 of 1986 sv “common property”.

<sup>49</sup> Van der Merwe *Sectional Titles* 3-11 – 3-12.

<sup>50</sup> Maree *Sectional Titles on Tap* 2.4. Examples of these improvements can include courtyards, plants, parking areas, gardens, lawns, drying yards and special recreational facilities such as swimming pools, tennis courts and children’s playground. See in general Van der Merwe *Sectional Titles* 3-12.

<sup>51</sup> S 4(2) of the Sectional Titles Act 95 of 1986.

<sup>52</sup> CG 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* 134 144.

Lastly, the Act states that land referred to in section 26 is also part of the common property. This section deals with the extension of schemes by the addition of land to the common property, initially to provide amenities and facilities to the members of the scheme but since 1997<sup>53</sup> also for the erection of sectionalised buildings by the body corporate.<sup>54</sup> This section creates an anomaly in land registration practice due to the fact that the additional land is acquired by the body corporate with the written consent of all the sectional owners, but is then registered in the name of the body corporate. This is only for registration purposes as the additional land is still deemed to be owned by the owners in undivided shares proportionate to their participation quotas.<sup>55</sup>

Common property can, thus, simply be defined as all the land on which the building or buildings are situated, together with such parts of the building or buildings which are not included in a section.<sup>56</sup> Consequently, common property consists of the parts of a sectional title scheme that cannot be exclusively owned by one person individually. This requires common property to be jointly co-owned in undivided abstract shares by all the owners of sections in a scheme.<sup>57</sup>

We shall see that apart from the financial and social obligations imposed on sectional owners with regard to their sections, the Act and the prescribed model rules, as supplemented, also impose financial and social obligations<sup>58</sup> on sectional owners with regard to the common property in the scheme.

The Act defines an exclusive use area as a part or parts of the common property destined for the exclusive use by the owner or owners of one or more than one section.<sup>59</sup> Although the Act allows for exclusive use areas to be allocated to one or more owners, in South African practice they are most frequently only allocated to one owner. Exclusive use areas are usually utilised to provide some or all the

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<sup>53</sup> See s 19(a) of the Sectional Titles Amendment Act 44 of 1997.

<sup>54</sup> Van der Merwe *Sectional Titles* 3-13.

<sup>55</sup> Ss 26(1) and (2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 5(1)(d) and 5(2)). Furthermore, see GJ Pienaar *Sectional Titles and other Fragmented Property Schemes* (2010) 70-72 for criticism of this anomaly.

<sup>56</sup> S 1(1) of the Sectional Titles Act 95 of 1986 sv “common property”.

<sup>57</sup> Paddock *Sectional Title Survival Manual* 1-2.

<sup>58</sup> See 6 3 below.

<sup>59</sup> S 1(1) of the Sectional Titles Act 95 of 1986 sv “exclusive use areas”.

sectional owners with exclusive parking or garden areas, which are carved out of the common property of the scheme.<sup>60</sup> These areas are indicated on the block plan or the relevant floor plans of the sectional plan depending on whether they are situated on the land or in a part of a building which forms part of the common property.<sup>61</sup>

The holders of these exclusive use rights can thus freely use areas of the common property to the exclusion of all other owners. But this does not, however, mean that the body corporate is deprived of its control over the common property where exclusive use has been created. The administration and control of exclusive use areas is one of the most intricate spheres of body corporate management.<sup>62</sup>

Firstly, so-called registered exclusive use areas can be created as independent real rights by describing it as such in the sectional plan. Secondly, so-called rule-based exclusive use areas can be created as personal rights by including it in the rules of the scheme.<sup>63</sup> The uncertainty as to whether both the management and conduct rules could be utilised to create rule-based exclusive use areas was clarified by section 10(7) of the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA) that stated either the management or the conduct rules may be used for this purpose. Besides the latter examples of exclusive use areas there are also so called 'historic' exclusive use areas created contractually or by an amendment of the rules under the old Act.<sup>64</sup> These are the only ways in which exclusive use areas can be created; they cannot be established informally.<sup>65</sup>

As independent real rights, registered exclusive use areas can either be reserved as such by the developer on registration of the sectional plan or even thereafter but prior to the establishment of the body corporate, and then transferred by unilateral

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<sup>60</sup> Van der Merwe *Sectional Titles* 3-13.

<sup>61</sup> Regs 5(2)(b)(vi) and 5(2)(c)(viii) of the Sectional Titles Act 95 of 1986.

<sup>62</sup> H 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) 8 *Stell LR* 324 325.

<sup>63</sup> Ss 27 and 27A of the Sectional Titles Act 95 of 1986.

<sup>64</sup> The validity of 'historic' exclusive use areas are recognised by ss 60(4) and 60A of the Sectional Titles Act 95 of 1986. Ss 60(3) and 60A(3) then provides a mechanism by which 'historic' exclusive use rights may be converted to independent real rights.

<sup>65</sup> Maree *Sectional Titles on Tap* 2.5.

cession to some or all individual owners,<sup>66</sup> or it can be created by unanimous resolution of the body corporate and allocated to some or all the sectional owners.<sup>67</sup> The sectional plan must clearly indicate the purpose for which the exclusive use areas would be used<sup>68</sup> and these areas must be numbered in a unique way.<sup>69</sup> Exclusive use areas may also be transferred from one owner to another owner in the scheme, but not to outsiders.<sup>70</sup>

For the purpose of this thesis it is important to know who the holders of the rights of exclusive use areas are and to which physical areas these rights pertain, for these holders are obliged to bear the expenses for the maintenance<sup>71</sup> and tidiness of these areas.<sup>72</sup> The responsibility for these expenses thus forms a part of the financial obligations of the particular sectional owners concerned. Besides these financial obligations, the Act and the rules of a sectional title scheme also impose various social obligations on sectional owners with regard to these exclusive use areas.<sup>73</sup>

## 2 2 4 Sectional owner

The focus of the thesis is the enforcement of the financial<sup>74</sup> and social<sup>75</sup> obligations of sectional owners. Therefore, it is of utmost importance to know who can be regarded as a sectional owner in a sectional title scheme to establish who has financial and social duties to comply with.

In terms of the Act the definition of owner in relation to immovable property (the unit) includes the following:<sup>76</sup> the person registered as owner of a unit; the person registered as holder of a unit; the trustee in an insolvent estate; the liquidator of a

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<sup>66</sup> Ss 27 and 27(1A) of the Sectional Titles Act 95 of 1986.

<sup>67</sup> Ss 27(2) and (3).

<sup>68</sup> S 27(1)(a).

<sup>69</sup> Reg 5(1)(k)(v).

<sup>70</sup> S 27(4).

<sup>71</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)). See also in general Mostert (1997) *Stell LR* 338-339.

<sup>72</sup> S 44(1)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(c)).

<sup>73</sup> See 6 2 below.

<sup>74</sup> See chapters 4 and 5 below.

<sup>75</sup> See chapter 7 below.

<sup>76</sup> S 1(1) of the Sectional Titles Act 95 of 1986 sv “owner” para (a).

company or close corporation which owns a unit; the executor of an owner who has died; and the legal representative of an owner who is a minor, of unsound mind or is otherwise under a disability.

From the outset it is important to note that trustees, liquidators, executors or legal representatives are only considered to be owners in so far as they are acting within the scope of their authority.<sup>77</sup>

In terms of the above enumeration, the first group of owners consists of persons that are registered as owners of units. It does not matter whether such person is a natural person, juristic person or even the state. Furthermore, this means that a person, who has acquired a unit by prescription or an expropriating authority which has expropriated a unit, would have to register the unit in their names to qualify as owner.<sup>78</sup>

The second group consists of persons registered as holders, and not owners, of units. Persons that would likely qualify as registered holders of units would include holders of a registered 99-year leasehold, a registered lease or a usufruct over a unit.<sup>79</sup> It is, however, important to note that these holders would only be seen as owners for specified purposes. Despite becoming members of the body corporate with the same rights and obligations with regard to their sections and the common property as any other sectional owner, they do not become co-owners of the land and building when the building is deemed to be destroyed in terms of section 48 of the Act. Furthermore, these holders are not entitled to sell the unit.<sup>80</sup>

Groups three to six consist of a variety of persons namely: trustees, liquidators, executors and legal representatives. None of these persons are actually owners of units since they only administer the property on behalf of an insolvent estate (trustees), a liquidated company or close corporation (liquidators), or on the behalf of a deceased (executors), minor or disabled owner (legal representatives).<sup>81</sup> They are

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<sup>77</sup> S 1(1) sv “owner” para (a).

<sup>78</sup> Van der Merwe *Sectional Titles* 3-26.

<sup>79</sup> 3-26 - 3-26(1).

<sup>80</sup> 3-26(1).

<sup>81</sup> 3-26(2).

only deemed to be owners because the actual owners are incapable of performing the functions expected from sectional owners.

The second part of the definition<sup>82</sup> aims to clarify the position of spouses married in community of property who own units in a sectional title scheme. With the abolition of the marital powers of the husband, as from 1 December 1993, the provisions of Chapter III of the Matrimonial Property Act 88 of 1984 became applicable to all marriages in community of property. This entails that all spouses who are married in community of property now have equal powers to enter into transactions regarding their units. Therefore, the Sectional Titles Amendment Act 29 of 2003 amends the definition of owner to refer to 'either one or both spouses'.<sup>83</sup> This applies whether the unit is registered in the names of both spouses in a marriage in community of property or registered in the name of only one spouse and forming part of the joint estate of both spouses in a marriage in community of property.<sup>84</sup>

The STSMA made the definition of owner more readable by defining an owner as the person in whose name the unit is registered at a deeds registry under the Act or in whom ownership is vested by statute, including the trustee in an insolvent estate, the liquidator of a company or close corporation which is an owner, the executor of an owner who has died and the representative of an owner who is a minor or of unsound mind.<sup>85</sup> The definition is then made subject to section 1(2) of the STSMA which includes under the definition of owner the holder of a registered lease for 99 years or longer for the duration of the lease and if the unit is registered in the names of both spouses in a marriage in community of property, or in the name of only one spouse and forms part of a joint estate of both spouses in a marriage in community of property, either one or both spouses.

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<sup>82</sup> S 1(1) of the Sectional Titles Act 95 of 1986 sv "owner" para (b).

<sup>83</sup> S 1(1) of the Sectional Titles Act 95 of 1986 sv "owner" paras (b)(i) and (ii). For a detailed discussion of the position of spouses after the abolition of the marital powers of the husband see CG Van der Merwe & CS Human "Eienaar in die 1992 Wysigingswet op Deeltitels met Spesiale Verwysing na Gades Getroud in Gemeenskap van Goed" (1993) 4 *Stell LR* 311 311-324. See also in general Van der Merwe *Sectional Titles* 3-26(2) - 3-27.

<sup>84</sup> Van der Merwe *Sectional Titles* 3-26(2) - 3-27.

<sup>85</sup> S 1(1) of the Sectional Titles Schemes Management Act 8 of 2011 sv "owner".

The definition under the STSMA differs from the definition in terms of the Act since the Act includes under owner not only the person registered as owner but also the person registered as holder which could include not only holders of long leases, as in terms of the STSMA, but also usufructuaries, usufructuaries and holders of a right of habitation.<sup>86</sup>

## 2 2 5 Participation quota

It was shown, at 2 2 2, that sectional ownership is of a threefold legal nature since it links ownership of a section with common ownership of the common property and with membership of the body corporate. The importance of the participation quota lies in the fact that participation in the latter two aspects is determined by the quota allotted to each section. Therefore, the participation quota is the numerical quantification of an owner's co-ownership share in the common property as well as his say in the management of the sectional title scheme. It also provides the numerical base for determining his financial obligations regarding administrative expenses in the maintenance and administration of the common property.<sup>87</sup>

An equitable formula for the determination of the participation quota is thus a prerequisite for the success of a sectional title scheme because it plays a role in sensitive issues, such as determining the sharing of common expenses. The participation quota allotted to each section thus has the potential of becoming the main source of conflict between sectional owners and of ultimately wrecking sectional title schemes.<sup>88</sup>

In terms of the Act the participation quota determines the following matters:<sup>89</sup> the value of the vote of a unit owner in a case where the vote is to be reckoned in value;<sup>90</sup> the unit owner's undivided share in the common property;<sup>91</sup> and the unit

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<sup>86</sup> CG Van der Merwe "Third Generation Sectional Titles" (2012) 4 *TSAR* 611 620-621.

<sup>87</sup> Van der Merwe *Sectional Titles* 4-3.

<sup>88</sup> 4-3.

<sup>89</sup> S 32(3) of the Sectional Titles Act 95 of 1986, (Sectional Titles Schemes Management Act 8 of 2011 s 11(1)).

<sup>90</sup> S 32(3)(a) of the Sectional Titles Act 95 of 1986, (Sectional Titles Schemes Management Act 8 of 2011 s 11(1)(a)).

<sup>91</sup> S 32(3)(b) of the Sectional Titles Act 95 of 1986, (Sectional Titles Schemes Management Act 8 of 2011 s 11(1)(b)).



owner's proportional contribution to common expenses<sup>92</sup> as well as his proportional liability<sup>93</sup> for the debts of the body corporate.<sup>94</sup>

As mentioned above, two of the functions of the participation quota are to determine<sup>95</sup> the sectional owner's proportional contribution to common expenses<sup>96</sup> and his proportional liability for the debts of the body corporate.<sup>97</sup> In practice this is also the most significant function of the participation quota since an existing or future sectional owner will be particularly interested in his estimated contribution to the common funds established for the maintenance and repair of the common property and for the control and administration of the scheme.<sup>98</sup>

The old Act stated that a sectional owner's relative contribution to common expenses would be calculated on the basis of the participation quota allotted to his section. This meant that all relative contributions to every type of expense were directly related to the relative floor area of a section, which was the only formula employed by the old Act.<sup>99</sup> The result was then expressed as a fraction of one correct to four decimal places.<sup>100</sup> However, this basis was too rigid and therefore the Act adopted more flexible criterion by drawing a distinction between residential and non-residential schemes.<sup>101</sup>

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<sup>92</sup> In terms of s 37(1)(a) of the Sectional Titles Act 95 of 1986, (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(a)).

<sup>93</sup> In terms of s 47(1) of the Sectional Titles Act 95 of 1986, (Sectional Titles Schemes Management Act 8 of 2011 s 15).

<sup>94</sup> S 32(3)(c) of the Sectional Titles Act 95 of 1986, (Sectional Titles Schemes Management Act 8 of 2011 s 11(1)(c)).

<sup>95</sup> S 32(3)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 11(1)(c)). See in general M Uys *Voorstelle ter Verbetering van die steeds Onbevredigende Posisie van Sakedeelleienaars onder die Wet op Deeltitels, 1986* LLM Thesis University of Stellenbosch (1990) 25-28.

<sup>96</sup> S 37(1)(a) and reg 4(i) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(a)(i)-(iv)).

<sup>97</sup> S 47 of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 15). See 3 5 below.

<sup>98</sup> In terms of s 37(1) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)). See also Annexure 8 r 31(1) of the Sectional Titles Act 95 of 1986 and Van der Merwe *Sectional Titles* 4-10.

<sup>99</sup> CG Van der Merwe "The Allocation of Quotas in a Sectional Title Scheme" (1987) 104 *SALJ* 70 81.

<sup>100</sup> An example of such a calculation can be seen in Paddock *Sectional Title Survival Manual* 7-1.

<sup>101</sup> See in General CL Van Schalkwyk & CG Van der Merwe "A critical analysis of the role of the developer in sectional title developments" (2008) 2 *TSAR* 222 226-228; see also L Chen *The Making of Chinese Condominium Law* (2010) 57.



For residential schemes, as defined in any applicable operative town planning scheme, the Act adopts the size of the floor area of a section as the basis for calculating a sectional owner's participation quota. Therefore, in terms of the Act the quota, for calculating a sectional owner's contribution to the common expenses, is a decimal fraction correct to four places, which is arrived at by dividing the floor area correct to the nearest square meter of the particular section by the aggregate floor area of all the sections in the scheme.<sup>102</sup> In calculating the floor area of a section all the parts of the section must be taken into account. For example, adjoining balconies and non-contiguous garages must also be taken into account when the floor area of a section is calculated.<sup>103</sup>

The formula of relative floor area is, however, too rigid for calculating a sectional owner's contribution towards the levies in schemes that are not used solely for residential purposes. Maree explains the latter problem as follows:

“In complex schemes it is often evident that certain owners, or classes of owners, will enjoy less benefit from certain amenities or parts of the common property than others. Owners of commercial sections probably won't use the swimming pool, parking bays, or other facilities situated in the residential portion of the scheme. Conversely, residential owners derive little benefit from expenses incurred to maintain shop fronts, awnings, plazas, toilet facilities and other features of a shopping area within a development.”<sup>104</sup>

Consequently, the Act wisely left the determination of the participation quota and thus the levies for non-residential sections to the discretion of the developer.<sup>105</sup> The developer is not bound by relative floor area but can take other factors such as relative value, location and composition, designated use, interior and exterior design and proximity to facilities of a section into account in determining the participation quota of a particular section in a percentage expressed to four decimals.<sup>106</sup> The developer is thus supposed to take the so-called 'par value' of the section into

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<sup>102</sup> S 1(1) of the Sectional Titles Act 95 of 1986 sv “participation quota” read with s 32(1).

<sup>103</sup> Van der Merwe *Sectional Titles* 4-5.

<sup>104</sup> T Maree “Differentiated Levy Structures and Dynamic Levy Adjustments during the Development Stage” (January 2005) 15 *MCS Courier Newsletter* 10 11.

<sup>105</sup> S 32(2) of the Sectional Titles Act 95 of 1986.

<sup>106</sup> See Van der Merwe (1999) *Singapore Journal of International and Comparative Law* 148.

account which aims at an equitable allocation based on similar considerations.<sup>107</sup> Unfortunately it is left to the sole discretion of the developer and his legal advisers to decide what role each of these factors should play and ultimately determine the participation quota of each non-residential section. It would have been wiser to prescribe a definite formula by which these quotas should be determined and to have an independent professional appointed to consider whether the developer's allotment of quotas is equitable.<sup>108</sup> Maree also questions whether developers know what they are doing when they establish their levy dispensations.<sup>109</sup>

In the case of mixed-use schemes, being partly residential and partly non-residential, the developer must indicate the total percentage of quotas allotted to residential sections and this quota must then be divided amongst those sections in accordance with the floor area method.<sup>110</sup> If the unit allocation is for example 40% residential and 60% non-residential, the quota for each individual non-residential section must be allocated by the developer in the aforesaid manner.<sup>111</sup>

We have seen that the participation quota becomes part of the economic interest involved in a particular unit and for this reason the participation quota is in principle not easily amendable.<sup>112</sup> However, the Act expressly provides two ways in which the method of calculating levies may be amended.<sup>113</sup>

Firstly, a developer may make special rules<sup>114</sup> when he is submitting an application for the opening of a sectional title register. These special rules may modify a

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<sup>107</sup> Pienaar *Sectional Titles* 82.

<sup>108</sup> Van Schalkwyk & Van der Merwe (2008) *TSAR* 228.

<sup>109</sup> Maree (January 2005) *MCS Courier Newsletter* 10-15. In this article Maree provides a formula which developers should use to establish a fair and workable levy dispensation. Maree is of the opinion that a developer's first task is to assign estimated weightings to the value of amenities which are used or enjoyed disparately. Then the degree of disparity must be estimated. The end result must be encapsulated in a formula which leaves no scope for misinterpretation. Ultimately the developer's decision should be reduced to a mathematical formula.

<sup>110</sup> S 32(2)(a) of the Sectional Titles Act 95 of 1986.

<sup>111</sup> Van der Merwe & Habdas (2006) *Stell LR* 178.

<sup>112</sup> Van der Merwe *Apartment Ownership* s 5-171.

<sup>113</sup> T Maree "Adjusting the Levy Formula" (October 2010) 37 *MCS Courier Newsletter* 4 5. See also in general L Chen *A Uniform Condominium Statute for China based on a Comparative Study of the South African Sectional Titles Act and American Uniform Common Interest Ownership Act* LLD thesis University of Stellenbosch (2008) 108.

<sup>114</sup> In terms of s 35 of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10)).

sectional owner's liability to make contributions to the common expenses or the unpaid debts of the body corporate.<sup>115</sup> Developers, assisted by their conveyancers, should use this opportunity to establish a fair and workable levy dispensation calculated from a carefully prepared scientific formula.<sup>116</sup> This formula should also be made public to facilitate later alterations.<sup>117</sup> Furthermore, if a developer sells a unit before submitting his application for the opening of a sectional title register, he must disclose the purported change in the relevant contract of sale for the change to have the necessary effect.<sup>118</sup>

Secondly, the body corporate may subsequently effect a similar amendment by special resolution,<sup>119</sup> provided that the written consent of an owner adversely affected by such a change is obtained. For such an amendment to take place at least 30% of the units in the scheme must have been sold or transferred to persons other than the developer.<sup>120</sup>

The second proviso of section 32(4),<sup>121</sup> which states that where an owner is adversely affected by such a decision of the body corporate his written consent must be obtained, seems to re-introduce the requirement of unanimity under the old Act.<sup>122</sup> If the levy formula is adjusted, it is inevitable that some sectional owners will pay less and others more. This means that somebody would always be adversely affected by any change to the levy formula and his consent would be necessary to make the change effective. The impracticality of expecting such consent undermines the intended objective to facilitate amendment of the levy formula.<sup>123</sup> However, a law

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<sup>115</sup> S 32(4) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 11(2)(a)).

<sup>116</sup> For an example of such a formula see Maree (January 2005) *MCS Courier Newsletter* 12-13.

<sup>117</sup> Van der Merwe *Sectional Titles* 4-10(1).

<sup>118</sup> S 32(4) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 11(2)(d)).

<sup>119</sup> A special resolution can be obtained in one of two ways. The first is when at least 75% of all the members of the body corporate (reckoned in value in number) agreed thereto in writing. The second manner is when it is passed at a general meeting by at least three fourths of the votes (reckoned in value and number) of the members of the body corporate present or represented at the meeting. See s 1(1) of the Sectional Titles Act 95 of 1986 sv "special resolution".

<sup>120</sup> S 32(4) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 11(2)(a) and (c)). See also Van der Merwe (1999) *Singapore Journal of International and Comparative Law* 149.

<sup>121</sup> Sectional Titles Schemes Management Act 8 of 2011 s 11(2)(b).

<sup>122</sup> S 24(3) of the Sectional Titles Act 66 of 1971.

<sup>123</sup> Van der Merwe & Habdas (2006) *Stell LR* 179.

should not be interpreted in a manner which is meaningless or counter-productive. Therefore, the best interpretation of the proviso would be that such written consent is only required if, objectively, an owner is unfairly or unreasonably disadvantaged by the proposed amendment. Any other interpretation of this proviso will render it ineffective, as it is unlikely that any sectional owner will consent to an amendment of the levies which would result in an unfavourable apportionment as far as he is concerned.<sup>124</sup>

This line of reasoning was followed in the unreported decision, in *Algar v Body Corporate of Thistledown*<sup>125</sup> in the Natal Provincial Division of the High Court. The body corporate passed a special resolution which stated the following:

“...to change the management structure from participation quota to equal share on all expenses, except the rates and taxes.”<sup>126</sup>

The applicant objected to this special resolution on the ground that he had been adversely affected by this change, due to the fact that his annual levy would be increased by R605.50.<sup>127</sup> The court reasoned that the applicant's interpretation of the words 'adversely affected' was too narrow since he only objected to the special resolution on the ground that his levy payments would be increased. The court indicated that the legislature replaced the requirement of a unanimous resolution in the old Act with the more liberal requirement of a special resolution<sup>128</sup> in order to achieve a more equitable distribution of the liability of a sectional owner for maintenance contributions. Consequently, the court decided that one must take all the facts and circumstances of the case into consideration and not only the fact that a particular sectional owner would have to pay an increased levy.<sup>129</sup> The court pointed out that the scheme, unlike some sectional title schemes which comprise units or dwellings to which exclusive use garden areas are allocated, was unique in the sense that the vast garden area and the road leading to the units formed part of the common property of the scheme that was open to equal use and enjoyment by

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<sup>124</sup> *Maree Sectional Titles on Tap* 6.7 - 6.8. See also *Maree* (October 2010) *MCS Courier Newsletter* 5.

<sup>125</sup> NPD 24-02-2003 case no 575/02.

<sup>126</sup> Page 1.

<sup>127</sup> Page 2.

<sup>128</sup> Page 3.

<sup>129</sup> See in general *Maree* (October 2010) *MCS Courier Newsletter* 5.

all the unit owners. Furthermore, it was unchallenged that unit owners derived equal benefit from the expenditure relating to the common property outbuildings, consisting of tool sheds, showers, toilets and a kitchen for the labour force employed in the complex. The cost of maintenance for the common areas constituted the major component of the annual levies and other expenses were negligible.<sup>130</sup> Consequently, the court found that the special resolution was intended to redress an inequitable situation and to ensure that the extraordinary cost of maintaining the extensive common property was shared equally amongst the members of the body corporate. Since there was equal use and enjoyment of the vast amenities, the court held that the applicant was not adversely affected by the special resolution and that his written consent was therefore not needed for the amendment of the quota.<sup>131</sup>

The liberal interpretation the court gave to the meaning of the words 'adversely affected' might cause a measure of uncertainty since it might lead to endless litigation in the courts. It is, however, submitted that such an interpretation accords with the intention of the legislator who wanted to ensure a fair and equitable dispensation in the allocation of contributions amongst the various owners.<sup>132</sup>

Section 11(2) of the STSMA, which deals with the amendment of the participation quota, restructured the provisions of section 32(4) of the Act to make them more understandable, but the principle remains the same as it was in terms of the Act.<sup>133</sup>

We have seen that in the case of residential schemes the size of the section is used for calculating a sectional owner's contribution to the common expenses and his proportional liability for the debts of the body corporate. This formula tends to promote certainty in sectional ownership relations.<sup>134</sup> However, using floor area as the basis for determining contributions to the maintenance, repair and administration of the common property is not without criticism. Some authors argue that cubic area rather than floor area should be used as the basis and that only half or less than half of the floor area of parts of sections adjoining a section, like balconies and atriums,

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<sup>130</sup> *Algar v Body Corporate of Thistledown* NPD 24-02-2003 case no 575/02 page 5.

<sup>131</sup> Page 6.

<sup>132</sup> Van der Merwe *Sectional Titles* 4-10(3).

<sup>133</sup> Van der Merwe (2012) *TSAR* 637-638.

<sup>134</sup> Van der Merwe (1987) *SALJ* 73.

and the floor area of non-adjointing parts, should be used in calculating the floor area of a particular residential section. Furthermore, not only does the floor area method ignore value as a criterion, but also utility.<sup>135</sup> Therefore, it is suggested that it would be wiser for such contributions to be calculated in terms of the benefit derived from each amenity by a particular owner or put differently by the use he makes of particular amenities. The reason for this is that certain owners would be prejudiced by the fact that they would have to contribute to common expenses incurred from common amenities from which they derive little or no benefit.<sup>136</sup> In final analysis the question is whether one wants to have certainty or fairness in the distribution of contributions in sectional title schemes.

It has already been indicated that relative floor area is too rigid to calculate a sectional owner's contribution towards levies in sectional title schemes which are not exclusively used for residential purposes. Fortunately, the Act therefore provides that the determination of levies for non-residential sections should be left to the sole discretion of the developer who can employ any formula of his choice.<sup>137</sup> It is, however, unfortunate that the Act does not limit the developer's discretion in this regard.<sup>138</sup> The Act also does not require the developer to disclose the formula he uses to determine the participation quotas for non-residential sections or by which he allots the percentage to residential sections in mixed-use schemes. Developers can thus do what they want and the sectional owners have no remedy against them if their allocations are incorrect.<sup>139</sup> To overcome this problem the legislator should consider the provisions of the United States of America's Uniform Common Interest Ownership Act of 2008 (the UCIOA) which mentions that developers might designate par value to allocate quotas<sup>140</sup> and to explain the formula he uses for his allocations.<sup>141</sup> Another sensible provision of the UCIOA in this regard is that the formulas used by a developer to calculate the quota may not discriminate in favour of units owned by the developer.<sup>142</sup> This would prevent the misuse of formulas to

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<sup>135</sup> T Maree "How to Achieve the Impossible" (October 2001) 405 *De Rebus* 13 13.

<sup>136</sup> Van der Merwe *Sectional Titles* 4-12.

<sup>137</sup> S 32(2) of the Sectional Titles Act 95 of 1986.

<sup>138</sup> Van Schalkwyk & Van Der Merwe (2008) *TSAR* 228.

<sup>139</sup> Van der Merwe *Sectional Titles* 4-17.

<sup>140</sup> S 2-107 comment 5 of the United States of America's Uniform Common Interest Ownership Act of 2008.

<sup>141</sup> S 2-107(b).

<sup>142</sup> S 2-107(b).

favour developers and it would also limit the possibility of unfair allocations amongst the various unit owners.<sup>143</sup> It will also provide non-residential owners with the formula used by the developer to calculate their contributions to the levy fund, and a basis on which they can challenge the quotas allocated to them if they believe that they have been prejudiced.

## **2 2 6 Rules of a scheme**

Besides the financial and social obligations that are imposed on sectional owners in terms of the Act, the rules of a scheme can also impose such obligations and indicate how these obligations should be enforced. These obligations and their measures of enforcement are contained in the prescribed management and conduct rules; special rules introduced by the developer or adopted in unanimous and special resolutions of the general meeting; as well as house rules adopted by the general meeting by means of ordinary resolutions. A proper consideration and understanding of these rules are necessary to grasp the full spectrum of the financial and social obligations that are imposed on sectional owners, as well as the nature of the measures provided for their enforcement.

The Act contains a model set of management and conduct rules for adoption by sectional title schemes. On application for the opening of a sectional title register at a deeds registry, the developer must submit a certificate by a conveyancer stating whether the model rules prescribed in terms of section 35(2)<sup>144</sup> of the Act namely the Annexure 8 and Annexure 9 rules are applicable to the sectional title scheme. This certificate must also contain the rules substituted by the developer for alternative rules to the extent that the developer is allowed to amend or substitute the model rules.<sup>145</sup> These rules may also later be amended by the general meeting (body corporate) of the scheme.

Section 10(2)(a) and (b) of the STSMA now states that rules substituting, adding to, amending or repealing the prescribed management or conduct rules by the

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<sup>143</sup> Van der Merwe *Sectional Titles* 4-17.

<sup>144</sup> Sectional Titles Schemes Management Act 8 of 2011 s 10(2).

<sup>145</sup> S 11(3)(e) of the Sectional Titles Act 95 of 1986.



developer or by unanimous or special resolution of the body corporate, must first be approved by the chief ombud. In order to synchronise the registration of the sectional plan and the opening of the sectional title register with the approval of the rules by the chief ombud, the draft rules will obviously have to be approved first. The advantage of this regulation is that developers and practitioners will have to focus on preparing proper rules to accommodate the particular characteristics for their sectional title schemes in order to avoid unwanted delays in the registration process.<sup>146</sup>

Once a body corporate is established by the registration of a unit in the name of a person other than the developer,<sup>147</sup> the rules submitted by the developer regulate the control, management, administration, use and enjoyment of sections and the common property.<sup>148</sup> The rules as they are or later amended by the general meeting, bind the body corporate, all sectional owners and other occupants of sections<sup>149</sup> and must be enforced by the trustees. Furthermore, the body corporate is obliged, on application, to make the rules in force available for inspection to any sectional owner, to any holder of a registered real right in or over a unit, or to any other person authorized in writing by such owner or person.<sup>150</sup>

A distinction must be drawn between two kinds of prescribed or model rules namely management and conduct rules.<sup>151</sup> The prescribed management rules in Annexure 8<sup>152</sup> mainly deal with administration matters such as the election, meetings, powers and duties of trustees;<sup>153</sup> the convening of and the procedure at general meetings;<sup>154</sup> and the legal position of managing agents.<sup>155</sup> Furthermore, the management rules

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<sup>146</sup> Van der Merwe (2012) *TSAR* 635.

<sup>147</sup> Ss 36(1) and (2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 2(1) and (2)).

<sup>148</sup> Ss 1(1) sv “rules” and 35(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10(2)).

<sup>149</sup> S 35(4) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10(4)). See also Paddock *Sectional Title Survival Manual* 9-1.

<sup>150</sup> S 35(6) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10(6)).

<sup>151</sup> Van der Merwe *Sectional Titles* 13-4 - 13-5. See also in general G Moore-Barnes “To rule, or not to rule – that is the question” (March 2010) 5-3 *Paddocks Press Newsletter* 2 2.

<sup>152</sup> Annexure 8 of the Sectional Titles Act 95 of 1986.

<sup>153</sup> Annexure 8 r 3-32 and 34-49.

<sup>154</sup> Annexure 8 r 50-67.

<sup>155</sup> Annexure 8 r 46-49.



also contain some provisions on non-administrative matters such as improvements to the common property.<sup>156</sup> The prescribed conduct rules in Annexure 9<sup>157</sup> on the other hand, regulate a sectional owner's conduct with regard to his section and the common property. Matters that are regulated by the conduct rules include the keeping of animals, reptiles and birds; refuse disposal; vehicles on the common property; damage, alterations or additions to the common property; the outside appearance of the building; signs and notices; littering; laundry; storage of inflammatory material, and other dangerous acts; letting of units; and the eradication of pests.<sup>158</sup> Therefore, broadly speaking the management rules deal with aspects of management, administration, determination of levies, powers of trustees, meetings and voting while conduct rules, on the other hand, seek to regulate the day to day social behaviour of the owners.<sup>159</sup>

It is also important to note that there is a specific hierarchy between the provisions of the Act and the management and conduct rules. Firstly, the provisions of the Act will prevail over any conflicting provision in both the management and conduct rules. Secondly, the conduct rules are subject to the Act as well as the management rules.<sup>160</sup>

We have seen that the management and conduct rules must be lodged with the sectional title plan. Although the Act allows developers to create special rules, most developers simply lodge the prescribed management and conduct rules.<sup>161</sup> Certain<sup>162</sup> of the management rules may not be changed by the developer when he is submitting an application for the opening of the sectional title register.<sup>163</sup> When it comes to the prescribed conduct rules, however, the developer has complete freedom to insert his special rules in this category.<sup>164</sup>

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<sup>156</sup> Annexure 8 r 33.

<sup>157</sup> Annexure 9.

<sup>158</sup> Annexure 9 r 1-11.

<sup>159</sup> *Maree Sectional Titles on Tap* 11.4.

<sup>160</sup> This hierarchy is created by the proviso to s 35(2)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10(2)(b)). See also Paddock *Sectional Title Survival Manual* 9-3.

<sup>161</sup> Van Schalkwyk & Van der Merwe (2008) *TSAR* 228.

<sup>162</sup> Reg 30(1) of the Sectional Titles Act 95 of 1986.

<sup>163</sup> S 35(2)(a) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10(2)(a)).

<sup>164</sup> S 35(2)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10(2)(b)).

After the establishment of the body corporate the management and conduct rules may be amended by the members of the body corporate in general meeting.<sup>165</sup> Management rules can only be changed by means of a unanimous resolution<sup>166</sup> while conduct rules can be changed by means of a special resolution.<sup>167</sup>

The body corporate must notify the registrar of deeds of any rules amended, repealed or substituted by the body corporate,<sup>168</sup> and such amendment, repeal or substitution comes into operation on the date of filing such notice at the deeds registry.<sup>169</sup> In the case of an amendment, addition, substitution, or repeal of the rules by the body corporate, the registrar of deeds is not required to examine or note such substitution, amendment, addition or repeal against any initial certificate by the developer, or any notice or existing rules, to determine whether such amendment, addition, substitution or repeal is in accordance with the provisions of the Act or regulations.<sup>170</sup>

Section 10(5) of the STSMA introduced the new requirement that all amendments of the management and conduct rules must be approved by the chief ombud, which process involves the following: a notification of an intended amendment of the rules lodged with the chief ombud in the prescribed form;<sup>171</sup> an examination of the intended amendments by the chief ombud and his personnel to determine whether they are reasonable and appropriate for the scheme;<sup>172</sup> and a certificate of approval of the amendments issued by the chief ombud and the filing of the amended rules in the office of the chief ombud.<sup>173</sup>

In terms of section 10(5)(d) of the STSMA the amended rules will come into operation either on the date of the issuing of the certificate of approval or on the

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<sup>165</sup> Maree *Sectional Titles on Tap* 11.8.

<sup>166</sup> S 35(2)(a) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10(2)(a)).

<sup>167</sup> S 35(2)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10(2)(b)).

<sup>168</sup> S 35(5)(a) of the Sectional Titles Act 95 of 1986.

<sup>169</sup> S 35(5)(c).

<sup>170</sup> S 35(5)(b).

<sup>171</sup> S 10(5)(a) of the Sectional Titles Schemes Management Act 8 of 2011.

<sup>172</sup> S 10(5)(b).

<sup>173</sup> S 10(5)(c).

opening of the sectional title register, whichever is the latest. Section 10(5) of the STSMA can be seen as a welcome improvement to the provisions of section 35(5) of the Act which provides that amendments of rules must be lodged with the registrar, and which contained no provisions as to the safe custody of such rules. In practice this led to careless supervision and the resultant loss of numerous sectional title schemes' rules in the various deeds offices. However, to achieve the desired results in terms of section 10(5) of the STMSA the personnel of the chief ombud would have to be expertly trained to become adept in the approval of sectional title scheme rules in order to avoid mistakes and future delays in the sectional title registration process.<sup>174</sup>

The most important limitation upon the creation and amendment of rules by the developer or body corporate is that the rules must be reasonable and equally applicable to all owners of units used for substantially the same purposes.<sup>175</sup> This would, in principle, mean that different rules may apply to commercial units than those that apply to residential units. However, when there are only residential units the same rules must apply.<sup>176</sup> Section 10(3) of the STSMA also provides that the management and conduct rules must be reasonable and apply equally to all owners of units but omits the phrase after units 'put to substantially the same purpose' which implies that the rules themselves must make such a distinction where applicable.<sup>177</sup>

In many sectional title schemes so called 'house rules' are also adopted by the body corporate or the trustees to further regulate the management of the scheme.<sup>178</sup> Although the Act does not expressly provide for house rules, it is generally accepted in practice that house rules may be adopted in general meeting or formulated by the trustees to regulate trivial matters in the control, administration and management of the common property.<sup>179</sup>

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<sup>174</sup> Van der Merwe (2012) *TSAR* 635.

<sup>175</sup> S 35(3) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 10(3)).

<sup>176</sup> Maree *Sectional Titles on Tap* 11.8.

<sup>177</sup> Van der Merwe (2012) *TSAR* 635.

<sup>178</sup> Pienaar *Sectional Titles* 203.

<sup>179</sup> Ss 36(4) and 37(1)(r) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 2(5) and 3(1)(t)). See J Van der Walt "Management, Conduct and house rules" (August 2008) 3-8 *Paddocks Press Newsletter* 7 7 where it is stated that the scope of house rules is usually limited to rules in connection with the health, safety and cleanliness of the common property.

The enforcement of house rules is, however, problematic because of the following considerations.<sup>180</sup> Firstly, the body corporate and the trustees are creatures of statute. Therefore, the powers of the body corporate and the trustees are derived either expressly or by necessary implication from the Act, read with the regulations thereunder. Neither the Act nor the regulations contain provisions that allow the body corporate or trustees to create house rules, which mean that they do not have the power to create such rules. Secondly, the content and amendment of the prescribed rules are very well controlled, which suggests that the creation of informal house rules is not permissible. Thirdly, the Act preserves the model rules made under the old Act, but only to the extent that they are not irreconcilable with the management rules of the Act. This clearly suggests that the legislature wanted to make model rules which should not be deviated from easily. Fourthly, a body corporate has general powers of management, administration and control over the common property of a sectional title scheme. These general powers do not apply to sections in a sectional title scheme.<sup>181</sup> Therefore, the creation of house rules to govern the conduct of owners in sections cannot be justified by these general powers of the body corporate. Lastly, some provisions in the Act and regulations enable the trustees to enforce the management and conduct rules as amended.<sup>182</sup> For example, the body corporate is allowed reasonable access to units for the purpose of ensuring that the rules are observed.<sup>183</sup> The wording of the Act with regard to these powers is specific and cannot, therefore, be construed to confer similar powers with regard to house rules.

Therefore, due to the fact that house rules cannot be regarded as domestic statutes of bodies corporate, their enforceability is problematic<sup>184</sup> and are thus 'worse than useless'.<sup>185</sup> However, some rules prohibit certain conduct of sectional owners except

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<sup>180</sup> MC Wood-Bodley "House Rules' in Sectional Title Schemes – are they Ultra Vires?" (2003) 120 *SALJ* 602 606-609. See also Van der Merwe *Sectional Titles* 13-34 – 13-35.

<sup>181</sup> See *Wimbledon Lodge (Pty) Ltd v Gore NO and Others* 2002 2 SA 88 (C) 98C-D.

<sup>182</sup> Ss 36(4) and 38(j) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 2(5) and 4(i)).

<sup>183</sup> S 44(1)(a) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(a)).

<sup>184</sup> Pienaar *Sectional Titles* 204.

<sup>185</sup> Maree *Sectional Titles on Tap* 11.11.

with the written consent of the trustees.<sup>186</sup> Wood-Bodley suggests that this creates two instances where house rules may be valid and enforceable.<sup>187</sup> Firstly, where it is proper to construe the house rule as an exercise by the trustees of their powers of control over the common property and, secondly, where it is proper to construe the house rule as a permission given by the trustees. Examples of such house rules would be that no person under a certain age shall use the swimming pool unless supervised by an adult or where the rule defines areas on the common property on which parking is permitted. He therefore argues that there can be no objection to house rules of this kind since they amount to no more than the exercise of the trustees' powers of control over the common property under the Act, or the granting of consent in terms of the rules.

## 2 2 7 Sectional title community

A sectional title scheme consists of a community of people of different ages, opinions, views, cultural backgrounds and beliefs. Furthermore, the close proximity in which they live, especially in high-rise buildings, is bound to lead to problems and disputes.<sup>188</sup> Moreover, sectional ownership consists of both individual and collective elements due to the fact that a sectional owner has individual ownership of his section, while he collectively also has an undivided share in the common property and facilities of the scheme.<sup>189</sup> Therefore, individual needs will always to some extent be in conflict with community interests. Van der Merwe and Muñis-Argüelles describe and then suggest a solution for this conflict:

“The aim of a condominium is to strive for happiness and harmony in an intensified, diverse community where the objects of ownership, the individual units, are physically interdependent. Since unit owners live in close proximity and use facilities in common, the most extensive freedoms inherent in their ownership or fee simple

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<sup>186</sup> See for example Annexure 8 r 68(1)(vi) and Annexure 9 r 1(1) and 3(1) of the Sectional Titles Act 95 of 1986.

<sup>187</sup> Wood-Bodley (2003) *SALJ* 606 and 609. See also Van der Merwe *Sectional Titles* 13-35.

<sup>188</sup> M Constat “Sectional Title Rage” (March 2008) 3-3 *Paddocks Press Newsletter* 1 1. For examples of these problems see page 4 of the article.

<sup>189</sup> M Brown “Living in a Condominium: Individual needs versus Community Interests” (1977) 46 *Cin. L. Rev.* 523 523.

need to be restricted. Each owner must give up a certain degree of freedom that he might otherwise enjoy in separate, privately owned property.”<sup>190</sup>

This suggests that harmony can only be obtained if a sectional owner’s unrestricted use and enjoyment of his section and the common property are restricted by social obligations imposed by law on individual sectional owners. Furthermore, financial obligations to place sufficient funds in the coffers of the body corporate to undertake works of repair and maintenance would require sufficient sanctions to enforce these obligations.<sup>191</sup> Without efficient enforcement measures there would be chaos instead of harmony in a sectional title scheme.

## 2 2 8 Levies

The most important financial obligation imposed on owners in a sectional title scheme, is the payment of their levies. The practice is generally to raise levies monthly, but the trustees are allowed to determine how the instalments shall be paid.<sup>192</sup> ‘Levies’ is the popular term used in practice for what is more formally referred to as ‘contributions’ or ‘assessments’ in the Act and the prescribed rules.<sup>193</sup> Without regular payment of levies a body corporate simply cannot function. Therefore, one of the most important functions of the body corporate is to establish a fund, called the administrative or levy fund, to cover expenses<sup>194</sup> and to use all available measures to force owners to pay their levies regularly. In the following chapter we shall see that sectional owners are responsible for the payment of ordinary levies;<sup>195</sup> special levies;<sup>196</sup> and in the case of exclusive use areas, additional levies.<sup>197</sup>

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<sup>190</sup> CG Van der Merwe & L Muñis-Argüelles “Enforcement of Conduct Rules in a Condominium or Apartment Ownership Scheme” (2006) *Liber Amicorum Festschrift Tugrul Ansay* 247 247.

<sup>191</sup> For the enforcement of financial obligations see chapters 4 and 5 below, and for the enforcement of social obligations chapter 7.

<sup>192</sup> Annexure 8 r 31(3) of the Sectional Titles Act 95 of 1986.

<sup>193</sup> Maree *Sectional Titles on Tap* 2.12.

<sup>194</sup> M Consta & K Bleijs *Demystifying Sectional Title* 1ed (2004) 17-18.

<sup>195</sup> S 37(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(2)).

<sup>196</sup> Annexure 8 r 31(4B) and ss 37(2A) and (2B) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(3)).

<sup>197</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)).

### 2 3 Relevant legislation: Property Rates Act and Systems Act

The relationship between the relevant provisions of the Act, the Property Rates Act and the Systems Act<sup>198</sup> requires clarification in order to understand references to these legislative enactments in later chapters of this thesis. This clarification can only be achieved by furnishing some background material on these acts and by examining the impact these acts have on the sectional title industry.

Property rates are one of the major sources of income for local governments, given that they serve as the main source of discretionary revenue for municipalities.<sup>199</sup> Municipalities are entitled to charge municipal property rates on properties within their municipalities based on municipal valuation. This valuation is in turn based on the market value of the property and is periodically updated. Residents do, however, have the opportunity of commenting on or raising objections to these valuations if they believe that it has not been fairly or correctly determined. An objection must be lodged before the closing date for objections on forms prescribed by the local or metropolitan municipality concerned. The prescribed forms are in most cases also available on the municipality's website. These forms must state the reasons for the objection and must be accompanied by any supporting documents.<sup>200</sup>

Historically local municipalities in the various provinces handled the rating of property differently by applying their own special legislation and unique system of rating and assessment.<sup>201</sup> Therefore, one of the main aims of the Property Rates Act is to bring consistency, uniformity and simplicity in respect of the way in which municipalities levy rates throughout the whole of the Republic of South Africa.<sup>202</sup>

The power of municipalities to levy property rates derives directly from the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 229(1)

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<sup>198</sup> See especially 5 4 below.

<sup>199</sup> See for instance the Memorandum on the Objects of the Local Government: Property Rates Bill B19-2003 para 1.1.

<sup>200</sup> Anonymous Phatshoane Henney Attorneys "How are my municipal rates and taxes determined?" <<http://www.kloppersinc.co.za/NewsPublications/NewsArticle.aspx?CategoryId=1&articleId=671>> (accessed 20-06-2013).

<sup>201</sup> Memorandum on the Objects of the Local Government: Property Rates Bill B19-2003 para 1.2. See also M Kelly-Louw "Collection of levies by a body corporate" (2004) 12-2 *JBL* 94 98.

<sup>202</sup> Kelly-Louw (2004) *JBL* 98.



of the Constitution clearly states that a municipality may impose rates on property and surcharges on fees for services provided by or on behalf of the municipality. If authorised by national legislation, the municipality may also impose other taxes, levies and duties appropriate to local government or to the category of local government to which the particular municipality belongs.<sup>203</sup> The Constitution, however, states that this power is not unfettered and also not solely in the discretion of municipalities.<sup>204</sup> Firstly, section 229(2)(a) restrains municipalities from exercising their fiscal powers in any way that would materially and unreasonably prejudice: national economic policies; economic activities across municipal boundaries; or the national mobility of goods, services, capital or labour. Secondly, section 229(2)(b) allows national legislation to regulate the exercise of this power of municipalities.<sup>205</sup> The Property Rates Act is consequently not the source of the power in terms of which municipalities may levy property rates, but rather an instrument to give effect to section 229 of the Constitution.<sup>206</sup>

Before the promulgation of the Property Rates Act municipalities levied rates and taxes on sectional title bodies corporate according to the value of the land and buildings in sectional title schemes. The total of these rates was then recovered from sectional owners according to their participation quota, based on floor area in the case of residential units and according to the quota as determined by the developer in the case of non-residential units or according to a special scheme rule which amended the levy share.<sup>207</sup>

With the promulgation of the Property Rates Act municipalities became entitled to levy rates and taxes on individual sectional title units.<sup>208</sup> This change is based on the fact that the definition of 'property', in the latter act, encompasses all immovable

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<sup>203</sup> Ss 229(1)(a) and (b) of the Constitution of the Republic of South Africa, 1996. The Constitution of the Republic of South Africa, 1996 does not define 'property' but in context it means land including any immovable property on or in the land or under the surface of the land. It includes all land in the Republic of South Africa as the whole of the territory of the Republic of South Africa is covered by municipalities. See also the Memorandum on the Objects of the Local Government: Property Rates Bill B19-2003 para 1.2 and N Steytler "Property Rates Act in operation" (July 2005) 7-3 *LGB* 1 1.

<sup>204</sup> Memorandum on the Objects of the Local Government: Property Rates Bill B19-2003 para 1.2.

<sup>205</sup> Memorandum on the Objects of the Local Government: Property Rates Bill B19-2003 para 1.2. See also in general Steytler (July 2005) *LGB* 1.

<sup>206</sup> Memorandum on the Objects of the Local Government: Property Rates Bill B19-2003 para 1.3.

<sup>207</sup> Van der Merwe *Sectional Titles* 4-10(4).

<sup>208</sup> 4-10(4).



property registered in the name of a person and thus also sectional title units registered in the name of a sectional owner.<sup>209</sup> The reason for this is that under the Property Rates Act sectional title units are considered immovable property on which the municipality can levy rates. Therefore, each sectional owner became responsible for the payment of his own rates to the municipality, instead of sharing a collective rate charged on the land and the building with the other sectional owners in the scheme.<sup>210</sup> This means that bodies corporate are no longer responsible for the collection of rates from the sectional owners and payment of these rates to the municipality.<sup>211</sup>

We have seen above that each unit is now rated individually according to its market value and not according to its floor area or the quota determined by the developer. The application of this uniform standard of market value is welcomed because it implies that, at least from a valuation point of view, all property owners are treated fairly.<sup>212</sup> Therefore, issues such as the quality of the view, the layout and the special equipment installed in the section will now be taken into consideration in the valuation of a unit. This new levy dispensation was introduced in the Cape Town metropolis from 1 July 2007 and in Johannesburg, Durban and most of the rest of the country from 1 July 2008.<sup>213</sup>

Although the Property Rates Act has been welcomed by the sectional title industry, it may create problems for municipalities. Municipal valuers must now value many more properties, as each sectional title unit now constitutes rateable property. Furthermore, obtaining data on individual sectional title units and their owners is laborious and costly, especially where bodies corporate are uncooperative. It is also often difficult to gain access to the individual units. Moreover, some municipalities struggle to comply with the added administrative burden of serving valuation notices and rates bills on so many property owners.<sup>214</sup>

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<sup>209</sup> S 1(1) of the Local Government: Municipal Property Rates Act 6 of 2004 sv “property”.

<sup>210</sup> S 10.

<sup>211</sup> Memorandum on the Objects of the Local Government: Property Rates Bill B19-2003 para 2.3.1.

<sup>212</sup> R Franzsen “Municipal Property Rates Act: Some Valuation Issues” (February/March 2009) 11-1 *LGB* 25.

<sup>213</sup> Van der Merwe *Sectional Titles* 4-10(5).

<sup>214</sup> Franzsen (February/March 2009) *LGB* 27.

The Systems Act also has an impact on levies charged to sectional owners in sectional title schemes. The latter Act seeks to establish the basic principles and mechanisms to give effect to a collective vision of developmental government and, therefore, focuses primarily on the internal systems and administration of the municipality.<sup>215</sup>

Before the promulgation of this act taxes and other local authority charges for electricity; gas; water; fuel; sanitary; and other services to the building or buildings and land, were payable by the body corporate in terms of section 37(1)(a)<sup>216</sup> of the Act. The Systems Act now provides that members of the local community have the duty to promptly pay service fees, surcharges on fees, rates on property and other taxes, levies and duties imposed by the municipality.<sup>217</sup> In charging fees for municipal services, a municipality must, within its financial and administrative capacity, take reasonable steps to ensure that the consumption of services by individual users is measured through accurate and verifiable metering systems in cases where the measuring of the consumption of services is mandatory.<sup>218</sup> There is also an obligation on an owner to provide access to the premises to an authorised representative of the municipality or service provider at all reasonable hours in order to read, inspect, install or repair any meter or service connection for reticulation, or to disconnect, stop or restrict the provision of any service.<sup>219</sup>

In terms of Annexure 8 of the regulations under the Act, rule 33(3) states that the trustees of the body corporate must, if so required in writing by a majority of owners, procure the installation and maintenance in good working order, at the body corporate's cost, of separate meters to record the consumption of electricity, water and gas in respect of each individual section and the common property. If and for so long as no separate meters have been installed the contribution payable by each owner in respect of electricity, water and gas must be calculated in accordance with

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<sup>215</sup> Memorandum on the Objects of the Local Government: Municipal Systems Bill B27B-2000 para 1.

<sup>216</sup> Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(a)(ii).

<sup>217</sup> S 5(2)(b) of the Local Government: Municipal Systems Act 32 of 2000.

<sup>218</sup> S 95(d).

<sup>219</sup> S 101.

the participation quota of each section or the amendment of such quota with regard to contributions for expenses.<sup>220</sup>

The installation of these separate meters is, however, very expensive and therefore not all sectional title sections are as yet equipped with such meters.<sup>221</sup> It is important to note that until every section in a particular scheme has been fitted with its own meter, the body corporate will still receive an account from the municipality for the electricity, water and gas consumption of the entire sectional title scheme. Once separate meters have been installed the amounts due will be charged to the owners of the individual sections in the above proportion and paid over to the municipality.<sup>222</sup>

The effect of the provisions of both acts is thus that rates and taxes and other local authority charges for electricity; gas; water; fuel; sanitary and other services to the building or buildings and land, in terms of section 37(1) of the Act,<sup>223</sup> are now no longer charges due to the body corporate but charges due to municipalities. Thus where separate meters have been installed, these charges can no longer be included in the ordinary levies collected from sectional owners.

Where all the sections in the scheme have been equipped with separate meters, the body corporate would need an agreement with the municipality to provide services to parts of the common property such as electricity to the entrance hall and the corridors in the building, and for operating the security gate and the lift as well as water for the lawns and gardens situated on the common property of the scheme. Section 38(h) of the Act makes provision for the latter situation by giving the body corporate the power to enter into an agreement with the municipality and any other person or body to supply the building or buildings and the land with electricity, gas, water, fuel and sanitary services. The latter power of the body corporate has not been re-enacted in section 4 of the STSMA (which deals with the powers of bodies corporate) and can, therefore, only be implied from the general provision of section 4(i) of the STSMA which states that the body corporate has the power to do all things

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<sup>220</sup> See Annexure 8 rule 31 of the Sectional Titles Act 95 of 1986 read with Annexure 8 r 33(4).

<sup>221</sup> The reason for this is, firstly, that such meters are expensive and, secondly, that it requires extra pipes and cables.

<sup>222</sup> J Van der Walt "Separate Rating of Sectional Title Units" (August 2007) 2-6 *Paddocks Press Newsletter* 1 2.

<sup>223</sup> Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(a)(ii).

necessary for the enforcement of the rules and for the management and administration of the common property. This is unfortunate since for the sake of certainty this power should have been expressly included in section 4 of the STSMA.

The combination of the Property Rates Act and the Systems Act is thus of great importance for this thesis since it has an enormous effect on the financial obligations of sectional owners. It substantially reduces the financial interdependence of sectional owners in sectional title schemes since rates and taxes are now subsumed under municipal charges and no longer treated as body corporate charges. However, in the case of service charges separate meters must be installed, to measure the consumption of the various services, for these services to fall under municipal charges. If no meters are installed the body corporate would still collect the service charges and then pay these over to the municipality. Bodies corporate, therefore, need to install these meters but due to the fact that the installations of these meters are expensive sectional title schemes are seldom equipped with such meters. I therefore strongly argue that bodies corporate must be forced to install these meters in all new schemes to make sure that service charges are directly due to municipalities rather than to bodies corporate. This will reduce the notoriously high debts owed by sectional title schemes to municipalities.

## Chapter 3: Financial Obligations of Sectional Owners

### 3 1 Introduction

We have seen in chapter 1, at 1 2, that the power of a body corporate to collect contributions from sectional owners is not directed at financial gain, but primarily to ensure that there is sufficient money available to cover the expenses of the scheme. Since a body corporate's only source of funding is the contributions received from sectional owners,<sup>1</sup> the most important financial obligation on a sectional owner is the payment of levies, which are often referred to as the 'lifeblood'<sup>2</sup> of the body corporate.

To achieve harmony in a sectional title scheme it must be managed properly. Proper management would require that the common parts of the building and the common facilities are maintained adequately and regularly.<sup>3</sup> To attain this goal, the Sectional Titles Act 95 of 1986 (the Act) requires that a body corporate establish an administrative fund sufficient in its opinion to cover the expenses related to the maintenance and management of a sectional title scheme.<sup>4</sup> Section 3(1)(a) of the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA) replaces this subjective criteria above by stating that the body corporate must establish and maintain an administrative fund which is 'reasonably sufficient' to cover the estimated annual operating cost of the scheme. In an effort to keep the monthly levies paid by sectional owners as low as possible, many bodies corporate do not provide sufficiently for the annual operating cost of the scheme.<sup>5</sup> Therefore, the replacement of a subjective criterion by an objective criterion would play an important role in ensuring the financial soundness of sectional title schemes.<sup>6</sup>

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<sup>1</sup> CG Van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 *Sectional Titles* (Service Issue 16 May 2013) 9-4.

<sup>2</sup> T Maree *Sectional Titles on Tap* Volume 1 2ed (2006) 6.1.

<sup>3</sup> CG Van der Merwe & L Muñis Argüelles "Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme" (2006) 16 *Duke Journal of Comparative and International Law* 125 125.

<sup>4</sup> S 37(1)(a) of the Sectional Titles Act 95 of 1986.

<sup>5</sup> CG Van der Merwe "Third Generation Sectional Titles" (2012) 4 *TSAR* 611 622-623.

<sup>6</sup> The innovation of this objective criterion is supported by s 39(1)(c) of the Community Schemes Ombud Service Act 9 of 2011 which states that any owner may now approach the ombud service for an order declaring

Another related issue is the existence of a reserve fund to cover unexpected or substantial capital expenditure.<sup>7</sup> In terms of the STSMA a reserve fund must be established in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of the common property but not less than the amounts as may be prescribed by the Minister of Human Settlements.<sup>8</sup> The impact of this provision on the issue of the financial contributions of sectional owners will be discussed.

The first part of this chapter will, therefore, deal with the obligation on the part of the body corporate to establish an administrative and a reserve fund and to indicate what contributions sectional owners are required to contribute to each of these funds.

In order to pinpoint the extent of the financial obligations of a sectional owner with regard to contributions to the administrative fund, it is important to know the types of expenses sectional owners are responsible for. In this regard the Act makes a distinction between ordinary levies;<sup>9</sup> special levies;<sup>10</sup> and additional levies.<sup>11</sup> The difference between these kinds of levies will be discussed before tackling the question as to when contributions become payable, which is essential for financial planning. In addition we will establish when responsibility for the payment of levies is transferred to a purchaser on the sale of a unit.

Another noteworthy financial obligation is that sectional owners do not only have to contribute to the administrative and reserve funds, but are also personally liable for the debts of the body corporate,<sup>12</sup> which must be paid out of the administrative fund. We shall see that this situation was unfair to sectional owners who had already paid

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that the contribution levied on owners was incorrectly determined and that an adjustment of the contribution to a correct or reasonable amount be made.

<sup>7</sup> See in general Van der Merwe *Sectional Titles* 14-19 – 14-20.

<sup>8</sup> S 3(1)(b) of the Sectional Titles Schemes Management Act 8 of 2011.

<sup>9</sup> S 37(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(2)).

<sup>10</sup> Annexure 8 r 31(4B) and ss 37(2A) and (2B) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(3)).

<sup>11</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)).

<sup>12</sup> S 47(1) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 15).

their contributions and that the Sectional Titles Amendment Act 7 of 2005<sup>13</sup> tried to rectify this inequity by amending the proviso to section 47(1). This, however, brought new problems to the table.

The chapter will be concluded with a consideration of the issue as to whether aggrieved sectional owners may withhold the payment of levies and whether they are entitled to a refund of the profits or contributions lawfully levied upon them and paid by them.

The chapter will thus critically analyse and evaluate the most important aspects regarding the financial obligations of sectional owners in a sectional title scheme. Where necessary, proposals for the improvement of unsuitable current conditions will be advanced.

### **3 2 Contributions to the administrative and reserve fund**

One of the main functions of the trustees is to prepare a detailed budget of the expected income and expenditure for the following financial year with or without the help of the managing agent.<sup>14</sup> This budget must contain realistic estimates of expenses for the ensuing year, including a reasonable provision for contingencies and future maintenance.<sup>15</sup> This will be replaced by the more exact provisions of the STSMA, which specifically divides levied contributions into contributions to the administrative fund<sup>16</sup> and to the reserve fund.<sup>17</sup>

In terms of the Act the body corporate must establish an administrative fund to cover expenses for the repair, upkeep, control, management and administration of the common property; rates and taxes; other local authority charges for the supply of electric current, gas, water, fuel, and sanitary and other services to the building or buildings and land and insurance premiums; and to enable the body corporate to

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<sup>13</sup> S 6 of the Sectional Titles Amendment Act 7 of 2005. See also WD Ryan & GJ Pienaar “Geskilbeslegting by die toepassing van bestuursreëls van deeltitelskemas” (2007) 3 *TSAR* 437 438.

<sup>14</sup> Annexure 8 r 36 of the Sectional Titles Act 95 of 1986.

<sup>15</sup> S 37(1)(a).

<sup>16</sup> Ss 3(1)(a)(i)-(iv) of the Sectional Titles Schemes Management Act 8 of 2011.

<sup>17</sup> S 3(1)(b).

discharge any other function or obligation.<sup>18</sup> This enumeration of charges is repeated in Annexure A regulation 4(i) as part of the information which must be given to tenants when a rental building is converted into a sectional title scheme. This administrative fund is essentially needed to finance proper maintenance of the common property and for keeping it in a state of good and serviceable repair.<sup>19</sup> The Act also requires the body corporate whenever necessary, to collect contributions from sectional owners to the administrative fund, in order to satisfy any claims against the body corporate.<sup>20</sup> The body corporate is under specific obligation to determine the amounts to be raised for these purposes on an annual basis.<sup>21</sup> Such an assessment is done in the annual budget which must be presented at each annual general meeting. The body corporate must then raise the amounts by levying contributions on the sectional owners in proportion to their respective participation quotas.<sup>22</sup>

The ordinary home-owner can postpone providing for maintenance and repairs until his budget allows it. Sectional owners are, however, obliged by the Act to contribute whenever the body corporate deems contributions necessary.<sup>23</sup> Contributions become payable from the date that the body corporate comes into existence<sup>24</sup> in proportion to the respective participation quotas of sectional owners or in accordance with special rules introduced by the developer or the body corporate with regard to the allocation of expenses.<sup>25</sup> The management rules require trustees to prepare the budget in the form of an itemised estimate of the anticipated income and expenditure of the body corporate for the following financial year for consideration at the annual general meeting of the body corporate.<sup>26</sup> This estimate must then be approved, with

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<sup>18</sup> S 37(1)(a) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 3(1)(a)(i)-(iv)). Furthermore, reg 4(i) of the Sectional Titles Act 95 of 1986 gives an indication of what would be regarded as common expenses. See also in general J Paddock “Levies: What you Really need to Know” (June 2008) 3-6 *Paddocks Press Newsletter* 1 1.

<sup>19</sup> Van der Merwe *Sectional Titles* 14-17 – 14-18.

<sup>20</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)).

<sup>21</sup> S 37(1)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(e)).

<sup>22</sup> S 37(1)(d) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(f)).

<sup>23</sup> Van der Merwe *Sectional Titles* 14-18(1).

<sup>24</sup> Annexure 8 r 31(1) of the Sectional Titles Act 95 of 1986.

<sup>25</sup> Annexure 8 r 31(1) read with s 32(4).

<sup>26</sup> Annexure 8 r 36.



or without amendment, by a majority resolution of the general meeting.<sup>27</sup> Management rule 36(1) has recently been amended and now states that prior to the commencement of every financial year of the body corporate, the trustees must cause to be prepared an itemised estimate of the anticipated income and expenditure of the body corporate for the ensuing financial year, which estimate shall be laid before the annual general meeting for consideration.<sup>28</sup> Therefore, it seems that the budget must be prepared in the format that it would be submitted to the annual general meeting for consideration prior to the start of the financial year.<sup>29</sup>

The first kind of levy for which sectional owners are responsible are ordinary levies. The annual budget would normally make provision for the payment of the following ordinary levies: insurance premiums; electricity consumed on the common property; water where the scheme has a bulk water meter; maintenance of lifts; audit fees given that bodies corporate must be audited once a year regardless of size; managing agent fees where applicable; stationary; bank charges; cleaning costs; security services and intercom charges; and garden and swimming pool expenses.<sup>30</sup> This list is by no means exhaustive and it excludes items of a non-recurrent or unimportant nature.<sup>31</sup>

Contributions levied on sectional owners should not be limited to the sum required to cover the amount budgeted for the actual running expenses of the ensuing year. Sectional owners can expect to spend a substantial amount of money over a period of time coping with both foreseen and unforeseen problems, warding off obsolescence and replacing worn-out equipment. For example, substantial amounts of capital will be required for the repainting or renovation of the building.<sup>32</sup> Sectional owners should thus not be miserly when they have to vote on the annual budget due to the fact that the equity in their units are dependent on the proper maintenance of

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<sup>27</sup> Annexure 8 r 31(2).

<sup>28</sup> GN R 23 in GG 34639 of 28-09-2011.

<sup>29</sup> C Riddin "Revised rules for levies and budgets" (December 2011) 6-12 *Paddocks Press Newsletter* 2 2.

<sup>30</sup> See in general T Woudberg *Basic Sectional Title Book One* 2ed (1999) 12-16 and Van der Merwe *Sectional Titles* 14-18(1) – 14-18(2).

<sup>31</sup> Woudberg *Basic Sectional Title Book One* 16.

<sup>32</sup> Van der Merwe *Sectional Titles* 14-19.

the scheme as a whole, which requires proper budgeting and adequate provision for unforeseen expenses.<sup>33</sup>

Bodies corporate can, however, reduce the problems posed by unexpected or substantial capital expenditure by including in the budget provision for future maintenance and repairs in a reserve fund (sinking fund). The advantage of such a reserve fund is that ordinary monthly levies need not be substantially increased to meet future capital expenses such as the painting of the building.<sup>34</sup> Therefore, the STSMA now replaces the obiter reference to a reserve fund<sup>35</sup> in the Act with a provision that explicitly makes provision for the mandatory establishment of a reserve fund<sup>36</sup> in order to promote the financial stability and longevity of sectional title schemes.<sup>37</sup> In this regard the STSMA now provides that bodies corporate must 'establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister'.<sup>38</sup> The main purpose of a reserve fund in sectional title schemes is to prevent malfunctioning facilities and building or buildings becoming derelict and no longer suitable for their intended use. The minimum annual contributions to this reserve fund, which will probably be a percentage of the annual contributions to the administration fund, will be prescribed by the Minister of Human Settlements in the regulations.<sup>39</sup> If the contributions determined for the reserve fund at the annual general meeting are not reasonably sufficient to cover the cost of future maintenance and repairs of the common property or facilities, any sectional owner may in future, in terms of section 39(1)(c) of the Community Schemes Ombud Service Act 9 of 2011 (the CSOSA), approach the ombud service for a declaratory order that the contribution levied on sectional owners for this purpose was incorrectly determined and must be adjusted to a correct amount.

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<sup>33</sup> T Maree "The levies issue" (October 2010) 37 *MCS Courier Newsletter* 1 1.

<sup>34</sup> See in general Van der Merwe *Sectional Titles* 14-19 – 14-20.

<sup>35</sup> See s 37(1)(a) of the Sectional Titles Act 95 of 1986 which refers to 'reasonable provision for future maintenance and repairs'.

<sup>36</sup> Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(b).

<sup>37</sup> Van der Merwe *Sectional Titles* 14-20.

<sup>38</sup> Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(b).

<sup>39</sup> Van der Merwe (2012) *TSAR* 623.

It is, however, unfortunate that the STSMA did not provide for such a reserve fund in a more detailed manner. For example, it would have been judicious to follow the New South Wales Strata Schemes Management Act 138 of 1996 which specifically distinguishes between the expenditure side and the income side of the sinking fund (reserve fund). In terms of the latter act the expenditure side of a sinking fund consists of seven items in strata schemes (sectional title schemes) with more than three lots (units) namely:<sup>40</sup> actual or expected expenditure for painting or repainting any part of the common property which is a building or other structure; actual or expected expenditure to acquire personal (movable) property;<sup>41</sup> actual or expected expenditure to renew or replace personal property;<sup>42</sup> actual or expected expenditure to renew or replace fixtures and fittings that are part of the common property; actual or expected expenditure to replace or repair the common property; actual or expected expenditure to meet other expenses of a capital nature; and any payments of surplus moneys to owners from the sinking fund.<sup>43</sup>

The income side consists of the following items:<sup>44</sup> contributions levied on, and paid by, owners for payment into the fund; any amounts paid to the owners corporation (body corporate) by way of discharge of insurance claims unless those amounts have been paid into the administrative fund; any amount received by the owners corporation that is not required or permitted to be paid into the administrative fund; interest paid or recovered forms part of the fund to which the relevant contribution belongs; and any interest received on an investment made under section 73(1) forms part of the fund to which the investment belongs.<sup>45</sup>

An inadvertent omission in this regard in the STSMA is that this act fails to expressly provide for the investment of moneys in the reserve fund as it does for the investment of moneys in the administrative fund.<sup>46</sup> The power of the body corporate

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<sup>40</sup> Ss 71(1) and 75(2) of the New South Wales Strata Schemes Management Act 138 of 1996.

<sup>41</sup> For example, purchasing a new or used washing machine, clothes dryer, lawn mower or broom for an owners corporation (body corporate). See A Ilkin *NSW Strata and Community Schemes Management and the Law* 4ed (2007) 209.

<sup>42</sup> This would include the renewal or replacement of an owners corporation's lawn mower, washing machine, clothes dryer and even light globes. See Ilkin *Strata and Community Schemes* 209.

<sup>43</sup> See in general Ilkin *Strata and Community Schemes* 208-209.

<sup>44</sup> Ss 70, 73(2) and 80(2) of the New South Wales Strata Schemes Management Act 138 of 1996.

<sup>45</sup> See in general Ilkin *Strata and Community Schemes* 210.

<sup>46</sup> Sectional Titles Schemes Management Act 8 of 2011 s 4(g).

to invest the moneys in the reserve fund can, however, be performed under the general provision of section 4(i) of the STSMA which states that the body corporate may do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property.

### 3 3 Kinds of levies

We have already discussed the ordinary levies which sectional owners must pay into the administrative fund as part of their financial obligation as members of a sectional title scheme. We shall now explain the other two kinds of levies owed by sectional owners in a sectional title scheme. However, before one can examine special<sup>47</sup> and additional levies<sup>48</sup> it must be noted that the Act used to make provision for the payment of increased levies in terms of prescribed management rule 31(4A).

Normally it is not possible to have an annual general meeting during the first month of the financial year and, therefore, levies for the next financial year are almost always fixed some time after the commencement of that year.<sup>49</sup> The main reason for this lapse of time is the fact that the annual financial statements, the budget for the ensuing financial year and other documentation relating to the annual general meeting take time to prepare.<sup>50</sup> There would thus be a gap in the financial calendar during which no levies are recoverable from owners that might cause cash flow problems for bodies corporate.<sup>51</sup>

Before the insertion of management rule 31(4A) this problem was overcome by the trustees raising special levies<sup>52</sup> on the basis of the participation quota of each unit to cover the shortage of funds in the financial calendar. All sectional owners were notified of these levies and were also advised as to the amounts payable by each of them. These special levies were then collected by the trustees until the budget was

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<sup>47</sup> Annexure 8 r 31(4B) and ss 37(2A) and (2B) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(3)).

<sup>48</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)).

<sup>49</sup> Maree *Sectional Titles on Tap* 6.13. See also G Paddock *Sectional Title Survival Manual* 6ed (2008) 10-13.

<sup>50</sup> I Kotze "Levies Due after the Financial Year End" (October 2010) 37 *MCS Courier Newsletter* 9 9.

<sup>51</sup> Maree *Sectional Titles on Tap* 6.13.

<sup>52</sup> Annexure 8 r 31(4) of the Sectional Titles Act 95 of 1986.

approved and the new levies were confirmed at the annual general meeting.<sup>53</sup> The insertion of management rule 31(4A) specifically catered for this situation in a different manner. It provided that sectional owners were liable for contributions in the same amount and payable in the same instalments as were due and payable by them during the previous financial year to cover the shortfall in levies for the shortfall period. This was given effect in the proviso which stated that the trustees may, if they consider it necessary and by written notice to the sectional owners, increase the contributions due by the owners by a maximum of 10% to account for the possible increased liability of the body corporate. The liability for the payment of these increased levies continued until the new budget for the ensuing year was approved.<sup>54</sup> The fact that the provision was inserted after management rule 31(4) meant that it applied not only to ordinary levies but also to special levies as raised by the trustees.<sup>55</sup>

The Sectional Titles Amendment Regulations of 2013,<sup>56</sup> however, deleted management rule 31(4A).<sup>57</sup> The latter rule was replaced by a new sub rule 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 payable in one sum or by such instalments as and at such times as the trustees shall think fit. Increased levies are thus a matter of the past.

The second kind of levy that may be raised by the trustees from time to time is thus special levies. Special levies may only be raised for expenses which are necessary but were not budgeted for in the estimate of income and expenditure approved at the last annual general meeting.<sup>58</sup> Over the years the raising of special levies has become an established practice, even though it was never covered expressly by the provisions of the Act. Model management rule 31(4) was the peg used to legitimise the collection of special levies. The latter rule determined that the trustees may from time to time, whenever necessary, charge special levies on sectional owners or call

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<sup>53</sup> Maree *Sectional Titles on Tap* 6.13 - 6.14.

<sup>54</sup> Annexure 8 r 31(4A) of the Sectional Titles Act 95 of 1986. See also Kotze (October 2010) *MCS Courier Newsletter* 10.

<sup>55</sup> Van der Merwe *Sectional Titles* 14-18(1).

<sup>56</sup> GN R 196 in GG 36421 of 14-03-2013.

<sup>57</sup> S 9(c) of the Sectional Titles Amendment Regulations of 14 March 2013.

<sup>58</sup> Annexure 8 r 31(4B) of the Sectional Titles Act 95 of 1986.

upon them to make special contributions in respect of particular expenses which were not included in the budget. The most important aspects of the latter rule is that special levies are raised by the trustees alone; special levies can only be raised if the expense is necessary; and the expense for which the special levy is raised must not have been budgeted for in the last annual budget approved at the last annual general meeting.<sup>59</sup>

The collection of special levies was only recently legalised by the Sectional Titles Amendment Act 11 of 2010. Subsection (2A) inserted into section 37 provides that any special contribution becomes due on the passing of a resolution in this regard by the trustees and may be recovered by the body corporate by action in any court (including a Magistrate's Court) having jurisdiction, from the persons who were owners of units at the time when such resolution was passed.<sup>60</sup> The newly inserted subsection (2B) of section 37 then defines a special contribution as any contribution not budgeted for at an annual general meeting and which is levied upon owners during the ensuing year. The reference should have been to the current year, as is the position in terms of section 3(4) of the STSMA, instead of the ensuing year. This provision leaves too much to the trustees' discretion with regard to the imposition of special levies. Furthermore, the ability to raise special contributions should have been limited to unbudgeted contributions in circumstances where the body corporate requires additional income to satisfy claims against it and the collection of such income cannot be delayed for inclusion in the budget ratified by owners at the next annual general meeting.<sup>61</sup>

Consequently, special levies are contributions which owners are obliged to pay in the same proportion as their participation quotas over and above their normal, budgeted for levies in order to provide additional funds for a special project or an unexpected expense during the current year.<sup>62</sup>

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<sup>59</sup> J Paddock "Special Levies in Sectional Title Schemes" (March 2009) 4-3 *Paddocks Press Newsletter* 5 5.

<sup>60</sup> Sectional Titles Schemes Management Act 8 of 2011 s 3(3). The recovery of such a special contribution is facilitated by allowing an application to an ombud instead of an action in any competent court (including a Magistrate's Court) having jurisdiction.

<sup>61</sup> Van der Merwe *Sectional Titles* 14-18(5) - 14-18(6). See also CG Van der Merwe "A Critical Analysis of the Innovations introduced by the Sectional Titles Amendment Bill of 2010" (2011) 22 *Stell LR* 115 133.

<sup>62</sup> See Woudberg *Basic Sectional Title Book One* 21.

Due to the unlimited extent of special levies, it is disputed whether the raising of special levies should be allowed. Developers can, however, amend management rule 31(4B) to make provision for a rule to indicate what kind of special expenses will be considered necessary. Since management rule 31(4B) can be amended, developers should be encouraged to impose more practical provisions to provide clarity to trustees as to when they have the right to raise special levies and as to when they should wait and rather cover the expense concerned in the next annual budget of the scheme.<sup>63</sup>

These special levies may be payable in one lump sum or by such instalments as the trustees think fit.<sup>64</sup> Trustees have every right to raise special levies without consulting with the sectional owners, but this is not recommended.<sup>65</sup> As already mentioned above, special levies are calculated and apportioned to owners according to their respective participation quotas. Therefore, any other formula would be invalid unless sanctioned in an amended management rule.<sup>66</sup>

The last kind of levies that can be raised are additional levies. The Act requires that sectional owners with exclusive use rights must make additional contributions to the fund established under section 37(1)(a) to satisfy claims against the body corporate with regard to the exclusive use areas concerned.<sup>67</sup> Normally these additional contributions are arranged to be part of the levy payable by the specific sectional owner that are served by the exclusive use area.<sup>68</sup> This means that additional levies should not be allocated to all sectional owners in accordance with their participation quotas, since only the owners of exclusive use areas are responsible for the payment of these additional levies.<sup>69</sup>

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<sup>63</sup> G Paddock "Now the Developer can Amend PMR 31" (December 2008) 3-12 *Paddocks Press Newsletter* 2 3.

<sup>64</sup> Annexure 8 r 31(4B) of the Sectional Titles Act 95 of 1986.

<sup>65</sup> Van der Merwe *Sectional Titles* 14-18(6) and Woudberg *Basic Sectional Title Book One* 21.

<sup>66</sup> Van der Merwe *Sectional Titles* 14-18(6). In practice trustees often make the mistake to apportion levies on an equal basis; see L De Lange "Special Levies – The Bare Necessities" (October 2007) 27 *MCS Courier Newsletter* 5 5.

<sup>67</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)). See also in general H 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) 8 *Stell LR* 324 338-339.

<sup>68</sup> G Paddock *The Sectional Title Handbook* 2ed (1990) 63. See also in general Mostert (1997) *Stell LR* 339.

<sup>69</sup> Maree *Sectional Titles on Tap* 6.17.



In *Body Corporate of the Solidatus Scheme No SS 23/90 v De Waal*<sup>70</sup> the court had to decide whether the repair of certain structural defects, caused by faulty workmanship and poor design and construction, in a number of exclusive use areas in a sectional title scheme could be accommodated under the term 'maintenance' in terms of section 37(1)(b). The perception of the court was that the rights to exclusive use areas were so closely akin to ownership as to be virtually indistinguishable.<sup>71</sup> Accordingly the court decided that the sectional owners of these exclusive use areas were liable for the cost of repairs for these structural defects even though the structural flaws were not caused by them.<sup>72</sup> This decision was severely criticised by various authors. Van der Merwe is of the opinion that the structural parts of the building or buildings in a sectional title scheme, whether situated within a section, an exclusive use area or on the common property, should always be considered common property. Furthermore, he suggests that the overhaul of structural defects should be considered as works which go beyond the ordinary scope of maintenance and should in principle fall in the responsibility sphere of the body corporate.<sup>73</sup> However, Maree proposed that there might be instances where the holders of exclusive use areas could rightly be held liable for the repair of structural defects. Examples of such instances would be where the structural failure was caused by the holder himself; where the structural failure occurred because of normal usage of the area; or where the structure forms part of the exclusive use area solely for the purpose of exclusive use and is not an integral part of the building supporting or protecting other sections or the common property.<sup>74</sup>

Maree also suggests that the amount required in respect of exclusive use areas should be apportioned to the sectional owners served by exclusive use areas in proportion to the actual estimated costs related to each exclusive use area. Furthermore, he suggests that the trustees should keep the levy income relating to these areas in a separate bank account, which account should only be utilised for expenditure related to such areas. Where expensive repairs are required to an exclusive use area and the budget is insufficient in such regard the costs related to

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<sup>70</sup> 1997 3 All SA 91 (T).

<sup>71</sup> 99E.

<sup>72</sup> 99E-F.

<sup>73</sup> Van der Merwe *Sectional Titles* 11-31.

<sup>74</sup> T Maree "Drawing the Line – apportionment of expenses of exclusive use areas" (June 2002) 412 *De Rebus* 54 55.



the repairs should be recovered from the sectional owner concerned as an additional levy.<sup>75</sup>

### **3 4 Date on which levies become payable and responsibility for payment on transfer of a unit**

The Act and the management rules contain contradictory statements as to when levies are payable. Before the amendment of section 37(2) of the Act by the Sectional Titles Amendment Act 29 of 2003, the body corporate could recover the amounts from the persons who were owners of units at the time *when such contributions became due*. The amended section 37(2) after 2003 provides that any contribution levied under section 37(1) is due and payable on the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by action in the relevant court from the persons who were owners of units at the time *when such resolution was passed*.<sup>76</sup> The relevant management rule 31(3) then somewhat confusingly states that within 14 days after each annual general meeting the trustees must advise each owner in writing of the amount payable by him in respect of the approved annual budget, whereupon such amount shall become payable in instalments, as determined by the trustees.<sup>77</sup>

This implies that the decision of the sectional owners at the annual general meeting is the legal act that triggers liability for levies. It would have been more logical for this sub rule to oblige the trustees to hold a meeting and to pass a resolution that the levy was due and payable within 14 days after the annual general meeting and, thereafter, to notify the owners in writing of the amounts due under the resolution they passed. Maree regards the notification as a requisite for the payment of instalments but not as the moment on which contributions become claimable. The failure to notify the owners would, therefore, constitute neglect on the part of the

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<sup>75</sup> T Maree “Determination of levies and involvement of the trustees?” (September 2009) 34 *MCS Courier Newsletter* 10 11.

<sup>76</sup> S 37(2) of the Sectional Titles Act 95 of 1986. In the absence of a trustees’ resolution levies will not be legally determined and will therefore not be due and claimable in law. Thus in terms of s 37(2) there simply are no levies without a trustees’ resolution. See in this regard *The Body Corporate of the Peaks Sectional Title Scheme, NO: SS 230/2002 v Dean Allan Prinsloo NO and Others* WCC 20-09-2012 case no 7729/2012 para 27 and T Maree “The Peaks Decision” (December 2012) 42 *MCS Courier Newsletter* 1 1.

<sup>77</sup> Annexure 8 r 31(3) of the Sectional Titles Act 95 of 1986.

trustees but should not render the contributions non-claimable.<sup>78</sup> The failure to notify the owners may also mean that the amount of the contributions is not payable in instalments but that the full amount of the annual levy became due and payable when the trustees approved the resolution.<sup>79</sup>

The amendment of section 37(2) by the Sectional Titles Amendment Act of 2003, which takes precedence over the provisions in the management rules, however, provides clarity as to the date when levies become due and payable. We have seen that it stipulates that any contributions levied under any provision of subsection (1), shall be due and payable on the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by action in any court (including any Magistrate's Court) of competent jurisdiction from the persons who were owners of units at the time *when such resolution was passed*.

The fact that contributions may be recovered 'from the persons who were owners of the units at the time when the resolution was passed' causes confusion amongst sectional owners in sectional title schemes since it is assumed that the effect is that if an owner sells during the budget year, he will still be liable for the contributions for the entire year.<sup>80</sup> Before the amendment the body corporate could recover the contributions 'from the persons who were the owners of units at the time when such contributions became due', as opposed to recovering them from the person who was the owner on the passing of the resolution by the trustees. This entailed that if a sectional owner sold his unit during the budget year, the monthly levy payments was merely transferred to the new purchaser.

After the amendment of section 37(2) it was suggested that the body corporate would not be allowed to collect levies for the remaining part of the year from new owners.<sup>81</sup> This implies that a person who owned the unit when the levy became due and payable is the only person from which the body corporate may legally recover

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<sup>78</sup> T Maree "Latest Amendments to the Sectional Titles Act: Why now? Why this" (May 2005) 16 *MCS Courier Newsletter* 10 10-11.

<sup>79</sup> 11.

<sup>80</sup> M Kelly-Louw "Collection of levies by a body corporate" (2004) 12-2 *JBL* 94 97 and M Kelly-Louw "The Preferential right of the Local Government or the Body Corporate above that of the Mortgage Bondholder during Insolvency Proceedings" (2004) 18 *Speculum Juris* 168 173.

<sup>81</sup> Kelly-Louw (2004) *JBL* 97 and Kelly-Louw (2004) *Speculum Juris* 173.

the levy. This can be problematic, for example, when a special levy is raised and becomes due and payable after an owner has sold his unit but before the transfer of ownership has taken place. The seller would thus still be the owner at the time the special levy was raised and therefore the body corporate is legally entitled to recover the special levy from the seller and not from the purchaser as the new owner.

To avoid disputes like this the seller may assign his levy obligations to the purchaser with effect from the date of transfer. This contractual agreement must be accepted by the body corporate to be of any effect and can be achieved by means of a tripartite agreement between the seller, purchaser and body corporate.<sup>82</sup> An example of such a clause, used by estate agency Chass Everrit, reads as follow:

“It is agreed between the parties that the seller shall not be liable for the levies and other costs due and payable to the Body Corporate as from the date of registration of the transfer into the purchaser’s name. Accordingly the purchaser shall be liable and shall pay all levies and other costs due to the Body Corporate from such date. The purchaser hereby indemnifies the seller against any claims in terms of section 37 of the Sectional Titles Act.”<sup>83</sup>

The suggestion of Chass Everrit may provide a workable solution and also end the confusion around section 37, as discussed above.

Fortunately, the amendment of section 37(2) of the Act by the Sectional Titles Amendment Act 11 of 2010<sup>84</sup> now specifically sheds light on the question as to who is responsible for the payment of levies where transfer of ownership has taken place. It now provides that upon the change of ownership of a unit, exclusive use areas or real rights of extension, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of ownership.<sup>85</sup> The fact that the new owner will become automatically liable for his share of the annual levies as from the date of registration of transfer of the unit into his name, will eliminate the need for the parties to enter into a tripartite agreement with the body corporate at the time of

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<sup>82</sup> Paddock (June 2008) *Paddocks Press Newsletter* 3.

<sup>83</sup> Kelly-Louw (2004) *JBL* 97 and Kelly-Louw (2004) *Speculum Juris* 173-174.

<sup>84</sup> S 11 of the Sectional Titles Amendment Act 11 of 2010.

<sup>85</sup> S 37(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(2)).

change of ownership in order to ensure the continued flow of budgeted contributions to the administrative fund.<sup>86</sup>

With regard to special levies, the inserted subsection (2A) of section 37 reads that any special contribution shall be due on the passing of a resolution in this regard by the trustees and may be recovered from the persons who were owners of units at the time when such resolution was passed.<sup>87</sup> Section 37(2A) was, however, not made subject to the same proviso as section 37(2) which means that the new owner will not automatically become liable for the portion of the special levy that was not yet paid on the transfer of ownership. This result seems fair where the special levy was made payable in one sum but it is questionable whether this should also be the case where the special levy was made payable in instalments and all instalments were not paid at the time of transfer of ownership.<sup>88</sup> Therefore, the tripartite agreement is not yet dead and should be utilised whenever a purchaser of a unit is required to take over the responsibilities of the seller in respect of any outstanding special levies.<sup>89</sup> The STSMA, however, now states that any special contribution becomes due on the passing of a resolution in this regard by the trustees of the body corporate levying such contribution and may be recovered by the body corporate by an application to an ombud. It also corrected the lacuna in the Act by providing that upon the change of ownership of a unit, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of ownership.<sup>90</sup>

### **3 5 Personal liability of sectional owners for the debts of the body corporate**

A harsh reality in the South African sectional title context is the culture of under-budgeting for expenses at annual general meetings and the non-payment of levies by sectional owners. Consequently, there are numerous examples of bodies corporate finding themselves in grave financial distress. The body corporate would inevitably default on its payments where the reserves and monthly income are insufficient to meet its commitments. When this happens creditors will turn to

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<sup>86</sup> T Maree “Latest Proposed Amendments to the Sectional Titles Act; Will these be the last?” (September 2009) 34 *MCS Courier Newsletter* 1 4.

<sup>87</sup> S 11 of the Sectional Titles Amendment Act 11 of 2010.

<sup>88</sup> Van der Merwe (2011) *Stell LR* 133.

<sup>89</sup> J Maree “End of the Tri-Partite Agreement” (January 2012) 39 *MCS Courier Newsletter* 5 6.

<sup>90</sup> S 3(3) of the Sectional Titles Schemes Management Act 8 of 2011.

sectional owners individually to recover their claims as, in terms of the Act, the sectional owners are personally liable for the debts of the body corporate.<sup>91</sup> This is, therefore, an instance where sectional owners are burdened with an additional financial obligation which can be enforced in the same manner as the other kinds of expenses discussed above.

Under section 47(1) of the Act the liability of sectional owners is, however, of a subsidiary nature because they can only be sued if the body corporate is unable to satisfy its debts.<sup>92</sup> If a judgement debt against the body corporate remains unsatisfied notwithstanding the issue of a writ, the judgement creditor can apply for the joinder of the members (sectional owners) of the body corporate in their personal capacities as joint judgement debtors in respect of the judgement debt.<sup>93</sup> When this joinder takes place, the judgement creditor may recover the amount of the debt still outstanding from the members on a pro rata basis in proportion to their respective participation quotas or in accordance with any amendment to these proportions made in terms of section 32(4).<sup>94</sup> Consequently, the trustees should not allow the liabilities of the body corporate to exceed its assets and result in an inability to discharge its ordinary day-to-day liabilities to its service providers and others.<sup>95</sup>

The main features of section 47(1) can be summarised as follow:<sup>96</sup> Firstly, a creditor of the body corporate can only demand payment from individual sectional owners if a judgement is obtained against the body corporate and such a judgement remains unsatisfied or a *nulla bona* return is issued. If this happens, the judgement creditor must apply to the court for the joinder of the sectional owners in their personal capacities as joint judgement debtors in order to recover the judgement

<sup>91</sup> H Delpont “Sectional Title Unit Owners’ Liability for Payment of Body Corporate’s Debts” (2005) 26-2 *Obiter* 404 404-405. See also Van der Merwe *Sectional Titles* 14-10(1).

<sup>92</sup> S 47(1) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 15). See also *In re: Body Corporate of the Caroline Court* 2002 1 All SA 49 (A) para 8; *Reddy v Body Corporate of Croftdene Mall* 2002 5 SA 640 (D) 644F-645B.

<sup>93</sup> S 47(1) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 15(1)(a)). See also in general Maree *Sectional Titles on Tap* 10.8 and M Constas & K Bleijs *Demystifying Sectional Title* 1ed (2004) 119.

<sup>94</sup> S 47(1) of the Sectional Titles Act 95 of 1986. S 15(1)(b) of the Sectional Titles Schemes Management Act 8 of 2011 states that upon such joinder, the judgement creditor may recover the amount of the judgement debt still outstanding from the said member on a pro rata basis in proportion to their respective quotas or a rule made in terms of section 10(2). See also in general Maree *Sectional Titles on Tap* 10.8 and Constas & Bleijs *Demystifying Sectional Title* 119.

<sup>95</sup> *Reddy v Body Corporate of Croftdene Mall* 2002 5 SA 640 (D) 645B-C.

<sup>96</sup> Delpont (2005) *Obiter* 408. See also Van der Merwe *Sectional Titles* 14-10(1) – 14-10(2).

debt pro rata from them. Secondly, while sectional owners are jointly and severally liable for the debts of the body corporate, this liability is limited to a percentage of the debt based on the unit's participation quota or as modified in the rules.<sup>97</sup> Thirdly, all sectional owners must be joined but the judgement creditor may recover pro rata payment from certain sectional owners only. Fourthly, only sectional owners at the time when the application for joinder is made may be joined. Therefore, sectional owners who were members when the debt was incurred may only be joined if they were still owners at the time of the application. Lastly, section 47(1) initially did not draw any distinction between sectional owners who consistently paid their levies and levy defaulters. That is, even though all the sectional owners had to be joined, the judgement creditor was able to recover from only levy-paying members who then had to recoup what they paid from the other sectional owners, some of whom were not in a financial position to repay what the sectional owner had paid. This situation was highly unfair to sectional owners who faithfully paid their levies, due to the fact that they could be held liable for the debts of the body corporate, even though they did not cause the indebtedness of the body corporate.<sup>98</sup> This 'highly unfair' situation was taken care of by the amendment of the proviso to section 47(1) in the Act by the Sectional Titles Amendment Act 7 of 2005. The proviso now reads as follow:

"Provided that any member who has paid the contributions due by him or her in terms of section 37(1) to the body corporate in respect of the same debts prior to the judgement against the body corporate, may not be joined as a joint judgement debtor in respect of the judgement debt"<sup>99</sup>

This means that a sectional owner who has paid his portion of the levies in respect of specific accounts cannot be joined as joint debtor in respect of those accounts because he has already made payment in respect of the same debt. Furthermore, if a special levy has been raised to cover extraordinary expenditure, the sectional owner who has paid his portion of the special levy cannot be joined as a judgement debtor in respect of this expenditure since he has already made payment in respect of the same debt, namely the extraordinary expenditure.<sup>100</sup>

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<sup>97</sup> Under s 32(4) of the Sectional Titles Act 95 of 1986.

<sup>98</sup> For a practical example of such an unfair situation see Constas & Bleijs *Demystifying Sectional Title* 119.

<sup>99</sup> S 47(1) of the Sectional Titles Act 95 of 1986 as amended by the Sectional Titles Amendment Act 7 of 2005.

<sup>100</sup> Delpont (2005) *Obiter* 410; Van der Merwe *Sectional Titles* 14-10(2).

An important question is, however, whether a sectional owner can be joined as a judgement debtor for debts incurred by the body corporate before he became a member of the body corporate, as was the situation before the Sectional Titles Amendment Act of 2005. On the one hand one can argue that a judgement creditor claiming payments of debts incurred before such owner became a member of the body corporate, may join the sectional owner as a joint judgement debtor in respect of those debts because the levies were not paid in respect of the same debt.<sup>101</sup> On the other hand it is arguable that the intention of the legislature was to amend the situation where levy paying sectional owners can be held liable for the debts of the body corporate. The intention of the legislator could never have been to grant relief to levy paying owners, and not to purchasers into the scheme, who were not even owners when the debts were incurred. Therefore, arguably the correct interpretation of section 47(1) would be that owners could be joined as judgement debtors, only if they were owners at the time when they were liable to pay levies in respect of the debt in question and they failed to pay these levies.<sup>102</sup>

We have seen that the new proviso forces judgement creditors to take action for satisfaction of their debts against only those sectional owners who have not paid their levies. Besides the fact that judgement creditors might find the task of unravelling the distinctive parts of levy payments impossible, it would also exempt sectional owners who have paid even the smallest portion towards 'the same debt'. From the perspective of the sectional owners the amendment would be welcomed since it removes the possibility to join sectional owners who paid their levies in respect of particular body corporate debts, but it might undermine the good governance and creditworthiness of bodies corporate in general.<sup>103</sup>

Furthermore, compromising the original idea of making sectional owners personally liable for the debts of the body corporate could in practice result in the fact that a body corporate might have to be liquidated. The Act does, however, not have any

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<sup>101</sup> Delport (2005) *Obiter* 410; Van der Merwe *Sectional Titles* 14-10(2) – 14-10(3). This argument does, however, not prevent the risk of purchasing into a scheme where the body corporate has unpaid debts. See Van der Merwe *Sectional Titles* 14-10(3).

<sup>102</sup> Delport (2005) *Obiter* 410-411; Van der Merwe *Sectional Titles* 14-10(3).

<sup>103</sup> T Maree "Notes on the Latest Amendments" (September 2005) 18 *MCS Courier Newsletter* 12 13.



provisions to regulate such an occurrence.<sup>104</sup> The fear that enormous municipal debts that have built up against bodies corporate would be passed on to individual sectional owners were also alleviated by the promulgation of the Local Government: Municipal Property Rates Act 6 of 2004 (the Property Rates Act), because it provides that sectional owners must be sued separately for municipal rates and in particular circumstances also for service charges.<sup>105</sup> Therefore, the robust approach by the legislature to solve this problem, and thereby compromising one of the basic principles of the Act, that sectional owners have a personal subsidiary liability to pay all the debts of the body corporate, was perhaps too drastic.<sup>106</sup>

### **3 6 Withholding payment of levies**

A situation may present itself in practice where sectional owners believe that the body corporate owes them money and that they are fully entitled to withhold their levy payments in lieu of this debt. Such action may sound reasonable but it is not legally justified since sectional owners are only entitled to off-set such debts once the matter has been adjudicated by an arbitrator or a judge.<sup>107</sup>

In the case of *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd*<sup>108</sup> the High Court of the Witwatersrand had the opportunity to adjudicate upon the withholding of contributions by aggrieved sectional owners. The body corporate applied for the final liquidation of a company, the registered owner of 22 units in the scheme, which owed the body corporate more than R400 000 in arrear levies and other charges. The company opposed the application on several grounds. The main grounds were the following: firstly, that the respondent had to carry out certain maintenance work, which the trustees omitted to do, and, secondly, that the increased and special levies were due to the trustees' mismanagement and were anyway superfluous because the body corporate had sufficient funds.<sup>109</sup>

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<sup>104</sup> Van der Merwe *Sectional Titles* 14-10(4).

<sup>105</sup> T Maree "Body Corporate Debts and Joinder of Owners: An Ineffectual Solution" (March 2006) 10-1 *Property Law Digest* 2 3. See also Van der Merwe *Sectional Titles* 14-10(4).

<sup>106</sup> Van der Merwe *Sectional Titles* 14-10(4).

<sup>107</sup> Paddock (June 2008) *Paddocks Press Newsletter* 3.

<sup>108</sup> 2003 5 SA 414 (W).

<sup>109</sup> Para 6.



The court looked at management rule 31(4) which entitled trustees, from time to time, to impose special levies upon owners. The court also took notice of section 39(1) of the Act which determines that the functions and powers of the body corporate (which includes the function of requiring owners, whenever necessary, to make contributions by way of levies in terms of section 37(1)(b)) must be performed and exercised by the trustees of the body corporate holding office in terms of the rules. It is the trustees, and not any individual sectional owner, who are empowered to take a decision as to whether or not the imposition of a levy (which would include a special levy) is necessary as contemplated by section 37(1)(b) of the Act, and by management rule 31(4).

Furthermore, in terms of section 37(1)(d) of the Act one of the functions of a body corporate is to determine from time to time the amount to be raised for the purposes aforesaid. In accordance with section 39(1) of the Act and management rule 30 the trustees for the time being of the body corporate have the function of determining the amounts to be levied upon sectional owners. The court, therefore, decided that no sectional owner is entitled to dispute his liability for the payment of levies on the ground that the levies concerned were excessive in his opinion.<sup>110</sup>

However, in terms of the CSOSA an applicant (sectional owners or occupiers) can now bring an application for an order declaring that a contribution levied on owners or occupiers is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct reasonable amount.<sup>111</sup> This provision is laudable since sectional owners can now dispute their liability for the payment of levies that are excessive. Following this route will also be much swifter and cheaper than having the matter adjudicated by an arbitrator or a judge.

### **3 7 Recovery of profits on levies**

Another related question with regard to the financial obligations of sectional owners is whether sectional owners are entitled to a refund of contributions lawfully levied upon and duly paid by them. The answer to this question necessitates a

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<sup>110</sup> Para 7.

<sup>111</sup> S 39(1)(c) of the Community Schemes Ombud Service Act 9 of 2011.

consideration of model management rule 45. This rule makes it clear that sectional owners are not entitled to a refund of contributions lawfully levied upon and duly paid by them.<sup>112</sup> The aim of this rule is to ensure that, once money has been lawfully levied and paid into the administrative fund, bodies corporate are not tempted to withdraw money for frivolous purposes. Placing an embargo on refunding was a fairly crude obstacle placed in the way of bodies corporate to guarantee sufficient money in the reserve fund to pay for reasonable future expenses. However, if the sectional owners decide to charge lesser levies in order to bring surpluses in the reserve fund down to what is required in the Act (to provide for reasonable future maintenance and repairs),<sup>113</sup> a purchaser cannot challenge such a resolution on the ground that it reduces his share in the reserve fund.<sup>114</sup>

Therefore, sectional owners are not entitled to recover or be refunded any levies that they have paid to the body corporate, unless they can prove that a part or a whole of a contribution levied upon them was unlawful.<sup>115</sup>

### 3 8 Evaluation

Bodies corporate can only discharge their statutory administrative and maintenance obligations if they have access to a continual supply of operating capital.<sup>116</sup> The Act caters for this by requiring that each body corporate must establish an administrative fund sufficient, in the opinion of the body corporate, to cover its expenses.<sup>117</sup> The payment of levies by sectional owners is, therefore, the most important financial obligation that is placed on sectional owners. However, for many years accounting and financial estimates and reporting in sectional title schemes were not up to a standard that ensured financially sound bodies corporate. The large amount of special levies that are currently raised in sectional title schemes bears testimony to this. This state of affairs may be due to the failure to deliver monthly management

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<sup>112</sup> Annexure 8 rule 45(1) of the Sectional Titles Act 95 of 1986.

<sup>113</sup> See s 37(1)(a) of the Sectional Titles Act 95 of 1986.

<sup>114</sup> Van der Merwe *Sectional Titles* 14-20(2).

<sup>115</sup> Paddock (June 2008) *Paddocks Press Newsletter* 3.

<sup>116</sup> DJ Manderscheid "Condominium Contributions: A Matter of Priority" (1999) 37-4 *Alta. L. Rev.* 973 975.

<sup>117</sup> S 37(1)(a) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(a)). See also Paddock (June 2008) *Paddocks Press Newsletter* 1.

reports in many sectional title schemes, or a lack of adequate expertise to prepare proper estimates.<sup>118</sup>

It is commendable that the STSMA now explicitly requires that the funds budgeted for the administrative fund must be reasonably sufficient to cover the annual expenses of the scheme and makes provision for the establishment of a reserve fund which will promote the financial stability and longevity of sectional title schemes. The fact that the Minister of Human Settlements must decide on the total amount of the reserve fund is to be welcomed since this would prevent bodies corporate from being stingy in determining such amount. Unfortunately, the STSMA does not specifically state what would be part of the income and expenditure side of the reserve fund, as is the case in New South Wales. This would have given more clarity on how to correctly determine the amounts payable to the reserve fund. Nevertheless, the fact that the body corporate must now ensure that the budgeted levies are sufficient to cover the expenses of the current year and that a reserve fund with reasonably sufficient funds must be set up, would definitely diminish the need to impose special levies on sectional owners.

We have seen, at 3.3, that the well-designed provision of model management rule 31(4A), which used to make provision for the payment of increased levies, has been deleted by section 9(c) of the Sectional Titles Amendment Regulations of 2013. A possible reason for the replacement of management rule 31(4A) is 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) by the Sectional Titles Amendment Act of 2010. The gap left by the deletion of increased levies is thus now covered by means of special levies which should not be raised by the trustees for frivolous purposes. Arguably, the raising of special levies will now take place more often because it also needs to cover expenses during the period where no levies are payable by sectional owners. Developers should thus use the opportunity to amend management rule 31(4B) to impose more practical provisions to provide clarity to trustees as to when they have the right to raise special levies.<sup>119</sup>

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<sup>118</sup> C Riddin "Financial Planning in Tough Times" (December 2008) 3-12 *Paddocks Press Newsletter* 5.5.

<sup>119</sup> Paddock (December 2008) *Paddocks Press Newsletter* 3.

Previously the seller, purchaser and body corporate had to enter into a tripartite agreement to transfer the levy obligations from the seller to the purchaser, which was costly, time consuming and impractical. Fortunately, with the amendment of section 37(2) of the Act by the Sectional Titles Amendment Act of 2010 the need for tripartite agreements came to an end because the amended section now provides that upon the change of ownership of a unit, exclusive use areas or real rights of extension, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of ownership.<sup>120</sup> Section 37(2A) was, however, not made subject to the same proviso as section 37(2) which means that the new owner will not become automatically liable for the portion of the special levy that was not yet paid on the transfer of ownership. This means that the tripartite agreement is still applicable in the case of special levies where transfer of ownership takes place and the liability for pro rata payments is transferred to the purchaser. The STSMA, however, took a step in the right direction by providing clarity on who is responsible for the payment of special levies where transfer of ownership has taken place by stating that the successor in title becomes liable for the pro rata payment of such contributions from the date of change of ownership.<sup>121</sup> Therefore the seller, purchaser and body corporate need not enter into a tripartite agreement because owners now automatically become liable for the pro rata payment of such contributions where transfer of ownership has taken place.

The new proviso to section 47(1)<sup>122</sup> of the Act, limiting the recovery of debts of the body corporate to owners who have not paid their contributions to the said debt, is problematic because it assumes that the total amount of levies raised prior to judgement will cover the current and judgement debts of the body corporate and does not take into account that the body corporate's debts are often not caused by the non-recovery of contributions, but rather by inadequate budgeting.<sup>123</sup> The new proviso also forces the judgement creditor to take action only against non-paying owners. Besides the fact that it would be almost impossible for a judgement creditor to unravel the distinctive parts of levy payments, it would apparently also excuse

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<sup>120</sup> S 37(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(2)).

<sup>121</sup> S 3(3) of the Sectional Titles Schemes Management Act 8 of 2011.

<sup>122</sup> S 15.

<sup>123</sup> Van der Merwe *Sectional Titles* 14-10(3) – 14-10(4).

owners who have paid even the smallest portion towards the same debt.<sup>124</sup> Furthermore, where necessary, the recovery could include execution proceedings which would presumably be limited to a specific owner's arrears in contributions. This entails a shortfall for the judgement creditor.<sup>125</sup> Moreover, the Sectional Titles Amendment Act of 2005 created uncertainty as to whether a member of the body corporate may, as in the past, be joined as a joint judgement debtor in respects of debts incurred by the body corporate before such member obtained his membership of the body corporate. It is unfortunate that section 15 of the STSMA, which is an exact re-enactment of section 47 of the Act, does not state that if an owner has paid his levies neither he nor his successor in title may be joined as judgement debtors for payment of the body corporate's debts, provided that the successor also keeps up his levy payments.<sup>126</sup> In principle members of a sectional title body corporate should be liable for its debts, because a movement away from this would undermine good governance and it would also wear down the creditworthiness of bodies corporate.

Lastly, we have seen that aggrieved sectional owners may not withhold the payment of levies to off-set debts they believe are owed to them by the body corporate. The withholding of the payment of levies may only take place once the matter has been adjudicated by an arbitrator or judge. This situation is laudable since owners would have otherwise been able to take the law into their own hands even in unjustifiable circumstances. Laudably, the CSOSA now makes provision for sectional owners to dispute their liability for the payment of levies that are excessive. It is also praiseworthy that owners are not entitled to a refund of contributions lawfully levied upon them and paid because this ensures that there are sufficient funds for expected and unexpected future maintenance and repairs.

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<sup>124</sup> Maree (September 2005) *MCS Courier Newsletter* 13. See also Maree (March 2006) *Property Law Digest* 3.

<sup>125</sup> Van der Merwe *Sectional Titles* 14-10(4).

<sup>126</sup> Delport (2005) *Obiter* 411.

## Chapter 4: Less Severe Measures for the Enforcement of Financial Obligations

### 4 1 Introduction

The difficulties involved in the timeous collection of levies are the main source of financial and personal anxiety encountered by bodies corporate in sectional title schemes. In difficult economic times the collection of levies becomes even more crucial, but unfortunately it also becomes less successful.<sup>1</sup> Repeated failure by sectional owners to comply with their financial obligations may prevent timely maintenance and the efficient administration of the scheme, which would ultimately result in the scheme's downfall.<sup>2</sup> Arrear levies should thus be strictly controlled and regulated by only allowing low margins for debt.<sup>3</sup> Harmony in sectional title schemes depends on competent management that allows the common parts of the building and the common facilities to be adequately and regularly maintained.<sup>4</sup> Therefore, it is clear that bodies corporate must be provided with stronger mechanisms to better enforce the payment of levies. A swift and inexpensive procedure must be found to allow the body corporate to collect these levies timeously.<sup>5</sup>

The attachment and sale in execution of sectional title units, which will be discussed in the next chapter, is the most severe measure used to enforce sectional owners' financial obligations. Fortunately for bodies corporate the Sectional Titles Act 95 of 1986 (the Act), the prescribed rules and the Magistrates' Courts Act 32 of 1944 also make provision for less severe measures for the enforcement of sectional owners' financial obligations. These measures include the following: levies are recoverable in court; the defaulting owner is held responsible for all costs of recovery and interest on arrears; the suspension of the defaulting owner's voting rights; an embargo on the defaulting owner's nomination and election as trustee; an embargo

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<sup>1</sup> JL Winokur "Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms under the Uniform Common Interest Ownership Act" (1992) 27 *Wake Forest L. Rev.* 353 357.

<sup>2</sup> CG Van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 *Sectional Titles* (Service Issue 16 May 2013) 9-4.

<sup>3</sup> 9-5.

<sup>4</sup> CG Van der Merwe & L Muñis Argüelles "Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme" (2006) 16 *Duke Journal of Comparative and International Law* 125 125.

<sup>5</sup> 154.

on the alienation of a unit unless all arrears have been paid; the attachment of the defaulter's movables and rental income; emolument attachment orders, garnishee orders and administration orders issued against the defaulter; and sequestration of the sectional owner.

The advantages and disadvantages of each of these measures will be thoroughly investigated in this chapter. We shall see that some of these measures are moderately successful in forcing solvent defaulters to pay their contributions but that most of them have been proved ineffectual in practice. We shall, therefore, consider whether the management rules can be amended to provide for more efficient measures of enforcement, and if so, whether these measures pass the test of constitutionality. Finally, we shall consider whether the legislator should be called upon to include stronger mechanisms for legal recourse in the Act that will better address the problems encountered in the enforcement of the financial obligations of sectional owners.

## **4 2 Less severe measures**

### **4 2 1 Recoverability in court**

In terms of the Act all contributions levied for administrative expenses shall be due and payable once the trustees of the body corporate have passed a resolution to that effect.<sup>6</sup> This resolution must be passed soon after each annual general meeting where the estimate of income and expenditure (budget) was approved and the amount to be levied on owners during the ensuing financial year determined.<sup>7</sup> The amount each sectional owner must pay is determined in accordance with the participation quotas, or an amendment with regard to expenses, of their respective sections.<sup>8</sup> Within 14 days after the annual general meeting each owner must be advised in writing of the amount payable by him. This amount will become payable in instalments as determined by the trustees.<sup>9</sup> Once the resolution has been passed by the trustees, arrear contributions may be recovered by the body corporate by

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<sup>6</sup> S 37(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(2)).

<sup>7</sup> Annexure 8 r 31(2) of the Sectional Titles Act 95 of 1986.

<sup>8</sup> S 32(4) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 11(2)).

<sup>9</sup> Annexure 8 r 31(3) of the Sectional Titles Act 95 of 1986.



action in court, including any Magistrate's Court, from the persons who were owners of units at the time when such resolution was passed.<sup>10</sup>

The following steps should be taken by collection attorneys before they commence with an action in the Magistrate's Court. Firstly, it would be advisable for the attorney to call the defaulting owner to inform him of the outstanding contributions that need to be paid. If no payment is made after the telephone call the second step would be to send a letter of demand to the defaulting owner informing him that if he fails to pay his levies before a certain date further legal action will commence. If the defaulting owner then fails to respond to the letter of demand a summons may be issued after the payment period expires. The summons should be delivered to the Magistrate's Court so that the sheriff can serve the summons on the defaulting owner. Thereafter the defaulting owner has 10 days to defend. If the claim is not defended the attorney can apply for a default judgement. Once judgement is granted by the Magistrate's Court the defaulting owner can be blacklisted and the collection attorney can execute against his assets.

The cost of the recovery of levies can be kept minimal since it can be recovered in the Magistrate's Court and not necessarily in the High Court having jurisdiction.<sup>11</sup> Bodies corporate should, therefore, act swiftly against levy defaulters in order to avoid having to go to the High Court since the claim or the value of the matter in dispute in a Magistrate's Court should not exceed the amount determined by the Minister from time to time by notice in the Government Gazette.<sup>12</sup>

The cost of recovery could have been even less if it was permissible to recover levies by an action in a South African Small Claims Court. The latter option is, however, ruled out by the Small Claims Court Act 61 of 1984 because it only entertains claims between natural persons and does not allow legal persons like a body corporate to institute claims in the Small Claims Court.<sup>13</sup>

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<sup>10</sup> S 37(2).

<sup>11</sup> Van der Merwe *Sectional Titles* 9-8(1) – 9-9.

<sup>12</sup> S 29(1)(g) of the Magistrates' Courts Act 32 of 1944. District court: R100 000 (GN R 1411 in GG 19435 of 30-10-1998); Regional court: above R100 000 to R300 000 (GN 670 in GG 33418 of 29-07-2010).

<sup>13</sup> S 7(1) of the Small Claims Court Act 61 of 1984.



The Sectional Titles Schemes Management Act 8 of 2011 (the STSMA) now states that ordinary levies, additional levies and levies payable to the reserve fund may be recovered by the body corporate by an application to a regional ombud from persons who were owners of units at the time when such resolution was passed.<sup>14</sup> This procedure would be swifter than the time-consuming action required in any competent court, including a Magistrate's Court, having jurisdiction. Furthermore, the STSMA also makes provision for the recovery of special contributions by an application to the ombud.<sup>15</sup> The swifter recovery of special contributions will be even more important where substantial amounts of money are required to affect maintenance or repairs in emergency situations. It is, however, important to note that the body corporate still has the discretion to rather pursue the action in a court of law since both of the above mentioned provisions of the STSMA uses the word 'may' which is considered to be permissive rather than mandatory.<sup>16</sup>

#### **4 2 2 Defaulting owner's responsibility for costs of recovery**

Prescribed management rule 31(5) reads as follows:

“An owner shall be liable for and pay all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies, or any other arrear amounts due and owing by such owner to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.”

In terms of this rule the defaulting owner will be liable to pay all legal costs incurred by the body corporate in the recovery of arrear levies. Legal costs may include the following (this list is by no means exhaustive and depends on the specific situation at hand): correspondence (telephone calls and e-mails sent and received); letters of demand; summonses; appearances in court; instructions; and the perusal of documents. De Villiers J, in *Barnard NO v Regspersoon van Aminie en 'n Ander*<sup>17</sup>

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<sup>14</sup> S 3(2) of the Sectional Titles Schemes Management Act 8 of 2011.

<sup>15</sup> S 3(3).

<sup>16</sup> Van der Merwe *Sectional Titles* 9-9.

<sup>17</sup> 2000 1 SA 213 (T).

also decided that legal costs include costs in respect of the sequestration of an insolvent estate.<sup>18</sup>

This rule also specifies that legal costs include costs as between attorney and client. The successful party in a court case is generally entitled to party and party costs, which means that the successful party will recover from the other side, a portion of the costs that he has to pay to his attorney. However, the Act specifically states that the winner, which would in this case be the body corporate, can recover legal costs on an attorney and client scale. This means that the body corporate will recover a higher proportion of its cost.<sup>19</sup>

Besides legal costs the defaulting owner will be liable for collection commission. In practice most levy financiers and collection attorneys will recover their costs incurred in collecting debts and enforcing compliance with the rules from amounts paid by defaulting owners. Therefore, Paddock suggests that it would be wise for a developer to amend management rule 31(5) to make this position clearer. This can be done by allowing a range of body corporate agents to charge contingency fees that the body corporate can recover from owners. Contingency fees are the arrangement between the levy financier or collection attorney and client (body corporate) whereby the levy financier or collection attorney agrees to represent the client with compensation (fee) to be a percentage of the amount recovered. Since contingency fees are generally charged at a higher rate than ordinary fees, such an amended rule might also address the fee structure, perhaps by allowing the trustees to approve the amounts payable from time to time.<sup>20</sup>

In addition the defaulting owner will be liable for expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies. It is difficult to answer whether fees charged and disbursements incurred by others such as managing agents and levy financiers, for example para-legal costs, are recoverable from the defaulting owner. Arguably management rule 31(5) only deals with legal costs and that all the examples following after the words 'legal costs' are qualified by the

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<sup>18</sup> 218H-J.

<sup>19</sup> M Constat & K Bleijs *Demystifying Sectional Title* 1ed (2004) 113.

<sup>20</sup> G Paddock "Now the developer can amend PMR 31. What does this mean?" (December 2008) 3-12 *Paddocks Press Newsletter* 2 3.

expression 'legal costs'. On this view 'expenses' and 'charges' incurred by others are not recoverable from the defaulting owner. A more likely interpretation would, however, be that the last part of management rule 31(5) namely 'expenses and charges incurred by the body corporate' are separate items not covered by the phrase 'legal costs'. In such a case the defaulter would be liable not only for legal costs but also for other expenses and charges incurred by the body corporate in recovering arrear levies, which would, therefore, include fees charged and disbursements incurred by others such as managing agents and levy financiers. If the latter interpretation is acceptable a mechanism should be put in place to prevent costs spiralling or the rule should be amended to exclude such expenses and charges as an item recoverable from the defaulting owner.<sup>21</sup>

Finally it should be noted that the defaulting owner will be liable for the legal costs, collection commission and recovery expenses of the body corporate in regard not only to the recovery of arrear levies but also for the recovery of any other arrear amount due and owing to the body corporate or in enforcing compliance with the prescribed rules and the Act.<sup>22</sup>

From a legal comparative perspective South Africa is not the only country that makes the defaulting owner liable for legal costs and other expenses in the recovery of arrear levies. For example, the Spanish Law on Horizontal Property of 21 July 1960 provides that all reasonable legal costs and the collection costs incurred prior to a court case can be claimed upon the presentation of written proof. Furthermore, court costs can be claimed and if the action gets opposed, the general rule as to judicial costs applies, and the total cost in using legal representation can be claimed.<sup>23</sup> The Ontario Condominium Act of 1998 also specifically states that the management association (body corporate) is entitled to claim all expenses connected with the collection or attempted collection of arrear contributions. This includes the cost of preparing and registering a certificate of lien which establishes a security charge on

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<sup>21</sup> See in general Van der Merwe *Sectional Titles 9-10* – 9-10(1) and Paddock (December 2008) *Paddocks Press Newsletter* 3.

<sup>22</sup> Annexure 8 r 31(5) of the Sectional Titles Act 95 of 1986.

<sup>23</sup> Arts 21.3 and 21.6 of the Spanish Law on Horizontal Property (*Ley de Propiedad Horizontal*) of 21 July 1960. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of International and Comparative Law* 130.

the apartment of the defaulter in favour of the body corporate for money owed to the body corporate.<sup>24</sup>

#### 4 2 3 Defaulting owner's responsibility for interest on arrears

Prescribed management rule 31(6) reads as follows:

“The trustees shall be entitled to charge interest on arrear amounts at such rate as they may from time to time determine”.

This rule places an additional financial burden on the defaulter who is already liable for legal costs, collection commission, and recovery expenses and charges because the trustees in addition are entitled to charge interest on arrear amounts at such rates as they may from time to time determine.

It must be pointed out that no interest will be recoverable if the trustees fail to take a resolution to set interest at a particular rate. This has been confirmed in the recent case of *The Body Corporate of the Peaks Sectional Titles Scheme, No: SS230/2002 v Dean Alan Prinsloo NO and Others*.<sup>25</sup> The absence of a resolution to set a rate of interest would lead to the unfortunate situation whereby levy-paying owners would effectively subsidise the arrears of levy defaulters.

The next question is whether the trustees really have absolute discretion in setting the rate of interest and whether they may set a rate which exceeds the rates set under the Prescribed Rate of Interest Act 55 of 1975, which currently specifies a rate of 15.5 %.<sup>26</sup>

In *Body Corporate Lynwood Gardens v Mureli Yegi and Another*<sup>27</sup> the court queried the statement<sup>28</sup> that the interest rate may not exceed the rate set under section 1(2)

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<sup>24</sup> Art 85(3)(c) of the Ontario Condominium Act of 1998 (S.O., 1998, Ch. 19). See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of International and Comparative Law* 130-131.

<sup>25</sup> WCC 20-09-2012 case no 7729/2012. For a summary of this case see T Maree “The Peaks Decision” (December 2012) 42 *MCS Courier Newsletter* 1 1.

<sup>26</sup> S 1(2) of the Prescribed Rate of Interest Act 55 of 1975.

<sup>27</sup> CPD 27-08-2003 case no A35/2003 para 11.

of the Prescribed Rate of Interest Act. The latter act provides that if a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom, or in any other manner, such rate shall be calculated at the prescribed rate.<sup>29</sup> In the present case, the annual general meeting resolved by majority vote to direct the board of trustees to increase the rate of interest charged on arrear contributions to 10% per month.<sup>30</sup> Therefore, it was held that the obligation to pay interest at the rate of 10% per month was created by agreement between the owners and for that reason the Prescribed Rate of Interest Act did not apply.<sup>31</sup>

It should be pointed out that the rationale for deciding that the interest rate was not restricted to the rate prescribed in the Prescribed Rate of Interest Act was that the rate decided on by the trustees was based on a direction of the general meeting to increase the rate of interest to 10% per month, which adds up to 120% per year. The court construed this direction to the trustees as an agreement reached between the members of the body corporate and because the rate at which the interest was to be calculated was governed by an agreement, the rate need not be calculated at the prescribed rate. It could be questioned whether a majority resolution directing the trustees to charge interest at a certain rate can be regarded as an 'agreement' as to the rate of interest. What is clear, however, is that if the trustees have set a rate of 10% per month without having been directed by the general meeting to do so, the rate set would not have been covered by an agreement and that, therefore, they had fallen foul of the prescribed rate of 15.5% per year as prescribed by the Prescribed Rate of Interest Act. From this it follows that trustees do not have absolute discretion to charge whatever rate they please, but that the rate they charge is governed by the provisions of the Prescribed Rate of Interest Act.<sup>32</sup>

A related question is whether the general meeting would be allowed to adopt a resolution to direct the trustees to charge a higher rate than the prescribed rate. In general it makes sense for a meeting of owners to decide what rate of interest

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<sup>28</sup> In n 6 to para 237 at page 196 in the chapter of LAWSA dealing with Sectional Titles, contributed by Prof CG Van der Merwe.

<sup>29</sup> S 1(1) of the Prescribed Rate of Interest Act 55 of 1975.

<sup>30</sup> *Body Corporate Lynwood Gardens v Mureli Yegi and Another* CPD 27-08-2003 case no A35/2003 para 2.

<sup>31</sup> See in general Van der Merwe *Sectional Titles* 9-10(2).

<sup>32</sup> See in general Van der Merwe *Sectional Titles* 9-10(2) – 9-10(3).

should be charged on arrear levies and this happens frequently in practice. It gives the owners a chance to decide on a reasonable rate related to the characteristics of that particular scheme. However, in my opinion not even the general meeting should have an unfettered discretion to adopt whatever interest rate they like since I am of the opinion that the rate of interest should be linked to an objective standard. Paddock supports this when he suggests that the applicable rate of interest should be linked to some external published interest rate that is regularly reviewed and amended in line with economic circumstances.<sup>33</sup> Maree, on the other hand, is of the view that the *in duplum* rule, which prevents interest exceeding the capital balance, should be the only limitation applicable to interest levied upon owners in respect of amounts mentioned in management rule 31(5) and (6).<sup>34</sup> In summary, I argue that prescribed management rule 31(6) requires the trustees to determine the rate of interest. General meetings should give owners an indication of the rate of interest to be charged on arrears, but this should not be construed as an agreement which can circumvent the limitations set by the Prescribed Rate of Interest Act. It seems improper to accept that the only limitation on the rate of interest charged should be the *in duplum* rule according to which a creditor is not allowed to obtain twice the amount of the capital debt.

The court in *Body Corporate Lynwood Gardens v Mureli Yegi and Another*<sup>35</sup> furthermore accepted the decision in *Standard Bank of South Africa v Oneanate Investments (in liquidation)*<sup>36</sup> that the compounding or capitalisation of interest is not permissible, for to allow such practice would be an easy method of avoiding the *in duplum* rule or the provisions of the Usury Act 73 of 1968.<sup>37</sup> Therefore, the court decided that the payment of the 10% interest per month was subject to the *in duplum* rule.<sup>38</sup>

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<sup>33</sup> Paddock (December 2008) *Paddocks Press Newsletter* 3-4.

<sup>34</sup> T Maree "Is there a cap on interest rates for arrears?" (December 2012) 42 *MCS Courier Newsletter* 2 2-3.

<sup>35</sup> CPD 27-08-2003 case no A35/2003.

<sup>36</sup> 1998 1 SA 811 (A).

<sup>37</sup> *Body Corporate Lynwood Gardens v Mureli Yegi and Another* CPD 27-08-2003 case no A35/2003 para 10.3.

<sup>38</sup> Para 14.2(1).

*Mitchell v Beheerliggaam RNS Mansions*<sup>39</sup> considered whether the charge of compound interest on unpaid levies and interest was permissible in terms of management rule 31(6). The applicant bought a unit in a sectional title scheme at a sale in execution subject to the condition that the buyer must pay any amount due in law to the body corporate. After the sale the applicant received a reconciliation which indicated that an amount of R180 579, 26 was owed in respect of the unit as at June 2008. It appeared from the statement that interest had been capitalised and thus that compound interest had been levied. The applicant then sought an order from the court that the respondent was only entitled to charge simple interest at a rate determined from time to time by the trustees.<sup>40</sup> Several pronouncements on the subject of compound interest in general was reviewed before the judge assumed in favour of the applicant that compound interest would only be payable if there was something in the Act which specifically provided for the payment of such interest.<sup>41</sup>

It was shown that one of the functions of a body corporate is to establish a fund for administrative expenses which is sufficient in its opinion for the repair, upkeep, control, management and administration of the common property.<sup>42</sup> It is for these reasons that the body corporate is obliged to require owners to make contributions to the fund<sup>43</sup> and to recover them in any competent court.<sup>44</sup> Management rule 30 provides that trustees are obliged to levy and collect contributions from the owners in accordance with the provisions and in the proportions set forth in management rule 31. After the content of management rule 31(5) was mentioned, Murphy J highlighted that management rule 31(6) entitles the trustees to charge interests *on arrear amounts* at such rate as they may determine from time to time. Murphy J then pointed out that rule 31(5) draws a distinction between ‘arrear levies’ on the one hand and ‘any other arrear amounts due and owing’ on the other hand; and that rule 31(6) entitles the trustees to charge interest on any arrear amounts and not only on arrear levies. From this literal interpretation he concluded that rule 31(6) allowed the trustees to charge interest on unpaid interest charged on arrear levies, thus

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<sup>39</sup> 2010 5 SA 75 (GNP). For a short summary of the judgment see N De Goede “M.D. Mitchell v Beheerliggaam RNS Mansions: Simplifying a Compounded Issue” (September 2010) 5-9 *Paddocks Press Newsletter* 2.

<sup>40</sup> *Mitchell v Beheerliggaam RNS Mansions* 2010 5 SA 75 (GNP) para 6.

<sup>41</sup> Paras 8-10.

<sup>42</sup> Para 11.

<sup>43</sup> Ss 37(1)(a)-(d) of the Sectional Titles Act 95 of 1986.

<sup>44</sup> S 37(2).



compound interest. He goes on to remark that the trustees would fail in their fiduciary duty if they did not charge defaulting owners compound interest, which they would be able to earn on money invested in a commercial bank as they are entitled to do under prescribed management rules 43<sup>45</sup> and 44;<sup>46</sup> and thus they comply with their obligation to ensure that the fund for administrative expenses is sufficient to enable the body corporate to fulfil its functions.<sup>47</sup> Therefore, Murphy J concluded that the Act authorised the charge of compound interest on unpaid levies and dismissed the application for a declarator that the body corporate is only allowed to charge simple interest on such amounts.<sup>48</sup>

Van der Merwe, however, submits that due consideration was not given to *Body Corporate Lynwood Gardens v Mureli Yegi and Another*<sup>49</sup> where the court remarked that the compounding or capitalisation of interest is not permissible, for to allow such practice would be an easy method of avoiding the *in duplum* rule or the provisions of the Usury Act.<sup>50</sup>

While the rationale for charging interest on arrears and other debts owed to the body corporate is to force the defaulting owner to pay arrears, the aim is not to punish the defaulting owner. Moreover, the modern trend under the Consumer Protection Act 68 of 2008 and other consumer protection legislation is to be more lenient on defaulters and to allow them to have their payments rescheduled. In view of this it seems acceptable to set the rate of interest that can be charged in accordance with the Prescribed Rate of Interest Act.

#### **4 2 4 Suspension of voting rights**

The sectional owner's right to vote is one of the normal consequences of membership of a body corporate. A sectional owner is automatically a member of

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<sup>45</sup> In terms of management rule 43 any funds not immediately required for disbursement may be invested in a savings or similar account with any building society or bank approved by the trustees from time to time.

<sup>46</sup> Management rule 44 then again states that interests on moneys invested shall be used for any lawful purpose.

<sup>47</sup> *Mitchell v Beheerliggaam RNS Mansions* 2010 5 SA 75 (GNP) para 14.

<sup>48</sup> Para 15.

<sup>49</sup> CPD 27-08-2003 case no A35/2003.

<sup>50</sup> Van der Merwe *Sectional Titles* 9-10(4).



the body corporate which entitles him to vote at all general meetings either personally, by proxy<sup>51</sup> or through a legally recognised representative.<sup>52</sup>

In this regard prescribed management rule 64 provides the following:

“Except in cases where a special resolution or unanimous resolution is required under the Act, an owner shall not be entitled to vote at any general meeting if -

- (a) any contributions payable by him in respect of his section and his undivided share in the common property have not been duly paid; or
- (b) ...: Provided that any mortgagee shall be entitled to vote as such owner’s proxy at any general meeting, even though paragraph (a) or the foregoing provisions of this paragraph may apply to such owner.”

From the above it is clear that the suspension applies only in the case of ordinary resolutions and not if he has to vote for matters requiring a special or unanimous resolution.<sup>53</sup> However, an owner who has not paid his levies may still attend and speak at any general meeting. Furthermore, the proviso to rule 64 clearly states that any sectional mortgagee of a defaulting sectional owner’s unit is entitled to vote as such owner’s proxy at any general meeting.<sup>54</sup> There is no reason why an owner who is not entitled to vote but remains entitled to attend and speak at a meeting should not be included in the calculation of the quorum.<sup>55</sup> It seems trite that this suspension will only be lifted once the whole debt is satisfied.<sup>56</sup>

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<sup>51</sup> Annexure 8 r 67 of the Sectional Titles Act 95 of 1986.

<sup>52</sup> Such as a trustee; Annexure 8 r 65 of the Sectional Titles Act 95 of 1986. See also J Paddock

“Disqualifications from Voting in Sectional Title Meetings” (July 2010) 5-7 *Paddocks Press Newsletter* 4.

<sup>53</sup> In terms of Puerto Rican case law this suspension also applies to unanimous resolutions, which would thus deprive the defaulting owner of the right to vote on a unanimous resolution. See in general Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of International and Comparative Law* 133.

<sup>54</sup> Annexure 8 r 64(a) and (b) of the Sectional Titles Act 95 of 1986. See also in general Van der Merwe *Sectional Titles* 9-10(5) and Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of International and Comparative Law* 133.

<sup>55</sup> C Baker “Quorums and the Value of Votes: Proposed changes to Prescribed Management Rules 53, 57 and 64” (February 2009) 4-2 *Paddocks Press Newsletter* 1 3.

<sup>56</sup> Van der Merwe *Sectional Titles* 9-10(5).

In *Herald Investments Share Block (Pty) Ltd and Others v Meer and Others; Meer v Body Corporate of Belmont Arcade and Another*<sup>57</sup> the court highlighted the phrase ‘contributions payable’ by the defaulting owner. The court examined prescribed management rules 30, 31 and 45 and the sections of the Act applicable to contributions, and found that ‘contributions’ referred solely to the amounts levied on owners of sections to meet the expenses of the body corporate and not to interest on any overdue contributions.<sup>58</sup> Since none of these rules refer to interest, the court found that rule 64(a), dealing with the suspension of voting rights in case of non-payment of ‘contributions’ could not be invoked if a defaulting owner paid the capital amount of the arrear levies but not the simple or compound interest that had accrued thereon. The court cautioned that to disqualify a sectional owner from voting at a general meeting is a very stringent sanction, as it deprives him of a voice in relation to matters arising directly from his ownership of immovable property. The latter inequitable disadvantage is recognised by the phrase at the beginning of rule 64(a) which excludes disqualification on resolutions requiring either unanimous or special resolutions. Therefore, it is impermissible to silence the voice of any sectional owner if he is in arrears with his contributions, when it comes to profoundly important issues. Consequently, the court found that the suspension of the right to vote on the ground of non-payment of compound interest was not justified and that the owners should have been permitted to exercise their voting rights at the special general meeting.<sup>59</sup>

De Goede pointed out that in terms of *Mitchell v Beheerliggaam RNS Mansions*<sup>60</sup> there is a fiduciary duty on trustees to raise compound interest on arrear levies under management rule 31(6), but because of the decision in *Herald Investments Share Block (Pty) Ltd and Others v Meer and Others; Meer v Body Corporate of Belmont Arcade and Another*<sup>61</sup> the trustees are not allowed to use the suspension of vote sanction to enforce the non-payment of interest. Therefore, trustees must settle for the more expensive and time-consuming option of approaching the court to claim arrear interest. He also pointed out that this narrow interpretation of management

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<sup>57</sup> 2010 6 SA 599 (KZD).

<sup>58</sup> Para 38.

<sup>59</sup> Para 39. See also T Maree “How not to Settle a Dispute” (March 2011) 506 *De Rebus* 35 35-37 and Van der Merwe *Sectional Titles* 9-10(5) – 9-10(6).

<sup>60</sup> 2010 5 SA 75 (GNP).

<sup>61</sup> 2010 6 SA 599 (KZD).

rule 64(a) meant that any unpaid interest, whether compound or simple, as well as administration and penalty fees did not bring the rule into application. He, therefore, argued that the court perhaps should have sought an interpretation of 'contributions' that precludes compound interest defaulters from voting in terms of management rule 64(a). He based this on the fact that the term 'contributions' is not pertinently defined in the Act and that management rules 30, 31 and 45 do not define the makeup of contributions. He, therefore, proposes a mechanism by which the term 'contributions' could include 'interest'. He furthermore argues that interest is a foregone conclusion on 'arrear amounts' as it is described in management rule 31(5) and (6) and to separate interest from 'contributions', which must surely fall under 'arrear amounts', is artificial. Finally, he argued that the exclusion of overdue interest in the application of management rule 64(a) is an absurdity and could not have been the intention of the legislature.<sup>62</sup>

It is also questionable whether an owner's voting right should be suspended in situations where the trustees consider that an owner has not duly paid a levy, but the owner insists that the levy was not correctly raised.<sup>63</sup> It may not be sensible to exclude these owners from the meeting or deny them a vote when their presence and participation may be crucial for curing the problem.<sup>64</sup> Moreover, some items on the agenda of an annual general meeting are so important that no owner should be excluded from the voting on these. Examples of such items include the election of trustees, the approval of the budget, or indeed all business related items.<sup>65</sup>

The main problem is, however, that the suspension of voting rights is in final analysis not an efficient remedy to force defaulting owners to settle their levies with the body corporate. Many owners who do not pay their levies care little about the operation of the sectional title scheme and rarely attend general meetings. Again, the practical difficulties involved in enforcing the suspension of voting rights may outweigh the deterrent value of this specific sanction.<sup>66</sup> One of these practical difficulties would be

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<sup>62</sup> N De Goede "Management Rule 64(a) now missing some teeth" (December 2010) 5-12 *Paddocks Press Newsletter* 2.

<sup>63</sup> Van der Merwe *Sectional Titles* 9-10(6).

<sup>64</sup> Baker (February 2009) *Paddocks Press Newsletter* 3.

<sup>65</sup> 4.

<sup>66</sup> Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of International and Comparative Law* 133-134. See also Van der Merwe *Sectional Titles* 9-10(6).

the identification of the defaulting owners at a general meeting who are not allowed to vote on ordinary resolutions, but must then be called upon to vote on unanimous and special resolutions. Therefore, the practical implications of the embargo on voting rights should be carefully considered and applied by chairpersons. An incorrect application of this embargo could render the proceedings and resolutions made at the general meetings null and void.<sup>67</sup>

We have seen that the voting embargo against levy defaulters only applies to arrear levies and not to interest raised in respect of arrears and other legal costs incurred in the collection of levies. Bodies corporate can only collect arrear compound interest by the expensive, time-consuming and often-divisive process of handing the account over to attorneys. Therefore, a strong argument can be advanced that either the legislature should amend the Act or management rule 64(a) or that the Courts should change their interpretation of this provision at the next opportunity to ensure that this embargo is an adequate deterrent against owners who have not paid accrued interest on their levies and collection expenses.<sup>68</sup>

#### **4 2 5 Embargo on nomination and election as trustee**

Section 9(a) of the Sectional Titles Amendments Regulations of 2013 now places an embargo on the nomination and election of owners as trustees if they are in arrears with the payment of their levies. Before the amendment of Annexure 8 rule 7 levy defaulters could have gained control of the trustees, manipulated decision-making and even blocked resolutions to institute levy recovery actions against themselves.<sup>69</sup> Therefore, Annexure 8 rule 7, which deals with the nomination of trustees, has now been amended by the addition of a second proviso which stipulates that no person who is in breach of management rule 64(a) or (b)<sup>70</sup> may be nominated or elected as trustee. We have seen at 4 2 4 above, that management rule 64(a) prevents owners who are in arrears with the payment of their levies from voting on ordinary resolutions of the general meeting. These owners may, therefore, not be nominated or elected as trustee. The introduction of this sanction is laudable since owners who

<sup>67</sup> Maree (March 2011) *De Rebus* 37.

<sup>68</sup> De Goede (December 2010) *Paddocks Press Newsletter* 2.

<sup>69</sup> T Maree "Latest rule amendments" (April 2013) 44 *MCS Courier Newsletter* 1 1.

<sup>70</sup> Not rule 64(1) and (2) as erroneously referred to in the amended regulations.

stand for election to the office of trustee should set the example for the other owners in honouring their financial obligations to the body corporate.

#### **4 2 6 Embargo on alienation unless arrears paid**

In terms of the Act, the registrar shall not register a transfer of a unit unless a conveyancer's certificate is produced confirming that, as at date of registration, the body corporate has certified that all moneys due to it have been paid or that provision has been made to the satisfaction of the body corporate for the payment thereof.<sup>71</sup> This provision thus places an embargo on the transfer of a unit unless arrear levies have been paid.<sup>72</sup> However, as will be explained in chapter 5, this remedy would only be effective if the unit is not heavily mortgaged and the transferor has sufficient funds before the sale to pay off the arrears.<sup>73</sup>

Most sectional owners who deny that the debt is owed will pay under protest in order to obtain the clearance certificate and will then institute an enrichment action to reclaim payment of money not owed. This is known as the 'protest payment' route. However, in terms of section 15B(3)(a)(i)(aa) of the Act the owner can, instead of payment, make provision to the satisfaction of the body corporate for the payment of the debt. This is known as the 'payment provision' route. Provision for payment can be made by providing some sort of conditional guarantee or depositing payment into the trust account of an attorney, accompanied by his undertaking to pay the body corporate the amount eventually found, or agreed, to be due. The body corporate must be reasonable when determining whether it is satisfied with the owner's payment provision; that is the body corporate's discretion is not unfettered.<sup>74</sup> When a statute requires an act to be 'to the satisfaction' of some entity or authority it confers discretion on that entity (here the body corporate). However, where the payment provision is objectively reasonable and the owner's dispute is bona fide, the

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<sup>71</sup> S 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986.

<sup>72</sup> For a similar embargo provision see s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 which prohibits the transfer of immovable property unless the relevant municipality has issued a certificate stating that all the amounts due in connection with that property, including municipal service fees during the two years preceding the date of application for the certificate have been fully paid.

<sup>73</sup> See in general Van der Merwe *Sectional Titles* 9-10(7) – 9-11.

<sup>74</sup> R Darrol "Payment provision for disputed sectional title debts when wishing to sell" (January/February 2007) 461 *De Rebus* 57 57.

law obliges the body corporate to be satisfied on the ground that discretion must be exercised according to the rules of reason and justice, not according to private opinion.<sup>75</sup>

Protest payments seem illogical, costly and time consuming by being unnecessarily litigious; they also raise questions about the onus of proof. Therefore, it would be wiser for sectional owners to follow the 'payment provision' route if they deny that they owe a debt and are in the process of selling and transferring their units.<sup>76</sup>

In *First Rand Bank Ltd v Body Corporate of Geovy Villa*<sup>77</sup> the Supreme Court of Appeal settled the dispute as to whether the embargo in question can be construed as a tacit lien, charge or preferent right in favour of the body corporate, ranking above a previously registered mortgage. The Supreme Court of Appeal decided that this restriction was significant in the case of the transfer from an insolvent estate<sup>78</sup> since the embargo can be accommodated as part of the cost of realisation within the scheme, as provided by the Insolvency Act 24 of 1936.<sup>79</sup> Therefore, the applicable conveyancer's certificate will only be issued once the debt is paid, which would then lead to the registration of the transfer of the unit. Only then would the mortgagee be able to exercise his security right from the proceeds of the sale.<sup>80</sup> The Supreme Court of Appeal, however, refused to recognise that the embargo could be construed as a security right, which would afford the body corporate a preferential right with respect to outstanding debts pertaining to the unit, in cases where the transfer was not from an insolvent estate.<sup>81</sup> This matter will be discussed in detail in chapter 5.

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<sup>75</sup> *Sharp v Wakefield* 1891 AC 173 179; *Cassar and Cassar v Belville Municipality and Another* 1958 3 SA 318 (C) 325; *Pretoria North Town Council v A.I. Electric Ice-Cream Factory (Pty.) Ltd.* 1953 3 SA 1 (AD) 12.

<sup>76</sup> See in general Darrol (January/February 2007) *De Rebus* 57.

<sup>77</sup> 2004 3 SA 362 (SCA).

<sup>78</sup> Para 27.

<sup>79</sup> S 89(1) of the Insolvency Act 24 of 1936. See also *Nel NO v Body Corporate of the Seaways Building and Another* 1995 1 SA 130 (C) 136E-F confirmed in *Nel NO v Body Corporate of the Seaways Building and Another* 1996 1 SA 131 (A).

<sup>80</sup> Van der Merwe *Sectional Titles* 9-11.

<sup>81</sup> *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA) paras 30-31.

#### 4 2 7 Attachment of movables and rental income of the defaulter

The Magistrates' Courts Act makes provision for the body corporate to attach and sell in execution the moveable property of a sectional owner against whom a judgement has been obtained.<sup>82</sup> Following this route, however, is not always a straight forward process.

A prudent body corporate (judgement creditor) which doubts whether a judgement debtor (sectional owner) has attachable moveable assets, will have to institute proceedings under a section 65A(1) notice which makes an inquiry into the financial position of the judgement debtor possible.<sup>83</sup> This firstly involves a court giving judgement for the payment of a sum of money or ordering the payment in specified instalments. Secondly, this judgement or order must have remained unsatisfied for a period of 10 days from the date it was given or became payable or from the expiry of the suspension period ordered in terms of section 48(e), as the case may be. In these instances the judgement creditor may issue, from the court of the district in which the judgement debtor resides, carries on business or is employed, a notice calling upon the judgement debtor to appear in chambers on a specified date to enable the court to inquire into the financial position of the judgement debtor.<sup>84</sup> This provision thus makes it possible to determine whether the judgement debtor has attachable assets for settling his debts to the judgement creditor.

If a judgement creditor issues a warrant of execution against the judgement debtor's movable property before the hearing in terms of a notice under section 65A(1) and a *nulla bona* return indicating a lack of movable property is made, section 65E(4) of the Magistrates' Courts Act provides that the judgement creditor shall not be entitled to claim the costs in connection with the warrant unless the court, on good cause, is shown orders otherwise. A prudent judgement creditor must, therefore, first ascertain whether the judgement debtor is in possession of attachable moveable assets, as discussed above.<sup>85</sup>

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<sup>82</sup> S 66 of the Magistrates' Courts Act 32 of 1944 and r 36.

<sup>83</sup> See in general DE Van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa* Vol 1 10ed (Service 3, 31 March 2013) 411-414. See also Van der Merwe *Sectional Titles* 9-11 – 9-12.

<sup>84</sup> S 65A(1)(a) of the Magistrates' Courts Act 32 of 1944.

<sup>85</sup> See in general Van der Merwe *Sectional Titles* 9-11 – 9-12.



A further problem is that movable property will frequently have been bought under a hire-purchase, credit or sale agreement with a term suspending the transfer of ownership to the purchaser.<sup>86</sup> Therefore, the seller retains ownership of the property and it is only the mostly negligible interest of the purchaser (judgement debtor) in the property that is attachable and not the moveable itself.<sup>87</sup> Moreover, there is the risk that third parties may lay claim to the attachable movable property by way of interpleading proceedings.<sup>88</sup> What is more, the costs of issuing a warrant and levying execution rank as a first charge on the proceeds of the moveable property sold in execution.<sup>89</sup> An obstructive judgement debtor may increase the costs of execution or the moveable property may be of so little value that a sale in execution would not be worthwhile. Rule 39(1) of the Magistrates' Courts Act provides that if the proceeds of such a sale are not sufficient to cover the costs of execution, such costs may be recovered from the judgement debtor as costs awarded by the court. Lastly, all warrants of execution lodged with the sheriff on or before the day preceding the date of sale in execution rank pro rata in the distribution of the moveable property sold in execution.<sup>90</sup>

Besides the attachment of movables, the judgement creditor is entitled to attach the rental which the sectional owner claims from a tenant to whom he has let his apartment. The reason for this is that the interest of a judgement debtor in a contract of lease is considered an incorporeal moveable which may be attached in execution.<sup>91</sup>

In *Jones and Others v Trust Bank of Africa Ltd and Others*<sup>92</sup> the Cape Provincial Division decided that the only incorporeal moveable property capable of attachment in terms of the Magistrates' Courts Act was the property defined as being subject to attachment in terms of section 68 of this act.<sup>93</sup> In terms of section 68(3) the

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<sup>86</sup> 9-12.

<sup>87</sup> S 68(3) of the Magistrates' Courts Act 32 of 1944 and r 42(2). See also Van der Merwe *Sectional Titles* 9-12.

<sup>88</sup> Van der Merwe *Sectional Titles* 9-12.

<sup>89</sup> R 39(1) of the Magistrates' Courts Act 32 of 1944.

<sup>90</sup> R 39(2).

<sup>91</sup> TLLDV Van Winsen, AC Cilliers and C Loots *The Civil Practice of the Supreme Court in South Africa* 4ed (1997) 780 and *Soja Ltd v Tuckers Land Development Corporation (pty) Ltd and Another* 1981 2 SA 407 (W) 409F – 410A. See also Van der Merwe *Sectional Titles* 9-12.

<sup>92</sup> 1993 4 SA 415 (C).

<sup>93</sup> 422B-C.



messenger may attach and sell in execution the interest of the execution debtor in any movable property belonging to him or pledged or sold under a suspensive condition to a third person. Further, the messenger may sell the interest of the execution debtor in movable property or immovable property leased to the execution debtor or sold to him under any hire-purchase contract or under a suspensive condition. The Magistrates' Courts Act, therefore, does not expressly include interest in a contract of lease, the rent payable by the lessee, as an incorporeal movable.

However, the court stated that a judgement creditor seeking to execute upon incorporeal moveable property not enumerated in terms of the Magistrates' Courts Act under the authority of a Magistrate's Court judgement must invoke the aid of the High Court.<sup>94</sup> In the latter regard it is important to note that it is not necessary to obtain a judgement in the High Court<sup>95</sup> since it would be sufficient to apply for and obtain the necessary permission from the High Court to attach and sell in execution the defaulting owner's right, title and interest in a lease.<sup>96</sup>

Since the interest of a sectional owner in a contract of lease is not expressly enumerated as an incorporeal moveable in terms of the Magistrates' Courts Act the body corporate as judgement creditor would have to bring an application in the High Court for the necessary permission to attach and sell in execution the defaulting owner's right, title and interest in the lease. Factors such as the duration of the term of lease, the period of notice required to terminate the lease and the rent payable by the lessee will be taken into account to determine the value of the lease.<sup>97</sup>

In comparative perspective, the Puerto Rican Law on Condominiums of 25 June 1958 provides the most direct example. Here it is stated that if the unit is let, the association (body corporate) can request a court order compelling the tenant to pay

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<sup>94</sup> 422C.

<sup>95</sup> As was held in *Hogan v Messenger, Johannesburg* 1915 WLD 101 104.

<sup>96</sup> See *Patel v Manika and Others* 1969 3 SA 509 (DCLD).

<sup>97</sup> Van der Merwe *Sectional Titles* 9-12 - 9-12(1).

the rent directly to the management council (trustees) of the scheme for the benefit of the association until the whole debt is extinguished.<sup>98</sup>

#### **4 2 8 Other orders under the Magistrates' Courts Act**

Besides the attachment and sale in execution of the defaulting owner's property, the Magistrates' Courts Act makes provision for other processes of execution.<sup>99</sup>

Firstly, it makes provision for emolument attachment orders. This requires the defaulting owner's employer to pay the specific amounts of the defaulting owner's emoluments<sup>100</sup> to the body corporate.<sup>101</sup> However, this type of enforcement is seldom used in practice in the sectional title industry.<sup>102</sup>

Secondly, the Magistrates' Courts Act makes provision for garnishee orders. This means that a Magistrate's Court may order the attachment of any debt at present or in future owing or accruing to the defaulting owner to an amount sufficient to satisfy the judgement and costs of the proceedings of attachment.<sup>103</sup> Garnishee proceedings are, therefore, a procedure by which a judgement creditor may obtain a court order against a third party who owes money to, or holds money for, the judgement creditor. In practice it is usually obtained against a bank to pay money held in the account of the debtor to the creditor. This means of enforcement is also not frequently used in practice.<sup>104</sup>

Lastly, the Magistrates' Courts Act makes provision for administration orders, which provide for the administration of the judgement debtor's estate by an administrator. Administration orders occur in cases where defaulting owners are unable to meet their financial obligations and where their estates are so small that sequestration

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<sup>98</sup> Art 39 (codified in § 1293c) of the Puerto Rican Law on Condominiums (*Ley de condominios*) of 25 June 1958 (Puerto Rico Laws Ann. Tit. 31 §§ 1291-1294d (2005)). See Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of International and Comparative Law* 136.

<sup>99</sup> Van der Merwe *Sectional Titles* 9-12(1).

<sup>100</sup> 'Emoluments' are the profits that arise from an office or employment, namely that which is received as compensation for services, or which flows from employment as a salary and incidental benefits. See *Black's Law Dictionary* 5ed (1983).

<sup>101</sup> In terms of s 65J of the Magistrates' Courts Act 32 of 1944.

<sup>102</sup> Van der Merwe *Sectional Titles* 9-12(1).

<sup>103</sup> In terms of s 72 of the Magistrates' Courts Act 32 of 1944.

<sup>104</sup> Van der Merwe *Sectional Titles* 9-12(1).

proceedings are not warranted. The administration order forces the defaulting owner to regularly pay the administrator a prescribed amount which the latter distributes *pro rata* among the creditors.<sup>105</sup> When the court determines this amount it may leave an unencumbered amount sufficient to enable a defaulting owner to discharge monthly instalments he may be obliged to pay in terms of an instalment sale transaction or mortgage bond. The problem with administration orders is that the amount available for distribution is usually very small and, therefore, the dividend accruing to individual creditors, especially if there are many, would be negligible.<sup>106</sup> Furthermore, this procedure cannot be initiated by the body corporate as creditor since the judgement debtor himself must generally bring an application for the granting of such order.<sup>107</sup>

#### 4 2 9 Sequestration

If a sale in execution is unsuccessful the body corporate can institute sequestration<sup>108</sup> proceedings on the basis that the defaulting owner is *de facto* insolvent.<sup>109</sup> As already pointed out and as will be discussed in more detail in the next chapter, it would be advantageous for the body corporate to have the indebted owner sequestrated where the owner's unit is heavily mortgaged.

The body corporate must show that it has a claim against the owner of not less than R100; the owner has committed an act of insolvency or is insolvent; and that there is reason to believe that it will be to the advantage of the owner's creditors if his estate is sequestrated.<sup>110</sup>

One of the requirements for compulsory sequestration is thus that the defaulting owner should either have committed an act of insolvency or that he should in fact be insolvent.<sup>111</sup> Due to the fact that the body corporate would normally have difficulty proving that the defaulting owner is in fact insolvent it would have to rely on any of

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<sup>105</sup> In terms of ss 74-74W of the Magistrates' Courts Act 32 of 1944.

<sup>106</sup> Van der Merwe *Sectional Titles* 9-12(1).

<sup>107</sup> In terms of s 74(2) of the Magistrates' Courts Act 32 of 1944.

<sup>108</sup> The main objective of a sequestration order is to secure the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors. See R Sharrock, K Van der Linde & A Smith *Hockly's Insolvency Law* 8ed (2006) 4.

<sup>109</sup> Van der Merwe *Sectional Titles* 9-12(2).

<sup>110</sup> Ss 10 and 12 of the Insolvency Act 24 of 1936.

<sup>111</sup> See in general Sharrock *et al Insolvency Law* 31-38.

the eight different grounds of insolvency mentioned in the Insolvency Act as grounds for his application for the compulsory sequestration of the defaulting owner's estate.<sup>112</sup> In practice the body corporate would probably rely on section 8(b) of the Insolvency Act which states that:

“if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment.”

The effect of the latter section is that attachment proceedings may be interrupted in order for a sequestration order to be applied for.<sup>113</sup>

The most important question which arises is whether the body corporate will satisfy the requirement that advantage to creditors in the specific circumstances must be shown.<sup>114</sup> In *Meskin & Co v Friedman*<sup>115</sup> Roper J defined this advantage to creditors as follows:

“In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors.”<sup>116</sup>

Pecuniary benefit has been understood to be in the form of a dividend to creditors, but Segal submits that the requirement of a pecuniary benefit need not necessarily be restricted to payment of a dividend.<sup>117</sup>

Notwithstanding the cost and time involved in applying for a sequestration order, it may be worthwhile for the body corporate to follow this route, especially if the unit is

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<sup>112</sup> In terms of s 8 of the Insolvency Act 24 of 1936.

<sup>113</sup> Van der Merwe *Sectional Titles* 9-12(2).

<sup>114</sup> N Segal “Any Cure for the Body Corporate Blues?” (2004) 121 *SALJ* 552 554.

<sup>115</sup> 1948 2 SA 555 (W).

<sup>116</sup> 559.

<sup>117</sup> Segal (2004) *SALJ* 554-555. See also C Louw “Voordeel vir Skuldeisers in geval van Gedwonge Sekwestrasie as gevolg van Agterstallige Heffings ingevolge die Wet op Deeltitels” (2002) 65 *THRHR* 597 597- 600 where it is argued that there may be other advantages to creditors even if there is no direct monetary advantage.

heavily mortgaged, on account of the effective right of preference the body corporate would obtain in terms of section 89(1) of the Insolvency Act.<sup>118</sup>

### **4 3 Suggestions for the more efficient enforcement of financial obligations in sectional title schemes**

#### **4 3 1 General**

In this section we shall consider the South African Property Owners' Association (SAPOA) proposals and measures employed in other jurisdictions to enforce sectional owners' financial obligations more efficiently and effectively. These measures include: a first claim to rental owed; suspension of services; the 'name and shame' sanction; monetary fines for the late payment of levies; special summary proceedings in court for the recovery of late payments and the loss of *locus standi* to sue. This will be followed by an examination of the Sectional Title Levy Underwriting Security (STILUS) which provides an affordable and effective, so called quick fix, solution to enforce the payment of levies. In conclusion, I will explore how the submission of sufficient information can simplify the levy recovery process. The ultimate aim is thus to advance proposals that strengthen the Act and improve the enforcement of sectional title financial obligations.

#### **4 3 2 SAPOA proposals**

In the following section I will analyse the sanctions suggested in the SAPOA Memoranda for the effective and efficient enforcement of an owner's financial obligations.

The first suggestion was that in the event that an apartment is rented out to a tenant, the body corporate should be given the first claim to the rental owed by the tenant in order to satisfy the owner's levies. This particular sanction can be found in various foreign law statutes. Such recourse usually takes the form of a security right in respect of the outstanding rent or a direct action by the body corporate against the

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<sup>118</sup> See 4 2 6 above.

tenant for rent owed on the unit in satisfaction of the debt or part thereof.<sup>119</sup> The Ontario Condominium Act provides that the body corporate may, by written notice, require the lessee to pay the lesser amount of the default and the amount due under the lease.<sup>120</sup> The Puerto Rican Law on Condominiums is even more direct since it provides that if the unit is let, the body corporate can request a court order compelling the tenant to pay all rent directly to the management council (trustees) of the scheme for the benefit of the association (body corporate) until the whole debt is extinguished.<sup>121</sup> A third mechanism is employed in terms of the Colombian Law on How to Expedite the Horizontal Property Regime of 3 August 2001 whereby the owner and occupier, by whatever title, are jointly and severally liable to the association for any contributions due. It is, however, important to note that the occupier would only be liable for claims that arise after the commencement of his occupation and that he would have recourse against the owner for payments made to the association. The effect is that a tenant or other occupier can be sued directly, whether or not the owner defaults on his payments.<sup>122</sup>

Commendably the legislator took notice of the rental diversion proposal.<sup>123</sup> The Community Schemes Ombud Service Act 9 of 2011 (the CSOSA) now provides that an adjudicator may in appropriate circumstances make an order which requires a tenant in a community scheme (which includes a sectional title scheme) to pay to the association (body corporate) and not to his landlord (sectional owner), all or parts of the rentals payable under a lease agreement. This payment will be made from a specified date and until a specified amount due by the landlord to the body corporate has been settled. It is further provided that in terms of such an order:<sup>124</sup> the tenant must make the requisite payments and may not rely on any right of deduction, set-off or counterclaim that he has against the landlord to reduce the amount to be paid to

<sup>119</sup> Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 136.

<sup>120</sup> Art 87 of the Ontario Condominium Act of 1998 (S.O., 1998, Ch. 19). See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 136.

<sup>121</sup> Art 39 (codified in § 1293c) of the Puerto Rican Law on Condominiums (*Ley de condominios*) of 25 June 1958 (Puerto Rico Laws Ann. Tit. 31 §§ 1291-1294d (2005)). See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 136.

<sup>122</sup> Art 29 of the Colombian Law on How to Expedite the Horizontal Property Regime (*Ley por medio de cual se expide el régimen de propiedad horizontal*) of 3 August 2001. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 136-137.

<sup>123</sup> See G Paddock "Rental diversions where landlords are in arrears with levies?" (November 2010) 5-11 *Paddocks Press Newsletter* 1 where it was argued that such a rental diversion should rather be included in the Community Schemes Ombud Service Bill than the rules of a scheme.

<sup>124</sup> S 39(1)(f) of the Community Schemes Ombud Service Act 9 of 2011.

the body corporate;<sup>125</sup> payments made by the tenant to the body corporate discharge the tenant's liability to the landlord under the lease;<sup>126</sup> and the association must credit amounts received from the tenant to the account of the landlord.<sup>127</sup>

The second suggestion offered by SAPOA was the suspension of services provided to a defaulting owner. This would only apply to schemes where separate meters have *not* been installed to measure the services provided to the apartments and charges for such services are collected by the body corporate as part of the levies payable to the municipality which provides such services. For example, the body corporate should be allowed to suspend the water; electricity; cable television; video and other services provided by common central installations to the defaulter's unit who is more than three months in arrears with levy contributions.<sup>128</sup> In terms of the Puerto Rican Law on Condominiums the board of directors (trustees) are allowed to suspend common services such as water, electricity, gas and telephone when an owner defaults on his contributions for more than two months. After the first month, the defaulting owner needs to be notified of the board of directors' intention to suspend these services. However, the interruption of these services may only take place if the health of the owner concerned would not be endangered. The services will only be restored once the outstanding debt has been paid in full.<sup>129</sup> Furthermore, the Puerto Rican Law on Condominiums provides that cable television, video, and other services provided by common installations may be suspended if the owner is more than three months in arrears with his levy payments.<sup>130</sup> The suspended services may not be reconnected by the owner or occupier unless the board or the manager have authorised this. If the owner or occupier does make illegal use of the common facilities of which he has been deprived a penalty amounting to triple the amount due, including the principal sum plus interest is enforced.<sup>131</sup>

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<sup>125</sup> S 39(1)(f)(i).

<sup>126</sup> S 39(1)(f)(ii).

<sup>127</sup> S 39(1)(f)(iii).

<sup>128</sup> Van der Merwe *Sectional Titles* 9-31.

<sup>129</sup> Art 38 (codified in § 1293b) of the Puerto Rican Law on Condominiums (*Ley de condominios*) of 25 June 1958 (Puerto Rico Laws Ann. Tit. 31 §§ 1291-1294d (2005)). See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 134.

<sup>130</sup> Art 39 (codified in § 1293c) of the Puerto Rican Law on Condominiums (*Ley de condominios*) of 25 June 1958 (Puerto Rico Laws Ann. Tit. 31 §§ 1291-1294d (2005)). See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 134.

<sup>131</sup> Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 134.



Depriving owners or occupiers of services such as water and electricity can be extremely effective in enforcing the timeous payment of monthly contributions where the sectional owner is solvent. It is, however, important to note that without authorisation in a condominium statute or the bylaws, the suspension of services in the South African context, would constitute spoliation and the body corporate could be ordered by the court to restore the *status quo ante*.<sup>132</sup>

This is illustrated by *Froman v Herbmore Timber and Hardware (Pty) Ltd.*<sup>133</sup> In this case the applicant purchased a townhouse from the respondent situated at 99 Francis Street, Bellevue, Johannesburg as No 4 on a plan prepared in terms of the Sectional Titles Act 66 of 1971 (the old Act). The applicant shortly thereafter went into occupation of the townhouse, at an occupational rental prescribed by the sale agreement which also made provision for the payment of a monthly levy until such time as the transfer of the unit had been registered.<sup>134</sup> Clause 21.4 of the agreement deals with the supply of electricity and water to the unit and reads as follow:

"The purchaser shall pay on due date the account for electricity consumed in the section in accordance with the consumption of electricity as shown on the sub-meter of the section. The purchaser agrees that should separate water meters be installed at any stage in the buildings, the purchaser shall pay the cost of water consumed in the section direct to the seller or the local authority, as the case may be, and promptly on the due date thereof."<sup>135</sup>

The respondent later purported to cancel the contract on the ground that the applicant was in breach thereof, and required the applicant to vacate the premises which the applicant declined to do. The respondent's servants then severed the supply of electricity and water to the applicant's unit. The applicant then reconnected the electricity and water, but the respondent's servants then once again cut them off. Besides the suspension of these services the respondent also removed the front door and an internal sliding door of the unit.<sup>136</sup> The applicant

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<sup>132</sup> Van der Merwe *Sectional Titles* 9-31 and Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 134-135.

<sup>133</sup> 1984 3 SA 609 (W).

<sup>134</sup> 610A-B.

<sup>135</sup> 610C.

<sup>136</sup> 610D-F.



thereupon applied to the court for the issue of a *rule nisi* calling on the respondent to show cause why an order should not be granted interdicting the respondent from severing the supply of electricity and water and removing the doors, and requiring their reinstatement, amongst other relief.<sup>137</sup> It was argued by counsel for the applicant that the severance of the electricity and water supplies amounted to an act of spoliation. In response counsel for the respondent contended that the discontinuance of these supplies could be no more than a breach of contract since it left the applicant in possession of the premises. The court favoured the conclusion that the respondent's only purpose in cutting off the water and lights was to force the applicant to vacate and therefore the action of the respondent amounted to a deprivation of the applicant's right to obtain water and electricity. The Court also stated that there was no reason why an incorporeal right of this nature should not form the subject of spoliation proceedings.<sup>138</sup>

In *Queensgate Body Corporate v Marcelle Josianne Vivianne Claesen*<sup>139</sup> the High Court once again had to decide whether cutting off the electricity supply constituted an act of spoliation. A dispute raged between the two parties and because of this the respondent refused to pay the monthly levies to the appellant as she was obliged to do. As a result of this the appellant cut off the electricity supply to her two units. The appellant claimed entitlement because of rule 15 of the house rules promulgated in terms of section 35 of the Act which stated that the trustees have the right to disconnect the electricity supply to the relevant unit until payment is made. On behalf of the respondent it was submitted that the appellant's action in cutting off the respondent's electricity supply constituted an act of spoliation which entitled the respondent to an order to have the electricity supply immediately restored. The Magistrate upheld the respondent's contentions and granted the order as prayed for by the respondent.

In an appeal brought against this order Blieden J quoted from the decision of *Nino Bonino v De Lange*<sup>140</sup> as authority for his statement that the legal remedy of *mandament van spolie* had been part of our law for generations. The appellant

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<sup>137</sup> 610F-G.

<sup>138</sup> 610G-I.

<sup>139</sup> WLD 26-11-1998 case no A3076/98.

<sup>140</sup> 1906 TS 120.

argued that depriving a party of electricity was an invasion of that person's possessory rights and could justify spoliation proceedings, but that the deprivation in this instance was lawful by virtue of the provisions of the Act and the house rules promulgated in terms thereof and that it occurred with at least the tacit consent of the respondent. It is trite that consent to spoliation is a valid defence to any application based on the *mandament van spolie*. In his averment that such consent was indeed present, the applicant advanced two arguments. Firstly, he argued that when buying into the sectional title scheme the respondent accepted the house rules as being binding on her and, secondly, that on a previous occasion the respondent had accepted the severance of her electricity supply through doing nothing about it. Blieden J dealt with the last argument first and decided that the fact that the respondent had agreed to be spoliated a year before did not assist the appellant since her claim before the Magistrate's Court was based on one event and that was the only one relevant at the stage of the hearing. With regard to the first argument advanced by the applicant, Blieden J once again quoted from the judgment of *Nino Bonino v De Lange*<sup>141</sup> (where Innes CJ dealt with a clause in a lease which purported to prevent a party who had breached a lease having access to the leased premises without the lessor having any recourse to law):

"Under these circumstances does a clause of this kind place the lessor in any better position than he would have occupied without it. In my opinion it does not and for the simple reason that the court cannot recognise such a provision. It is an agreement which purports to allow one of the two contracting parties to take the law into their own hands to that which the law says only a court shall do, that is to dispossess one person and to put another person in the possession of the property. It purports to allow the lessor to be himself the judge of whether a breach of contract has been committed and having decided in his own favour to allow him on his own motion to prevent the lessee from having access to the premises. Only a court of law does these things. The parties cannot stipulate to do it themselves."<sup>142</sup>

Furthermore, Blieden J decided that the appellant's attempt to distinguish the present case from *Nino Bonino v De Lange*<sup>143</sup> because the house rules were

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<sup>141</sup> 1906 TS 120.

<sup>142</sup> 123-124.

<sup>143</sup> 1906 TS 120.

sanctioned by section 35 of the Act was without merit. The fact that the house rules were in accordance with the provisions of section 35 of the Act did not elevate the rules from being anything more than an agreement between the unit holders and the appellant and therefore the analogy between the house rules and the Articles of Association of a company, as suggested by the respondent's council, was a valid one. To reach this conclusion Blieden J quoted from *Gohlke & Schneider and Another v Westies Minerals Eiendoms Beperk and Another*.<sup>144</sup>

“The articles therefore merely have the same force as a contract between a company and each and every member as such as to observe their provisions...”<sup>145</sup>

Therefore, the clause in the house rules which gives the appellant the right to cut off the electricity supply of any owner who is in arrears with his levies is clearly contrary to the common law because it constitutes nothing but a power to interfere with such person's right to use the existing electricity supply. Blieden J then concluded that this was a clear act of spoliation and that there was no consent valid in law that allowed such an act. Accordingly the appeal was dismissed.

These two cases show that it is not an option in South African law to introduce a sanction in the rules of a sectional title scheme which authorises the body corporate to cut off the electricity and water supply of an owner who defaults on the payment of his levies. The option is further undermined by the fact that in the course of time separate meters will be installed in the apartments of most sectional title schemes with the effect that the electricity and water will be charged by the municipality concerned and not by the body corporate as part of levies.

Two recent Supreme Court of Appeal decisions can be applied by analogy to the question as to whether a statutory provision (as opposed to a provision in the rules of a particular sectional title scheme) authorising the cutting off of services to specific premises could prevent redress in terms of the *mandament of spolie*.

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<sup>144</sup> 1970 2 SA 685 (A).

<sup>145</sup> 692F-G.

In *City of Cape Town v Strümpher*<sup>146</sup> the issue was whether the disconnection of the municipal water supply to certain premises could be redressed by a *mandament van spolie*. The crucial question was whether the City's interference with the respondent's water supply was lawful and whether it was authorised by section 11(2)(d) of the Water Services Act 36 of 1998 or section 30(1) of the relevant water by-law and section 9 of the City's debt collection by-law, which allows the cutting off of services on certain conditions.<sup>147</sup> The Supreme Court of Appeal found that the interference was not lawful due to the fact that the City overlooked the provisions of section 4(3)(a) of the Water Services Act, which requires that 'the limitation or discontinuation of water services must be fair and equitable', and its own dispute resolution procedures provided for in the Credit Control and Debt Collection Policy which stipulated the procedure to be followed when the water user (debtor) has declared a dispute.<sup>148</sup>

In dismissing the appeal, the Supreme Court of Appeal rationalised its finding that a spoliation order was the appropriate remedy in the circumstances as follows:

“The evidence in the present matter shows that the respondent for the past 37 years had received an uninterrupted supply of water from the City at the time when that service was summarily terminated. I have already alluded to the fact that the respondent's rights to water were not merely personal rights flowing from a contract, but public-law rights [*Joseph and Others v City of Johannesburg and Others* 2010 4 SA 55 (CC) para 34] to receive water, which exist independently of any contractual relationship the respondent had with the City. The respondent's use of the water was an incident of possession of the property. Clearly interference by the City with the respondent's access to the water supply was akin to deprivation of possession of property. There is therefore no reason in principle why a water user who is deprived of a water service summarily by a water service authority, without that authority complying with its procedural formalities for dispute resolution laid down in its own bylaws, should not be able to claim reconnection of the water supply by means of a spoliation order. It therefore follows that the *mandament van spolie* was available to

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<sup>146</sup> 2012 4 SA 207 (SCA).

<sup>147</sup> Paras 12-13.

<sup>148</sup> Paras 14 and 16.

the respondent and the courts below were correct in granting the relief claimed by the respondent.”<sup>149</sup>

This case may be contrasted with the decision of the Supreme Court of Appeal in *Rademan v Moqhaka Municipality and Others*<sup>150</sup> which dealt with the disconnection of an electricity supply by the municipality concerned. The appellant, a member of the Moqhaka Ratepayers and Residents Association, failed to pay her taxes and levies to the respondent, the Moqhaka municipality. The above Association comprised residents who claimed to be unhappy with the poor delivery of municipal services. The members decided to withhold payment of their rates and taxes as a means of forcing the municipality to attend to their various complaints. On account of the non-payment of rates and taxes, the municipality disconnected the electricity supply to the appellant without a court order.

The Supreme Court of Appeal pointed out that the legislature, appreciating the difficulties experienced by municipalities when ratepayers protest and refuse to pay for municipal services, decreed in section 97(1)(g) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) that provision should be made for the termination of municipal services or the restriction of the provision of municipal services when payments of ratepayers are in arrears. Further, similar powers for municipalities were decreed in section 25 of the Credit Control and Debt Collection Bylaws of 14 May 2004.<sup>151</sup> The Supreme Court of Appeal found it both unrealistic and untenable to expect a municipality faced with numerous residents who steadfastly refuse to pay their rates and taxes to approach the court each time a ratepayer defaults to seek a court order authorising the discontinuation of services. Taking into account the number of service delivery protests and demonstrations across the country and the concomitant refusal by ratepayers to pay their rates, taxes and fees for municipal services, the Supreme Court of Appeal found that pursuing these matters in court would result in municipalities being overwhelmed by court cases, losing precious time in the process and incurring costly legal bills unnecessarily. Quoting from the judgment of Yacoob J in *Mkontwana v Nelson*

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<sup>149</sup> Para 19.

<sup>150</sup> 2012 2 SA 387 (SCA).

<sup>151</sup> Paras 13 and 14.

*Mandela Metropolitan Municipality and others; Bisset and others v Buffalo City Municipality and others; Transfer Rights Action Campaign and others v MEC, Local Government and Housing, Gauteng and others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curia)*,<sup>152</sup> the Supreme Court of Appeal concluded that these powers were undoubtedly given to municipalities to enable them to collect all moneys that are due and payable to them in the most cost-effective manner.<sup>153</sup>

Consequently, the Supreme Court of Appeal concluded that in light of the relevant legislation, there was no statutory instrument which requires a municipality to obtain a court order authorising the discontinuation of a municipal service. It also confirmed that there was incontrovertible evidence that a letter of demand preceding discontinuance was sent to the appellant but that, in line with resolutions taken by the Moqhaka Ratepayers and Residents Association, she decided not to pay. It also pointed out that in terms of section 21(2) of the applicable by-laws failure to deliver or send a final demand within seven working days does not relieve a customer from paying arrears.<sup>154</sup>

In effect this case decided that if the legislation which authorises the discontinuance of services is followed to the letter, the discontinuance of services would be considered lawful and would not, therefore, expose the municipality for a *mandament of spolie*.

For our purpose these cases have shown that a legislative sanction consisting of the discontinuance of services would have to be clearly worded to prevent such discontinuance being addressed by the *mandament of spolie*. To amend the Act to provide such a sanction to the body corporate would not be worthwhile since the collection of service charges are in the process of being transferred to the municipalities concerned.<sup>155</sup> Furthermore, these cases have shown that even municipalities have to tread very carefully to prevent reliance on the *mandament of spolie* if they want to sanction defaults in payment of service charges by discontinuing services.

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<sup>152</sup> 2005 1 SA 530 (CC).

<sup>153</sup> *Rademan v Moqhaka Municipality and Others* 2012 2 SA 387 (SCA) paras 15-17.

<sup>154</sup> Para 21.

<sup>155</sup> See 2 3 above.

### 4 3 3 The 'name and shame' sanction

A third SAPOA suggestion encouraging timeous payment of arrears is for the legislator to consider the so-called 'name and shame' sanction encountered in a few overseas jurisdictions. The aim of this sanction is to embarrass defaulting owners into paying outstanding debts owed to the body corporate.<sup>156</sup> The Spanish and Colombian statutes make provision for this particular sanction. In terms of the Spanish Law on Horizontal Property it is required that the notice convening the general meeting must contain a list of the names of owners who are in arrears with the payment of their debts to the body corporate. At the start of the general meeting, a warning must be given to such owners who are at risk of being deprived of their vote.<sup>157</sup> The Colombian Law on How to Expedite the Horizontal Property Regime is even more severe. Besides including the names of the defaulters in the minutes of the general meeting, the publication of their names on a notice board in an appropriate location in the condominium complex is also authorised. To make sure this notice is for the eyes of the residents only it may not be displayed in a place visited by visitors of the building.<sup>158</sup>

### 4 3 4 Penalties for late payment of levies

Finally, in addition to the three previous SAPOA proposals it is suggested that the model rules of sectional title schemes should be amended by either the developer or the sectional owners to exact monetary fines for the late payment of contributions.<sup>159</sup> This sanction is found in several foreign condominium statutes. In terms of the Puerto Rican Law on Condominiums the by-laws of a scheme may charge a penalty of 10% interest on a contribution that is more than 15 days overdue. Furthermore, amounts that are not paid on the due date will automatically generate interest at the maximum rate. After more than three monthly instalments remain unpaid, the unpaid amount will draw an additional penalty of 1% of the total debt which needs to be paid

<sup>156</sup> Van der Merwe *Sectional Titles* 9-31.

<sup>157</sup> Art 16 of the Spanish Law on Horizontal Property (*Ley de Propiedad Horizontal*) of 21 July 1960. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 135-136.

<sup>158</sup> Art 30 of the Colombian Law on How to Expedite the Horizontal Property Regime (*Ley por medio de cual se expide el régimen de propiedad horizontal*) of 3 August 2001. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 136.

<sup>159</sup> Van der Merwe *Sectional Titles* 9-32.



monthly.<sup>160</sup> The Singapore Building Maintenance and Strata Management Act 47 of 2004 states that where any contribution and interest thereon is not paid within 30 days after becoming due and payable, the management corporation (trustees) may serve a written demand on the subsidiary proprietor of the lot (unit) concerned.<sup>161</sup> An owner who fails to pay contributions or interest due and owing within 14 days from the date of service of a written demand is guilty of an offence. This offence attracts, on conviction, a fine not exceeding \$10 000 and, in the case of a continuing offence, a further fine not exceeding \$100 for every day or part thereof during which the contribution or interest or both remain unpaid.<sup>162</sup> The Singapore Land Titles (Strata) Act 41 of 1967 includes substantially the same provision together with a further fine 'not exceeding \$100 for every day during which the contribution or interest remains unpaid after conviction.'<sup>163</sup>

*MCST Plan No 593 (Delta House) v Grandfield Investment International Pte Ltd*,<sup>164</sup> dealt with this provision of the Singapore Land Titles (Strata) Act with regard to a further fine. Young CJ, who delivered the judgment in this case, held that a court does not have the power to impose a fine in advance for continuing offences that have yet to be committed. Young CJ explained the decision as follows:

"... It is a fundamental principle in criminal law that an offender can only be punished for an offence with which he was charged and of which he was convicted. To sentence an offender in advance, for a criminal act yet to be committed, would be going completely against all jurisprudential theory, either of the common law or the civil code. A statutory provision such as that of s 42(11) of the LTSA creates, at the time of conviction, a liability for continuing the offence. However, this liability will only be crystallized subsequently, when it has actually been proven that the default has continued after the time of conviction."<sup>165</sup>

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<sup>160</sup> Art 39 (codified in § 1293c) of the Puerto Rican Law on Condominiums (*Ley de condominios*) of 25 June 1958 (Puerto Rico Laws Ann. Tit. 31 §§ 1291-1294d (2005)). See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 132.

<sup>161</sup> S 40(9) of the Singapore Building Maintenance and Strata Management Act 47 of 2004. See also T Keang Sood *Strata Title in Singapore & Malaysia* 3ed (2009) 502.

<sup>162</sup> S 40(10) of the Singapore Building Maintenance and Strata Management Act 47 of 2004. See also Keang Sood *Strata Title* 502-503.

<sup>163</sup> S 42(11) of the Singapore Land Titles (Strata) Act 41 of 1967 (Cap 158, 1985 Rev Ed). See also Keang Sood *Strata Title* 503.

<sup>164</sup> [2000] 1 SLR 228.

<sup>165</sup> 231-232. See also Keang Sood *Strata Title* 503.



It is very unlikely that the Sectional Titles Regulations Board<sup>166</sup> or the Sectional Titles Schemes Management Advisory Council<sup>167</sup> will be persuaded to change the model rules in order to insert a provision exacting fines from sectional owners who default on the payment of their levies. The only other available option would be to advise the owners in sectional titles to adopt a special rule to provide for fines against owners who fail to pay their monthly contributions. The content of such a rule must, however, be considered carefully.

#### **4 3 5 Summary proceedings in court**

Most jurisdictions usually have to resort to ordinary court procedures to enforce owners' financial obligations. However, certain jurisdictions have introduced special summary proceedings for the recovery of late payments.<sup>168</sup> These proceedings are less time-consuming, more informal and supposedly less costly.

The Spanish Law on Horizontal Property introduced a summary court procedure which must be authorised at the general meeting. If authorised, the debtor is notified of the amount claimed and furnished with a certificate signed by the chairman and the secretary indicating the amount of the debt. The defaulting owner must then provide a bank guarantee for this amount, otherwise the association is entitled to execute against an adequate amount of the owner's property to cover the debt.<sup>169</sup>

The Puerto Rican proceedings are even more effective. In terms of the Puerto Rican Law on Condominiums the board of directors (trustees) are allowed to sue the debtor for arrears of up to \$5000 in special court proceedings devised for the collection of small claims. The debtor must be notified of the claim for payment at least 15 days before the filing of the action in court.<sup>170</sup> This is similar to an action in the South African Small Claims Court. Unfortunately, we have seen, at 4 2 1, that the Small

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<sup>166</sup> Under s 54(1)(b) of the Sectional Titles Act 95 of 1986.

<sup>167</sup> Under s 18(1)(b) of the Sectional Titles Schemes Management Act 8 of 2011.

<sup>168</sup> Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 129.

<sup>169</sup> Arts 21.1, 21.2 and 21.5 of the Spanish Law on Horizontal Property (*Ley de Propiedad Horizontal*) of 21 July 1960. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 129.

<sup>170</sup> Art 39 (codified in § 1293c) of the Puerto Rican Law on Condominiums (*Ley de condominios*) of 25 June 1958 (Puerto Rico Laws Ann. Tit. 31 §§ 1291-1294d (2005)). See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 129-130.

Claims Court Act does not allow bodies corporate to institute claims in the Small Claims Court.

#### **4 3 6 Loss of *locus standi* to sue**

The Puerto Rican statute provides a sanction of another kind for owners with outstanding debts which are applicable after only one month's default. The Puerto Rican Law on Condominiums requires that an owner must be up to date with his contribution payments in order to challenge any resolution of the board or the general meeting in court or in any other administrative tribunal. After hearing both sides of the story the court or tribunal may decide in accordance with the law, equity, and good neighbourliness to validate the *locus standi* of the defaulting owner.<sup>171</sup>

In terms of South African law there is no similar provision for the loss of *locus standi* to sue. This is due to the fact that section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution) states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Therefore, it is highly unlikely that such a sanction would stand the test of constitutionality in the South African context.

#### **4 3 7 STILUS**

An affordable and effective, so called quick fix, solution to enforce the payment of levies has now become available to trustees for the first time in the form of the STILUS levy guarantee insurance policy.<sup>172</sup> The aim of STILUS is to insure bodies corporate against the non-payment of levies and thereby guaranteeing their monthly income. In order to utilise its specialist skills in the sectional title industry STILUS was registered in July 2010 as Santam's newest underwriting management agency

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<sup>171</sup> Art 42 (codified in § 1293f) of the Puerto Rican Law on Condominiums (*Ley de condominios*) of 25 June 1958 (Puerto Rico Laws Ann. Tit. 31 §§ 1291-1294d (2005)). See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 135.

<sup>172</sup> T Maree "The Levies Issue" (October 2010) 37 *MCS Courier Newsletter* 1 1.

and has already been welcomed by insurance brokers, managing agents and trustees who have been briefed by the policy.<sup>173</sup>

By insuring with STILUS bodies corporate are able to insure levy income at a fairly modest premium in order to have sufficient money in their administrative and reserve funds to undertake necessary maintenance and thereby preserve the value of their investment. This can be seen as a form of guarantee insurance. When a levy financier lends money to a body corporate it must be repaid with interest while STILUS ensures that any unpaid levies will be paid. Owners who do not pay their levies will become defaulters under the STILUS policy and would be liable for the cost of the recovery of arrears. According to the policy the body corporate agrees to charge defaulting owners interest at a rate determined by STILUS, which includes legal costs at the 'attorney and client' rate. The interest and charges will be for the benefit of STILUS and its collection attorneys. Because the defaulting owner will be sued in the name of the body corporate, the managing agent and the trustees are obliged to give whatever support and assistance that are required in the litigation process. Furthermore, if requested, STILUS must be furnished with certificates by the bodies corporate's auditors, managing agents and lawyers to support the claim.<sup>174</sup>

By receiving payment of a levy default claim, the body corporate is obliged to credit that payment to a STILUS claims received ledger account rather than to the defaulting owner's ledger account. This is because the owner's debt to the body corporate must continue to reflect as unpaid for it is only on this basis that the body corporate is entitled to refuse to issue a levy clearance certificate and effectively charge the units as security for the claim. Therefore, both the approved managing agent and the body corporate undertake not to issue a levy clearance certificate for a unit in respect of which a claim has been made or at least not without the written consent from STILUS. By breaching this condition, the capital amounts received from STILUS will become repayable together with interest and collection costs.<sup>175</sup>

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<sup>173</sup> T Maree "STILUS Insuring Liquidity" (October 2010) 37 *MCS Courier Newsletter* 2 2.

<sup>174</sup> Van der Merwe *Sectional Titles* 9-5 - 9-6.

<sup>175</sup> 9-6.

When STILUS has investigated and paid a claim, it is clear from the documentation that STILUS and Santam accept the risk that the body corporate might not be successful in the legal action against the defaulting debtor. This means that if any amount is not legally recoverable, the body corporate will not have to repay any part of the claim. This kind of insurance is sold as an annual policy through insurance brokers and would be renewed annually except where the body corporate gives prior notice of cancellation. The amount of the premium payable is linked to the amount of the specific sectional title scheme's indemnity insurance. This insurance will be operated by approved managing agents and they will have to ensure, in return for a share in the administrative fee, that the body corporate has a legally recoverable claim. These managing agents will, however, not be involved in the collection of the claim except for rendering administrative support.<sup>176</sup>

We have seen that this guarantee insurance is marketed to bodies corporate through Santam's network of insurance brokers, who will then co-operate with the managing agents responsible for the administration of sectional title schemes. Bodies corporate can claim once an owner is more than a month in arrears with his levy payments. STILUS will then settle these claims within 7 to 10 days. Furthermore, STILUS will delegate the task of collecting the claims to a panel of attorneys appointed by Tertius Maree.<sup>177</sup>

STILUS will thus benefit the following parties. Firstly, owners are assured that levy payments will be up to date and, therefore, budgeted maintenance programmes can be implemented with confidence as the body corporate's cash flow is secured. Secondly, trustees can bank on a guaranteed cash flow according to their budget. This will prevent delays in the payment of the creditors of the body corporate and the undertaking of maintenance to the building and its facilities. Thirdly, managing agents do not have to spend unnecessary time and effort collecting outstanding levies, instead allowing them to focus solely on the administration of their clients' properties. Lastly, brokers will now be able to offer additional financial assistance to

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<sup>176</sup> 9-6 – 9-7.

<sup>177</sup> Maree (October 2010) *MCS Courier Newsletter* 2.

bodies corporate. STILUS is thus reportedly providing a winning scenario for all parties concerned.<sup>178</sup>

There are, however, some issues that need to be addressed. It is perhaps questionable whether the body corporate has the right to refuse a levy clearance certificate when it has received the insurance pay-out for the levy on the argument that the defaulter's debt had not been paid under the STILUS policy. Van der Merwe suggests that the courts will in all probability espouse the arrangement and regard the owner's debt as unpaid.<sup>179</sup>

Another issue is whether the trustees need to obtain a special resolution from the owners in terms of section 37(1)(g)<sup>180</sup> of the Act to conclude the contract on behalf of the body corporate. The conclusion of the policy cannot be classified as one of the functions of the body corporate and, therefore, it would have to be accommodated under the catch-all function under section 38(j).<sup>181</sup> Section 38(j) allows the trustees to 'do all things reasonably necessary for the management and administration of the common property' and therefore it can be argued that the trustees would be entitled to enter into the arrangement without being authorised by a special resolution of the general meeting. The trustees would thus be entitled to enter into such arrangement under section 39(1)<sup>182</sup> of the Act if a scheme cannot reasonably take the risk of not receiving levies on the due date and the STILUS levy guarantee option is the most sensible type of financing available.<sup>183</sup>

#### **4 3 8 Submitting sufficient information at the start of the recovery process**

Tertius Maree Associates, who have been specialising in the collection of arrear levies for many years, found that problems relating to the recovery of levies mostly arise due to the lack of information submitted to attorneys at the start of the recovery process. Therefore, it is of utmost importance that attorneys who are approached to

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<sup>178</sup> 2.

<sup>179</sup> Van der Merwe *Sectional Titles* 9-7.

<sup>180</sup> Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(i).

<sup>181</sup> S 4(i).

<sup>182</sup> S 7(1).

<sup>183</sup> Van der Merwe *Sectional Titles* 9-7.

recover levies are supplied with all the facts and details pertaining to the levies and the defaulting owner.<sup>184</sup>

The trustees or managing agent must be prepared to furnish the acting attorney with the following information.<sup>185</sup> Firstly, there must be an up to date account of the debt owed by the defaulting owner. The reason for this is that such an account indicates how the outstanding amount has been calculated. This would be the first matter a debtor scrutinises and if necessary queries when he receives a letter of demand.

Secondly, the correct contact details of the defaulting owner must be supplied to the attorney. The domicilium addresses of owners who are in default are very important, because any legal action taken must be addressed to the domicilium address of the debtor. The postal address must also be supplied because the defaulting owner often does not live at the unit address and if a residential address is available, is must be provided as well. Therefore, the letter of demand should be sent to the domicilium address, the postal address and if available to the residential address of the debtor as well.

Thirdly, a copy of the management rules must be furnished since these rules establish how levies are determined, how interest is raised and for which costs the debtor may be held liable. Most sectional title schemes are governed by the standard rules, but some schemes may contain special rules, which are especially important if they alter the formula determining the way expenses are calculated.

Fourthly, bodies corporate must provide attorneys with the budget and minutes approved at the most recent annual general meeting. This will allow the collection attorneys to evaluate whether the correct procedures were followed in determining the levies. In addition this will give the attorney sufficient information to answer the defaulting owner's queries as to how the outstanding amount was calculated and what expenses he is liable for in terms of the budget. The above documents are always required as evidence if the debtor decides to defend the action.

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<sup>184</sup> T Maree "Initiating the Levy Recovery Process" (October 2010) 37 *MCS Courier Newsletter* 5 5.

<sup>185</sup> See 5-7 for a detailed discussion of the minimum requirements that need to be complied with to ensure the efficient and effective collection of outstanding levies.

Further, it is important that the trustees or managing agent supply the attorney concerned with the resolution of the trustees which determined the levies to be paid by individual owners. The prescribed management rules require the trustees to meet within 14 days after the annual general meeting, to determine the individual levies due by owners and to notify them accordingly.<sup>186</sup> The supply of this information must not be overlooked by trustees since it would give opposing attorneys grounds to dispute levy recovery claims.

Lastly, attorneys must be supplied with the trustees' resolution confirming the rate of interest as provided for in standard prescribed management rule 31(6). It can either be in the form of an extract from the minutes of a trustees' meeting, or by means of a written resolution signed by all the trustees.

By complying with the abovementioned requirements, attorneys will be provided with the essential information that is needed for the effective and efficient collection of arrear contributions. Compliance with all of the above mentioned documents may appear cumbersome but it should not discourage trustees. In the event that some information is lacking attorneys should be able to assist bodies corporate in obtaining what is required.<sup>187</sup>

#### **4 4 Evaluation**

At 4 2 1 it was shown that an application to an ombud, from persons who were owners of units at the time when such resolution was passed, is sufficient to recover arrear contributions.<sup>188</sup> This is a crucial innovation to help bodies corporate collect outstanding contributions timeously. Because regional adjudicators will be given specialised training in handling such claims this is a better solution than making it possible for the part-time judges in the Small Claims Court to handle such claims. The recovery of arrear contributions by an application to an ombud may become one of the major operations of the various regional offices and may necessitate the

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<sup>186</sup> Annexure 8 r 31(3) of the Sectional Titles Act 95 of 1986.

<sup>187</sup> Maree October (2010) *MCS Courier Newsletter* 7.

<sup>188</sup> Ss 3(2) and (3) of the Sectional Titles Schemes Management Act 8 of 2011.



appointment of an experienced debt collector on the staff of every regional ombud office in the country.

The threat of having to pay all legal costs, including costs between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies might in practice encourage defaulting owners to think carefully before they refuse to make payment. This is especially so in cases where owners withhold levies on account of some complaint or grievance against the body corporate, the trustees or the managing agent. Defaulting owners should be advised to avoid escalating debts by settling their debts immediately and then trying to settle their complaints or grievances in another manner, such as raising their complaints at a general meeting.

If not preceded by a due process hearing the suspension of voting rights may be unconstitutional, especially where the resolutions affect the property rights of the owner in terms of sections 25 and 26 of the Constitution. The fact that the management rules allow the defaulting owner to attend and take part in the discussions of the general meeting and that the mortgage creditor may vote as proxy for a defaulting owner goes a long way to protecting the constitutional and perhaps also the property rights of the defaulting owner.

That the CSOSA now makes provision for an order that the body corporate may, in appropriate circumstances, have the first claim to the rent owed by the tenant of the defaulting owner will significantly improve the position of the body corporate.<sup>189</sup> This is especially true for schemes with a large number of absentee owners where most of the apartments are let to tenants.

Besides the fact that it would be difficult to argue that the discontinuation of services would not affect the health of the defaulting owner and his family, it is also questionable whether the body corporate should be given such extensive powers. It can be argued that bodies corporate are neither courts nor public service bodies and should not be allowed to utilise such extremes without proper adjudication.

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<sup>189</sup> S 39(1)(f) of the Community Schemes Ombud Service Act 9 of 2011.

Furthermore, we have seen that rushed action by the body corporate may not only lead to claims for restoration of the *status quo ante* but might also establish grounds for damages. Moreover, the removal of services might result in unjustifiable hardship to a non-solvent owner who already finds it difficult to keep his unit from being sold at a forced sale.<sup>190</sup>

Any rule in a sectional title scheme should be reasonable. In deciding what is reasonable, the values enshrined in the Bill of Rights in the Constitution are paramount. This means that conflicting interests must be balanced by giving careful consideration to the fundamental rights concerned.<sup>191</sup> In terms of the Constitution everyone has the right to privacy<sup>192</sup> and dignity.<sup>193</sup> Therefore, it is difficult to see how the 'name and shame' sanction introduced by an amendment of the Act or a model rule would survive a constitutional challenge. However, it can be argued that an owner's right to privacy and dignity may be restricted in terms of the limitation clause in the Constitution where these rights are required to be reasonable and justifiable.<sup>194</sup>

At 4 3 7 above we have seen that STILUS provides an efficient, effective and low cost measure to enforce the financial obligations of sectional owners, which will benefit all parties concerned. It is, however, important to note that the decision to make use of STILUS involves entering into a complex contract and that it would also increase the body corporate's overheads. Paddock therefore correctly suggests that no trustee should take this decision without obtaining independent professional advice as to whether the body corporate needs levy financing and whether STILUS is the best type available. Furthermore, the majority of owners should agree that levy financing is necessary and that an increase in the scheme's overhead expenses is justifiable.<sup>195</sup> We have also seen that trustees and managing agents must submit

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<sup>190</sup> Van der Merwe *Sectional Titles* 9-31. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 135.

<sup>191</sup> CG Van der Merwe, P Mohr & M Blumberg "The Bill of Rights and the Rules of Sectional Title Schemes: A Comparative Perspective" (2000) 11 *Stell LR* 155 180.

<sup>192</sup> S 14 of the Constitution of the Republic of South Africa, 1996.

<sup>193</sup> S 10.

<sup>194</sup> S 36.

<sup>195</sup> G Paddock 'Stilus' Santam Insurance" (February 2011) 6-2 *Paddocks Press Newsletter* 4.

sufficient information at the start of the recovery process to ensure that attorneys can collect arrear levies without unnecessary delays and difficulties.

Arguably the most efficient and effective measure to enforce financial obligations is to make provision for penalties for late payment of contributions. The main advantage of this measure is that the body corporate need not go to court to exact the fine, unless challenged. This sanction can be very effective, even more so in the case of absentee landlords who do not bother to pay their monthly contributions. However, the effect would be limited in the case of poor owners who simply do not have the money.<sup>196</sup> A temporary solution in the South African context would be to amend the rules to exact a monetary fine where a sectional owner does not pay his monthly levies on time.<sup>197</sup> However, a more permanent and uniform solution is needed and therefore the legislator should consider amending the Act so as to make provision for this particular sanction.

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<sup>196</sup> Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 132.

<sup>197</sup> Van der Merwe *Sectional Titles* 9-32.

# Chapter 5: Attachment and Sale in Execution of Sectional Title Units

## 5 1 Introduction

In chapter 3 we have seen that sectional owners are obliged to pay their share of the common expenses by contributing to a fund from which the costs for administering and managing the scheme as well as maintaining the common property are drawn.<sup>1</sup> Ultimately the success of a sectional title scheme will depend on a steady flow of levy payments from the sectional owners to the coffers of the body corporate.<sup>2</sup> Many bodies corporate, however, find themselves in a chaotic financial position because of financial difficulties on the part of sectional owners when it comes to the payment of regular monthly levies and the recent tendency on the part of owners to refuse to pay levies.<sup>3</sup> The non-payment of levies is thus a serious problem in many sectional title schemes.<sup>4</sup>

Since non-compliance with financial obligations can destroy the financial stability of a scheme, effective measures for its enforcement are essential.<sup>5</sup> In the previous chapter it was shown that the body corporate may ensure compliance with the financial obligations in various ways but most of these mechanisms have proven to be unsatisfactory in practice. This dissatisfaction stems from either the fact that the mechanisms do not have adequate recourse to provide an efficient legal remedy or simply because the defaulting owner's financial position is so poor that he is not able to pay the levies and the interest on the arrears. Consequently, this chapter will focus on the most severe measure and in fact a measure of last resort for the enforcement of financial obligations, namely attachment and sale in execution of the sectional title unit where a sectional owner's movable property proves to be insufficient to cover his debt to the body corporate.

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<sup>1</sup> S 37(1)(a) of the Sectional Titles Act 95 of 1986.

<sup>2</sup> CG Van der Merwe & L Muñis-Argüelles "Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme" (2006) 16 *Duke Journal of Comparative and International Law* 125 126.

<sup>3</sup> CG Van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 *Sectional Titles* (Service Issue 16 May 2013) 9-5.

<sup>4</sup> M Kelly-Louw "Collection of Levies by a Body Corporate" (2004) 12-2 *JBL* 94 98.

<sup>5</sup> Van der Merwe *Sectional Titles* 9-7.

Sectional title units are usually subject to mortgage bonds which entails that the bondholder's interests must be weighed against those of the body corporate in securing compliance with the sectional owner's financial obligations.<sup>6</sup> Section 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 (the Act) restrains the registrar from registering transfer of a unit until a conveyancer's certificate is issued confirming that the body corporate has certified that all moneys due by the transferor in respect of the said unit have been or that provision has been made for the payment thereof. The crucial question in this regard is whether this embargo provision can be construed as a tacit lien, charge or preferent right in favour of the body corporate ranking higher than that of the mortgage creditor.<sup>7</sup>

There are also some obstacles that await the mortgage creditor when it comes to the attachment and sale in execution of a sectional title unit. In this regard it is important to examine the constitutionality of the execution procedure against mortgaged units in terms of section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 and rule 45(1) of the Uniform Rules of the High Court, as well as the impact of the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) on mortgaged units that are sold in execution.

In terms of section 15B(3)(b) of the Act where provision has been made by law for the separate rating of units the registrar is not entitled to transfer a unit unless he is furnished with a clearance certificate from the local authority confirming that all rates and moneys due to it under any law in respect of the land and buildings of the scheme have been paid. Therefore, this chapter will conclude with an examination of the relationship between the Local Government: Municipal Property Rates Act 6 of 2004 (the Property Rates Act), the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and the Act.

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<sup>6</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) 488.

<sup>7</sup> See in general CG Van der Merwe "Does the restraint on transfer provision in the Sectional Titles Act accord sufficient preference to the body corporate for outstanding levies" (1996) 59 *THRHR* 367-387.

## 5 2 Ranking of body corporate's embargo vis-à-vis the security right of the mortgage creditor

If the sectional owner's movable property turns out to be insufficient to settle his debt, the body corporate can proceed to attach the unit and to sell it in execution.<sup>8</sup> However, in terms of the Act the registrar shall not register a transfer of a unit unless a conveyancer's certificate is produced to him that, as at date of registration, the body corporate has certified that all moneys due to it have been paid or that provision has been made to the satisfaction of the body corporate for the payment thereof.<sup>9</sup> The latter provision is called the embargo or restraint provision.<sup>10</sup>

Units that are attached and sold in execution, to settle a sectional owner's debt to the body corporate, are more often than not subject to a mortgage bond and therefore the critical question is whether the embargo provision confers on the body corporate a preferent claim ranking higher than that of the mortgage creditor.<sup>11</sup> This very question came up for decision in several court cases over a period of time.

The first court called upon to make a decision on this matter was the Transvaal Provincial Division (now the South Gauteng High Court) in *South African Permanent Building Society v Messenger of the Court, Pretoria, and Others*.<sup>12</sup> Although already decided in 1989, this case was only reported in 1996 in the appendix to the 1996 (1) South African Law Reports. In this case the applicant, the SA Permanent Building Society, brought an application for an order declaring that its mortgage bond was preferent in a sale in execution of the unit of a defaulting owner in the Solitaire Sectional Title Scheme to the claim of the second respondent, Body Corporate of Solitaire Building, in terms of the previous embargo provision in the Sectional Titles Act 66 of 1971 (the old Act).<sup>13</sup> The body corporate was the only respondent that appeared by way of counsel.

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<sup>8</sup> Van der Merwe *Sectional Titles* 9-12(3).

<sup>9</sup> S 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986.

<sup>10</sup> GJ Pienaar *Sectional Titles and other Fragmented Property Schemes* (2010) 213.

<sup>11</sup> Van der Merwe *Sectional Titles* 9-12(3) and Badenhorst *et al The Law of Property* 488.

<sup>12</sup> 1996 1 SA 401 (T).

<sup>13</sup> S 15(4)(b) of the Sectional Titles Act 66 of 1971.

Curlewis J pointed out that the facts were not in dispute and that the only point to decide upon was a legal one, namely whether the claim of the mortgage creditor (applicant) was preferent to the claim of the body corporate for arrear levies.<sup>14</sup> The applicant had a mortgage bond over a certain unit in the Solitaire sectional title scheme and the body corporate was still owed certain levies when the sectional owner attempted to transfer the unit to a new purchaser. Curlewis J, therefore, had to decide whether the claim of the mortgage creditor was preferent to that of the body corporate. Counsel for the body corporate relied on the embargo provision in section 15(4)(b) of the old Act (before it was replaced by section 15B(3)(a)(i)(aa) of the Act), which stated the following:

“No transfer of a unit, any portion thereof, or any individual share therein can be registered unless all money due to the body corporate by the transferor in respect of the unit has been paid, or satisfactory arrangements have been made for the payment thereof.”

Counsel for the body corporate argued that the embargo provision<sup>15</sup> was analogous to section 26 of Ordinance 43 of 1903 (T), which placed an embargo upon transfer unless certain rates were paid to a municipality. He continued that in *Johannesburg Municipality v Cohen's Trustees*,<sup>16</sup> it was stated that this embargo creates a ‘very real and extensive preference’ and that this would have preference over any other right, such as a mortgage bond.<sup>17</sup> Curlewis J pointed out that these remarks were fortified by the statement of the judge from whom that appeal came namely that the embargo is ‘something not wholly in the nature of a lien or hypothec but sui generis whereby the council practically obtains a preference over other creditors’.<sup>18</sup> Another case relied upon by counsel for the body corporate was *Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd.*<sup>19</sup> In this case Ackermann J interpreted section 26 of the Ordinance (analogous to section 50(1) of the Local Government

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<sup>14</sup> *South African Permanent Building Society v Messenger of the Court, Pretoria, and Others* 1996 1 SA 401 (T) 402B-D.

<sup>15</sup> S 15(4)(b) of the Sectional Titles Act 66 of 1971.

<sup>16</sup> 1909 TH 811.

<sup>17</sup> *South African Permanent Building Society v Messenger of the Court, Pretoria, and Others* 1996 1 SA 401 (T) 402F-G.

<sup>18</sup> *Johannesburg Municipality v Cohen's Trustees* 1909 TH 811 137.

<sup>19</sup> 1981 4 SA 911 (T) 917D.



Ordinance 17 of 1939 (T)) as conferring ‘a lien or some other species of right which was preferent to a bond’.

Curlewis J found that *Cohen* and *Letabakop* were of no consequence for two reasons.<sup>20</sup> Firstly, the remarks of Innes CJ and Solomon J were only obiter dicta.<sup>21</sup> Secondly, these obiter dicta were considered by a Full Bench in the same Transvaal Division in *Rabie NO v Rand Townships Registrar*.<sup>22</sup> Curlewis JP, Greenberg J and Gey van Pittius J held in this case that the right given to municipal councils by the embargo provision of section 47(b) of Ordinance 9 of 1912 to prevent transfer of premises until arrear rates had been paid, did not constitute ‘a claim ranking in priority’ to a mortgage over such premises within the meaning of section 55(2) of Act 32 of 1917.<sup>23</sup>

Curlewis J was not prepared to go an inch beyond what section 15(4)(b) sets out. He reasoned that the right resulting from this embargo may be ‘not wholly in the nature of a lien or a hypothec but sui generis’ but that it was nothing more.<sup>24</sup> This conclusion was in his opinion supported by two considerations namely, firstly, that commercial undertakings (and indeed the public generally) required legal certainty rather than doctrinal purity or juristic correctness and, secondly, that the preference afforded to mortgage creditors should not be lightly disturbed. He also cautioned that if the legislature wished to change this position, the intention to do so must be clearly expressed and the ambit of the change clearly defined.<sup>25</sup>

Consequently, Curlewis J having found further support for his view in the Transvaal Provincial Division case of *Pretoria Stadsraad v Geregsbode, Landdrostdistrik van Pretoria*,<sup>26</sup> concluded that the clause did not create a preferential claim in favour of the body corporate and that the claim of the mortgagee was indeed preferent to that

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<sup>20</sup> See in general Van der Merwe (1996) *THRHR* 379.

<sup>21</sup> *South African Permanent Building Society v Messenger of the Court, Pretoria, and Others* 1996 1 SA 401 (T) 402I.

<sup>22</sup> 1926 TPD 286.

<sup>23</sup> *South African Permanent Building Society v Messenger of the Court, Pretoria, and Others* 1996 1 SA 401 (T) 403A-B, referring to the *ratio decidendi* in *Rabie NO v Rand Townships Registrar* 1926 TPD 286 289-290.

<sup>24</sup> *South African Permanent Building Society v Messenger of the Court, Pretoria, and Others* 1996 1 SA 401 (T) 403C.

<sup>25</sup> 403C-D.

<sup>26</sup> 1959 1 SA 609 (T) 613.

of the body corporate within the meaning of section 66(2) of the Magistrates' Courts Act.<sup>27</sup> The result of this decision was that the mortgagee's claim ranked higher than that of the body corporate and that, since the mortgagee had not in terms of section 66(2) of the Magistrates' Courts Act consented to it, the sale in execution had to be set aside.<sup>28</sup>

The Cape Provincial Division (now the Western Cape High Court) was the next court that grappled with this problem. The main factual difference between this case and the previous case was that the owner of the unit which was attached in execution was insolvent. The applicant in *Nel NO v Body Corporate of the Seaways Building and Another*<sup>29</sup> was the liquidator of a company which owned six units in a sectional title scheme known as Seaways. All six units were mortgaged in favour of Standard Bank for an amount of R1, 3 million. The applicant caused the units to be sold by public auction in September 1992 for the sum of R1,05 million and lodged the transfer documents at the Cape Town Deeds Office for registration. The body corporate of the Seaways Building, the first respondent, however, refused to issue the levy clearance certificate required in terms of the embargo provision in section 15B(3)(a)(i)(aa) of the Act before the registrar could register transfer of the units. It appeared that levies in the amount of R106 655, 24 were outstanding in respect of the six units and that the company would not have sufficient funds after the mortgage debt owed to Standard Bank had been paid. The body corporate's contention was that it was entitled to refuse to issue the certificate envisaged by section 15B(3)(a)(i)(aa) until the full amount of the outstanding levies have been paid, or until satisfactory provision has been made for payment thereof. The applicant then sought an urgent declaratory order that section 15B(3)(a)(i)(aa) did not, as was contended by the body corporate, confer an effective preference on the body corporate in respect of levies owed to it by the owners of units in the event of their insolvency or liquidation.<sup>30</sup>

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<sup>27</sup> *South African Permanent Building Society v Messenger of the Court, Pretoria, and Others* 1996 1 SA 401 (T) 403F-G.

<sup>28</sup> 403G.

<sup>29</sup> 1995 1 SA 130 (C).

<sup>30</sup> 131A-J -132A-B.

In the course of his judgment Brand J considered the effect of the judgment by Curlewis J in *SA Permanent Building Society* that the embargo provision in the Act was similar in effect to the embargo provision which was considered in *Rabie NO* in that it did not render the body corporate a preferent creditor for the purposes of section 66(2) of the Magistrates' Courts Act. In Brand J's view this verdict and the opinion of other authorities did not support the applicant's case due to the fact that they did not afford an answer to the contention of the body corporate (first respondent) which 'was not that it was a preferent creditor (properly so called) for the purposes, for example, of the Magistrates' Courts Act or the Insolvency Act 24 of 1936'. According to Brand J the body corporate's case was that by virtue of the embargo provisions of section 15B(3)(a)(i)(aa) 'it enjoyed an effective preference in the event of insolvency over any other rights, including such as those derived from a mortgage bond'.<sup>31</sup> Consequently Brand J reached the following conclusion with regard to *Rabie NO* relied upon in *SA Permanent Building Society*:

"The very impact of the judgment in the *Rabie* case, read together with the *Cohen* case, is, in my view that a creditor can by virtue of an embargo provision, such as the one under consideration, enjoy an effective preference in the event of insolvency despite the fact that he is not a preferent creditor properly so called for the purposes of the Magistrates' Courts Act or the Insolvency Act."<sup>32</sup>

Brand J eventually found that section 15B(3)(a)(i)(aa) of the Act must be understood to create an effective preference in the event of insolvency in favour of the body corporate in respect of its claim for outstanding levies and that such a preference can be accommodated in the scheme of insolvency under the Insolvency Act as being part of 'the costs of realisation' (*koste van tegeldemaking* in Afrikaans), envisaged in section 89(1) of the latter act.<sup>33</sup> The trustee in insolvency proceedings must turn all assets into money (*tegeldemaking*) so as to distribute the estate of the insolvent amongst his creditors. The only way to realise the costs of the asset would be to sell the unit and this first requires the settlement of the arrears in terms of the embargo. Therefore, moneys due to the body corporate form part of the costs of realisation of the asset of the insolvent. The moral of the case is thus that a body

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<sup>31</sup> 133F-G

<sup>32</sup> 133H.

<sup>33</sup> 136E-F.

corporate will only enjoy preferential status on a sale in execution where the owner is insolvent. Consequently, it would be wise for bodies corporate to wait until the unit owner is insolvent before procuring an attachment of the unit.<sup>34</sup>

With the leave of the Cape Provincial Division the matter came before the Appellate Division (now the Supreme Court of Appeal).<sup>35</sup> EM Grosskopf JA discussed *Cohen* and *Rabie NO* and pointed out that *Rabie NO* concluded that the municipality's claim, although enjoying the benefits discussed in *Cohen*, nevertheless was not 'a claim ranking in priority to that of the judgement creditor'. He expressly mentioned that this was also decided in *SA Permanent Building Society*. Due to the fact that both parties accepted that the nature of the contested provision was the same as that of the measures considered in *Cohen* and *Rabie NO*, he then found that although the contested provision did not create a preference in the ordinary sense it nevertheless gave the body corporate a power to resist transfer of units until moneys due to it were paid.<sup>36</sup>

With regard to the ambit of this provision, the appellant's main contention was that the contested provision did not apply to all transfers from an insolvent estate (that of the insolvent unit owner) or from a company in liquidation which was unable to pay its debts (the company that owns the units).<sup>37</sup> Having reviewed the principles gathered from the applicable provisions of the Insolvency Act and the Companies Act 61 of 1973 in the light of the legislative history of the contested provision,<sup>38</sup> EM Grosskopf JA found that particularly the provisions relating to legal proceedings were destructive of the appellant's arguments that after liquidation of a unit owner the contribution was no longer due to the body corporate, or, alternatively, that only the eventual dividend in insolvency was due. The right of a creditor to successfully prosecute proceedings for the recovery of his pre-insolvency claim necessarily presupposed that the whole debt to him was still owing, and, indeed, that it was still due. The amount which the creditor would ultimately recover would of course depend on the nature of his claim and the amount available for distribution among creditors (cf

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<sup>34</sup> Van der Merwe *Sectional Titles* 9-13.

<sup>35</sup> *Nel NO v Body Corporate of the Seaways Building and Another* 1996 1 SA 131 (A).

<sup>36</sup> 135A-C.

<sup>37</sup> 135D

<sup>38</sup> 135D-139D

section 78(3) of the Insolvency Act).<sup>39</sup>

Consequently, EM Grosskopf JA concluded that the contributions owing to the body corporate remained due within the meaning of the contested provision when the company was placed in liquidation. He reasoned that any other conclusion would have been anomalous in the light of the legislative history of the provision. The contested provision required a certificate of payment (or provision for payment) of moneys 'due' to the body corporate even in respect of transfers from insolvent estates. He reasoned that in the light of these provisions the legislature could hardly have thought that in practice nothing would ever be due by an insolvent estate. Moreover, it was very unlikely that the legislature would have granted bodies corporate a remedy which is valueless when most needed, for example, when the unit holder is insolvent.<sup>40</sup> The legislature clearly considered that the nature and purpose of the contributions were such that on insolvency of a unit owner, they should be paid by the estate of the unit owner rather than become the responsibility of the other unit owners.<sup>41</sup>

The appellant's counsel accepted the correctness of the finding of the court a quo that the contested provision must be understood to create an effective preference in the event of insolvency in favour of the body corporate in respect of its claim for outstanding levies. This preference was granted on the grounds that it could be accommodated in the scheme of the insolvency as being part of the 'costs of realisation' envisaged in section 89(1) of the Insolvency Act. Consequently all that remained for EM Grosskopf JA to do was to agree with the correctness of the finding<sup>42</sup> and to dismiss the appeal.

The decision of the Appellate Division in *Nel NO v Body Corporate of the Seaways Building and Another*<sup>43</sup> was then again followed and applied in the Transvaal High Court in *Barnard NO v Regspersoon van Aminie en 'n Ander*<sup>44</sup> and confirmed in the

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<sup>39</sup> 139E-F

<sup>40</sup> 139G-I.

<sup>41</sup> 140F-G.

<sup>42</sup> 141B.

<sup>43</sup> 1996 1 SA 131 (A).

<sup>44</sup> 2000 1 SA 213 (T).

Supreme Court of Appeal in *Barnard NO v Regspersoon van Aminie en 'n Ander*.<sup>45</sup> The Supreme Court of Appeal, in *Barnard NO v Regspersoon van Aminie en 'n Ander*,<sup>46</sup> indicated that the legal costs incurred to recover the levies due on a unit formed part of the moneys owed to the body corporate. Consequently, moneys due to the body corporate in terms of section 15B(3)(a)(i)(aa) of the Act did not only include levies due on a sectional title unit, but also legal costs incurred by the body corporate in collecting such levies.<sup>47</sup> Furthermore, the Supreme Court of Appeal held that arrear contributions were not 'taxes' for the purposes of section 89(1) and (4) of the Insolvency Act and that the two-year restriction contained in those subsections could not be applied to arrear contributions.<sup>48</sup> Consequently, in the event that the transferor (unit owner) is insolvent, the body corporate may refuse to issue a clearance certificate unless all outstanding levies and other moneys due to the body corporate have been paid in full.<sup>49</sup>

The next decision handed down was the decision of the Transvaal Provincial Division in *Body Corporate of Geovy Villa v Sherrif, Pretoria Central Magistrate's Court, and Another*.<sup>50</sup> In this test case, the body corporate of a sectional title scheme sought a declaratory order that the bond held by the second respondent, a bank, over a unit in the scheme did not rank higher than the body corporate's claim for overdue levies and costs. In particular it sought an order that the provisions of section 66(2)<sup>51</sup> of the Magistrates' Court Act did not apply to the unit in question. The body corporate in December 2000 had obtained judgement against the owner of the unit for overdue levies and costs in an amount of R8 600. No payment was made and in February 2002 the unit was sold in execution for R32 000. However, the bank refused to accept the purchase price of R32 000.<sup>52</sup> The bank relied on section 66 of the Magistrates' Courts Act and its position as bondholder. Section 66 provides that:

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<sup>45</sup> 2001 3 SA 973 (SCA).

<sup>46</sup> 2001 3 SA 973 (SCA).

<sup>47</sup> Paras 17-18.

<sup>48</sup> Para 29.

<sup>49</sup> Kelly-Louw (2004) *JBL* 96. See also W Mars *The Law of Insolvency in South Africa* 9ed (2008) 499.

<sup>50</sup> 2003 1 SA 69 (T).

<sup>51</sup> Section 66(2) of the Magistrates' Courts Act 32 of 1944 was instituted to protect the interest of bondholders. See Kelly-Louw (2004) *JBL* 96.

<sup>52</sup> *Body Corporate of Geovy Villa v Sherrif, Pretoria Central Magistrate's Court, and Another* 2003 1 SA 69 (T) 69D-F.

“no immovable property that is subject to a claim preferent to that of the judgement creditor shall be sold in execution unless

(a) the judgement creditor has caused...notice in writing of the intended sale in execution to be served personally on the preferent creditor...and...

(c) the proceeds of the sale are sufficient to satisfy the claim of such preferent creditor, in full, or

(d) the preferent creditor confirms the sale in writing”.

Consequently, under section 66(2) of the Magistrates’ Courts Act a unit can only be sold in execution if the proceeds of the sale are sufficient to satisfy the claim of the bondholder, or if the bondholder approves the sale. In practice the bondholder would normally not approve the sale unless the proceeds are sufficient to cover the balance owing to it.<sup>53</sup>

The body corporate relied on *Nel NO v Body Corporate of the Seaways Building and Another*<sup>54</sup> and *Barnard NO v Regspersoon van Aminie en ‘n Ander*<sup>55</sup> for its contention that the bank did not have a preferent right and that it therefore did not have to comply with section 66(2).<sup>56</sup> It was argued that in these cases the Supreme Court of Appeal held that section 15B(3)(a)(i)(aa) of the Act created a right ranking in preference above that of the bondholder and that its claim for overdue levies accordingly ranked above the bond of the bank. The bank’s reaction was that there was an established commercial practice that the bondholder’s right was preferent to that of the body corporate.<sup>57</sup>

The court held that the instant case was part of a larger socio-economic problem. Many purchasers of sectional title units are employees of the State, parastatal enterprises and huge private enterprises, and are therefore entitled to housing subsidies. Financial institutions grant bonds of up to 100% of the purchase price and quite often the employer automatically credits repayments to the account of the

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<sup>53</sup> Van der Merwe *Sectional Titles* 9-14.

<sup>54</sup> 1996 1 SA 131 (A).

<sup>55</sup> 2001 3 SA 973 (SCA).

<sup>56</sup> *Body Corporate of Geovy Villa v Sherrif, Pretoria Central Magistrate’s Court, and Another* 2003 1 SA 69 (T) 69H.

<sup>57</sup> 70A.



mortgage creditor bank. Many purchasers are, however, unaware of their obligation to pay a levy and have made no provision for it in their financial planning. The result is a disaster since even though their bond payments are up to date, the arrear levies and charges remain unpaid from the outset and the arrears increase monthly. The failure to pay levies meant that bodies corporate were hampered in their functioning, which led to a deterioration of the building and eventually the creation of slum conditions and areas where financial institutions were no longer prepared to grant loans. Thus the interests of not only the bodies corporate but also of the other unit owners in the scheme, bondholders and the community as a whole required that bodies corporate act against defaulters as quickly and efficiently as possible before arrears became completely out of hand. It was also pointed out that many sequestrations and the concomitant negative effects thereof could be avoided if housing subsidy schemes of employers allowed for bond repayments, as well as for the payment of levies.<sup>58</sup>

The court then concluded that the statement in *Rabie NO v Rand Townships Registrar*<sup>59</sup> relative to a similar embargo creating 'a preference' or 'something not wholly in the nature of a lien or a hypothec but sui generis' was obiter. Since the decision of the Supreme Court of Appeal in *Nel NO v Body Corporate of the Seaways Building and Another*<sup>60</sup> and *Barnard NO v Regspersoon van Aminie en 'n Ander*<sup>61</sup> interpreted section 15B(3)(a)(i)(aa) as creating a right which ranks in preference above that of the bondholder, it decided that *Rabie NO v Rand Townships Registrar*<sup>62</sup> had in effect been overruled. The effect of this judgment was that a body corporate wishing to sell a unit in execution to satisfy payment of arrear levies, does not have to give notice to the bondholder of the unit, and the bondholder's consent was not required for the sale.<sup>63</sup>

Lastly, the court held that in the light of the socio-economic situation sketched above the sale of units without the knowledge of the mortgage creditor could have a

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<sup>58</sup> Paras 6-7.

<sup>59</sup> 1926 TPD 286.

<sup>60</sup> 1996 1 SA 131 (A).

<sup>61</sup> 2001 3 SA 973 (SCA).

<sup>62</sup> 1926 TPD 286.

<sup>63</sup> *Body Corporate of Geovy Villa v Sherrif, Pretoria Central Magistrate's Court, and Another* 2003 1 SA 69 (T) para 13.

negative effect on the value of units. It could also result in difficulty in obtaining loans from financial institutions for the purchase of sectional title units, which in turn would negatively affect property values. It therefore proposed an amendment to section 66 of the Magistrates' Courts Act so as to compel the body corporate to give the bondholder advance notice of the sale in execution of a sectional title unit.<sup>64</sup> Accordingly the court issued a declaratory order that, for the purposes of section 66 of the Magistrates' Courts Act, the bank's bond did not rank higher than the body corporate's claim for arrear levies and costs as intended in section 15B(3)(a)(i)(aa) of the Act. The sheriff was directed to transfer the unit in question to the purchaser who bought it at the sale in execution.<sup>65</sup>

The latter decision was reversed by the Supreme Court of Appeal in *First Rand Bank Ltd v Body Corporate of Geovy Villa*.<sup>66</sup> The court examined the embargo provisions in *Johannesburg Municipality v Cohen's Trustees*<sup>67</sup> and in *Rabie NO V Rand Townships Registrar*,<sup>68</sup> quoted the conclusions<sup>69</sup> and reasons<sup>70</sup> advanced in the latter case and stated that it had stood the test of further scrutiny over time. With approval the court also quoted passages following the *Rabie NO V Rand Townships Registrar*<sup>71</sup> conclusion in *South African Permanent Building Society v Messenger of the Court, Pretoria, and Others*<sup>72</sup> and in *Nel NO v Body Corporate of the Seaways*

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<sup>64</sup> Para 14.

<sup>65</sup> Para 16.

<sup>66</sup> 2004 3 SA 362 (SCA).

<sup>67</sup> 1909 TS 811.

<sup>68</sup> 1926 TPD 286.

<sup>69</sup> "I do not think that one can go further than to say that the result of the right is 'in effect to create a preference' or 'something not wholly in the nature of a lien or hypothec but sui generis'. In my opinion the council's claim was not one ranking in priority to the mortgage within the meaning of the section." 292.

<sup>70</sup> "In all these cases therefore the benefit sought to be introduced by the Magistrates' Courts Act of providing an inexpensive form of execution will not be available. Thus the council would not only have the right to prevent transfer being passed but also to prevent execution being levied in the magistrate's court on immovables in all these cases. No matter how small the rates for claims or how valuable the properties as long as rates were unpaid there could be no execution under s 55(2). Moreover, the security afforded by mortgage investments would be materially decreased if bonded property is liable to be sold in execution for a trifling claim for rates without notice to the mortgagee: the rules of the magistrate's court do not prescribe the precautions afforded by the practice in the superior courts of requiring notice to the mortgagee." 290 – 291.

<sup>71</sup> 1926 TPD 286.

<sup>72</sup> 1996 1 SA 401 (T): "The right may be 'not wholly in the nature of a lien or hypothec but sui generis' but it is nothing more...[C]ommercial undertakings (indeed the public [generally]) requires certainty from our law... and mortgage bonds have enjoyed a certain and preferred existence for many years: this should not be lightly disturbed. If Parliament wishes to bring about a change, then the intention to do so must be clearly expressed and the ambit of the change clearly defined." 403C-D.

*Building and Another*.<sup>73</sup> The court held that the decision of the Supreme Court of Appeal in *Nel NO v Body Corporate of the Seaways Building and Another*<sup>74</sup> must be understood in the following way. The embargo provision of the Act created an effective preference in the event of insolvency in favour of the body corporate in respect of its claim for outstanding contributions since such a preference could be accommodated as part of 'costs of realisation' under the scheme of insolvency as envisaged by section 89(1) of the Insolvency Act.<sup>75</sup>

By contrast to the reasoning in the court a quo the Supreme Court of Appeal pointed out that the effect of the judgments referred to above was that the 'preference' created under the provisions of the Act was something less than and something different from the 'preference' under the Magistrates' Courts Act.<sup>76</sup> There was nothing in the provisions of section 15B(3)(a)(i)(aa) of the Act that expressly elevated the embargo or veto right of a body corporate above the security rights of the holder of a mortgage bond. If Parliament had intended that the veto right of the body corporate to have such an effect, it should have legislated for such an effect in express terms.<sup>77</sup> The practical effect of section 15B(3)(a)(i)(aa) was that whenever funds were available, the body corporate would be paid before an effective delivery took place on account of a sale in execution of the defaulting owner's unit. However, if insufficient funds were available, a reasonable mortgage creditor could seek some kind of accommodation with the body corporate, but it was under no obligation to do so.<sup>78</sup> He could therefore put a stop to the sale in execution.

The Supreme Court of Appeal then distinguished *Nel NO v Body Corporate of the Seaways Building and Another*<sup>79</sup> in which it was decided that if the owner of a unit was sequestrated or liquidated, the embargo in effect created a preference in favour of the body corporate since the payment of arrear levies could be treated as part of

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<sup>73</sup> 1996 1 SA 131 (A): "In argument before us it was accepted by both sides, rightly in my view, that the juristic nature of the contested provision is the same as that of the measures considered in the above cases. The position then is that the contested provision, although it did not create a preference in the ordinary sense, nevertheless gave the body corporate a power to resist transfer of units until moneys due to it were paid. The question at issue was the exact ambit of the power." 135C-D.

<sup>74</sup> 1996 1 SA 131 (A).

<sup>75</sup> *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA) para 22.

<sup>76</sup> Para 23.

<sup>77</sup> Para 24.

<sup>78</sup> Para 26.

<sup>79</sup> 1996 1 SA 131 (A).

the 'costs of realisation' envisaged in section 89(1) of the Insolvency Act. The fact that the debt to the body corporate was satisfied as part of the process of realisation produced the same result as if the rights conferred by an embargo provision were preferent in the strict sense.<sup>80</sup> Since the owner's unit was not sequestrated in the present case, the court held that the mortgage creditor, the bank, had a preferent claim under section 66(2) of the Magistrates' Court Act. Reversing the decision of the court a quo, the court concluded that the body corporate, consequently, did not have the right to sell the unit in question in execution without reference to the first mortgage held by the bank.<sup>81</sup>

The effect of all the cases referred to above is thus that in the event that the defaulting owners of units are still solvent, bodies corporate would require the consent of the bondholder to the sale of the unit in execution which, in practice, precludes bodies corporate from having the unit sold in this way. The wisest option for bodies corporate would therefore be to wait until sectional owners in arrears are declared insolvent since they would then not only save the cost of litigation, but they would also have a preferent claim for arrears as part of the costs of realisation of the insolvent's assets.<sup>82</sup> In this manner the embargo provision strengthens the position of the body corporate to collect outstanding levies, but it might also create a situation where financial institutions may become cautious to advance credit to purchasers on security of a mortgage bond as their preference is eroded by the insolvency of the mortgagor (defaulting owner).<sup>83</sup>

It is, however, possible for financial institutions to take some cautious steps to reduce their losses by pressurising sectional owners to pay their levies timeously and thus to keep the payment of their levies up to date. The following steps could be suggested. Firstly, under section 37(3) of the Act mortgage creditors have the right

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<sup>80</sup> *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA) para 27. See also Van der Merwe (1996) *THRHR* 385.

<sup>81</sup> *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA) para 28. If the claim of the body corporate was upheld it would have had the following impact on mortgage creditors: "Moreover, the security afforded by mortgage investments would be materially decreased if bonded property is liable to be sold in execution for a trifling claim for rates without notice to the mortgagee; the rules of the magistrate's court do not prescribe the precautions afforded by the practice in the superior courts of requiring notice to the mortgagee." Para 17.

<sup>82</sup> Van der Merwe *Sectional Titles* 9-18.

<sup>83</sup> D Burdette "New Problems Relating to Contribution in Insolvent Estates" (2000) 63 *THRHR* 458-464. See also Van der Merwe *Sectional Titles* 9-18 and Pienaar *Sectional Titles* 214.

to determine the extent to which a sectional owner's levies have been paid. With this knowledge they can try to use friendly persuasion to warn defaulting owners to pay up. Secondly, the loan agreement between the sectional owner and the mortgage creditor may provide that the mortgage creditor must be informed of meetings of the body corporate, and that the mortgage creditor may be present at such meeting and may vote on behalf of the sectional owner whose unit is burdened with the mortgage. The effect of this is that if bodies corporate do not make sufficient effort to collect arrear levies in accordance with the provisions of the Act, the mortgage creditors can pressurise the body corporate to take the necessary steps to collect arrear levies. In such a way they would minimise their losses and ensure that the mortgagor does not fall substantially behind with the payment of levies. A third option would be to insist in the mortgage agreement that mortgage debtors pay their levies to the body corporate by means of debit orders. In the event that a mortgage debtor (unit owner) then cancels his debit order, the financial institution will immediately be aware of a potential problem which will give them the opportunity to take the necessary steps to protect their interests.<sup>84</sup> The above options have no legal force and their effect would largely depend on the financial soundness of the unit owner.

By contrast, bodies corporate could fortify their position in the case of imminent non-payment of contributions by a particular unit owner by applying for the sequestration of the defaulting unit owner under the Insolvency Act. Section 82(1) of the Insolvency Act provides that the trustee in insolvency is obliged to sell all the property in the insolvent estate as soon as he is authorised to do so at the second meeting of creditors. As a result, the trustee can sell the unit without having to obtain the consent of the bondholder, which would benefit the body corporate in two ways. Firstly, the new owner will replace the previous owner, and will most likely be able to pay future levies charged by the body corporate. Secondly, the money due to the body corporate by the previous owner will be recouped from the proceeds of the sale as part of the cost of realisation of the assets of the insolvent, which means that in practice the body corporate would be paid out of the proceeds preferent to

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<sup>84</sup> Burdette (2000) *THRHR* 459-460.

bondholders and other holders of security rights. The only disadvantage of the latter option is that it might be a protracted process.<sup>85</sup>

### **5 3 Obstacles for mortgage creditors on sale in execution**

#### **5 3 1 Introduction**

It can be argued that there are two obstacles facing the mortgage creditor when it comes to securing an execution order against a sectional title unit. Firstly, the constitutionality of the procedure for the sale in execution of immovable property in terms of section 66(1)(a) of the Magistrates' Courts Act and rule 45(1) of the Uniform Rules of the High Court, is questionable in the light of the provisions of section 26 of the Constitution of the Republic of South Africa, 1996 (the Constitution).<sup>86</sup> Secondly, if the mortgage debtor refuses to vacate the premises after the sectional title unit has been sold in execution, the mortgage creditor has to bring an action for eviction. Therefore, in every case where the eviction is sought of mortgagees who have foreclosed on their bonds legal practitioners would have to follow the arduous and costly route prescribed by PIE.<sup>87</sup> Under this subheading both of these obstacles will be discussed and analysed in order to determine whether they can justifiably be called obstacles.

#### **5 3 2 Unconstitutionality of execution procedures under the Magistrates' Courts Act and the Uniform Rules of the Court**

The constitutionality of the attachment and execution procedure of immovable property in terms of the Magistrates' Courts Act was first considered in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*.<sup>88</sup> These cases considered the effect of section 26 of the Constitution on the attachment and sale in execution process in terms of section 66(1)(a) of the Magistrates' Courts Act.

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<sup>85</sup> Van der Merwe *Sectional Titles* 9-18.

<sup>86</sup> See in general Van der Merwe *Sectional Titles* 9-18(4) - 9-24(4) and Pienaar *Sectional Titles* 218-220.

<sup>87</sup> See in general Van der Merwe *Sectional Titles* 9-24(4) – 9-24(5) and Pienaar *Sectional Titles* 216-218.

<sup>88</sup> 2005 2 SA 140 (CC). For a detailed discussion of this judgment see L Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* LLD thesis University of Pretoria (2012) 181-190.

In both cases under consideration, the property was attached and sold in execution for trifling and extraneous debts in accordance with the normal debt collection procedure of obtaining a *nulla bona* return<sup>89</sup> and thereafter attaching and selling the judgement debtor's immovable property in execution. Furthermore, in both cases the judgements and warrants of execution were issued by the clerk of the court without considering the relevant circumstances.<sup>90</sup>

In the High Court<sup>91</sup> the appellants applied for orders setting aside, firstly, the sales and execution and, secondly, interdicting the two respondents from taking transfers of their homes. The applications were based on the argument that the sale in execution process provided for in sections 66(1)(a) and 67 of the Magistrates' Courts Act was unconstitutional. The applications were dismissed by the High Court because it held that if the sheriff issued a *nulla bona* return, the clerk of the court was obliged in terms of rule 36 of the Magistrates' Courts Rules to issue and sign a warrant of execution against the immovable property of the judgement debtor. When execution takes place the judgement debtor can either vacate the premises voluntarily or remain in occupation. If the premises were vacated voluntarily the effective loss of the home would be caused by the exercise of the judgement debtor's own free will and not by the execution process. However, if the judgement debtor does not vacate the premises voluntarily he would be 'holding over' and the purchaser would be required to act in terms of the provisions of PIE to secure eviction and therefore the eviction would be caused not by the execution process but by the separate legal proceedings instituted by the new owner.<sup>92</sup>

In the appeal to the Constitutional Court,<sup>93</sup> the appellants relied on section 26(1) of the Constitution which protects the right of access to adequate housing. Their argument was formulated in the following manner: the right of access to adequate housing places a duty on both the state and private parties not to interfere unjustifiably with any person's existing access to adequate housing. Consequently,

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<sup>89</sup> A *nulla bona* return is a return by the sheriff of the Magistrate's Court that the judgement debtor does not have sufficient movable assets to satisfy the judgement debt.

<sup>90</sup> Pienaar *Sectional Titles* 218.

<sup>91</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2003 3 All SA 690 (C).

<sup>92</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) 141C-F; see also Van der Merwe *Sectional Titles* 9-18(4) - 9-18(5).

<sup>93</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC).



section 66(1)(a) of the Magistrates' Courts Act was unconstitutional because it allowed a person's right to adequate housing to be removed even in circumstances in which such removal was unjustifiable.<sup>94</sup>

The Constitutional Court held that if section 26 of the Constitution is read as a whole, section 26(3) is directly applicable to eviction cases and guarantees that a person may not be evicted from his home without a court order being issued after considering all the relevant circumstances. The aim of the entire section is to create a new dispensation in which everyone has access to adequate housing free from interference by the state unless the interference is justifiable.<sup>95</sup> Due to the fact that section 26(1) protects a person's right of access to adequate housing, any measure permitting a person to be deprived of existing access to adequate housing limits the protection afforded in terms of section 26(1), leaving it to the court to determine whether such measure is just and equitable.<sup>96</sup>

The Constitutional Court, therefore, held that, to the extent that section 66(1)(a) of the Magistrates' Courts Act fails to provide for a procedure of judicial oversight in the sales in execution process, it is unconstitutional and invalid.<sup>97</sup> To remedy the defect, the Constitutional Court reverted to the mechanism of 'reading in' and suggested that section 66(1)(a) must be read as though the words 'a court, after consideration of all relevant circumstances, may order execution' appear before the words 'against the immovable property of the party'.<sup>98</sup> This has the practical effect that, once the sheriff of the Magistrate's Court has issued a *nulla bona* return, the clerk of the court may not automatically issue a warrant of execution to attach the immovable property. The judgement creditor must first lodge an application with the court for an order that execution against the immovable property of the judgement debtor is in the specific circumstances of the case just and equitable.<sup>99</sup> Furthermore, the Constitutional Court held that section 67 of the Magistrates' Courts Act is not unconstitutional to the

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<sup>94</sup> Para 17.

<sup>95</sup> Para 28.

<sup>96</sup> Para 29.

<sup>97</sup> Paras 39-40.

<sup>98</sup> Paras 61-64.

<sup>99</sup> Para 64.

extent that it does not provide for a blanket prohibition against sales in execution of houses below a certain value.<sup>100</sup>

I am in agreement with Brits that the Constitutional Court should be highly praised for introducing judicial oversight for the sale in execution of immovable property (in our case sectional title units) in terms of the Magistrates' Courts Act for it does not prevent the sale of execution of homes as such, but it does ensure that unjustifiable sales in execution do not occur.<sup>101</sup>

The constitutional principles applied in *Jaftha* were also applied to a writ of attachment against immovable property issued by the registrar of the High Court in terms of rule 45(1) of the Uniform Rules of the High Court in the case of *Nedbank Ltd v Mortinson*.<sup>102</sup> The registrar's power to issue the writ limits the debtor's right to housing in terms of section 26 of the Constitution. Since this limitation was not reasonable and justifiable in terms of section 36(1) of the Constitution, the defect in the rule could be remedied by importing words into the rule providing for judicial consideration of relevant factors before the writ against immovable property is issued.<sup>103</sup> Consequently, the court held that section 27A of the Supreme Court Act 59 of 1959 read with rule 31(5) empowered the registrar to grant the order but that such power limits the debtor's right to housing in terms of section 26 of the Constitution. However, the court found that, in the absence of abuse of the court procedure, such limitation was reasonable and justifiable in terms of section 36(1) of the Constitution and permitted the registrar to grant the order.<sup>104</sup> Rules of practice were then formulated by the court to alert the registrar in order to assist him in determining abuses and in referring those applications for consideration by the court.<sup>105</sup>

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<sup>100</sup> Paras 50-51.

<sup>101</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* LLD thesis University of Stellenbosch (2012) 75.

<sup>102</sup> 2005 6 SA 462 (W). See in general Van der Merwe *Sectional Titles* 9-18(6) – 9-19.

<sup>103</sup> *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 39.

<sup>104</sup> Para 33.

<sup>105</sup> Para 33.1.

In *Standard Bank of South Africa Ltd v Saunderson and Others*<sup>106</sup> the Supreme Court of Appeal made a distinction between a sale in execution of the judgement debtor's immovable property based on a trifling extraneous debt and a judgement based on arrear mortgage payments in respect of a mortgage bond registered over the property.<sup>107</sup> In this case the mortgage creditor, Standard Bank of SA Ltd, in separate actions issued summons against the respondents in the High Court requesting judgement against each of the respondents and in accordance with the normal procedure, for ancillary orders declaring the mortgaged properties executable. Failure on behalf of the respondents to defend the actions resulted in Standard Bank of SA Ltd approaching the registrar for default judgements in terms of rule 31(5) of the Uniform Rules of the High Court. It was, however, ordered that the matters be adjudicated in open court rather than by the registrar. The High Court then granted judgement by default in each case, but declined to order the mortgage properties to be executable. It reasoned that *Jaftha*<sup>108</sup> had held that section 26 of the Constitution was compromised whenever execution against residential property was sought and that, in all such cases, it had to be shown that execution was permissible under section 26(3). The reasoning of the High Court was that since the appellant's summonses lacked averments to the effect that the alleged facts were sufficient to justify an order in terms of section 26(3), they could not sustain an order of execution.<sup>109</sup>

The Supreme Court of Appeal pointed out that this was a test case as hundreds of similar cases came before the courts each year.<sup>110</sup> The routine practice in the courts has become controversial because of uncertainty as to what must be alleged to justify an order for execution. In the Western Province, applications for default judgements and orders declaring residential property executable have all but ground to a halt.<sup>111</sup> The interpretation of *Jaftha*<sup>112</sup> in the High Court was rejected by the Supreme Court of Appeal. The Supreme Court of Appeal found that the issue in

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<sup>106</sup> 2006 2 SA 264 (SCA). For a detailed discussion of this judgment see Steyn *Statutory Regulation of Forced Sale* 205-210.

<sup>107</sup> Para 18.

<sup>108</sup> 2005 2 SA 140 (CC).

<sup>109</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) 265C-F; see also Van der Merwe *Sectional Titles* 9-19.

<sup>110</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 6.

<sup>111</sup> Para 14.

<sup>112</sup> 2003 3 All SA 690 (C).

*Jaftha*<sup>113</sup> was not section 26(3) of the Constitution but section 26(1) relating to the impact of the right to adequate housing on execution against residential property. The latter case did not decide that the right to adequate housing was compromised in every case where execution was levied against residential property but that a writ of execution that would deprive a person of 'adequate' housing would compromise his rights in terms of section 26(1) and would, therefore, need to be justified as contemplated by section 36(1) of the Constitution.<sup>114</sup>

The Supreme Court of Appeal also found that section 26(1) did not confer a right of access to housing per se but only a right of access to 'adequate' housing, which is of necessity relative and fact-bound.<sup>115</sup> For that reason *Jaftha*<sup>116</sup> did not decide that section 26(1) afforded protection to the ownership of all residential property, even more so because the situation in *Jaftha*<sup>117</sup> was radically different from that of *Standard Bank of South Africa Ltd v Saunderson and Others*.<sup>118</sup> In *Jaftha*,<sup>119</sup> the sale in execution deprived the debtor of ownership of her home because she had been unable to pay a trifling unrelated debt, and no judicial oversight was interposed to preclude an unjustifiably disproportionate outcome. Furthermore, the judgement creditor in *Jaftha*<sup>120</sup> had not been a mortgage creditor with rights over the property which was derived from an agreement with the owner. By contrast in *Standard Bank of South Africa Ltd v Saunderson and Others*,<sup>121</sup> the property owners had willingly mortgaged their property to the bank in order to obtain a loan. Their debt was not extraneous but fused into the title to the property. *Jaftha*<sup>122</sup> did not deal with the effect of section 26(1) on such cases.<sup>123</sup>

It was also found that cases where execution against mortgaged property conflicts with section 26(1) were rare. In practice the right of the mortgage creditor to reclaim

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<sup>113</sup> 2005 2 SA 140 (CC).

<sup>114</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 15.

<sup>115</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 16. For this the Court relied on *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC). See paras 36-37 of the latter case.

<sup>116</sup> 2005 2 SA 140 (CC).

<sup>117</sup> 2005 2 SA 140 (CC).

<sup>118</sup> 2006 2 SA 264 (SCA).

<sup>119</sup> 2005 2 SA 140 (CC).

<sup>120</sup> 2005 2 SA 140 (CC).

<sup>121</sup> 2006 2 SA 264 (SCA).

<sup>122</sup> 2005 2 SA 140 (CC).

<sup>123</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 18.

the debt is seldom denied and it would be unacceptable to allow a different approach, depending on the reasons for bonding the property or the objects on which the loan was expended. In essence the mortgage creditor's claim is against the property and its entitlements originate from the fact that the mortgage debtor chose to accept a limitation in his ownership or title when the loan was obtained.<sup>124</sup>

Therefore, the Supreme Court of Appeal held that the fact that an execution order was sought in respect of residential property was not sufficient to constitute an infringement of section 26(1) of the Constitution. Consequently, the orders ought to have been granted since no such infringement had been alleged or shown by the defendant mortgage debtors and the mortgage creditor had not been called upon to justify the orders sought.<sup>125</sup> The Supreme Court of Appeal also found that this implied that the registrar of the High Court had been entitled to dispose of the applications for orders of execution by default.<sup>126</sup> Rule 31(5) of the Uniform Rules of the High Court requires only a formal evaluation of whether a summons discloses a proper cause of action and, if the constitutionality of an order is not challenged, allows the registrar to enter a judgement. This does not mean that the registrar must exercise judicial discretion regarding justifiability or that he would automatically grant an order in circumstances in which it would be constitutionally impermissible.<sup>127</sup> Since the mortgage debtors would have no defence against payment in most cases in which orders against mortgaged property are sought and would therefore not seek legal advice, the Supreme Court of Appeal proposed a prospective rule of practice to apply in cases where a plaintiff claims relief that includes declaring immovable property executable. In terms of this rule of practice the summons in such cases must inform the defendants that the order might infringe their rights to adequate housing and must encourage them to place information before the court to convince the court to grant extenuation (moderation) in the execution of the order.<sup>128</sup> The Supreme Court of Appeal therefore upheld the appeal and declared the properties executable. In the course of judgment, the Supreme Court of Appeal acknowledged

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<sup>124</sup> Para 19.

<sup>125</sup> Paras 20-21.

<sup>126</sup> Para 22.

<sup>127</sup> Para 24.

<sup>128</sup> Para 25.

that a mortgage bond is a vital tool for spreading home ownership<sup>129</sup> and that execution against mortgaged residential property should in most cases take its normal course.<sup>130</sup>

After *Saunderson*, the position with regard to execution against mortgaged sectional title units can be summarised as follows. *Saunderson* confirmed that the decision of the Constitutional Court in *Jaftha* does not necessarily apply in every case of execution against residential property. It is, however, possible for the defendant to plead an infringement of his right to adequate housing in all cases where execution is attempted, but this plea is unlikely to succeed in cases of execution against mortgaged residential property. If the constitutionality of the order is not challenged, section 26(1) of the Constitution is no obstacle to the granting of such an order by the registrar.<sup>131</sup> As a rule of practice, to protect the mortgage debtor's right to access to adequate housing, the summons must include a statement that the mortgage debtor's right to access to adequate housing may be infringed by the execution procedure. If the mortgage debtor proves that his right to adequate housing has been infringed, the mortgage creditor must show that such infringement is justifiable in terms of section 36(1) of the Constitution.<sup>132</sup> It is important to note that this is the position with regard to mortgaged residential property when being sought to be declared executable. Where the residential property that is sought to be declared executable is not mortgaged, the averments referred to in *Mortinson* would have to be made by the applicant, following the rules of practice adopted in the Cape, Transvaal and Natal High Courts.<sup>133</sup>

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<sup>129</sup> Para 1: "The mortgage bond is an indispensable tool for spreading home ownership. Few people can buy a home immediately: by providing security for a loan, the mortgage bond enables them to do so. There can hardly be a private residence in this country that has not at one time or another been mortgaged, nor a homeowner who has not at some time been a mortgagor. We were told by the appellant bank that in August 2005 loans secured by mortgage bonds on residential property in this country amounted to almost R500 billion".

<sup>130</sup> Para 3: "The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms. That confidence has been shaken by a recent decision of the Cape High Court that is the subject of this appeal. The decision must be seen against the background of the ordinary legal process for recovering debts. When judgement is given against a debtor and the debtor fails to satisfy the judgement debt the process for recovery of the judgement debt is by execution against the judgement debtor's belongings. It is a long-standing practice of our courts that execution must be directed first against the debtor's moveable property and only thereafter, if the movables are insufficient, against immovable property."

<sup>131</sup> Paras 20-21 and 23-24. See also *Van der Merwe Sectional Titles 9-22* and *Pienaar Sectional Titles 219*.

<sup>132</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 25. See also *Van der Merwe Sectional Titles 9-22* and *Pienaar Sectional Titles 219-220*.

<sup>133</sup> *Van der Merwe Sectional Titles 9-22*.

However, in *Gundwana v Steko Development and Others*<sup>134</sup> the Constitutional Court confirmed that execution may only follow upon judgment in a court of law, and that judicial oversight is required where execution is sought against the primary homes of indigent debtors after judgement on a monetary debt. It was also found that the High Court Rules and practice allowing registrars to grant orders declaring primary homes executable was unconstitutional in view of the right to housing entrenched in the Constitution. Bondholders who wish to execute on a mortgage bond must therefore first approach a court of law to determine whether the sale in execution of a person's home is justifiable in the circumstances of the case.<sup>135</sup> Therefore, it was ordered that it is unconstitutional for a registrar to declare the judgement debtor's primary home specially executable when ordering default judgement under rule 31(5) of the Uniform Rules of the High Court to the extent that this permits the sale in execution of such property.<sup>136</sup> The effect is that the judgments in *Mortinson* and *Saunderson* are overruled, to the extent that they held that a registrar is constitutionally competent to make execution orders when granting default judgements in terms of rule 31(5)(b).<sup>137</sup>

With the focus on retrospective relief, the Constitutional Court ruled that the persons affected by the above ruling must approach the courts to set aside the sales and transfers concerned. Besides the normal requirements for rescission, aggrieved debtors will also have to show that a court, with full knowledge of all the relevant facts existing at the time of the granting of default judgement, would nevertheless have refused leave to execute against the debtor's home. The consequences of invalid execution sales and subsequent transfers must now be considered in the light of the applicable principles.<sup>138</sup> To conclude matters the Constitutional Court noted that the prospective effect of the order was overtaken by the amendment effective from 24 December 2010, of rule 46(1) of the Uniform Rules of the High Court, which provides that where either the court or the registrar had declared the property encumbered with a mortgage specially executable, and the property sought to be

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<sup>134</sup> 2011 3 SA 608 (CC). For a detailed discussion of this judgment see Steyn *Statutory Regulation of Forced Sale* 255-263. See also AJ Van der Walt & R Brits "Judicial Oversight Over the Sale in Execution of Mortgaged Property" (2012) 75 *THRHR* 322-324-325.

<sup>135</sup> *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) paras 41, 49-50 and 53.

<sup>136</sup> Para 65.

<sup>137</sup> Para 52.

<sup>138</sup> Paras 58-60.



attached was the primary home of the judgement debtor, no writ should be issued unless the court, having considered all the relevant circumstances, orders execution against such property.<sup>139</sup>

The main implication of *Gundwana v Steko Development and Others*<sup>140</sup> and the amended rule 46(1) of the Uniform Rules of the High Court is that if a mortgaged creditor wants to execute against the immovable property of a debtor (sectional owner) without first seeking to execute against the debtor's movables (which is the normal steps of debt enforcement), a court must in all such instances assess whether this would be justifiable. The mortgage creditor's entitlement to direct execution against hypothecated immovable property is thus subject to intervention by a court where it would lead to an unjustifiable limitation of section 26(1) of the Constitution.<sup>141</sup>

In *Firstrand Bank Ltd v Folscher and Another, and Similar Matters*<sup>142</sup> it was pointed out by the court that the judicial supervision under the amended rule 46(1)(a)(ii) of the Uniform Rules of the High Court and *Gundwana* is limited to those instances where the execution orders relate to the debtor's principal or generally his only dwelling and not a holiday home or a second house that is not usually occupied by the debtor.<sup>143</sup> The court also pointed out that the term 'judgement debtor' refers to a natural person owning a primary residence<sup>144</sup> and not to property owned by a company, a close corporation or a trust, even if the property is the shareholder's, member's or beneficiary's only residence.<sup>145</sup>

This outcome requires the court to take regard of the relevant circumstances and ensure that a judgement debtor does not become a victim of an abuse of the execution process. Firstly, it must be considered that the creditor and debtor voluntarily concluded an agreement to enable the debtor to acquire the property against the security of the mortgage registered over the property. Without

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<sup>139</sup> Para 56

<sup>140</sup> 2011 3 SA 608 (CC).

<sup>141</sup> Van der Walt & Brits (2012) *THRHR* 325.

<sup>142</sup> 2011 4 SA 314 (GNP).

<sup>143</sup> Para 30.

<sup>144</sup> Para 31.

<sup>145</sup> Para 32.

extraordinary circumstances the judgement creditor will normally be entitled to enforce his judgement by executing against the property encumbered with a mortgage which was consciously registered for mutual benefit as security for the moneys advanced for the purchase of the home.<sup>146</sup>

The court found it impossible to provide an exhaustive list of extraordinary circumstances, which would persuade a court to decline a writ of execution. They would usually consist of factors that would render enforcement of the judgement debt an abuse of process. The creditor's conduct need not be wilfully dishonest or vexatious to constitute an abuse of intended writs against mortgaged properties. Although bona fide the creditor's conduct may be iniquitous if the debtor loses his home while alternative methods of satisfying the creditor's debt exist that would not prejudice the creditor.<sup>147</sup> The court did, however, identify numerous factors which a court may need to take into consideration in deciding whether a writ should be issued or not.<sup>148</sup> It was also emphasised that these facts must in each case be established as legally relevant.<sup>149</sup>

Furthermore, the court detailed the manner in which the relevant information should be placed before the court. It was emphasised that the court should not normally be expected to take proactive steps to establish whether the debtor is the victim of abusive legislation, although it will have to do so in the extraordinary instance where there is no reason to suspect that execution should not be levied against the debtor's home, and no alternative way exists of establishing the true state of affairs. In the

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<sup>146</sup> Para 37-39.

<sup>147</sup> Para 40.

<sup>148</sup> Para 41. These factors include the following: whether the mortgaged property is the debtor's primary residence; the circumstances under which the debt was incurred; the arrears outstanding under the bond when the bond was called up and on the date the default judgement is sought; the total amount owing in respect of which execution is sought; the debtor's payment history; the relative financial capacities of the creditor and the debtor; the possibility that the debtor may satisfy his or her debt within a reasonable period, thus avoiding execution against the debtor's residence; the proportionality of prejudice suffered by the creditor on refusal of execution when compared to the prejudice suffered by the debtor if execution results in the loss of a home; whether the debtor was notified under section 129 of the National Credit Act 34 of 2005 prior to the institution of action and the debtor's reaction to such notice, and the period of time that elapsed between the notification and the institution of action; whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy or with money advanced by the creditor; whether the property is in fact occupied by the debtor; whether the debtor will lose access to housing as a result of execution being levied against his home; whether there is any indication that the creditor has instituted action with an ulterior motive; and the position of the debtor's dependants and other occupants of the house.

<sup>149</sup> Para 41.

ordinary course of events the creditor will be able to inform the court of when the debt was created, the manner in which it was repaid and comment on the debtor's ability to effect payment of arrears by means other than allowing execution against his home. In default proceedings the creditor is in a similar position to that of an applicant in unopposed motion proceedings, and is, as any litigant in that role, duty bound to make full disclosure to the court of all facts that might influence the court in coming to a conclusion.<sup>150</sup>

The creditor, while under oath, must furnish the court with essential information relating to the debtor and his residence when application is made for default judgement. All the factors that are within the creditor's knowledge must be dealt with prior to judgement being granted and execution being affected. This includes disclosure of the debtor's current address if such address is not the same as that of the mortgaged property. If all the facts that might be relevant are not known to the creditor, the court will have to consider the available known and relevant facts.<sup>151</sup>

Lastly, the court focussed on the matter of informing the debtor. The court found that service on the domicile of the debtor was normally sufficient. When summons is issued the debtor is entitled to be informed of his right to access to adequate housing in terms of section 26(1) of the Constitution; of the fact that default judgement might be granted against him in the absence of any reaction on his part; and that execution against his home with subsequent eviction from the home might follow. It was suggested that this could be met (at least partially) by including a warning to this effect in a notice under section 129 of the National Credit Act 34 of 2005 where the act was applicable. In addition, a writ of execution should include a reference to the provisions of rule 31(5)(d), dealing with the consequences of a default judgement, to ensure that the debtor is aware of his rights.<sup>152</sup>

In *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases*<sup>153</sup> the court once again addressed the issue of judicial oversight. Due to conflicting judgments and the amendment to rule 46 of the Uniform Rules of the High

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<sup>150</sup> Para 43.

<sup>151</sup> Paras 43-44.

<sup>152</sup> Paras 45-47.

<sup>153</sup> 2011 6 SA 111 (WCC).

Court, it became unclear what information a bondholder had to place before the court to enable it to decide whether to grant a writ of attachment and sale in execution of a judgement debtor's home. Therefore, the court had asked counsel representing the bondholders in five applications for default judgement against mortgagors to formulate specific questions to be addressed by the court. The following questions were submitted.<sup>154</sup> Firstly, what were the 'relevant circumstances' which a court had to consider before ordering execution against mortgaged property specially hypothecated to satisfy the debt secured by such mortgage. Secondly, who had to plead such circumstances and, finally, whether the new rule 46(1) set up any substantive requirements on the part of the mortgage creditor in order to obtain the relief sought.

With regard to the first question, the court found that no definitive answer can be given. However, relevant circumstances included evidence of an infringement of constitutional rights or an abuse of process, as well as evidence in support of any contention by the bondholder that an alleged or demonstrated infringement was justifiable. The court then answered the second question as follows: allegations that execution against the hypothecated property would infringe the debtor's constitutional rights or that the application for a writ of execution was an abuse had, in principle, to be pleaded by the judgement debtor, and any rebutting allegations by the bondholder. Lastly, the court decided that the amended rule 46(1)(a) did not give rise to new substantive obligations on bondholders seeking orders for execution against the hypothecated property. The court also pointed out that the proviso made it clear that execution against the judgement debtor's primary residence (home) entailed a potential infringement of the right to housing and could therefore only occur under judicial oversight.<sup>155</sup>

As far as the procedural requirements were concerned, the court decided that mortgage creditors had (apart from the special requirements in terms of Practice Note 33 of the Western Cape Consolidated Practice Notes relating to proceedings instituted in terms of the National Credit Act and those set out in the practice note in

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<sup>154</sup> Para 5.

<sup>155</sup> Para 30.

*Standard Bank of South Africa Ltd v Saunderson and Others*<sup>156</sup>) to comply with the following guidelines.<sup>157</sup> Firstly, where a declaration of special executability was sought ancillary to the judgement in the money claim, the bondholder had to indicate in the summons whether or not execution was being sought against the judgement debtor's home. If the bondholder was unable to do so because of a lack of knowledge this had to be stated in the summons. Secondly, where the bondholder was able to state that the property was not the debtor's home, the matter, where possible, had to be disposed of by the registrar. In such cases the bondholder had to submit to the registrar an affidavit confirming the fact that the property was not the debtor's home. Lastly, where the property might be the debtor's home, and the secured debt was repayable in periodic instalments, it could be to the advantage of the bondholder to assist the court by stating the amount of arrears; and where this was relatively low, by stating why it was resorting to direct realisation of the security.

The current position is thus that it would be unconstitutional for an execution order to be granted against a mortgaged unit without judicial oversight. This means that courts can now, based on the relevant circumstances, decline to grant an execution order, which was not previously the case. Accordingly only a Magistrate or Judge has the power to make such an evaluation. Therefore, mortgage creditors would now have to convince a Magistrate or Judge that the sale in execution would be justified, which means that they can no longer circumvent the courts by simply approaching the clerk or registrar for execution orders by default.<sup>158</sup>

### **5 3 3 Impact of PIE on the sale in execution of mortgaged sectional title units**

In terms of section 26(3) of the Constitution no one may be evicted from their home without a court order being issued after all the relevant circumstances have been considered and no legislation may permit arbitrary evictions. The preamble to PIE strengthens this constitutional right not to be evicted arbitrarily or without due process of law by stating the following:

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<sup>156</sup> 2006 2 SA 264 (SCA).

<sup>157</sup> *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 6 SA 111 (WCC) paras 4 and 27-30.

<sup>158</sup> *Brits Mortgage Foreclosure* 68-69.

“WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;

AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances;

AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;

AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of these groups should be considered.”

In terms of PIE the relevant circumstances that would have to be considered include the following. In the event that the unlawful occupation lasted for less than six months, relevant circumstances to be considered are the rights and needs of elderly persons, children, disabled persons and households headed by women.<sup>159</sup> In the event that the unlawful occupation lasted for more than six months, the availability of suitable alternative accommodation must be considered together with the above mentioned circumstances.<sup>160</sup>

In *Brisley v Drotzky*<sup>161</sup> the Supreme Court of Appeal held that all relevant circumstances do not have to be taken into consideration when an eviction order is granted in the application of the common law eviction procedures, but that all legally relevant circumstances should be considered.<sup>162</sup> The Supreme Court of Appeal also confirmed that section 26(3) of the Constitution applies horizontally and is binding on all natural and juristic persons.<sup>163</sup> However, the Supreme Court of Appeal decided that socio-economic and other circumstances are not legally relevant circumstances in the case of common law provisions regarding evictions due to the fact that section

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<sup>159</sup> S 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>160</sup> S 4(7).

<sup>161</sup> 2002 4 SA 1 (SCA).

<sup>162</sup> Para 42.

<sup>163</sup> Para 40.

26(3) does not grant the courts the discretion or prescribe the circumstances when they can divert from the common law position. Such circumstances should be considered only in the case of evictions in terms of PIE because it specifies the considerations upon which the courts have the jurisdiction to override the legally relevant circumstances.<sup>164</sup> However, the application of the provisions of PIE was not at issue in *Brisley v Drotzky*.<sup>165</sup>

In *Ndlovu v Ncgobo; Bekker and Another v Jika*<sup>166</sup> the Supreme Court of Appeal limited the application of PIE to residential occupiers, thus excluding occupiers of commercial land from the protection of PIE.<sup>167</sup> The Supreme Court of Appeal also held that ‘hold over’ cases do indeed fall under the provisions of PIE.<sup>168</sup> ‘Hold over’ cases refer to cases where the occupation was initially lawful and then became unlawful.<sup>169</sup> Examples of such cases would be where the mortgage debtor refuses to vacate the sectional title unit or where tenants and sectional owners who have sold their properties refuse to vacate after foreclosure. The common law requirements for evictions were not amended by section 26(3) of the Constitution but by the provisions of PIE, which explicitly prescribes that courts may grant an eviction order only if it is fair and equitable with reference to all the relevant circumstances.<sup>170</sup> Moreover, it was held that the courts do not *mero motu* take note of all the relevant circumstances in eviction cases but that the onus of proof rests on the respondent who has to bring such circumstances to the court’s attention.<sup>171</sup>

The Constitutional Court then authoritatively stated the requirements for an eviction order in the case of *Port Elizabeth Municipality v Various Occupiers*.<sup>172</sup> The

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<sup>164</sup> Paras 41-43 and 45.

<sup>165</sup> 2002 4 SA 1 (SCA). See also Pienaar *Sectional Titles* 216-217.

<sup>166</sup> 2003 1 SA 113 (SCA). For a detailed discussion of this case see DJ Lötz & CJ Nagel “Uitsetting van Huurders en Verbandskuldenaars en die Wet op die Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond” (2003) 66 *THRHR* 164 164-172 and JAH May *Die Afweging van Belange van Grondeienaars en Plakkers* LLM thesis Potchefstroomse Universiteit vir Christelike Hoër Onderwys (2004) 17-26.

<sup>167</sup> *Ndlovu v Ncgobo; Bekker and Another v Jika* 2003 1 SA 113 (SCA) para 20.

<sup>168</sup> *Ndlovu v Ncgobo; Bekker and Another v Jika* 2003 1 SA 113 (SCA) para 11. See also May *Die Afweging van Belange van Grondeienaars en Plakkers* (2004) 19.

<sup>169</sup> *Ndlovu v Ncgobo; Bekker and Another v Jika* 2003 1 SA 113 (SCA) para 11. See also in general JM Pienaar & H Mostert “Uitsettings onder die Suid-Afrikaanse grondwet: die verhouding tussen artikel 25(1), artikel 26(3) en die uitsettingswet (deel 1)” (2006) 2 *TSAR* 277 289.

<sup>170</sup> Pienaar *Sectional Titles* 217.

<sup>171</sup> *Cape Killarney Property Investments (pty) Ltd v Mahamba and Others* 2001 4 SA 1222 (SCA) para 20.

<sup>172</sup> 2005 1 SA 217 (CC) paras 12-13.



Constitutional Court also confirmed that section 26(3) of the Constitution places an obligation on courts to find a reasonable and just balance between the rights of the applicant in eviction matters and the right of unlawful occupiers not to be arbitrarily evicted from their homes.<sup>173</sup> This does not only apply to classical squatter cases but also to cases where previously lawful occupiers have been evicted in terms of an eviction order.<sup>174</sup> Under common law unlawful occupiers do not have any occupation rights, but their vulnerable position and human dignity must still be taken into consideration by the courts.<sup>175</sup> Consequently, eviction orders should not be granted too easily and not before all the relevant circumstances have been taken into consideration. This does not mean that it is impossible to obtain an eviction order since it may still be granted in just and equitable circumstances.<sup>176</sup>

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (PTY) LTD and Another*<sup>177</sup> one of the main issues was the constitutionality of a differentiation made by the appellant in its housing policy, between persons evicted from so called 'bad buildings' and persons evicted by private landowners. It was common cause that Blue Moonlight was the owner of the property concerned, that the occupiers' occupation was unlawful and that they had occupied the property for more than six months. The crucial question before the Constitutional Court was therefore whether it was just and equitable to evict the occupiers, considering all the relevant circumstances including the availability of alternative land, as well as the date the eviction must take place.<sup>178</sup> The appellant noted that Blue Moonlight was entitled to eviction if PIE was complied with, but emphasised that they cannot be held liable for providing accommodation to all people who are evicted by private landowners.<sup>179</sup> The Constitutional Court held that to determine what was just and equitable consideration must be given to an open list of factors. In this case the relevant factors were the following: the occupiers had been in occupation for more than six months; the occupation was once lawful; Blue Moonlight was aware of the occupiers when it purchased the property; and the eviction would render the

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<sup>173</sup> Paras 19-23

<sup>174</sup> *Ndlovu v Ncgobo; Bekker and Another v Jika* 2003 1 SA 113 (SCA) para 11.

<sup>175</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 17-18.

<sup>176</sup> Paras 21 and 33-38.

<sup>177</sup> 2012 2 SA 104 (CC).

<sup>178</sup> Para 30.

<sup>179</sup> Para 32.

occupiers homeless.<sup>180</sup> The Constitutional Court held that to the extent that Blue Moonlight was the owner of the property and the occupation was unlawful, they were entitled to an eviction order. Furthermore, it was held that all relevant circumstances must be taken into account when determining under which conditions, and by which date, eviction would be just and equitable. The availability of alternative housing was one of the circumstances. In this regard it was decided that the appellant was obliged to provide temporary accommodation to the occupiers.<sup>181</sup> Moreover, it was held that the appellant's housing policy was unconstitutional in that it excluded people evicted by private landowners from its temporary housing programme, as opposed to those relocated by the appellant. One cannot expect from Blue Moonlight to indefinitely provide free housing to the occupiers, but the property owner's rights must be interpreted within the context of the requirement that the eviction must be just and equitable. The Constitutional Court then concluded that the eviction of the occupiers would be just and equitable under the circumstances, if linked to the provision of temporary accommodation by the appellant.<sup>182</sup>

From the above it is evident that the objective of PIE is not to protect wealthy unlawful occupiers against eviction, since eviction is still possible if there are no relevant circumstances or if it just and equitable in the light of all the relevant circumstances. By contrast the objective of PIE is rather to increase the procedural and substantive hurdles that are faced by landholders who apply for eviction orders against certain occupiers who are in direct need of protection.<sup>183</sup> Therefore, when a sectional title unit is attached for non-payment of a sectional owner's contributions to the administrative fund or for the non-payment of instalments on a mortgage loan, PIE creates an obstacle for the body corporate or mortgage creditor who has secured an execution order. If the defaulting owner or mortgage debtor (both being the sectional owner) refuses to vacate the premises after the sectional title unit has been sold in execution, the body corporate or the mortgage creditor must bring an action for eviction. At this stage, PIE kicks in. This means that legal practitioners representing bodies corporate and mortgage creditors must follow the tough and costly route prescribed by PIE in cases where the eviction of sectional owners or

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<sup>180</sup> Para 39.

<sup>181</sup> Para 96.

<sup>182</sup> Para 97.

<sup>183</sup> MA Greig "The 'Textual Hash' in PIE and the Lean-to of PISA" (2003) 15 *SA Merc Law Jnl* 278 279.

mortgagees who had defaulted or foreclosed on their assessment payments or bonds is sought.<sup>184</sup>

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill<sup>185</sup> aims to limit the application of PIE so that it would not be applicable to ‘hold over’ cases. The Memorandum to the Bill clearly states that the act should only cover those persons who unlawfully invade land without the landowner or person in charge of land having consented thereto.<sup>186</sup> This amendment will place mortgage debtors who refuse to vacate the premises after the sectional title unit has been sold in execution outside the scope of PIE which means that the common law eviction procedures, without the prescribed procedure of PIE and the consideration of relevant circumstances, will then again be applicable.<sup>187</sup>

However, in August 2008 the Amendment Bill was rejected and due to the existing backlog in the approval of legislation by Parliament, the Amendment Bill was withdrawn.<sup>188</sup> Therefore, until the Amendment Bill is put into effect PIE will be applicable in circumstances where mortgage debtors refuse to vacate the premises after the sectional title unit has been sold in execution.

#### **5 4 Rates clearance certificates**

Section 2(1) of the Property Rates Act entitles a municipality to levy rates on property in its area and section 24(1) then states that the owner of a property (unit) must pay the rates levied by the municipality on the property. We have already seen, at 2 3 above, that the definition of property in terms of the latter act includes immovable property registered in the name of a person, including, in the case of a sectional title scheme, a sectional title unit registered in the name of a person.<sup>189</sup> We have also seen that this act introduced a new rating dispensation. It removed the responsibility placed on the body corporate to pay rates and taxes, which the body

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<sup>184</sup> Van der Merwe *Sectional Titles* 9-24(4).

<sup>185</sup> B11-2005 published in GG 27370 of 18-03-2005.

<sup>186</sup> See the Memorandum on the Objects of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Bill B11-2005 para 2.2.

<sup>187</sup> Pienaar *Sectional Titles* 130.

<sup>188</sup> See in general Van der Merwe *Sectional Titles* 9-24(5).

<sup>189</sup> S 1 of the Local Government: Municipal Property Rates Act 6 of 2004 sv “property”.

corporate collected from individual owners in proportion to their participation quotas or in a proportion altered by special resolution. Instead this act requires that rates and taxes must be levied on individual sectional title units, each owner being responsible for payment of his own rates to the municipality. This system of individual rating of sectional title units was first introduced in the Cape Town Metropole from 1 July 2007. Individual rating in Johannesburg, Durban and most parts of the rest of the country only came into operation from 1 July 2008.<sup>190</sup>

Section 15B(3)(b) of the Act provides that where provision is made by law for the separate rating of units the registrar is not entitled to transfer a unit unless he is furnished with a clearance certificate from the local authority confirming that all rates and moneys due to it under any law in respect of the land and buildings of the scheme have been paid.<sup>191</sup> Section 51(3) of the Act also provides that when provision has been legally made for the separate rating of units, each relevant unit is for the purposes of valuation and the levying and recovery of rates by a local authority deemed to be a separate entity. Section 51 of the Act was, however, repealed but not re-enacted in the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA) because of the uncertainty surrounding the relationship between the relevant provisions of the Act, the Property Rates Act and the Systems Act. Section 51 of the Act may indeed have been superseded by the relevant provisions of the above mentioned acts which by their provisions for the separate rating of units made the application of section 15B(3)(b) of the Act a reality.

All of these provisions must be read in conjunction with section 118 of the Systems Act which provides that a registrar of deeds may not register the transfer of property except on production of a prescribed certificate issued by the municipality where the property is situated. This certificate must certify that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been paid in full.<sup>192</sup>

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<sup>190</sup> Van der Merwe *Sectional Titles* 9-18(2).

<sup>191</sup> S 15B(3)(b)(i) of the Sectional Titles Act 95 of 1986.

<sup>192</sup> S 118(1) of the Local Government: Municipal Systems Act 32 of 2000.

The fact that provision has been made for the separate rating of units means that a clearance certificate must be furnished to the registrar before a unit may be transferred. There used to be uncertainty as to whether two clearance certificates were needed. One certificate stating that all rates, taxes and moneys due in respect of the unit had been paid, as well as a another certificate from the local authority stating that all rates and moneys due to such local authority in terms of any law in respect of the land and buildings of the scheme had been paid.<sup>193</sup> This uncertainty was resolved at the Registrars Conference in 2009 where it was decided that only one and not two clearance certificates must be handed in on the transfer of a unit.<sup>194</sup>

The Property Rates Act does not deal directly with the issue of a clearance certificate to the registrar. There is, however, such a close correspondence between section 15B(3)(b) of the Act and the Systems Act that it seems that the payment of both rates and service charges should be certified. Therefore, it seems that section 118(1) of the Systems Act would be applicable to the clearance certificate under section 15B(3)(b) of the Act. This would mean that the certificate must certify that not only rates but also all amounts that became due in connection with that unit for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been paid in full.<sup>195</sup>

In addition section 118(2) of the Systems Act provides that in the case of the transfer of immovable property by a trustee of an insolvent estate, the provisions of section 118 are subject to section 89 of the Insolvency Act.<sup>196</sup> Furthermore, section 118(3) of the Systems Act states that an amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge or hypothec upon the property for which the amount is owing, and enjoys preference over any mortgage bond registered against the property.

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<sup>193</sup> Van der Merwe *Sectional Titles* 9-18(2).

<sup>194</sup> RCR 58/2009.

<sup>195</sup> Van der Merwe *Sectional Titles* 9-18(3).

<sup>196</sup> For the effect of s 118(1) of Local Government: Municipal Systems Act 32 of 2000 read with s 89 of the Insolvency Act 24 of 1936, in relation to an insolvent estate, see PM Meskin *Insolvency Law and its Operation in Winding-up* (Service Issue 40 June 2013) 12-14 – 12-15.

An important question is whether the word 'an amount' in section 118(3) should be interpreted as referring to all amounts which implies that the charge would not be limited to municipal debts that became due in the two years preceding the date of application for the certificate.<sup>197</sup> This question was then answered in the Supreme Court of Appeal in *BOE Bank Ltd v City of Tshwane Metropolitan Municipality*.<sup>198</sup> In the latter case the Supreme Court of Appeal held that section 118(3) did not only refer to a category or class of debts, but to the aggregate of different debts secured by a single charge or hypothec. In terms of section 118(3), it therefore did not matter when the component parts of the secured debt became due since the amounts of all debts which arose from the stipulated causes were added up to become one composite amount secured by a single hypothec which ranked above all mortgage bonds over the property.<sup>199</sup>

A practical consequence of the application of section 118 of the Systems Act would be that if a sectional owner sells a unit occupied by a tenant, the municipality will not issue a clearance certificate until the tenant, the owner or a third party has paid the charges for electricity and water consumed by the tenant. However, if none of the latter parties is in a position to pay the municipal service charges incurred at the leased property, the owner would have no other option as to settle the amount owed by the tenant in order to obtain the required clearance certificate. The impact of section 118 has therefore given rise to much concern on the part of property owners. A group of landlords formed the organisation Transfer Rights Action Campaign (TRAC), which has questioned the use of section 118 which allows local governments to hold landlords liable for tenants' water and electricity arrears. The organisation's argument was that since section 118 came into operation, the municipalities have had less incentive to collect municipal debts from users of electricity and water because they are now able to force property owners to settle the outstanding amounts before allowing them to sell or re-let. In their opinion, since individual contracts for the supply of municipal services like water and electricity are concluded between municipalities and tenants, it is the responsibility of the

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<sup>197</sup> 9-18(3).

<sup>198</sup> SCA 29-03-2005 case no 240/2003.

<sup>199</sup> Para 10.

municipalities to collect the tenants' arrears for water and electricity and property owners should not be held liable.<sup>200</sup>

Constitutional challenges of section 118 of the Systems Act, based on the ground that it provides for the arbitrary deprivation of property contrary to section 25 of the Constitution in that it authorises interference with the transfer of property which is one of the constituent entitlements of the right of ownership, failed.<sup>201</sup> In *Geyser and Another v Msunduzi Municipality and Others*<sup>202</sup> the KwaZulu-Natal High Court found that section 118 did contemplate deprivation, but that the deprivation was not arbitrary and so the section was not unconstitutional.<sup>203</sup> Therefore, the court dismissed the challenge to the constitutionality of section 118(1) and (3).

However, in the unreported case of *Mkontwana v Nelson Mandela Metropolitan Municipality and Others; Bisset and Others v Buffalo City Municipality and Others*<sup>204</sup> the South Eastern Cape Local Division of the High Court ruled that the provisions of subsection 118(1), as they applied to these two cases, did constitute arbitrary deprivation of property in conflict with section 25(1) of the Constitution<sup>205</sup> and then referred the declaration of invalidity for confirmation to the Constitutional Court in terms of section 172(2) of the Constitution.<sup>206</sup>

These two conflicting judgments on the constitutionality of section 118(1) was brought to an end by the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi*

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<sup>200</sup> See M Kelly-Louw "The Preferential right of the Local Government or the Body Corporate above that of the Mortgage Bondholder during Insolvency Proceedings" (2004) 18 *Speculum Juris* 168 177-178 and M Kelly-Louw "Selling or Leasing Property? Beware of Municipal Debts! A Note in two Parts (Part II)" (2005) 122 *SALJ* 778 778-779.

<sup>201</sup> For a detailed discussion of these cases see Kelly-Louw (2004) *Speculum Juris* 178-181; M Kelly-Louw "Owners Liable for Tenants' Arrear Water and Electricity Consumption Charges" (2004) 12-3 *JBL* 132 133-135; and Kelly-Louw (2005) *SALJ* 779-792.

<sup>202</sup> 2003 5 SA 18 (N).

<sup>203</sup> 38A-39A.

<sup>204</sup> SECLD 30-09-2003 case no 1238/02 and 903/02.

<sup>205</sup> Paras 67-68.

<sup>206</sup> See also Kelly-Louw (2004) *Speculum Juris* 178-179 and Kelly-Louw (2004) *JBL* 134.



*Municipality as Amici Curia*).<sup>207</sup> Yacoob J, who delivered the majority judgment, held that section 118 does deprive persons of their property<sup>208</sup> but that such a deprivation is not arbitrary.<sup>209</sup> He also held that the deprivation is not insignificant and that the purpose of the provision is to place the risk on the owner if the occupiers did not pay for the electricity and water they used. The purpose of this is important and commendable since it encourages payment and a sense of civic responsibility.<sup>210</sup> The court reasoned that the consumption charge is connected both to the property and the owner, even if the owner is not the occupier.<sup>211</sup> Therefore, it was held that the purpose of the deprivation is compelling and that it is not unreasonable, in all the circumstances, to expect the owner to bear the risk if the occupier does not pay.<sup>212</sup> Accordingly, the Constitutional Court ruled that the owner of a property is effectively obliged to make sure that certain consumption charges owing to the municipality in connection with a property is paid before such property can be validly transferred.<sup>213</sup> Yacoob J also held that section 118(1) does not infringe upon the right to equality;<sup>214</sup> the right of access to housing;<sup>215</sup> and the right of access to courts<sup>216</sup> as enshrined in the Constitution.<sup>217</sup>

The latter judgment of the Constitutional Court can be criticised because of the practical consequence that municipalities now have even less incentive to take legal action for arrear consumption charges because there is no need for municipalities to act against tenants. Owners are now forced to pay the arrears of their tenants despite the fact that individual contracts are concluded between municipalities and tenants. Municipalities can now simply refuse to issue a clearance certificate if an

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<sup>207</sup> 2005 1 SA 530 (CC).

<sup>208</sup> Para 33.

<sup>209</sup> Para 64.

<sup>210</sup> Para 38.

<sup>211</sup> Para 43.

<sup>212</sup> Para 51-60.

<sup>213</sup> Par 73.

<sup>214</sup> S 9 of the Constitution of the Republic of South Africa, 1996.

<sup>215</sup> S 26.

<sup>216</sup> S 34.

<sup>217</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curia)* 2005 1 SA 530 (CC) paras 68-71.

owner tries to sell his property unless the outstanding consumption charges are paid by the owner.<sup>218</sup>

## 5 5 Evaluation

In *Body Corporate of Geovy Villa v Sheriff, Pretoria Central Magistrate's Court, and Another*<sup>219</sup> Hartzenberg J highlighted the difficulties experienced by bodies corporate faced with defaulting owners and the socio-economic problems that resulted from inadequate funds to execute necessary repairs to sectional title buildings.<sup>220</sup> We have seen that this only applies in circumstances where the defaulting unit owner is not insolvent. Unfortunately, the uncertainty created by the differing outcome for solvent versus insolvent sectional owners whose units are attached in execution, makes it problematic for bodies corporate to decide when to attach the units of defaulting owners.

A possible accommodation between the interests of both first mortgage creditors and bodies corporate might be the creation of a statutory hypothec in favour of the body corporate for 6 months' arrears ranking above first mortgages based on the model of the United States of America's Uniform Common Interest Ownership Act of 2008 (the UCIOA).<sup>221</sup>

The UCIOA offers an ingenious compromise that strikes an equitable balance between the need to collect unpaid levies swiftly and the necessity to retain the continued investment of lenders in condominiums (sectional title schemes), since it grants the condominium association (body corporate) a super priority lien over previously registered (first) mortgages for unpaid contributions for up to six months before the foreclosure action.<sup>222</sup> Computation of the amount of the lien is based on a periodically adopted budget.<sup>223</sup> In reality what is created is a lien with a split priority. This perpetually renewable lien comes into existence once the assessment

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<sup>218</sup> Kelly-Louw (2004) *Speculum Juris* 181.

<sup>219</sup> 2003 1 SA 69 (T).

<sup>220</sup> Paras 6-7.

<sup>221</sup> See in general Van der Merwe *Sectional Titles* 9-18(1).

<sup>222</sup> Ss 3-116(a),(b), (c), (e) and (i) of the United States of America's Uniform Common Interest Ownership Act of 2008.

<sup>223</sup> Ss 3-116(i) and 3-103(c).

or fine becomes due and as soon as a unit owner defaults on his payments the amount is transformed into a lien with super priority.<sup>224</sup> Any excess on the assessed defaults and fines or costs over the six month period remains a lien on the property. The portion of the association lien that secures this excess will be junior to the first mortgage on the unit, but senior to other mortgages and encumbrances not recorded before the declaration. Thus, even though the association's lien is a single lien, it is split into two liens holding varying priority.<sup>225</sup> Subject to any contrary language in the declaration, the assessment lien covers regular monthly dues, as well as fees, charges, fines and interest.<sup>226</sup> Furthermore, the lien and its statutory priority may not be waived.<sup>227</sup>

Associations can only benefit from this mechanism if they recorded a verified claim for unpaid contributions, which describes the amount due, the name of the owner, and the common elements of the scheme. The lien does not need to be recorded since the recording of the declaration on establishment of the scheme is considered notice of any future claim of the association and perfection of the lien.<sup>228</sup> If the owner fails to pay, the association can collect the assessment by taking advantage of the local jurisdiction's expedited foreclosure or holdover-tenant procedures.<sup>229</sup> The association can also wait and use the lien to prevent the sale of the unit until the lien is paid off. If a unit owner resists, or brings an action to challenge the imposition of fees or the lien, or contests foreclosure and loses, the association is entitled to attorney's fees.<sup>230</sup>

An association lien may be foreclosed in a similar manner to a mortgage on real estate or by power of sale if the declaration allows for such an option.<sup>231</sup> The association would join the holders of any mortgage, deeds of trust or other interest junior to the super lien as necessary parties to a judicial foreclosure, or formally

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<sup>224</sup> S 3-116(b)(2).

<sup>225</sup> JL Winokur "Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms under the Uniform Common Interest Ownership Act" (1992) 27 *Wake Forest L. Rev.* 353-366. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 148-149.

<sup>226</sup> S 3-116(a) of the United States of America's Uniform Common Interest Ownership Act of 2008.

<sup>227</sup> S 1-104.

<sup>228</sup> S 3-116(e).

<sup>229</sup> S 3-116(k).

<sup>230</sup> S 3-116(h).

<sup>231</sup> S 3-116(k).

notify these parties of the sale in non-judicial foreclosure. Holders of junior interest would have the right to receive any excess of the foreclosure sale price over the amount of the super lien in order of their priorities. The association's lien on an outstanding amount exceeding six months from the date of action would be among those junior interests.<sup>232</sup>

If the first mortgagee institutes foreclosure proceedings on any ground, the mortgage and its foreclosure would be subject to an existing super lien.<sup>233</sup> As a senior interest, the association's super lien could probably not be forced into the mortgage foreclosure, but if the association participates, payment of the super lien will be necessary to clear title for resale or for presentation of mortgage insurance.<sup>234</sup>

The super priority lien of the UCIOA is thus intended to encourage the association to react timeously in collecting unpaid assessments while simultaneously allowing it sufficient time to enforce its security right, if necessary.<sup>235</sup> Since first mortgagees have an interest in keeping the association solvent they will, in practice, probably prefer to pay the six months' assessment demanded by the association rather than permit foreclosure and the sale of the apartment. Another alternative is that the mortgagee could discount the value of the apartment by an amount equal to the six months' assessment and adjust the size of the loan according to this. Although assessments will probably increase in time in an inflationary economy, the owners' equity would almost invariably raise significantly more rapidly if the value of the apartment is discounted in such a manner. A third alternative is that the mortgagee could require that an amount of money be put in a trust account for rectifying any defaults on the payment of assessments, with the stipulation that any surplus would be returned to the apartment owner when the loan is extinguished.<sup>236</sup>

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<sup>232</sup> Winokur (1992) *Wake Forest Law Rev.* 377. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 150.

<sup>233</sup> See Winokur (1992) *Wake Forest Law Review* 371-374. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 150.

<sup>234</sup> See Winokur (1992) *Wake Forest Law Review* 377-378. See also Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 150.

<sup>235</sup> CG Van der Merwe "Apartment Ownership" in *International Encyclopaedia of Comparative Law* Vol VI "Property and Trust" (1994) s 268.

<sup>236</sup> Van der Merwe *Sectional Titles* 9-18(1); CG Van der Merwe "The Sectional Titles Act in the light of the Uniform Condominium Act" (1987) 20 *CILSA* 1 36; and Van der Merwe *Apartment Ownership* s 268.

The obstacles facing the mortgage creditor (or body corporate), when it comes to the sale and execution of a sectional title unit, looks more severe than they actually are. Firstly, the requirement of a court order before a mortgaged unit can be sold in execution does not threaten the real security of the mortgage, nor does it mean that the mortgage is no longer the same strong and valuable security right that it always was. It simply means that courts can now, based on the relevant circumstances, decline to grant an execution order, which was not previously the case.<sup>237</sup> It may, however, cause practical difficulties for courts that are running at full capacity and for judges with full schedules, but the practical difficulties cannot outweigh the prejudice and hardship some owners might face due to the potentially unjustifiable sale in execution of their units. Therefore, judicial oversight seems like an obvious requirement even though it has taken a number of years, numerous court decisions and amendments to court practice to finally establish this requirement.<sup>238</sup>

Secondly, the impact of PIE can be seen more as an irritation than an obstacle because it does not prohibit the attachment and sale in execution of sectional title units. But it does mean that legal practitioners representing bodies corporate and mortgage creditors would have to follow the tough and costly route prescribed by PIE where the eviction of sectional owners who have defaulted or foreclosed on their assessment payments or bonds is sought. The Impact of PIE will be more limited when the Illegal Eviction from and Unlawful Occupation of Land Amendment Bill<sup>239</sup> comes into operation since PIE would then not be applicable to holdover cases.

If section 118(1) of the Systems Act is proved to be applicable to the clearance certificate under section 15B(3)(b) of the Act the certificate would have to certify that not only rates but also all amounts that became due in connection with that unit for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been paid in full. This position is similar with the super lien of the UCIOA, but one major difference is that it is not limited to six months because the 'amounts' (in terms of section 118(3)) of all debts which arose from the stipulated

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<sup>237</sup> Brits *Mortgage Foreclosure* 69.

<sup>238</sup> 92.

<sup>239</sup> B11-2005.

causes gets added up to become one composite amount secured by a single hypothec which ranks above all mortgage bonds over the property and would thus not be limited to the two year period preceding the date of application for the certificate.<sup>240</sup> Separate meters would, however, have to be installed before separate service charges can be charged and for section 118(1) of the Systems Act to be applicable to the clearance certificate under section 15B(3)(a) of the Act. To avoid situations where sectional owners would be responsible for the service charges of tenants, when the unit is sold to an outsider, it would be wise to install prepaid meters. Furthermore, in terms of section 118(3) of the Systems Act the municipality would have a preferent right ranking above that of bodies corporate and even mortgagees when a unit gets attached and sold in execution. This indicates that the attachment and sale in execution procedure for the recovery of arrear contributions become less successful since the proceeds of such forced sales would more often than not be insufficient to cover the debt towards the body corporate.

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<sup>240</sup> See *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* SCA 29-03-2005 case no 240/2003 para 10.

## Chapter 6: Social Obligations

### 6 1 Introduction

When taking occupation of a sectional title unit for the first time, the new sectional owner enters a specific communal way of life.<sup>1</sup> He most probably chooses to join a particular sectional title scheme on account of the lifestyles, attitudes and practices shared in that scheme. Sectional title schemes are, however, rarely homogeneous. They frequently consist of groups of people who do not represent an ideally suited selection of owners. Furthermore, the composition of a particular sectional title scheme will change in the course of time due to market forces and a fluctuating membership on account of individual mobility and mortality.<sup>2</sup>

In the introductory chapter, at 1 2, we have seen that one of the main aims of sectional title schemes is to strive for happiness and harmony in an intensified community where the objects of ownership, the individual units, are physically interdependent. Since sectional owners live in close proximity to each other and use common facilities the most extensive freedoms inherent in their ownership need to be restricted. Accordingly, each owner must give up a certain degree of freedom that he might otherwise enjoy in separate, privately owned property.<sup>3</sup>

Therefore, in order to enjoy the advantages offered by sectional title schemes, sectional owners are subjected to numerous social obligations.<sup>4</sup> It is the extent to which owners are prepared to comply with these social obligations that will determine their ability to enjoy a harmonious living environment, as well as the quality of the scheme's common facilities and amenities. Even so, striking the ideal

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<sup>1</sup> T Maree *Sectional Titles on Tap* Volume 1 2ed (2006) 10.1.

<sup>2</sup> MC Kim "Involuntary Sale: Banishing an Owner from the Condominium Community" (1997-1998) 31 *J. Marshall. L. Rev.* 429-430; see also CG Van der Merwe & L Muñiz-Argüelles "Enforcement of Conduct Rules in a Condominium or Apartment Ownership Scheme" (2006) *Liber Amicorum Festschrift Tugrul Ansay* 247-247.

<sup>3</sup> CG Van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 *Sectional Titles* (Service Issue 16 May 2013) 9-32; see also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 247.

<sup>4</sup> Maree *Sectional Titles on Tap* 10.1.



balance between individual freedom and the demands of a harmonious community is often a difficult goal to achieve.<sup>5</sup>

In this chapter I shall discuss the various non-financial obligations, grouped together under the term 'social obligations', imposed on sectional owners with regard to their sections, exclusive use areas and the common property. The Sectional Titles Act 95 of 1986 (the Act) provides the broad framework and sets the standards for owners' behaviour, complemented by the common law concept of nuisance.<sup>6</sup> It is the Annexures to the Act, mainly the management and conduct rules, which prescribe more precisely what is expected from sectional owners living in a particular sectional title scheme. Consequently, it is crucial for purchasers buying units in a sectional title scheme to carefully examine the rules adopted for the scheme.<sup>7</sup> Although most schemes are regulated by the prescribed management and conduct rules, the developer and sectional owners have the ability to amend the prescribed rules by introducing special rules which might impose additional social obligations on owners, further restricting the use and enjoyment of their sections, exclusive use areas and the common property.<sup>8</sup>

I shall now proceed to discuss the various social obligations imposed on a sectional owner with regard to his section, an exclusive use area and the common property in terms of the Act, the prescribed management and conduct rules and the common law of nuisance. The chapter will be concluded with the assessment that these social obligations are essential to preserve the tranquility and harmony of a sectional title scheme in view of the peculiar physical features of the building and the unique community of owners gathered almost permanently within the confines of the scheme. The surrender of freedoms inherent in the imposition of social obligations on sectional owners is the price to be paid for a contented and harmonious sectional title community.

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<sup>5</sup> Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 247-248.

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

<sup>7</sup> M Constat & K Bleijs *Demystifying Sectional Title* 1ed (2004) 51.

<sup>8</sup> Ss 35(2)(a) and (b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 10(2)(a) and (b)).

## **6 2 Social obligations pertaining to a section and an exclusive use area**

### **6 2 1 Social obligations imposed in terms of the Act**

It is generally accepted that the social obligations of a landowner towards his neighbours are less intensive than the social obligations owed by a sectional owner to other members of a sectional title community. Besides all the statutory limitations that might exist on ownership in general, a sectional owner's use and enjoyment of his section and an exclusive use area are further limited by the social obligations imposed by the Act.<sup>9</sup> From the outset it is important to note that these social obligations are mandatory and cannot be excluded in terms of the rules of the sectional title scheme or in any other manner.<sup>10</sup>

The Act imposes the following social obligations on a sectional owner with regard to his section and an exclusive use area:

Firstly, an owner is obliged to permit any person authorised in writing by the body corporate to enter his section or exclusive use area for inspecting and maintaining it; repairing or renewing pipes, wires, cables and ducts in the section being used in connection with the enjoyment of any other section or the common property; or ensuring that the provisions of the Act and rules are being observed. The entry is only allowed at reasonable hours and on written notice, except in the case of emergency.<sup>11</sup>

Entry into the premises without a warrant or consent generally infringes a person's right of privacy protected under the Constitution of the Republic of South Africa, 1996 (the Constitution).<sup>12</sup> However, this infringement is mitigated by the goal of such entry, namely to preserve the physical condition of the building and its facilities and to ensure that the owners comply with the behavioural rules of the scheme. Furthermore, to protect an owner's right to privacy the Act only allows access under

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

<sup>10</sup> Van der Merwe *Sectional Titles* 8-7.

<sup>11</sup> S 44(1)(a) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(a)).

<sup>12</sup> S 14 of the Constitution of the Republic of South Africa, 1996.

certain conditions. Firstly, only a person authorised in writing by the body corporate will have access and since a sectional owner is a member of the body corporate with a right to vote at a general meeting, he has some control over the number and type of people who can obtain this authorisation from the trustees. Secondly, entry is only allowed at reasonable hours except in the case of an emergency. For instance, where a water pipe has burst it would obviously be to the advantage of the whole sectional title scheme that no written notice is required.<sup>13</sup>

Moreover, the written authorisation must be in the form of an appropriate trustees' resolution authorising such entry. This implies that the trustees must apply their minds to the matter and comprehensively minute their resolution to prove that this was the case. Therefore, written authorisation detailing what is required must be provided by the person prior to entering an owner's section or exclusive use area. The sectional owner or occupier must be notified of the aspects requiring attention and his responsibility with regard to the matter. Finally, if the trustees resolve to perform the work required in his section or exclusive use area and recover the expenses from the owner, such owner should be notified.<sup>14</sup>

In addition, the Act also makes provision for implied reciprocal servitudes of subjacent and lateral support;<sup>15</sup> and for the passage or provision of certain services such as electricity, water and sewerage through pipes, wires, cables or ducts.<sup>16</sup> These servitudes in favour of each section<sup>17</sup> and against each section<sup>18</sup> and relevant portions of the common property are deemed to be incorporated without registration in the sectional title deeds of each sectional owner.<sup>19</sup> The ancillary rights to make these servitudes effective are also included.<sup>20</sup> Consequently, these servitudes burden a sectional owner with the obligation to provide subjacent and lateral support for the other sections and the common property and to allow for the passage of the services mentioned through his section. Here again a sectional owner is obliged to

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<sup>13</sup> Van der Merwe *Sectional Titles* 8-7 – 8-8.

<sup>14</sup> T Maree "Do the Trustees have a Duty to Maintain Sections?" (June 2007) 24 *MCS Courier Newsletter* 1 2-3.

<sup>15</sup> Ss 28(1)(a)(i) and (b)(i) of the Sectional Titles Act 95 of 1986.

<sup>16</sup> Ss 28(1)(a)(ii) and (b)(ii).

<sup>17</sup> S 28(1)(a).

<sup>18</sup> S 28(1)(b).

<sup>19</sup> S 28(2)(a).

<sup>20</sup> S 30.

grant access to his section or exclusive use area to the body corporate from time to time during reasonable hours in order to maintain, repair or renew any part of the building or any pipes, wires, cables or ducts in the building, or for emergency repairs necessary to prevent damage to the common property or any other section or sections.<sup>21</sup>

Secondly, a sectional owner is obliged to carry out all work that may be ordered by a competent public or local authority in respect of the section.<sup>22</sup> This obligation is similar to that applicable in the case of conventional ownership of land. For example, the obligations imposed by the National Buildings Regulations and Buildings Standard Act 103 of 1977 apply equally to land and sections.<sup>23</sup> In terms of the latter act no person (sectional owner) shall erect any building in respect of which plans and specifications are to be drawn and submitted without the prior written approval of the local authority.<sup>24</sup> The definition of ‘erect’ includes the alteration, conversion, extension, re-building, re-erection, sub-division of or addition to, or repair of any part of the structural system of any building (in our case the sectional title building).<sup>25</sup> Consequently, a sectional owner may not make alterations to his section (including the extension of his section) without the prior written approval of the local authority in question. Where a section is leased or occupied by a non-owner, this obligation will still rest on the owner unless specifically provided for in the lease or occupation agreement.<sup>26</sup> This obligation is again justified by its goal, namely the prevention of damage to the physical integrity of the building by unauthorised alterations inside a section.

Thirdly, an owner is obliged to 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.<sup>27</sup> This

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<sup>21</sup> Ss 28(2)(b), 30 and 44(1)(a).

<sup>22</sup> S 44(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(b)). S 13(1)(b) of the Sectional Titles Schemes Management Act 8 of 2011 obliges the owner to carry out all work ordered by a competent authority instead of by a competent local or public authority as worded under s 44(1)(b) of the Sectional Titles Act 95 of 1986, but the substance of the duty is not changed by this amendment.

<sup>23</sup> Van der Merwe *Sectional Titles* 8-7.

<sup>24</sup> S 4(1) of the National Buildings Regulations and Building Standard Act 103 of 1977.

<sup>25</sup> S 1(1) sv “erection”.

<sup>26</sup> Pienaar *Sectional Titles* ch 5 n 8.

<sup>27</sup> S 44(1)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(c)). Annexure 8 r 70(a) and (b) of the Sectional Titles Act 95 of 1986 provides that an owner’s failure to repair or maintain his or her section or an exclusive use area, if such failure persists for a period of thirty days

obligation may at first glance seem an excessive limitation on the ownership of a section. In principle the owner of a building may demolish it or allow it to fall into disrepair since he is the only one who suffers a loss if it depreciates in value. However, the various sections in a sectional title scheme are part of an interrelated and interdependent complex and therefore the state of repair of each section inevitably affects the tone and value of the whole building. If sectional owners are allowed to demolish their sections or to let them fall into disrepair it would immediately affect the soundness and existence of adjoining sections and the building as a whole and diminish the value of every unit in the scheme. Therefore, this positive obligation to preserve the good condition of a section must be seen as a natural extension of the rule of neighbour law that an owner is not allowed to do anything on his land which would cause unreasonable prejudice to his neighbour.<sup>28</sup> Obliging an owner to maintain his section thus ensures that the stability of the building is maintained to the benefit of the other sections and the common property and that the sectional title scheme does not degenerate and depreciate in value.<sup>29</sup> Maintenance of an exclusive use area is restricted to keeping it in a 'clean and neat' condition which aims to preserve the overall outward appearance of a sectional title scheme.

Fourthly, an owner is obliged to use his section or exclusive use area in such a manner or purpose that it will not cause any nuisance to any other occupier of another section.<sup>30</sup> This obligation is common in various jurisdictions and is a normal feature in leases. Furthermore, the prevention of nuisance is one of the basic rules of neighbour law that requires one to use one's property without prejudicing others.<sup>31</sup> This obligation enshrined in the Act is thus a confirmation that the common law concept of nuisance applies perhaps even more strictly in an intensified sectional title community. This notion is also fortified in the Act by the provision that this

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after a written notice by the trustees or managing agent, empowers the body corporate to remedy such failure and recover the reasonable cost for such repairs and maintenance from the owner.

<sup>28</sup> Van der Merwe *Sectional Titles* 8-7 – 8-8(1).

<sup>29</sup> Pienaar *Sectional Titles* ch 5 n 9.

<sup>30</sup> S 44(1)(e) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(e)).

<sup>31</sup> *Sic utere tuo ut alienum non laedes*. See in general Van der Merwe *Sectional Titles* 8-8(1).

obligation does not only rest on sectional owners but also on the members of his family, tenants and other occupants in a sectional title scheme.<sup>32</sup>

Finally, an owner is obliged to use a section or an exclusive use area only for the purpose expressly or by implication shown on the registered sectional plan. This obligation is subject to the proviso that a section or exclusive use area may be used for another purpose with the written consent of all owners.<sup>33</sup> Unfortunately, the sectional plan itself gives little information as to whether the units in the scheme are intended for residential, commercial, office or mixed-use purposes. An indication of the type of scheme may perhaps be gleaned from the name of the scheme on the title page of the sectional plan, but apart from that a perusal of the further pages of the sectional plan gives no concrete evidence of the kind of scheme we are dealing with. We shall see below, at 6 2 2, that this is fortunately embroidered upon to some extent by the provision in Annexure 8 rule 68(1)(v).

Sections intended for residential purposes should therefore not be turned into commercial premises or *vice versa*. It is not clear whether this obligation only pertains to the broad categories of schemes mentioned above and thus whether sectional owners may use premises designated for a particular kind of business to conduct another kind of trade. Clarity should be provided in this regard.<sup>34</sup> The justification for this rule is the preservation of a particular sectional title scheme's characteristics by avoiding the disruption of harmony that various uses of sections or exclusive use areas are likely to cause. The harmonious co-existence in a residential scheme is therefore maintained by preventing any disturbance that might occur if owners are allowed to conduct different kinds of commercial activities in their sections.

In order to provide a measure of flexibility an owner is allowed to change the use of his section or exclusive use area with the written consent of all the sectional

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<sup>32</sup> Van der Merwe *Sectional Titles* 8-8(1).

<sup>33</sup> S 44(1)(g) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(g)).

<sup>34</sup> Van der Merwe *Sectional Titles* 8-8(1) - 8-9.

owners.<sup>35</sup> Any owner who feels that the refusal of consent by another owner is unfairly prejudicial, unjust or inequitable to him, may within six weeks after the date of such refusal make an application to the High Court to have the refusal reconsidered.<sup>36</sup> If the refusal is found to be unfairly prejudiced, unjust or inequitable to the applicant, and if the court considers it just and equitable, it may with a view to settling the dispute make such order as it deems fit. This order may include: the requirement that section 44(1)(g) is deemed to have been met; that section 14 of the Act is deemed appropriate with reference to the amendment of the registered sectional plan; any other supplementary order the court deems fit; and a determination on costs as the court deems appropriate.<sup>37</sup>

The Sectional Titles Schemes Management Act 8 of 2011 (the STSMA) now states that any owner who is of the opinion that the refusal of consent of another owner is unfairly prejudicial, unjust or inequitable to him, may, within six weeks after the date of such refusal, make an application to a regional ombud instead of the High Court as directed by section 44(2) of the Act.<sup>38</sup> An application to an ombud instead of the High Court will be more cost effective and will deliver swifter results. Furthermore, the adjudicator appointed by the ombud would have the benefit of at least two precedents, handed down by the two High Courts in South Africa, dealing with this issue.<sup>39</sup>

In *Cujè-Jacoby and Another v Kaschub and Another*<sup>40</sup> the applicants have since 1995 conducted the business of letting out and cleaning the sectional title units at the Glen Abbey sectional title scheme at Erinvale Estate in Somerset West. It was well known that many of the owners of the units in this scheme did not reside in their units on a full time basis and that it was a widespread practice for owners to let their

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<sup>35</sup> See proviso to s 44(1)(g) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(g)).

<sup>36</sup> S 44(2)(a) of the Sectional Titles Act 95 of 1986 read with s 1 sv “court”.

<sup>37</sup> S 44(2)(b).

<sup>38</sup> S 13(2) of the Sectional Titles Schemes Management Act 8 of 2011.

<sup>39</sup> *Cujè- Jacoby and Another v Kaschub and Another* 2007 3 SA 345 (C) and *Bonthuys and Others v Scheepers* ECD 17-09-2007 case no CA 303/2006.

<sup>40</sup> 2007 3 SA 345 (C). Commented on by T Maree “Kan jy Deel vir Nuwe Doel gebruik?” (April 2008) 29 *MCS Courier Newsletter* 7 7-8 and CG Van der Merwe “Refusal to Consent to the Change of Use of a Sectional Title Unit” (2008) 71 *THRHR* 692 692-698.



units when they were not personally occupying them.<sup>41</sup> The applicants owned seven units and let a further five units on behalf of other owners. The applicants converted three of their garages so as to provide ablution facilities for their staff and the gardener employed by the body corporate and to provide a rest, administration, laundry and ironing room for conducting their business. All the sectional owners except the first respondent had given their written consent<sup>42</sup> for the use of the garages being changed in the above manner.<sup>43</sup>

It is common cause that the applicants originally did the laundry in a washing machine and tumble dryer in their own unit, but that the noise of the washing machine disturbed the first respondent. When she complained about the noise, they moved the washing machine and tumble dryer to garage 14. This was done in 2001 and the first respondent did not complain about the change of use of garage 14<sup>44</sup> until four years later. In a letter written on 19 January 2005 the respondent detailed her complaint about the change of use of garage 14 and proposed that the dispute be resolved by moving the laundry from garage 14 to garage 11 and by blocking up the side door in garage 10. Subject to this she did not seem to have any objection to the change of use of the other garages.<sup>45</sup> At an annual general meeting held on 25 January 2005 the first respondent voted in favour of the change of use of garages 9, 10 and 12, but voted against the existence of the side door in garage 10. Then in a letter dated 24 October 2005 the first respondent repeated her suggestion that the laundry be moved from garage 14 to garage 11 and that the side door be closed. She was, however, not prepared to give an undertaking that if these changes were made, she would withdraw her objection and reserved all her rights even if her proposal was implemented. Understandably the applicants were not willing to incur enormous costs to accommodate the first respondent without any guarantee that it would conclude the matter.<sup>46</sup>

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<sup>41</sup> *Cujè- Jacoby and Another v Kaschub and Another* 2007 3 SA 345 (C) para 3.

<sup>42</sup> Under s 44(1)(g) of the Sectional Titles Act 95 of 1986.

<sup>43</sup> *Cujè- Jacoby and Another v Kaschub and Another* 2007 3 SA 345 (C) para 4.

<sup>44</sup> Para 8.

<sup>45</sup> Para 6.

<sup>46</sup> Para 7.

Therefore, the applicants applied to the court for an order that consent was deemed to have been given<sup>47</sup> on the ground that the refusal of the first respondent was 'unfairly prejudicial, unjust or inequitable' to them.<sup>48</sup> The court found that the words 'unfairly prejudicial, unjust or inequitable' denoted conduct which departed from the accepted standards of fair play and that the word 'unfairly' should be equated with the word 'unreasonably'.<sup>49</sup> The court decided that the first respondent's objections to the change of use were fanciful and irrational and her refusal to give consent was prejudicial to the applicants and ordered that the first respondent was deemed to have given the necessary consent.<sup>50</sup>

In reaching this conclusion, Traverso DJP indicated that the respondent already consented to the change of use of three of the garages, that neither her security nor her privacy would be impacted by the change in use and that she exaggerated the amount of movement of staff between the washing and the ironing room. Furthermore, the change in use would not devalue her property because the judge found it self-evident that the availability of an efficient on-site and centralised letting arrangement was likely to make the properties more attractive to prospective owners who wished to occupy them on a part-time basis. In contrast the removal of the business to other premises would have a devastating impact on the business and on those people who make use of the services of the applicants.<sup>51</sup> Finally, any objections of the respondent could be met by moving the laundry in garage 14 to garage 11 and since the applicants had no objection to this, such an order was made.<sup>52</sup>

In the unreported case of *Bonthuys and Others v Scheepers*<sup>53</sup> the High Court of the Eastern Cape reversed the decision of the Magistrate's Court granting consent to the sectional owner in a residential sectional title scheme to run her hairdressing salon in her unit. The appeal of the other owners was allowed because the lady

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<sup>47</sup> Under s 44(2)(b) of the Sectional Titles Act 95 of 1986.

<sup>48</sup> S 44(2)(a).

<sup>49</sup> *Cujè-Jacoby and Another v Kaschub and Another* 2007 3 SA 345 (C) para 10.

<sup>50</sup> Paras 12, 15 and 16.

<sup>51</sup> Paras 11-14.

<sup>52</sup> Para 15.

<sup>53</sup> ECD 17-09-2007 case no CA 303/2006, commented on by M Botha "Is Consent by the Trustees of the Body Corporate of the Sectional Title Scheme to Conduct Business in a Residential Unit, Sufficient? Lessons from Body Corporate of Algoa Bay and 13 others v Scheepers" (March 2008) 12 *Property Law Digest* 3 3-8.

started the business without obtaining the written consent of the other owners and, second, because it found that the refusal of thirteen of the sectional owners to grant their consent was not unfairly prejudicial to the applicant.<sup>54</sup>

The same line of reasoning as in the case of *Cujè- Jacoby and Another v Kaschub and Another*<sup>55</sup> was followed in interpreting the word 'unfairly' as 'unreasonably' and it was found that the prejudice suffered by the other sectional owners far outweighed the prejudice that may be suffered by the applicant. The court reasoned that the construction of a separate entrance for her clients to the hairdressing salon would affect the peace and tranquility associated with a residential scheme. Moreover, the evidence at hand did not indicate any value added to the scheme but rather suggested an adverse effect on the other owners.<sup>56</sup> It was stressed that the personal circumstances of the applicant, namely that she lost her job because the salon she worked for closed down and that she struggles to maintain a four year old child, did not justify a departure from the established scheme.<sup>57</sup>

## 6 2 2 Social obligations imposed in terms of the model management rules

Besides the social obligations imposed by the Act, the model management rules also contain a number of provisions which subject sectional owners to social obligations regarding their sections and exclusive use areas.<sup>58</sup> They include the following:

Firstly, an owner is under an obligation not to use his section or exclusive use area, or allow it to be used, for any purpose injurious to the reputation of the building.<sup>59</sup> It is unclear what exactly is meant by the word 'reputation'.<sup>60</sup> Reputation can have a moral connotation or it could refer to the prestige or status of a certain building. However, where a section or exclusive use area is used for, or seen or heard to be used for, immoral purposes like a brothel, it would certainly affect the reputation of

<sup>54</sup> See in general Botha (March 2008) *Property Law Digest* 5; Van der Merwe (2008) *THRHR* 697; and Van der Merwe *Sectional Titles* 8-12.

<sup>55</sup> 2007 3 SA 345 (C) para 10.

<sup>56</sup> *Bonthuys and Others v Scheepers* ECD 17-09-2007 case no CA 303/2006 para 15.

<sup>57</sup> Para 16.

<sup>58</sup> Annexure 8 r 68-70 of the Sectional Titles Act 95 of 1986.

<sup>59</sup> Annexure 8 r 68(1)(i).

<sup>60</sup> *Maree Sectional Titles on Tap* 10.9.

any sectional title scheme. Furthermore, the reputation of the high-class sectional title scheme may also suffer if the owners were to hang their washing on the balconies.<sup>61</sup> The aim of this obligation is to protect the reputation of the scheme in order to preserve harmony in the scheme and to safeguard the financial investment of sectional owners.

Secondly, an owner is under an obligation not to contravene or permit the contravention of any law, by-law, ordinance, proclamation, regulation, or the conditions of any license with regard to the occupation of the building or the carrying on of business in the building. In terms of this rule an owner is obliged not to contravene the conditions of title<sup>62</sup> applicable to his or any other section or exclusive use area.<sup>63</sup> This rule thus obliges sectional owners to be aware of and abide by any law or license condition that affects the residential or commercial use of his unit and any conditions of title that apply to his section and exclusive use area.<sup>64</sup> For example, it is an offence under section 20(1A)(a) of the Sexual Offences Act 23 of 1957 for any person 18 years or older to have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward. Furthermore, licenses are required to conduct certain kinds of businesses in the building.<sup>65</sup> The patent goal of this obligation is to prevent illegal and unwanted activities from being conducted in the sections or exclusive use areas in order to safeguard the social standing and harmony of the scheme.

Thirdly, an owner is under an obligation not to make alterations to his section or exclusive use area which are likely to impair the stability of the building or the use and enjoyment of other sections, the common property or any exclusive use area.<sup>66</sup> This obligation does not only concretise, but also extends a sectional owner's existing obligations in terms of the servitude of support.<sup>67</sup> The intention, to preserve

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<sup>61</sup> Van der Merwe *Sectional Titles* 8-16 – 8-17.

<sup>62</sup> In terms of s 11(3)(b) of the Sectional Titles Act 95 of 1986 conditions of title are contained in a conveyancer's certificate filed as an annexure to the sectional plan at the Deeds Registry.

<sup>63</sup> Annexure 8 r 68(1)(ii) of the Sectional Titles Act 95 of 1986.

<sup>64</sup> G Paddock *Sectional Title Survival Manual* 6ed (2008) 10-34.

<sup>65</sup> Licenses are required for the following businesses: the sale or supply of perishable foodstuffs; the provision of certain types of health facilities or entertainment; and the hawking of meals or perishable foodstuffs. See the Businesses Act 71 of 1991, Schedule 1.

<sup>66</sup> Annexure 8 r 68(1)(iii) of the Sectional Titles Act 95 of 1986.

<sup>67</sup> Van der Merwe *Sectional Titles* 8-17.

the physical integrity of the building to the greatest possible extent, once again validates the rule.

Fourthly, an owner is under an obligation not to do anything to his section or exclusive use area which is likely to prejudice the harmonious appearance of the building.<sup>68</sup> The difficulty in discovering what is meant by the term 'harmonious appearance' is compounded by the fact that the Afrikaans version of the rule, which is the official version of the Act, uses the expression *estetiese voorkoms*, meaning 'aesthetic appearance'. For example, enclosing a balcony on the ground floor with glass will spoil the harmonious appearance of the building, but might still look beautiful and would thus not necessarily prejudice the aesthetic appearance of the building.<sup>69</sup>

Fifthly, when the intended usage of a section or exclusive use area is shown expressly or by implication on or by a registered sectional plan, or on the original approved building plan, or can be inferred from the provisions of the rules or is obvious from its construction, layout and available amenities, an owner is under an obligation not to use, nor permit, such section or exclusive use area to be used for any other purpose except with the written consent of all the sectional owners.<sup>70</sup> This management rule is an elaboration of section 44(1)(g), as discussed above at 6 2 1, in that the intended purpose for which a section or exclusive use area must be used must not only be inferred from the registered sectional plan but also from the original approved building plan, the provisions of the rules and its construction, layout and available amenities. Unfortunately, except for the name of a sectional title scheme and the manner in which the participation quota is calculated, the intended use of a section or exclusive use area in a sectional title building is not easily noticeable. This is aggravated by the fact that most developers simply adopt the prescribed management and conduct rules as the rules for a particular sectional title scheme without any attempt to change the rules for non-residential schemes. Furthermore, the original approved building plan usually contains little, if any, indication of the use

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<sup>68</sup> Annexure 8 r 68(1)(iv) of the Sectional Titles Act 95 of 1986.

<sup>69</sup> See J Maree "Confusion Regarding the Harmonious Appearance Rule" (April 2008) 29 *MCS Courier Newsletter* 5 5-6.

<sup>70</sup> Annexure 8 r 68(1)(v) of the Sectional Titles Act 95 of 1986 as amended by GN R 805 in GG 34639 of 28-09-2011.

of a section or exclusive use area. The intended use of sections or exclusive use areas in residential buildings can, however, to a certain extent be inferred from its construction, layout and available amenities. In chapter 2, at 2 2 6, we have seen that a management rule may not be in conflict with a provision of the Act. A wise suggestion by Van der Merwe is thus to delete subsection (v) of management rule 68(1) and to amend section 44(1)(g) of the Act so as to provide that the purpose and intended use of a section or exclusive use area can also be inferred with reference to the construction, layout and available amenities in a particular sectional title scheme.<sup>71</sup> The justification for this rule is similarly to preserve the characteristics of a particular sectional title scheme and to avoid any disruption of harmony by allowing all kinds of incompatible and unsuited uses of sections or exclusive use areas.

Finally, an owner shall not construct or place any structure or building improvement on his exclusive use area, without the prior written consent of the trustees. This is subject to the proviso that such consent must not be unreasonably withheld.<sup>72</sup> It is important to note that this social obligation applies solely to exclusive use areas. Maree argues that if the sectional owner had failed to apply for prior consent, but applied and obtained consent after erection of the structure, he should be deemed to have complied with the provisions of this rule. In the event that it comes to the attention of the trustees that a sectional owner has erected a structure without their consent, the trustees should require the sectional owner to make written application for the necessary consent. If the sectional owner fails to respond or his application is rejected, the trustees should request him to remove the structure and, if necessary, apply for a court interdict ordering the removal of the structure.<sup>73</sup> The main reason for imposing this obligation solely in respect of exclusive use areas is to preserve the pleasing appearance of the sectional title scheme from the outside. For example, the trustees may withhold their consent for the erection of a carport which will disturb the attractive exterior of the scheme because of its rudimentary design.

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<sup>71</sup> These proposals by Van der Merwe have been triggered by the observations of T Maree “Permitted Usage of Sections and Use Areas” (March 2013) 43 *MCS Courier Newsletter* 2 2-3. See in general Van der Merwe *Sectional Titles* 8-17.

<sup>72</sup> Annexure 8 r 68(1)(vi) of the Sectional Titles Act 95 of 1986. Such construction or structure may not be in contravention of the requirements of ss 24 and 25 or other relevant provisions of the Sectional Titles Act 95 of 1986 or the rules of the scheme.

<sup>73</sup> Maree *Sectional Titles on Tap* 10.12.

### 6 2 3 Social obligations imposed in terms of the model conduct rules

Several model conduct rules, in Annexure 9, impose social obligations on sectional owners in accordance with the demands of the high-density living conditions prevailing in most sectional title schemes.<sup>74</sup> They include the following:

Firstly, an owner must obtain the written consent of the trustees to keep any animal, reptile or bird in his section. The trustees may not unreasonably withhold their approval and when granting such consent may prescribe any reasonable condition on breach of which their approval may be withdrawn.<sup>75</sup> Reasonable conditions could include a requirement that the owner must immediately clean up the mess the pet makes on the common property, that the pet may not cause a nuisance or be present on the common property unless on a lead.<sup>76</sup>

Secondly, an owner must maintain in his section or exclusive use area a receptacle for refuse in a hygienic and dry condition and ensure that any refuse placed in such receptacle is securely wrapped or completely drained.<sup>77</sup> The trustees may determine the area where such receptacle may be placed for refuse collection, and the receptacle must be promptly returned after the refuse has been collected.<sup>78</sup> Even though this rule contains provisions which represent the legislature's attempt at drafting a rule of general application, it may be unsuitable in many instances because the layouts of sectional title schemes and other factors differ greatly from scheme to scheme.<sup>79</sup> The aim of this obligation is to regulate the disposal of refuse in an orderly manner and to prevent owners from placing their rubbish in boxes on any part of the common property, which would impair the attractive external look of the sectional title scheme. Furthermore, the orderly regulation of refuse disposal diminishes health risks to owners and occupiers of the scheme.

<sup>74</sup> Pienaar *Sectional Titles* 242.

<sup>75</sup> Annexure 9 r 1(1)-(3) of the Sectional Titles Act 95 of 1986.

<sup>76</sup> J Paddock "The Three P's: Pets, Parking and difficult People" *Paddocks Press*

*Newsletter* <<http://www.paddocks.co.za/paddocks-press-newsletter/59-jennifer-paddock-the-three-ps-pets-parking-and-difficult-people-in-sectional-title>> (accessed 07-05-2013).

<sup>77</sup> Annexure 9 r 2(1)(a) and (b) of the Sectional Titles Act 95 of 1986.

<sup>78</sup> Annexure 9 r 2(1)(c) and (d).

<sup>79</sup> Maree *Sectional Titles on Tap* 10.16.



Thirdly, no owner is permitted to dismantle or effect major repairs to any vehicle on his exclusive use area or in his section.<sup>80</sup> This obligation clearly aims to ensure that the attractiveness and cleanliness of the exterior parts of the scheme are maintained. It would also prevent sections and exclusive use areas from being used as workshops to repair vehicles for monetary reward.

Fourthly, an owner of a section used for residential purposes must not place or do anything on a balcony, stoep or patio, forming part of the section or exclusive use area, which, in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed from outside the section.<sup>81</sup> The placing of a roughly constructed doll's house on an exclusive use area or the erection of a washing line on a balcony may render the exterior aesthetics of the scheme displeasing.

Fifthly, an owner must obtain the written consent of the trustees to place any sign, notice, billboard or advertisement on any part of his residential section which is visible from outside the section.<sup>82</sup> This obligation is again a concretisation of the principle that an owner is not allowed to do anything in his section that may jeopardise the harmonious appearance of the outside of the building or the view from the staircase or corridors inside the building. This rule only refers to sections used for residential purposes, and, in the case of sections used for commercial or mixed purposes this rule should accordingly be amended.<sup>83</sup>

Sixthly, an owner is not permitted to store any inflammatory material or do, or allow to be done, any other dangerous act in a section or exclusive use area that may increase the rate of the premium payable by the body corporate on any insurance policy.<sup>84</sup> The objective here is to avoid damage to or destruction of the building by fire or other dangerous acts conducted within a section or on an exclusive use area.

Finally, an owner is under an obligation to keep his section free of insects and pests and must permit the trustees, the managing agent, or their employees or agents, to

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<sup>80</sup> Annexure 9 r 3(4) of the Sectional Titles Act 95 of 1986.

<sup>81</sup> Annexure 9 r 5.

<sup>82</sup> Annexure 9 r 6.

<sup>83</sup> Pienaar *Sectional Titles* 243.

<sup>84</sup> Annexure 9 r 9 of the Sectional Titles Act 95 of 1986.

enter his section from time to time for the purpose of inspecting the section and taking any action as may be reasonably necessary to eradicate such pests. The cost of inspection, eradication of pests, and replacement of any woodwork or other material forming part of the section is borne by the owner of the section.<sup>85</sup> This rule is a reification of the owner's obligation to keep his section in a state of good repair in order to prevent the degeneration of the building.

## 6 2 4 Evaluation

The main objectives of the above mentioned social obligations can be fitted into one of the following three general categories: the preservation of the physical features of the building, the preservation of the harmonious appearance of the sectional title scheme when viewed from outside the section or the preservation of the social coherence and harmony in the scheme.

The following social obligations aim to preserve the physical features of the building: that authorised persons may enter the owner's section or exclusive use area to inspect the physical condition and to repair defects that might impair the physical integrity of other sections or the sectional title building as a whole;<sup>86</sup> the provision of subjacent and lateral support to other sections and the common property;<sup>87</sup> the carrying out of all work that may be ordered by a competent public or local authority in respect of the section;<sup>88</sup> the maintenance of the section in a state of good repair,<sup>89</sup> not to make alterations which are likely to impair the stability of the building or the use and enjoyment of other sections, the common property or any exclusive use area;<sup>90</sup> not to store any inflammatory material or do, or allow to be done, any other

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<sup>85</sup> Annexure 9 r 11.

<sup>86</sup> Ss 44(1)(a) and 28(2)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(a)).

<sup>87</sup> Ss 28(1)(a)(i) and (b)(i) of the Sectional Titles Act 95 of 1986.

<sup>88</sup> S 44(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(b)).

<sup>89</sup> S 44(1)(c) of the Sectional Titles Act 95 of 1986 ; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(c)).

<sup>90</sup> Annexure 8 r 68(1)(iii) of the Sectional Titles Act 95 of 1986.

dangerous act in a section or exclusive use area;<sup>91</sup> and the keeping of the section free of insects and pests.<sup>92</sup>

The purpose of the second category of social obligations is to preserve the harmonious appearance of the sectional title scheme from the outside. These duties include: to keep an exclusive use area in a clean and neat condition;<sup>93</sup> not to do anything to a section or exclusive use area which is likely to prejudice the harmonious appearance of the building;<sup>94</sup> not to construct or place any structure or building improvement on an exclusive use area, without the prior written consent of the trustees;<sup>95</sup> to maintain in or on a section or exclusive use area a receptacle for refuse in a hygienic and dry condition and to ensure that any refuse placed in such receptacle is securely wrapped or completely drained;<sup>96</sup> not to dismantle or effect any major repairs to any vehicle in or on a section or exclusive use area;<sup>97</sup> not to place or do anything on a balcony, stoep or patio, forming part of the section or exclusive use area, which, in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed from outside the section;<sup>98</sup> and not to place any sign, notice, billboard or advertisement on any part of the residential section so as to be visible from outside the section, without the written consent of the trustees.<sup>99</sup>

The focus of the last category of social obligations is the preservation of the social coherence and harmony in the scheme. The social obligations that relate to this aspect include the following: to use a section or exclusive use area in such a manner or purpose that it will not cause any nuisance to any other occupier of another section;<sup>100</sup> not to use, nor permit a section or exclusive use area to be used for any other purpose except with the written consent of all the sectional owners;<sup>101</sup> not to

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<sup>91</sup> Annexure 9 r 9.

<sup>92</sup> Annexure 9 r 11.

<sup>93</sup> S 44(1)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(c)).

<sup>94</sup> Annexure 8 r 68(1)(iv) of the Sectional Titles Act 95 of 1986.

<sup>95</sup> Annexure 8 r 68(1)(vi).

<sup>96</sup> Annexure 9 r 2.

<sup>97</sup> Annexure 9 r 3(4).

<sup>98</sup> Annexure 9 r 5.

<sup>99</sup> Annexure 9 r 6.

<sup>100</sup> S 44(1)(e) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(e)).

<sup>101</sup> S 44(1)(g) and Annexure 8 r 68(1)(v) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(g))

use a section or exclusive use area, or allow it to be used for any purpose injurious to the reputation of the building;<sup>102</sup> not to contravene or permit the contravention of any law, by-law, ordinance, proclamation, regulation, or the conditions of any license with regard to the occupation of the building or the carrying on of business in the building;<sup>103</sup> and not to keep any animal, reptile or bird in a section without the written consent of the trustees.<sup>104</sup>

Furthermore, it is important to note that it is possible for both the developer, upon application for the opening of the sectional title register, and subsequently the body corporate, through passing unanimous or special resolutions,<sup>105</sup> to impose additional social obligations on sectional owners with regard to the use and enjoyment of their sections and exclusive use areas. This can be done by supplementing the management and especially the conduct rules of a particular sectional title scheme with special rules. These special rules may for instance regulate specific matters such as when and how loud music may be played within a section.

### **6 2 5 Special note on the keeping of pets**

Due to the fact that the keeping of pets is one of the most contentious and problematic issues in sectional title schemes, this part of the chapter will be concluded with a discussion of applicable case law on this topic.<sup>106</sup> Restrictions on the guardianship of animals are designed to minimise nuisance being caused to neighbouring residents.<sup>107</sup> In *Nahrstedt v. Lakeside Village Condominium Ass'n Inc*<sup>108</sup> the Californian Supreme Court decided that a virtual ban on pets was not unreasonable and could be enforced against the owner of three cats even though the animals remained inside the unit at all times, did not make noise or generate

<sup>102</sup> Annexure 8 r 68(1)(i) of the Sectional Titles Act 95 of 1986.

<sup>103</sup> Annexure 8 r 68(1)(ii).

<sup>104</sup> Annexure 9 r 1.

<sup>105</sup> Ss 35(2)(a) and (b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 ss 10(2)(a) and (b)).

<sup>106</sup> Van der Merwe *Sectional Titles* 8-18(1).

<sup>107</sup> J Paddock "The Three P's: Pets, Parking and difficult People" *Paddocks Press Newsletter*

<<http://www.paddocks.co.za/paddocks-press-newsletter/59-jennifer-paddock-the-three-ps-pets-parking-and-difficult-people-in-sectional-title>> (accessed 07-05-2013).

<sup>108</sup> 878 P.2d 1275, 1278-79 (Cal. 1994) (en banc). For a detailed discussion of this case see A Arabian "Condos, Cats, and CC&Rs: Invasion of the Castle Common" (1995-1996) 23 *Pepp. L. Rev.* 1 1-11.

smells, and was not a nuisance to other residents. The court denied Nahrstedt's relief on the following terms:

“[a]s a matter of law,... the recorded pet restriction...is not arbitrary, but is rationally related to health, sanitation and noise concerns legitimately held by residents.”<sup>109</sup>

However, an absolute prohibition on the keeping of pets militates against the sectional owner's true ownership of his section and should be justified only in exceptional circumstances. Nonetheless the trustees have the power to limit the number of pets per section or even the kind of pets allowed.<sup>110</sup> Any sectional owner who feels aggrieved by a refusal of the trustees to allow him to keep a particular pet can approach the court for a declaratory order that the written consent of the trustees has been unreasonably withheld.<sup>111</sup> Fortunately, South African courts have ruled that the wording of this conduct rule implies that the trustees are obliged to consider each case or application for the keeping of pets on its own merits.<sup>112</sup>

*Body Corporate of the Laguna Ridge Scheme No 152/1987 v Dorse*<sup>113</sup> dealt with the rule which granted the trustees the discretion to grant or refuse permission to keep pets in the units or common property of a scheme. When the trustees refused permission to keep her dog in her flat an elderly lady challenged the refusal by taking the trustees to court. The court held that each request for permission to keep an animal had to be considered on its own merits and the decision of the trustees had to be based on facts and circumstances relevant to the particular case.<sup>114</sup> It appeared that there was never a danger that the respondent's small dog could cause a nuisance, as it, as testified by the respondent, did not bark and was never allowed to

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<sup>109</sup> Nahrstedt v. Lakeside Village Condominium Ass'n, Inc. 878 P.2d 1275, 1278-79 (Cal. 1994) (en banc) 1290. In addition, it was noted by the court that Nahrstedt's complaint did not allege any facts showing that the burden of the restriction outweighed its benefits; 1291. Finally, the restriction did not violate public policy because no state or federal provision confers a right to keep household pets in condominiums; 1290-1291.

<sup>110</sup> However, if the rule was placed and filed at the Deeds Registry before the owner bought into the scheme, the legal principle of let the buyer beware comes into play as the buyer is presumed to have knowledge of the rules applicable to the particular scheme; see J Paddock “The Three P's: Pets, Parking and difficult People” *Paddocks Press Newsletter* <<http://www.paddocks.co.za/paddocks-press-newsletter/59-jennifer-paddock-the-three-ps-pets-parking-and-difficult-people-in-sectional-title>> (accessed 07-05-2013).

<sup>111</sup> Annexure 9 r 1(1).

<sup>112</sup> *Maree Sectional Titles on Tap* 10.15.

<sup>113</sup> 1999 2 SA 512 (D).

<sup>114</sup> 520F-I.

wander freely around the common property.<sup>115</sup> The court found that the decision of the trustees to refuse permission for the pet to be kept on the premises was heavily influenced by policy considerations such as the fear to create a precedent rather than contextual circumstances pertaining to the particular dog and whether its presence in the respondent's apartment could possibly constitute a nuisance. The court argued that their decision was grossly unreasonable and warranted the inference that they failed to apply their minds to the matter. On this basis the trustees' decision was reviewable under the common law.<sup>116</sup> The matter concluded when the court found it proper to substitute the trustees' decision with its own and ordered that the elderly lady should be allowed to keep the dog in her apartment.<sup>117</sup>

The New South Wales situation regarding the keeping of pets is similar to the position in South Africa. There the courts also decided that the decision of the executive council (trustees) on the keeping of pets must be based on the facts and circumstances of each case. In *Johnson v The Owners – Strata Plan*<sup>118</sup> the adjudicator of the strata title tribunal reasoned that precedent concerns were not valid and it was therefore inappropriate for an owners corporation (body corporate) to have a policy which it arbitrarily sought to apply in every instance. This judgment was given because the owners' corporation was obliged to consider each request for the keeping of an animal on merit. Furthermore, in *Montagna v The Owners – Strata Plan*<sup>119</sup> the tribunal found that it was not open to the owners corporation to decide that it does not want animals in the scheme and that the executive council was obliged to consider any request for permission to keep an animal on its merits. The tribunal also found that it was not simply a matter that the majority rules, but rather that the owners corporation are obliged to reasonably consider every request put to it.<sup>120</sup>

In the event that the prescribed conduct rules are applicable in a particular scheme and the owners want to adopt a 'no pets' rule as an amendment to Annexure 9 rule

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<sup>115</sup> 521F and 522A-C.

<sup>116</sup> 522D-F and 522H-I.

<sup>117</sup> 523E-G.

<sup>118</sup> [2003] NSWCTTT 74.

<sup>119</sup> [2003] NSWCTTT 783.

<sup>120</sup> See in general A Ilkin *NSW Strata and Community Schemes Management and the Law* 4ed (2007) ch 13 n 47.

1, the body corporate can pass a special resolution and have it filed at the Deeds Registry. Since all rules must be reasonable, the new rule must honour the vested rights of current sectional owners who have pets residing with them in the sectional title scheme. In such circumstances the ‘grandfathering’ or ‘twilight’ principle must be observed and pet owners should not be forced to get rid of them. However, once the pets die the owners concerned would not be automatically entitled to replace them.<sup>121</sup>

### **6 3 Social obligations pertaining to the common property**

Having dealt with the social obligations of a sectional owner pertaining to sections and exclusive use areas, I now turn to the social obligations of owners with regard to the common property in terms of the Act and the prescribed management and conduct rules.

#### **6 3 1 Social obligations imposed in terms of the Act**

In terms of the Act sectional owners own the common property in undivided shares in accordance with the provisions of the Act.<sup>122</sup> The extent to which a sectional owner owns and may, therefore, use and enjoy the common parts of the scheme, technically depends on the size of his section relative to that of the other sections in the sectional title scheme.<sup>123</sup> In practice it is difficult to divide the use and enjoyment of land and the common parts of the buildings in accordance with a participation quota system based on size in residential schemes and the quota allotted by the developer in non-residential schemes. Therefore, the Act incorporated a general principle whereby a sectional owner must:

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<sup>121</sup> J Paddock “The Three P’s: Pets, Parking and difficult People” *Paddocks Press Newsletter* <<http://www.paddocks.co.za/paddocks-press-newsletter/59-jennifer-paddock-the-three-ps-pets-parking-and-difficult-people-in-sectional-title>> (accessed 07-05-2013). See also G Paddock “Q and A with the Professor” (June 2009) 4-6 *Paddocks Press Newsletter* 11 11.

<sup>122</sup> S 2(c) of the Sectional Titles Act 95 of 1986.

<sup>123</sup> S 16(1) of the Sectional Titles Act 95 of 1986; see also s 32(3)(b); (Sectional Titles Schemes Management Act 8 of 2011 s 11(1)(b)).



“use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other owners or other persons lawfully on the premises”.<sup>124</sup>

Each sectional owner is thus entitled to substantially the same rights of use and enjoyment of the common property. This is irrespective of whether his undivided share is of equal size or not since a higher participation quota cannot, as such, confer special or greater rights of use.<sup>125</sup>

Therefore, a sectional owner is under an obligation to use and enjoy the common property in such a manner so as not to interfere with the concurrent rights of other lawful owners and residents.<sup>126</sup> This accord with the principles of neighbour law that sectional owners are obliged to allow other sectional owners or occupiers to use and enjoy the common property in a reasonable way.<sup>127</sup> To determine the parameters of reasonable usage Van der Merwe suggests the following four guidelines:<sup>128</sup> no owner has an *ius prohibendi* against another owner or lawful occupant; no owner may appropriate for himself the exclusive use of any part of the common property; no owner may decide unilaterally on work to be done in connection with the common property; and no owner may use the common property for an abnormal purpose or in an unusual way.

Consequently, no sectional owner may prevent another sectional owner or person lawfully on the premises to use any part of the common property for lawful purposes such as using the lifts, lawn or swimming pool. Furthermore, no sectional owner may appropriate for himself the exclusive use of any part of the common property and therefore cannot, for example, erect a washing line, a doll’s house for his daughter or carport. Moreover, a sectional owner may not in his own discretion decide to redecorate any part of the common property, for instance a common games room or gym area. Finally, no sectional owner may use the common property

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<sup>124</sup> S 44(1)(d) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(d)).

<sup>125</sup> Van der Merwe *Sectional Titles* 8-23.

<sup>126</sup> S 44(1)(d) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(d)).

<sup>127</sup> Pienaar *Sectional Titles* 244.

<sup>128</sup> Van der Merwe *Sectional Titles* 8-23.

for an abnormal purpose or in an unusual way. Abnormal or unnatural usage of common property occurs where parts of the common property are utilised in a manner contrary to its nature or accepted usage, for instance where the scheme's lawn is used for playing a rugby or soccer match.<sup>129</sup>

Furthermore, the implied reciprocal statutory servitudes against each section in favour of the common property, and in favour of each section against relevant portions of the common property, as discussed at 6 2 1, apply to the same extent in respect of the common property. We have seen that these servitudes include a reciprocal servitude for subjacent and lateral support<sup>130</sup> and a reciprocal servitude for the passage or provision of certain services through pipes, wires, cables and ducts.<sup>131</sup> We have also seen that the implied servitudes confer on the body corporate the right to have access to each section and exclusive use area to maintain, repair or renew any part of the building or any pipes, wires, cables or ducts in the building, or for emergency repairs necessary to prevent damage to the common property or any other section or sections.<sup>132</sup> The impetus for this social obligation is, as already indicated, to preserve the physical features of the building.

### **6 3 2 Social obligations imposed in terms of the model management rules**

The prescribed management rules impose the following social obligations on sectional owners in respect of the common property:

Firstly, an owner is obliged to refrain from using the common property in such a way or for such a purpose as to cause harm to the reputation of the building.<sup>133</sup> We have already commented, at 6 2 2, that this obligation is unfortunately fairly vague. Nevertheless it would presumably prevent sectional owners from entering the common property indecently clothed or from leaving dust-bins or bicycles in the drive-way. Consequently, it would be advisable for sectional owners to obtain the trustees' consent before they do anything on the common property which may impair

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<sup>129</sup> 8-23 – 8-24.

<sup>130</sup> Ss 28(1)(a)(i) and 28(1)(b)(i) of the Sectional Titles Act 95 of 1986.

<sup>131</sup> Ss 28(1)(a)(ii) and 28(1)(b)(ii).

<sup>132</sup> S 28(2)(b); See also s 44(1)(a); (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(a)).

<sup>133</sup> Annexure 8 r 68(1)(i) of the Sectional Titles Act 95 of 1986.

the reputation of the scheme.<sup>134</sup> By protecting the reputation of the building, the social harmony in the scheme is preserved and the financial investment of sectional owners safeguarded.

Secondly, an owner is obliged to refrain from contravening any law, by-law, ordinance, proclamation or statutory regulation, or the conditions of any license affecting the occupation or the carrying on of business in any part of the building that is defined as common property.<sup>135</sup> Consequently, sectional owners are obliged to be aware of and abide by any law or license condition that affects his residential or commercial use of any part of the common property. An example of such a law was already mentioned in 6 2 2, when I unpacked section 20(1A)(a) of the Sexual Offences Act which makes it an offence for any person 18 years or older to have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward. A sectional owner would thus commit an offence if he performed any of the above-mentioned acts for reward on any part of the common property. Furthermore, licenses are required to conduct certain kinds of businesses in any part of the building that is defined as common property. Licences are for instance required for the sale or supply of perishable foodstuffs; the provision of certain types of health facilities or entertainment; and the hawking of meals or perishable foodstuffs.<sup>136</sup> From the latter examples, it is reiterated that this social obligation aims to prevent illegal and unwanted activities from taking place on any part of the common property in order to protect the lawful order and social harmony in the scheme.

### **6 3 3 Social obligations imposed in terms of the model conduct rules**

The model conduct rules of Annexure 9 impose several further social obligations on sectional owners regulating their use and enjoyment of the common property. Most of these obligations, which I will now analyse, reiterate the social obligations with regard to sections and exclusive use areas discussed above.

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<sup>134</sup> Van der Merwe *Sectional Titles* 8-27.

<sup>135</sup> Annexure 8 r 68(1)(ii) of the Sectional Titles Act 95 of 1986.

<sup>136</sup> See the Businesses Act 71 of 1991, Schedule 1.

As in the case of a section, an owner is not allowed to keep an animal, bird or reptile on the common property without the written consent of the trustees, which consent may not be unreasonably withheld. Again, the consent may be given subject to certain conditions which if breached may lead to the withdrawal of approval.<sup>137</sup> An example of animals kept on the common property would be the keeping of horses in an environment friendly rustic sectional title scheme at the boundaries of a city.

An owner must maintain a receptacle for refuse in a hygienic and dry condition on such part of the common property as authorised by the trustees in writing.<sup>138</sup> Refuse placed in this receptacle must be securely wrapped and completely drained.<sup>139</sup> Furthermore, the receptacle must be placed within the area and at times designated by the trustees<sup>140</sup> and after the refuse has been collected the receptacle must be returned promptly to the section or exclusive use area concerned.<sup>141</sup> The aim of this obligation is to regulate the disposal of refuse in an orderly manner and to prevent owners from placing their refuse in a haphazard manner on any other part of the common property with disastrous consequences to the external appearance of the scheme. In addition the disposal of refuse in an orderly manner would reduce the health risks that scheme owners and occupiers may be exposed to.

Furthermore, an owner is not allowed to deposit, throw, or permit or allow to be deposited or thrown, any rubbish on the common property. This includes not only any dirt, cigarette butts, food scraps but any other kind of litter whatsoever.<sup>142</sup> This social obligation is closely related to the previous obligation and therefore also works towards preventing the attractive outside appearance of the sectional title scheme from being prejudiced.

An owner must not park or stand any vehicle on the common property, or permit or allow any vehicle to be parked or remain standing on the common property, without

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<sup>137</sup> Annexure 9 r 1 of the Sectional Titles Act 95 of 1986.

<sup>138</sup> Annexure 9 r 2(1)(a).

<sup>139</sup> Annexure 9 r 2(1)(b).

<sup>140</sup> Annexure 9 r 2(1)(c).

<sup>141</sup> Annexure 9 r 2(1)(d).

<sup>142</sup> Annexure 9 r 7.

the written consent of the trustees.<sup>143</sup> Regulating parking on the common property is one of the most difficult issues that the body corporate and the trustees face. Allowing owners or their visitors to park their vehicles at random on the common property will cause chaos and conflict amongst owners and other residents of the scheme.

An owner must also ensure that his vehicles, and the vehicles of his visitors and guests, do not drip oil or brake fluid on to the common property or in any other way deface the common property.<sup>144</sup> In addition, as in the case of a section or an exclusive use area, an owner is not permitted to dismantle or effect major repairs to any vehicle on any portion of the common property.<sup>145</sup> The intention of this obligation is again the preservation of the exterior aesthetics of the scheme.

In addition, an owner must not mark, paint, drive nails or screws into, or otherwise damage, or alter, any part of the common property without the written consent of the trustees.<sup>146</sup> Exceptions are, however, made in respect of the installation of any locking device; safety gate; burglar bars; or other safety device; or any screen or other device to prevent the entry of animals or insects. Even though the rule confers a right on owners to install such items, they may only do so after the trustees have provided written approval of the nature and design of the device and the manner of its installation.<sup>147</sup> This rule was undoubtedly formulated to allow owners to improve their security and prevent disturbance by insects and other pests.

Moreover, an owner of a section used for residential purposes is not allowed to place or do anything on any part of the common property, including balconies, patios, stoeps, and gardens which, in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed from the outside of the section.<sup>148</sup> This obligation is somewhat ambiguous since balconies, patios and stoeps are usually structured as part of a section or as exclusive use areas. Only the reference to the

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<sup>143</sup> Annexure 9 r 3(1).

<sup>144</sup> Annexure 9 r 3(3).

<sup>145</sup> Annexure 9 r 3(4).

<sup>146</sup> Annexure 9 r 4(1).

<sup>147</sup> Annexure 9 r 4(2).

<sup>148</sup> Annexure 9 r 5.

garden makes sense because it is always part of the common property. It is also confusing that the prohibited placement or action on the common property must be visible from the outside of the section. This would thus apply to balconies, patio's and stoeps that are structured as part of the common property, but not to gardens. Even so the aim of this obligation is to ensure that the harmonious external appearance of the building is preserved.

An owner of a residential section must also not place any sign, notice, billboard or advertisement of any kind whatsoever on any part of the common property so as to be visible from outside the section, without the written consent of the trustees.<sup>149</sup> This obligation, which also applies to a section, requires owners of residential units to first obtain the written consent of the trustees before placing nameplates or other signs on the outside walls adjoining their units or in the entrance of the building which forms part of the common property. The aim of this obligation is yet again to preserve the harmonious external appearance of the building by regulating the advertisements and notices that may be affixed to the external walls.

The repercussions of this rule are more problematic when it comes to non-residential sectional title schemes. The entitlement of non-residential owners to place signs and other items on the outside walls of a unit can be summarised as follow. Firstly, the outside walls of a unit fall under the definition of common property and therefore the owner may only make reasonable use thereof. Such unit owners therefore do not have complete freedom to erect whatever signs they want on the outside walls. Secondly, if it is accepted that one-sided appropriation of any part of the common property always amounts to unreasonable use thereof, the affixing of signs and other items would be considered unreasonable and the necessary authorisation must be obtained from either the trustees or the body corporate. Lastly, it might well be argued that moderate use of outside walls for identification and advertising purposes could be considered reasonable use of outside walls in a commercial or mixed sectional title scheme where such displays are natural and appropriate. Because of all the difficulties that are encountered in applying Annexure 9 rule 6, it is suggested

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<sup>149</sup> Annexure 9 r 6.

that the developer should either insert special rules in this regard in the model conduct rules or that the owners themselves should later adopt special rules.<sup>150</sup>

Another social obligation pertaining to the common property is that an owner must not, without the written consent of the trustees, erect his own washing lines, nor hang any washing or laundry or any other items on any part of the building or the common property so as to be visible from the outside or from any other sections.<sup>151</sup> The purpose of this obligation is thus to ensure that the attractive external appearance of the scheme is not impaired.

Again, as applies in the case of a section or exclusive use area, an owner must not store any inflammatory material on the common property or perform or permit any other dangerous act in the building or on the common property which will or may increase the rate of the premium payable by the body corporate on any insurance policy.<sup>152</sup> We have seen that the intention of this obligation is to prevent the building being damaged or destroyed by fire or other dangerous acts conducted on the common property.

From the above, it is clear that most of these social obligations attempt to prevent the common property from being used unreasonably by the owners of the scheme. We have, however, seen that unreasonable use of the common property may in some cases be permitted with the written consent of the trustees acting on behalf of the body corporate.<sup>153</sup>

### **6 3 4 Evaluation**

As in the case of social obligations pertaining to sections and exclusive use areas,<sup>154</sup> the social obligations pertaining to the common property can again be summarised according to the same three categories. These categories, which I will now unpack,

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<sup>150</sup> CG Van der Merwe “The Placing of Signs, Billboards and Advertisements on the Outside Walls of Sectional Title Buildings” (1996) 3 *TSAR* 568 571.

<sup>151</sup> Annexure 9 r 8 of the Sectional Titles Act 95 of 1986.

<sup>152</sup> Annexure 9 r 9.

<sup>153</sup> Van der Merwe *Sectional Titles* 8-27.

<sup>154</sup> See 6 2 4 above.



are the preservation of the physical features of the building, the preservation of the harmonious appearance of the sectional title scheme when viewed from outside the section and the preservation of the social coherence and harmony in the scheme.

Firstly, the physical features of the building are preserved by the obligations to provide subjacent and lateral support to parts of the common property;<sup>155</sup> not to damage, alter or make additions to the common property without the written consent of the trustees<sup>156</sup> and not to store any inflammatory material on the common property or perform or permit any other dangerous act in the building or on the common property.<sup>157</sup>

Secondly, the outside attractiveness and harmonious appearance of the sectional title scheme is guaranteed by the obligations to maintain a receptacle for refuse in a hygienic and dry condition on such part of the common property as authorised by the trustees in writing;<sup>158</sup> not to deposit, throw, or permit or allow to be deposited or thrown, any rubbish on the common property;<sup>159</sup> to ensure that the vehicles of owners and their guests, do not drip oil or brake fluid on to the common property or in any other way deface the common property;<sup>160</sup> not to dismantle or effect major repairs to any vehicle on any portion of the common property;<sup>161</sup> not to place or do anything on any part of the common property which, in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed from the outside of the section;<sup>162</sup> not to place any sign, notice, billboard or advertisement of any kind whatsoever on any part of the common property so as to be visible from outside the section, without the written consent of the trustees;<sup>163</sup> and not, without the written consent of the trustees, erect washing lines, nor hang any washing or laundry or any other items on any part of the building or the common property so as to be visible from outside the buildings or from any other sections.<sup>164</sup>

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<sup>155</sup> Ss 28(1)(a)(i) and (b)(i) of the Sectional Titles Act 95 of 1986.

<sup>156</sup> Annexure 9 r 4(1).

<sup>157</sup> Annexure 9 r 9.

<sup>158</sup> Annexure 9 r 2(1)(a).

<sup>159</sup> Annexure 9 r 7.

<sup>160</sup> Annexure 9 r 3(3).

<sup>161</sup> Annexure 9 r 3(4).

<sup>162</sup> Annexure 9 r 5.

<sup>163</sup> Annexure 9 r 6.

<sup>164</sup> Annexure 9 r 8.

Finally, the social obligations to use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other owners or other persons lawfully on the premises<sup>165</sup> are concretised by the social obligations not to use the common property in such a way or for such a purpose that is injurious to the reputation of the building;<sup>166</sup> to refrain from contravening any law, by-law, ordinance, proclamation or statutory regulation, or the conditions of any license affecting the occupation or the carrying on of business in any part of the building that is defined as common property;<sup>167</sup> and not to keep any pet on the common property without the written consent of the trustees.<sup>168</sup> The ultimate aim of these obligations is to preserve social harmony and to protect the financial investments of sectional owners in the scheme.

As in the case of sections and exclusive use areas, it is also possible for both the developer and the body corporate in general meeting to impose additional social obligations on sectional owners regarding the use and enjoyment of any portion of the common property. An example of a special rule imposing additional social obligations on sectional owners regarding the use of the common swimming pool reads as follow:

“Swimming pool

- (1) Not pets or animals are permitted in the pool area.
- (2) The body corporate absolves itself from any responsibility concerning the use of the pool and requires adult supervision of children under 12 years of age.
- (3) No surf boards or the like are permitted in the pool area.
- (4) Resident’s visitors using the pool must be accompanied by a resident who will be responsible for the behaviour of the visitors.
- (5) All persons using the pool area are to keep it in a neat and tidy condition and all refuse must be removed from the area after use.
- (6) Any trustee shall have the right in his own discretion to demand that anyone using the pool area in an unacceptable manner shall leave and such persons shall comply therewith immediately.

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<sup>165</sup> S 44(1)(d); (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(d)).

<sup>166</sup> Annexure 8 r 68(1)(i) of the Sectional Titles Act 95 of 1986.

<sup>167</sup> Annexure 8 r 68(1)(ii).

<sup>168</sup> Annexure 9 r 1(1).

(7) Braais are permitted in designated areas only.<sup>169</sup>

From the discussion of the social obligations imposed on sectional owners with regard to the use of the common property it becomes evident that a sectional owner's powers of use and enjoyment of the common property are more restricted than his powers of use and enjoyment of his section. This is understandable since a sectional owner does not have the same exclusive individualistic powers inherent in the ownership of a section with regard to the common property. A sectional owner is only a co-owner in undivided shares of the common property and must share the common property with all the other sectional owners.<sup>170</sup> Furthermore, most of the individualistic characteristics of traditional co-ownership have been limited in the modified concept of co-ownership adopted by the Act.<sup>171</sup> The imposition of stricter and more specific social obligations on sectional owners with regard to the use and enjoyment of the common property are thus justifiable.

#### **6 4 Social obligations imposed by neighbour law**

Apart from the provisions of the Act and the model rules, the social obligations of sectional owners with regard to the use of their sections, exclusive use areas and the common property are also regulated by intensified common law principles of neighbour law. These are required by the dense living and usage conditions prevailing in most sectional title schemes. Therefore, a greater measure of care towards neighbours in the exercise of usage rights must be observed on the one hand, and a greater measure of tolerance towards the exercise of usage rights of neighbours must be accepted on the other hand.<sup>172</sup>

In terms of the Act, as discussed at 6 3 1, sectional owners are obliged not to use and enjoy the common property in a manner that will result in unreasonable interference with the use and enjoyment by other owners and persons lawfully on the

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<sup>169</sup> T Woudberg *Basic Sectional Title Book Two* 2ed (1999) 112.

<sup>170</sup> Van der Merwe *Sectional Titles* 8-28.

<sup>171</sup> 2-16 - 2-19.

<sup>172</sup> Pienaar *Sectional Titles* 248.

premises.<sup>173</sup> Since neither the Act or the rules contain express provisions indicating how the principle of reasonable use of the common property, the sections and exclusive use areas are to be understood, the concept of reasonableness should be interpreted in terms of common law neighbour law principles.<sup>174</sup>

The purpose of neighbour law is the harmonisation of the interests of neighbouring owners or users of immovable properties by weighing their rights and obligations in the exercise of entitlements against each other in order to balance conflicting interests.<sup>175</sup> A sectional owner must therefore exercise his entitlements in respect of a section, an exclusive use area and the common property reasonably, and, on the other hand, the neighbour must tolerate this within reasonable bounds.<sup>176</sup>

Neighbour law is based on the notion that the sectional title property must be used in such a way that a neighbouring owner or occupier is not unreasonably prejudiced or burdened by such use.<sup>177</sup> This is encapsulated in the Roman maxim *sic utere tuo ut alienum non laedas*.<sup>178</sup> Any form of annoying or unreasonable conduct which interferes with or causes actual damage to a neighbour's health, well-being or comfort in his occupation of a sectional title unit or the common property, is regarded as a nuisance.<sup>179</sup>

It is a question of fact and often a matter of degree whether the conduct of the sectional owner is sufficiently serious to constitute a nuisance.<sup>180</sup> The reasonable test poses the question whether a normal person, finding himself in the position of the plaintiff, would have been expected to tolerate the interference concerned.<sup>181</sup> This test is an objective one and has to be applied in the light of the prevailing

<sup>173</sup> S 44(1)(d) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(d)).

<sup>174</sup> Pienaar *Sectional Titles* 248.

<sup>175</sup> *Gien v Gien* 1979 2 SA 1113 (T) 1123E.

<sup>176</sup> Pienaar *Sectional Titles* 249.

<sup>177</sup> *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 120G.

<sup>178</sup> Van der Merwe *Sectional Titles* 8-5.

<sup>179</sup> *East London Western Districts Farmer's Association v Minister of Education and Development Aid* 1989 2 SA 63 (A) 67H-J; see also in general Badenhorst *et al The Law of Property* 111-119; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2ed (1994) 251-257; JRL Milton "The Law of Neighbours in South Africa" (1969) *Acta Juridica* 123 123-269; CG Van der Merwe *Sakereg* 2ed (1989) 185-197; and AJ van der Walt *The Law of Neighbours* (2010) ch 6.

<sup>180</sup> *Dorland and Another v Smits* 2002 5 SA 374 (C) 383B; see also Badenhorst *et al The Law of Property* 112.

<sup>181</sup> Badenhorst *et al The Law of Property* 112.

circumstances.<sup>182</sup> In terms of case law several factors can be taken into account to ascertain whether a sectional owner's intrusive conduct is objectively reasonable.<sup>183</sup>

In the first place the conduct concerned must be repetitive or continuous, since a single action of short duration must normally be tolerated, except if there is a reasonable expectation that the activity will be repeated.<sup>184</sup>

Secondly, the displeasing conduct must, according to the prevailing social views of the community (*secundum bonos mores*), be objectively unreasonable.<sup>185</sup> This means that objectively intolerable conduct is not acceptable.

The test employed is further 'not [that] of the perverse or finicking or over-scrupulous person, but [that] of the normal man of sound and liberal taste and habits'.<sup>186</sup> Consequently, plaintiffs who are abnormally or extraordinarily sensitive or neurotic will not be entitled to relief even though they may personally suffer substantial discomfort and inconvenience.<sup>187</sup> For example, a woman who suffers from acute attacks of migraine would not be able to complain about ordinary noises made by children playing in an adjoining apartment.<sup>188</sup>

Furthermore, aspects such as the location of an apartment or unit in the building, the nature of the scheme as residential, commercial or mixed-use, the customs of the

<sup>182</sup> *Vogel v Crewe and Another* 2003 4 SA 509 (T) 512E.

<sup>183</sup> See in general CG Van der Merwe, MJ De Waal & D Carey Miller *Property and Trust Law in the International Encyclopaedia of Law* series (2004) s 245-253; Van der Merwe *Sakereg* 191-197; Sonnekus & Neels *Sakereg vonnisbundel* 254; Badenhorst *et al The Law of Property* 111-113; AJ Van der Walt & GJ Pienaar *Inleiding tot die Sakereg* 6ed (2009) 98-99; and Pienaar *Sectional Titles* 251.

<sup>184</sup> *Gien v Gien* 1979 2 SA 1113 (T) 1123E.

<sup>185</sup> *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 4 SA 188 (D) 192; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 111, 112, 114, 116 and 117; *Kirsh v Pincus* 1927 TPD 199; *Gien v Gien* 1979 2 SA 1113 (T); *Dorland and Another v Smits* 2002 5 SA 374 (C) 384A-C; *Vogel v Crewe and Another* 2003 4 SA 509 (T) para 4; see also CG van der Merwe "Die Bepaling van die Redelikeidskriterium by Oorlas" (March 1980) 147 *De Rebus* 117 117-119; CG van der Merwe & M Blumberg "For Whom the Bells Toll – A Solution in Neighbour Law" (1998) 9 *Stell LR* 351 352-353.

<sup>186</sup> *Prinsloo v Shaw* 1938 AD 570 575; see also *Holland v Scott* 1882 2 EDC 307 313, 318 and 331; *Whittaker v Hime* 1912 33 NLR 72 76; *Leith v Port Elizabeth Museum Trustees* 1934 EDL 211 213; *Van den Berg v OVS Landbou Ingenieurs (Edms) Bpk* 1956 4 SA 391 (O) 400; *Die Vereniging van Advokate (TPA) v Moskeplein (Edms) Bpk* 1982 3 SA 159 (T) 163; *Vogel v Crewe and Another* 2003 4 SA 509 (T) para 4; see also Van der Merwe & Blumberg (1998) *Stell LR* 354.

<sup>187</sup> *Jecks & Co v O'Meara & Co* 1904 TH 284 285; *Hollam v Mowbray Municipality* 1906 23 SC 133 136; *Leith v Port Elizabeth Museum Trustees* 1934 EDL 211 214; *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 4 SA 188 (D) 192.

<sup>188</sup> *Cf Du Toit v De Bot, Du Toit v Zuidmeer* 1883 2 SC 213.

residents and the question whether the health of the neighbour may be affected are important in the determination of the reasonableness of the activities practiced at neighbouring apartments.<sup>189</sup>

Moreover, the harm suffered by the plaintiff must be weighed against the benefit and utility of the activity to the sectional owner. If the harm suffered were disproportionately serious in comparison with the trivial benefits gained by the activity, the interference would be considered unreasonable. Conversely, substantial benefits derived from a particular activity could render an activity that causes minor harm reasonable in the circumstances.<sup>190</sup>

In addition, the motive of a certain activity may determine its objective reasonableness. If the activity is motivated solely by an intention on the part of a sectional owner to harm his neighbour (*animo vicino nocendi*) this fact may turn an otherwise lawful activity into an unreasonable activity which cannot be expected to be tolerated.<sup>191</sup> Banging on the walls with the sole intention of interrupting piano lessons conducted in a neighbouring apartment would be considered unreasonable.<sup>192</sup> The reasonableness of the conduct of a neighbouring sectional owner can thus be determined by the wrongfulness of his conduct.<sup>193</sup> In this regard the expression of 'abuse of rights' is often used.<sup>194</sup>

Another important factor which may be taken into account is the fact that the same goal could have been achieved by the sectional owner by measures less harmful to the plaintiff. Therefore, where precautionary measures are used to limit harm the less likely a particular activity will be assessed as unreasonable. Thus an interference with the comfort and convenience of a neighbour which could have been prevented or at least diminished by the sectional owner carrying on the activity at a

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<sup>189</sup> *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 2 SA 81 (SEC) and *Laskey v Showzone CC* 2007 2 SA 48 (C).

<sup>190</sup> *Dorland and Another v Smits* 2002 5 SA 374 (C) 384D–385C/D; and *Van der Merwe & Blumberg* (1998) *Stell LR* 353–354.

<sup>191</sup> *Blacker v Carter* 1905 19 EDC 223 234–235; *Ingelthorpe v Sackville-West* 1908 EDC 159 161; *Kirsh v Pincus* 1927 TPD 199; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 107–108; *Gien v Gien* 1979 2 SA 1113 (T) 1121; see also Milton (1969) *Acta Juridica* 162–165.

<sup>192</sup> Cf the English case of *Christie v Davey* [1893] 1 Ch 316.

<sup>193</sup> Pienaar *Sectional Titles* 253.

<sup>194</sup> See in general Pienaar *Sectional Titles* 253.

different time, in a different manner, in a different part of his section, or with greater expertise is more likely to be considered unreasonable than one which could not have been prevented by such measures.<sup>195</sup> For example, a musician living in a sectional title scheme can play his guitar during the day instead of the late hours of the night and he can minimise the noise made by not using an amplifier.

If a sectional owner inherits a certain state of affairs that is injurious to his neighbours, the practicability of preventing harm to his neighbour is also taken into account in assessing the reasonableness of his continuing the state of affairs. The sectional owner is only expected to take steps 'reasonably practicable' in the circumstances. The courts do not regard harm that could not have been avoided, even if reasonably practicable measures had been taken, as unreasonable.<sup>196</sup>

A final factor which may be taken into account in assessing the reasonableness of a sectional owner's activity is whether the activity complained about was carried on prior to the plaintiff 'coming to the nuisance'.<sup>197</sup> For example, where a sectional owner gave guitar lessons during the day for the last 15 years before the plaintiff bought into the scheme.

After assessing the factors that are relevant in a particular situation, the court has to balance all probabilities and decide whether the sectional owner's conduct was reasonable in the circumstances or was such that the plaintiff could not be expected to tolerate such conduct.<sup>198</sup> In the context of a sectional title community the following activities will constitute an actionable nuisance if conducted in a section, an exclusive use area or on the common property:<sup>199</sup> causing excessive noise;<sup>200</sup> the

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<sup>195</sup> *Ingelthorpe v Sackville-West* 1908 EDC 159 161; *Herrington v Johannesburg Municipality* 1909 TH 179 199; *Starfield and Starfield v Randles Bros and Hudson* 1911 WLD 175 180; *Gibbons v SAR&H* 1933 CPD 521 531–535; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 103; *Die Vereniging van Advokate (TPA) v Moskeplein (Edms) Bpk* 1982 3 SA 159 (T) 164; see also Van der Merwe & Blumberg (1998) *Stell LR* 355–356.

<sup>196</sup> *Bloemfontein Town Council v Richter* 1938 AD 195; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 111–112 and 116–118; and *Vogel v Crewe and Another* 2003 4 SA 509 (T) para 6.

<sup>197</sup> *Miller v Jackson* 1977 QB 966 (CA); *Du Toit v De Bot, Du Toit v Zuidmeer* 1883 2 SC 213; see also Van der Merwe & Blumberg (1998) *Stell LR* 356–357.

<sup>198</sup> *Cf Gien v Gien* 1979 2 SA 1113 (T).

<sup>199</sup> See in general Pienaar *Sectional Titles* 252.

<sup>200</sup> *Cf Leith v Port Elizabeth Museum Trustees* 1934 EDL 211; *Prinsloo v Shaw* 1938 AD 570; *Die Vereniging van Advokate (TPA) v Moskeplein (Edms) Bpk* 1982 3 SA 159 (T); *Nelson Mandela Metropolitan Municipality*



emission of an unreasonable amount of smoke, fumes or smells;<sup>201</sup> carrying on a business in a residential scheme without the necessary consent;<sup>202</sup> hurling stones, balls or other objects into a section or onto an exclusive use area;<sup>203</sup> allowing leaves or roots to intrude into neighbouring exclusive use areas;<sup>204</sup> and the leakage of fluids from a neighbouring section or exclusive use area.<sup>205</sup>

## 6 5 Evaluation

The adage that you can choose your friends, but you cannot choose your family is extended in the sectional title context, as you certainly cannot choose your neighbours in a sectional title scheme. A clash of personalities is often prevalent in sectional title schemes which are seldom homogeneous.<sup>206</sup> Therefore, in order to obtain social harmony the Act; the model rules; neighbour law principles; and special rules impose social obligations on sectional owners with regard to the use and enjoyment of their sections, exclusive use areas and the common property. Without these obligations there will certainly be chaos in sectional title schemes all over South Africa. The importance of these social obligations can never be overemphasized and sectional owners should be properly informed and educated about their existence.

On closer examination it will become apparent that social obligations are essential for the preservation of the unique characteristics of a sectional title scheme. In chapter 2, at 2 2 1, we have seen that these characteristic features include the following:

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*v Grevenouw CC* 2004 2 SA 81 (SEC); and *Laskey v Showzone CC* 2007 2 SA 48 (C) regarding excessive noise in urban areas.

<sup>201</sup> *Cf Botha v Andrade* 2009 1 SA 259 (SCA).

<sup>202</sup> *Cf Nelson Mandela Metropolitan Municipality v Grevenouw CC* 2004 2 SA 81 (SEC) and *Botha v Andrade* 2009 1 SA 259 (SCA).

<sup>203</sup> *Cf Allacras Investments (Pty) Ltd v Milnerton Golf Club* 2008 3 SA 134 (SCA).

<sup>204</sup> *Cf Kirsch v Pincus* 1927 TPD 199 and *Malherbe v Ceres Municipality* 1951 4 SA 510 (A).

<sup>205</sup> *Cf Van der Merwe v Carnarvon Municipality* 1948 3 SA 613 (C) and *Regal v African Superplate* 1963 1 SA 102 (A).

<sup>206</sup> J Paddock "The Three P's: Pets, Parking and difficult People" *Paddocks Press Newsletter*

<<http://www.paddocks.co.za/paddocks-press-newsletter/59-jennifer-paddock-the-three-ps-pets-parking-and-difficult-people-in-sectional-title>> (accessed 07-05-2013).

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

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

Thirdly, the community life in a sectional title scheme is much more intensified than the community life of a group of neighbouring landowners. Sectional owners live in a close-knit community. In high-rise sectional title buildings sectional owners would have neighbours on either side and on top and below them. This feature has been judicially recognised in *Body Corporate of Albany Court and 17 Others v Nedbank and Others*<sup>207</sup> where Gautschi AJ stated:

“The interdependence of owners within a single building or complex logically requires co-operation, and compliance with and subservience to the will of the majority.”<sup>208</sup>

Fourthly, the legislature intended that the community of unit owners established in terms of the Act should be more or less permanent and should only be terminated on compliance with the strict conditions set for the dissolution of a sectional title scheme. In terms of the Act a sectional title scheme can only be dissolved where the building is in fact physically destroyed; where the owners unanimously resolve that the building be regarded as destroyed and the holders of registered real rights give their written consent thereto; and where the court on application of an interested

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<sup>207</sup> 2008 JOL 21739 (W).

<sup>208</sup> Para 20.

party<sup>209</sup> finds it just and equitable that the building be deemed to be destroyed and makes an order to that effect.<sup>210</sup>

These basic features of sectional ownership merit the imposition not only of stricter social obligations on a sectional owner, but also social obligations of a different kind. Put differently, these features justify more intensive restrictions on the powers and entitlements of a sectional owner with regard to his section, exclusive use area and the common property. This does not mean that sectional ownership is degraded to a lesser limited real right or a ‘nebulous something’ as suggested by Professor De Wet in the early days of sectional ownership.<sup>211</sup> Although sectional ownership has different features, it is still genuine ownership and should be placed on the same footing as the ownership of land.<sup>212</sup> This was judicially confirmed by the same High Court Judge in *Body Corporate of Albany Court and 17 Others v Nedbank and Others*:<sup>213</sup>

“[T]he powerful right of ownership of an immovable property is not an absolute right. Indeed, the very essence of the [Sectional Titles] Act is to render many of the interests of owners of units in a sectional title scheme subservient to the will of the majority. Certain of the normal rights of an owner, for instance the right to keep pets or make building alterations, may be curtailed by the rules imposed by the majority.”<sup>214</sup>

The evolution of the concept of ownership is perfectly encapsulated in the following words of Van der Merwe:

“The influence of social, economic and political forces led to a reformulation of the traditional notion of ownership, which no longer regards ownership as autonomous and individualistic, but recognises that ownership carries with it social obligations and

<sup>209</sup> As specified in s 48(4) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 17(4)).

<sup>210</sup> S 48(1) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 17(1)). See van der Merwe *Sectional Titles* 16-6 – 16-7.

<sup>211</sup> JC De Wet & F St GA Tatham “Die wet op deeltitels” (May 1972) *De Rebus* 205 205.

<sup>212</sup> Van der Merwe *Sectional Titles* 8-21 – 8-22.

<sup>213</sup> 2008 JOL 21739 (W).

<sup>214</sup> Para 20.

that the concept needs to be broken down and rendered more amenable to comply with the requirements of the day.”<sup>215</sup>

Therefore, it is clear that the social obligations discussed above are indispensable in the maintenance of the basic framework of sectional ownership. Due to the fact that a section forms part of a destructible building, the social obligation to maintain the section in a good condition<sup>216</sup> prevents destruction or damage to the walls, floors and ceilings that form the physical boundaries of all the sections in the building. Furthermore, to avoid destruction to the building sectional owners are obliged to carry out all work that may be ordered by a competent public or local authority in respect of the section;<sup>217</sup> not to make alterations which are likely to impair the stability of the building;<sup>218</sup> and not to store any inflammatory material or do, or allow to be done, any other dangerous act in the building or on the common property.<sup>219</sup>

That the sections of a sectional title building are structurally interdependent and that the very existence of sections are dependent on the continued preservation of all the sections in the scheme, is reinforced by the following two social obligations: the reciprocal servitudes of subjacent and lateral support;<sup>220</sup> as well as the obligation to allow authorised persons to enter a section to investigate the physical condition of a section and to repair items that might impair the physical integrity of other sections or the sectional title building as a whole.<sup>221</sup> The latter obligation is concretised by the duty to keep a section free of insects and pests and to allow authorised persons to enter the section from time to time to inspect the section and to take any action reasonably necessary to eradicate such pests and to repair damaged woodwork within the section.<sup>222</sup>

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<sup>215</sup> CG Van der Merwe “The Adaptation of the Institution of Apartment Ownership to Civilian Property Law Structures in the Mixed Jurisdictions of South Africa, Sri Lanka and Louisiana” (2008) 19 *Stell LR* 298 307.

<sup>216</sup> S 44(1)(c) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(c)).

<sup>217</sup> S 44(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(b)).

<sup>218</sup> Annexure 8 r 68(iii) of the Sectional Titles Act 95 of 1986.

<sup>219</sup> Annexure 9 r 9.

<sup>220</sup> Ss 28(1)(a)(i) and (b)(i).

<sup>221</sup> Ss 44(1)(a) and 28(2)(b); (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(a)).

<sup>222</sup> Annexure 9 r 11 of the Sectional Titles Act 95 of 1986.

We have also seen that the aim of several of the social obligations mentioned above is to maintain the social harmony in the intensified community of sectional owners. This applies not only to the obligations with regard to a section, but also with regard to exclusive use areas and the common property. Thus the obligation imposed on sectional owners in terms of the common law principles of nuisance, which has stricter application in the sphere of sectional ownership and is reified by the obligation against nuisance<sup>223</sup> in the Act, plays an important role. Moreover, the obligations imposed on sectional owners in terms of the management rules and especially the conduct rules, as well as special rules adopted for particular schemes, performs an important function in regulating the affairs of the intensified community of owners.

Lastly, the legislature intended to establish a more or less permanent community of sectional owners which is fortified by all the obligations which work towards preserving the physical integrity of the building as well as the obligations aimed at maintaining a harmonious community. This reinforces the main purpose of sectional titles schemes, namely to provide affordable housing to as large a segment of the population as possible to promote social, economic and ultimately political stability. One of the main objectives for the introduction of apartment ownership in post-war Europe, which suffered from a severe housing shortage, was to satisfy the psychological and social need most persons have to own their own home. By placing sectional ownership and house ownership on the same level, the dream of home ownership is placed within reach of an ever growing number of citizens.<sup>224</sup>

The various social obligations imposed on sectional owners with regard to their sections, exclusive use areas and the common property are thus essential to preserve the tranquility and harmony of a sectional title scheme in view of the peculiar physical features of the building and the unique community of owners gathered almost permanently within the confines of the scheme. Consequently, the surrender of freedoms inherent in the social obligations imposed on sectional owners is the price to be paid for a contented and harmonious sectional title community.

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<sup>223</sup> S 44(1)(d); (Sectional Titles Schemes Management Act 8 of 2011 s 13(1)(d)).

<sup>224</sup> CG Van der Merwe "Is Sectional Ownership True Ownership?" (1992) 3 *Stell LR* 131 136; Van der Merwe (2008) *Stell LR* 308-309; and Van der Merwe *Sectional Titles* 8-22.

## Chapter 7: Enforcement of Social Obligations

### 7 1 Introduction

As the saying goes ‘rules are there to be broken.’ However, as was seen in the previous chapter, non-compliance with social obligations is capable of destroying the physical features and the external harmonious appearance of the building or buildings, as well as the social harmony in a sectional title community.<sup>1</sup> Violations of social obligations should, therefore, be addressed swiftly and uniformly to prevent defenses against the body corporate based on waiver and selective enforcement of obligations. Furthermore, an offending sectional owner should, as soon as possible, be warned appropriately and if required warned repeatedly.<sup>2</sup>

The efficient enforcement of social obligations would preserve stability, foster harmony and protect the rights of those sectional owners who paid a premium to enter a particular sectional title scheme. Ultimately it would benefit the sectional title community as a whole.<sup>3</sup> Accordingly, effective sanctions to force owners to comply with their social obligations are a *sine qua non* for a viable and harmonious sectional title scheme.<sup>4</sup>

Sectional title living, however, can trigger aggression and rage in South Africa today. We have seen, at 1 2, that the media reports on matters such as vehicles that have been scratched or even set alight; a young man killed as a result of a quarrel with a neighbour; pets that have been poisoned; and gunshots fired. In addition, assaults are on the increase and elderly people especially are maltreated and emotionally and physically abused. More subtle forms of harassment are also escalating. There are accounts of neighbours stomping noisily on staircases and moving furniture

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<sup>1</sup> CG Van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 *Sectional Titles* (Service Issue 16 May 2013) 9-7.

<sup>2</sup> MR Fierro “Condominium Association Remedies against a Recalcitrant Unit Owner” (1999) 73 *St. John’s L. Rev.* 247 271-272; See also Van der Merwe *Sectional Titles* 9-32(1).

<sup>3</sup> Anonymous Note “Judicial Review of Condominium Rulemaking” (1980-1981) 94 *Harv. L. Rev.* 647 652-653; Van der Merwe *Sectional Titles* 9-32 – 9-32(1); CG Van der Merwe & L Muñiz-Argüelles “Enforcement of Conduct Rules in a Condominium or Apartment Ownership Scheme” (2006) *Liber Amicorum Festschrift Tugrul Ansay* 247 249.

<sup>4</sup> Van der Merwe *Sectional Titles* 9-7.

around at all hours of the day and night. Apparently, some sectional owners invite a large number of their unruly friends to private parties which continue late into the night.<sup>5</sup> Such offenders should be brought to book swiftly. But the question is whether the Sectional Titles Act 95 of 1986 (the Act) and the model management and conduct rules have sufficient mechanisms to deal with these outrageous situations.<sup>6</sup>

In what follows the remedies provided for in the Annexure 8 and 9 model rules will be examined first. We shall see that these rules provide for specific solutions to deal with particular kinds of non-compliance.

Thereafter, the remedies available in South Africa that fall outside the confines of the Act will be explored. In this regard it will be examined in how far sectional owners or the trustees acting on behalf of the body corporate can make use of court interdicts to prevent disturbances that breach social obligations. The focus will then shift to the crucial question of whether it is possible to obtain an eviction order against a sectional owner who persistently contravenes the social obligations of a particular scheme. This section will then conclude with a brief examination of the rarely used order to keep the peace, served on an offending owner by a Magistrate in terms of the Criminal Procedure Act 56 of 1955.

The next section will examine the use of alternative dispute resolution mechanisms available in South Africa to resolve disputes resulting from non-compliance with social obligations. These measures include negotiation; conciliation; arbitration; and mediation. Thereafter we shall briefly review the exciting implications of the sectional title ombud dispute resolution service, which is governed by the Community Schemes Ombud Service Act 9 of 2011 (the CSOSA). The advantages and disadvantages of each of these measures will be thoroughly investigated to determine their suitability to resolve non-compliance related issues.

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<sup>5</sup> M Constat "Sectional Title Rage" (March 2008) 3-3 *Paddocks Press Newsletter* 1 4; See also Van der Merwe *Sectional Titles* 9-32(1) – 9-33.

<sup>6</sup> Van der Merwe *Sectional Titles* 9-33.



From the above discussions it will become evident that the sanctions contained in the model rules and remedies outside the confines of the Act provide the body corporate with even less effective sanctions than those discussed in relation to the enforcement of financial obligations.<sup>7</sup> The second part of the chapter will therefore examine enforcement measures employed in foreign jurisdictions, with the aim of identifying more effective sanctions that may be introduced in South Africa to render compliance with social obligations. The less severe sanctions encountered in legislation and in model or amended by-laws will be dealt with first, while the concluding part of the chapter will focus on two drastic remedies found in the German, Swiss, Austrian and Spanish apartment ownership statutes, namely the permanent or temporary exclusion of recalcitrant owners from the sectional title community.

## **7 2 Measures of enforcement in terms of the model management and conduct rules**

Several sanctions are encountered in the model rules to deal with badly behaving owners:

Firstly, an owner who is persistently in breach of any of the Annexure 9 conduct rules, notwithstanding written warning by the trustees or the managing agent, is not entitled to vote for ordinary resolutions at a general meeting.<sup>8</sup> Note that this rule only refers to the breach of conduct rules and not to the breach of social obligations imposed by virtue of management rule 68 of Annexure 8.<sup>9</sup> The deterrent effect of this rule is, however, undermined as the mortgagee of the offending unit owner is entitled to vote as the sectional owner's proxy at any general meeting. As argued at 4 2 4 above, the deterrent effect of the suspension of the voting power of the offender is further limited by the circumstance that chronic offenders of conduct rules

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<sup>7</sup> 9-39.

<sup>8</sup> Annexure 8 r 64(b) of the Sectional Titles Act 95 of 1986.

<sup>9</sup> The rule refers to conduct rules referred to in s 35(2)(b) of the Sectional Titles Act 95 of 1986, (Sectional Titles Schemes Management Act 8 of 2011 s 10(2)(b)).

are also not necessarily eager to attend general meetings and would therefore not be concerned if their votes were suspended.<sup>10</sup>

Secondly, Annexure 8 model management rule 7 was recently amended by the addition of a second proviso stipulating that no person who is in breach of management rule 64(a) and (b)<sup>11</sup> may be nominated or elected as trustee.<sup>12</sup> Management rule 64(b) deals with owners who, notwithstanding written warning by the trustees or managing agent, persist in breaching conduct rules. A persistent contravener of conduct rules would thus forgo the possibility of being nominated or elected as trustee. It is uncertain whether this exclusion would encourage social obedience.

Thirdly, an owner who fails to repair or maintain his section or exclusive use area in a good condition can be given written notice to repair or maintain it by the trustees or the managing agent on their behalf. If the sectional owner thereafter persists in such failure for a period of thirty days the body corporate is entitled to undertake the necessary maintenance or repairs and to recover the reasonable cost of such intervention from the owner.<sup>13</sup>

Fourthly, as in the case of the enforcement of financial obligations, the owner is liable for and must pay all legal costs, including costs as between attorney and client, incurred by the body corporate in enforcing compliance with the model rules or the Act.<sup>14</sup> The threat to pay all legal costs, including costs between attorney and client, might in practice force sectional owners to comply with their social obligations.

Finally, in terms of the Annexure 9 model conduct rules, the trustees may cause any vehicle parked or abandoned on the common property without their written consent, to be removed, or towed away at the risk and expense of the owner.<sup>15</sup> To implement this sanction, the trustees may consider employing the services of a reputable towing

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<sup>10</sup> Van der Merwe *Sectional Titles* 9-33.

<sup>11</sup> Not rule 64(1) and (2) as erroneously referred to in the Amendment Regulations.

<sup>12</sup> GN R 196 in GG 36241 of 14-03-2013.

<sup>13</sup> Annexure 8 r 70 of the Sectional Titles Act 95 of 1986.

<sup>14</sup> Annexure 8 r 31(5).

<sup>15</sup> Annexure 9 r 3(2).

company that has a secure storage facility. This course of action might, however, cause problems due to the fact that the trustees would most likely have to pay the towing company upfront and then attempt to recover this expense from the owner concerned. Furthermore, there is the possibility that the vehicle may not be claimed. It would be good practice for trustees to inform the offender of their intention to remove the vehicle<sup>16</sup> and if he does not respond, send him a letter demanding that the vehicle be removed. If this is not successful, the trustees can arrange for the vehicle to be towed away.<sup>17</sup> From the context of this rule, it is clear that it also applies to the vehicles of other residents in the scheme, as well as to the vehicles of guests since a sectional owner is obliged to ensure his guests' compliance with the rules.<sup>18</sup>

### **7 3 South African measures of enforcement outside the confines of the Act**

#### **7 3 1 General**

The measures discussed above deal with special offences for which appropriate sanctions are provided. If an offender's misconduct is not covered by any of the special model rules, the aggrieved sectional owner or body corporate would have to resort to mechanisms outside the confines of the Act. The most important remedies in this sphere are the mandatory and prohibitory interdicts which can be claimed in terms of the common law tort of nuisance.<sup>19</sup> These particular remedies have been extensively examined under a sectional owner's social obligation not to cause a nuisance, at 6 4 above. Consequently, the focus in this section will be on interdicts that can be requested outside the tort of nuisance. Thereafter, we shall tackle the important question as to whether an owner or the trustees on behalf of the body corporate can obtain a court order to evict a sectional owner who makes life unbearable for his fellow owners. In conclusion, reference will be made to a remedy available to the body corporate in terms of the provisions of the Criminal Procedure Act.

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<sup>16</sup> J Paddock "Q & A with Jennifer Paddock" (December 2009) 4-12 *Paddocks Press Newsletter* 6 6.

<sup>17</sup> 6.

<sup>18</sup> Annexure 8 r 69 of the Sectional Titles Act 95 of 1986.

<sup>19</sup> Van der Merwe *Sectional Titles* 9-34; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) 489.

It must be noted that in all these instances court proceedings may be initiated by a sectional owner, the trustees or managing agent on behalf of the body corporate. If the body corporate fails to institute legal proceedings against a sectional owner who breaks the rules, an owner may approach the court for the appointment of a *curator ad litem* to institute legal proceedings on behalf of the body corporate.<sup>20</sup>

### 7 3 2 Interdicts not strictly confined to the tort of nuisance

Where urgent relief is required, social obligations can be enforced by means of an application to court for an interdict.<sup>21</sup> An interdict is a court order which can be used by a plaintiff to prevent harmful conduct or the continuation of harmful conduct. Interdicts are either of a mandatory or prohibitory nature. A mandatory interdict requires a positive action on the part of the wrongdoer, whereas a prohibitory interdict requires the wrongdoer to desist from wrongful conduct or from continuing wrongful conduct.<sup>22</sup> Interdicts can furthermore be classified as either temporary or permanent. A temporary interdict prohibits the threatened conduct pending the outcome of another hearing.<sup>23</sup> In an application for a temporary interdict, the applicant only has to establish a *prima facie* right and the court may grant the interdict on a balance of convenience.<sup>24</sup> In order to obtain a final interdict the applicant will have to establish a clear right, an actual or threatened infringement of such right and the absence of another suitable remedy.<sup>25</sup>

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<sup>20</sup> Ss 41-43 of the Sectional Titles Act 95 of 1986. S 9 of the Sectional Titles Schemes Management Act 8 of 2011 streamlined the provisions of ss 41-43 of the Sectional Titles Act 95 of 1986 dealing with proceedings on behalf of the body corporate. The powers of curator ad litem and the security for costs by applicants for appointment of a curator ad litem are contracted into one section. This makes the proceedings more understandable and easier to read.

<sup>21</sup> Annexure 8 r 71(1) of the Sectional Titles Act 95 of 1986.

<sup>22</sup> M Loubser, R Midgley, A Mukheibir, L Niesing & D Perumal *The Law of Delict in South Africa* 2ed (2012) 432-433.

<sup>23</sup> For example, if a newspaper wishes to print a story exposing a well-known rugby player, the rugby player may go to court to obtain a temporary interdict. If the application is successful, the publication will be interdicted until the date of the hearing, on which day a court will either set aside the interdict, and the newspaper can print the story, or make a final order, in which case the interdict stands and the newspaper will not be allowed to print or continue with the story. See Loubser *et al The Law of Delict* 433.

<sup>24</sup> Badenhorst *et al The Law of Property* 309.

<sup>25</sup> Badenhorst *et al The Law of Property* 309-310; see also Loubser *et al The Law of Delict* 433.

These interdicts could be used in neighbour disputes or persistent infringements of rules which cause or threaten damage.<sup>26</sup> The aggrieved sectional owner or the body corporate on behalf of one or more of the aggrieved sectional owners can apply to court for an interdict.<sup>27</sup> Prohibitory and mandatory interdicts may be granted by a Magistrate's Court or the High Court. If a person willfully disobeys, or refuses or fails to comply with an order of court, they can by way of criminal prosecution be sentenced to payment of a fine or imprisonment for a period not exceeding 6 months.<sup>28</sup>

The jurisdiction of the Magistrate's Court is limited in terms of section 29 of the Magistrates' Court Act 32 of 1944<sup>29</sup> which places monetary limits on the jurisdiction of Magistrates' Courts. The difficulty of placing a monetary value on a claim for an interdict inhibits interdict proceedings in a Magistrate's Court.<sup>30</sup> Moreover, in *Badenhorst v Theophanous*<sup>31</sup> it was found that Magistrates' Courts do not have jurisdiction to grant a mandatory interdict which amounts to an order for specific performance of a sectional owner's contractual obligations under a sectional title scheme.

From the above, it becomes evident that in most cases the High Court will be the realistic forum for dealing with an interdict. However, such proceedings will not be ideal due to high legal costs and the protracted nature of the judicial process. Furthermore, the severity of an interdict would work against harmonious relations in a sectional title community. In the final analysis a series of interdicts obtained against neighbouring sectional owners<sup>32</sup> are an inadequate and inappropriate remedy in the sectional title context.

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<sup>26</sup> GJ Pienaar *Sectional Titles and other Fragmented Property Schemes* (2010) 210.

<sup>27</sup> S 36(4) of the Sectional Titles Act 95 of 1986 read with s 36(6)(d) provides the body corporate with the capacity to act on behalf of an aggrieved owner; (Sectional Titles Schemes Management Act 8 of 2011 ss 2(5) and 2(7)(d)).

<sup>28</sup> In terms of s 106 of the Magistrates' Courts Act 32 of 1944.

<sup>29</sup> S 30(1) of the Magistrates' Courts Act 32 of 1944.

<sup>30</sup> Van der Merwe *Sectional Titles* 9-35.

<sup>31</sup> 1988 1 SA 793 (C).

<sup>32</sup> Van der Merwe *Sectional Titles* 9-36.

*Body Corporate-Montpark Drakens and Others v Smuts*<sup>33</sup> illustrates a court case where the managing agent applied for various interdicts against a sectional owner who waged a vendetta against the management organs of a sectional title scheme. This vendetta started as a rebuttal to the resignation of the owner as chairman of the sectional title scheme after being in office for one week.<sup>34</sup> Marcus AJ divided the various interdicts sought into 'screening', 'defamation' and 'improper interference' interdicts.<sup>35</sup>

The 'screening interdicts' sought to restrain the sectional owner from acting in a variety of ways without the prior leave of the court. These interdicts requested restraint in terms of the following: the lodgement of complaints against service providers, the trustees or the body corporate; threats to institute legal proceedings against the trustees or service providers; and the publication of information in local newspapers on how the body corporate conducts its affairs. The applicants conceded that the offending owner might, in some cases, have good cause for such actions. However, it was contended that to dispense with the requirement of prior leave would allow the offender to persist in vexatious or frivolous complaints with the *mala fide* purpose of disrupting the affairs of the body corporate. On the other hand, an absolute prohibition of these actions would be too extreme as it would prevent legitimate complaints or grievances.<sup>36</sup> The court found that this kind of relief was unprecedented except in circumstances where a person was declared a vexatious litigant under the Vexatious Proceedings Act 3 of 1956.<sup>37</sup> After reviewing the constitutionality of this act,<sup>38</sup> the court concluded that the present matter was not concerned with allegedly vexatious proceedings in courts of law and that the relief sought was not competent.<sup>39</sup> With regard to the 35 threats of legal action by the offender, the court indicated that an alternative remedy was available, namely an edict of perpetual silence designed to put the offender on terms to proceed with the action or else be subjected to an edict of perpetual silence.<sup>40</sup>

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<sup>33</sup> 2007 JOL 19484 (W).

<sup>34</sup> Para 4.

<sup>35</sup> Para 8.

<sup>36</sup> Para 9.

<sup>37</sup> Para 10.

<sup>38</sup> Para 11.

<sup>39</sup> Para 13.

<sup>40</sup> Para 14.

The 'defamation interdicts' sought to restrain the offender from threats of negative publicity in the press, the distribution of defamatory circulars, attacks on the auditor and any defamatory correspondence.<sup>41</sup> However, Marcus AJ found that the prayers were couched in such wide terms that they would impermissibly stifle the offender's right to freedom of expression.<sup>42</sup> Furthermore, it was found that alternative remedies were available and that an action for defamation in terms of which compensation could be claimed for insult suffered would probably achieve the desired result and have the salutary effect of curtailing the offender's excesses.<sup>43</sup>

Lastly, the 'improper interference interdicts' sought to interdict the offender from disrupting or unlawfully interfering with the proper and efficient administration of the affairs of the body corporate as well as with the proper and efficient conduct of business at any annual or special general meeting. This included, among other conditions, that he refrain from demanding information that he already possessed, demanding inclusion in the agenda of matters already dealt with and demanding urgent meetings.<sup>44</sup> Having regarded all the evidence the court concluded that the offender's conduct had a deleterious effect on the administration of the scheme. Therefore, the court interdicted the offender from disrupting or unlawfully interfering in any manner with the proper and efficient administration of the affairs of the body corporate and the proper and efficient conduct of business at any annual or special general meeting of the body corporate, as well as at any meeting of the trustees.<sup>45</sup>

### 7 3 3 Eviction instead of a prohibitory interdict?

The crucial question as to whether it is possible to obtain an eviction order based on the tort of nuisance against a sectional owner who persistently contravenes the social obligations imposed on him, came up for decision in *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others*.<sup>46</sup> The body corporate (applicant) sought a final interdict against the respondents and in the event

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<sup>41</sup> Para 15.

<sup>42</sup> Para 18.

<sup>43</sup> Paras 20-21. *Tsichlas and Another v Touch Line Media (Pty) Ltd* 2004 2 SA 112 (W) was cited as support for this state of affairs.

<sup>44</sup> *Body Corporate-Montpark Drakens and Others v Smuts* 2007 JOL 19484 (W) para 22.

<sup>45</sup> Paras 26-27.

<sup>46</sup> 2003 5 SA 1 (C).



of non-compliance an order for temporary eviction until compliance with the interdict. In the alternative the body corporate sought a prohibitory interdict and in the event of non-compliance, leave to apply for an order holding second to fifth respondents in contempt of court and authorising warrants for their arrests.<sup>47</sup> The respondents were occupiers of units holding through owners. The alleged contraventions included drug dealing and prostitution.<sup>48</sup> The occupants of one flat admitted that they were employed as escorts, but denied that they had contravened the conduct rules of the particular scheme.<sup>49</sup> They also submitted that they were not bound by the conduct rules since they had not entered into any contract which submitted them to the conduct rules.<sup>50</sup>

The court found that the respondents were bound by the conduct rules under the Act and that no contractual nexus was necessary. The court, referring to the provisions of the Spanish Law on Horizontal Property,<sup>51</sup> acknowledged the urgent necessity of ensuring compliance with scheme rules. It generally approved the idea that owners or occupiers should be deprived of their right of residence in the scheme when they persistently and intentionally disregarded conduct rules or failed to pay their levies.<sup>52</sup> The court found, however, that neither the Act nor a special rule adopted by the general meeting authorised an eviction order under the circumstances at hand.<sup>53</sup> All that was left for the court was to grant a prohibitory interdict to compel the respondents to abide by the conduct rules, failing which the applicant could apply for an order holding the respondents in contempt of court and warranting their arrest.<sup>54</sup>

Under normal circumstances an eviction order can only be obtained by the owner of the premises against a person who occupies his premises unlawfully. Before a body corporate has the power to evict an unruly owner or occupant, the Act or the Annexure 8 or 9 rules must grant the body corporate such a power. It is, however,

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<sup>47</sup> 3G-H.

<sup>48</sup> 4D.

<sup>49</sup> 4E-F.

<sup>50</sup> 5 F-G.

<sup>51</sup> The court referred to the Spanish Law on Horizontal Property which allows a court under certain narrowly defined circumstances to deprive a troublemaker of his right to reside in a unit for a period of up to three years depending on the seriousness of the contravention; *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others* 2005 3 SA 1 (C) 7C-F.

<sup>52</sup> *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others* 2005 3 SA 1 (C) 7 F-G.

<sup>53</sup> 7G-H.

<sup>54</sup> 7I-8B.

highly improbable that a conduct rule authorising the body corporate to eject an unruly owner from the scheme would pass constitutional muster. In the South African sectional title context such an extreme measure by the body corporate in the case of residential units would be contrary to the constitutional requirements of section 26(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution). This section stipulates that persons may not be evicted from their homes without a court order made after careful consideration of all the relevant circumstances, and that no legislation may permit arbitrary evictions.<sup>55</sup> However, whereas the power to evict an unruly owner might prove unconstitutional, the power to evict an unruly tenant or occupier should not.<sup>56</sup> It is submitted that legislation containing an eviction provision for persistent offenders, as well as a management or conduct rule containing such a provision, would infringe upon the ownership rights of a sectional owner in terms of section 26(3) of the Constitution. Therefore, a body corporate's only options would be to apply for an interdict or adopt a suitable management or conduct rule to recover fines from the offender.<sup>57</sup>

#### **7 3 4 Remedy in terms of the Criminal Procedure Act**

In the case of bodily threats or flagrant instances of nuisance<sup>58</sup> the body corporate or a sectional owner can make use of section 384 of the old Criminal Procedure Act of 1955, which was not repealed by the new Criminal Procedure Act 51 of 1977. In terms of this section a complaint under oath can be made to the Magistrate of the district where the scheme is situated. The basis for such a complaint would include that a sectional owner has assaulted another or is conducting himself violently towards, or is threatening injury to the person or property of another, or has used language or behaved in a manner likely to provoke a breach of the peace. It does not matter whether such threat, language or conduct occurred in a public or private place such as a sectional title scheme.<sup>59</sup> On receipt of the complaint the Magistrate may order the offender to appear before him and, if necessary, may cause him to be

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<sup>55</sup> See also Pienaar *Sectional Titles* 211

<sup>56</sup> Van der Merwe *Sectional Titles* 9-39.

<sup>57</sup> 9-38 – 9-39.

<sup>58</sup> For example, where an owner is drunk and wanders on the common property shouting abuse at any person he encounters; see Van der Merwe *Sectional Titles* 9-34.

<sup>59</sup> Van der Merwe *Sectional Titles* 9-35.

arrested and brought before him. Having investigated the complaint, the Magistrate may, in his discretion, order the offender to keep the peace towards the complainant and refrain from threatening his person or property for a period of six months. To ensure obedience, the Magistrate may obtain a warranty with or without sureties in an amount not exceeding R2 000 from the offender.<sup>60</sup> If the offender refuses or fails to give the guarantee, the Magistrate may commit him to jail for a period not exceeding six months unless such security is found.<sup>61</sup> If the conditions of the guarantee are not observed, the Magistrate may declare the guarantee forfeited and this shall have the effect of a judgment in a civil action in the Magistrate's Court for the district.<sup>62</sup> This remedy is rarely used in practice and has never been used to put a stop to violent assaults of a sectional owner causing public nuisance in a sectional title scheme.

## 7 4 Alternative dispute resolution

### 7 4 1 General

Even though civil courts are open to hear disputes, they are often perceived to be inappropriate for the settlement of disputes in sectional titles schemes because of the high costs<sup>63</sup> and the protracted procedures involved.<sup>64</sup> Moreover, litigation occurs in public, the results are not confidential and the parties have limited control over the process or the outcome.<sup>65</sup> Furthermore, the question of whether a particular conduct rule, such as the keeping of a pet in a section, should be allowed or disallowed may make a mockery of the judicial process. Finally, litigation between sectional owners or between the body corporate and a sectional owner or owners

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<sup>60</sup> S 384(1) of the Criminal Procedure Act 56 of 1955.

<sup>61</sup> S 384(3).

<sup>62</sup> S 384(4).

<sup>63</sup> See WD Ryan & GJ Pienaar "Geskilbeslegting by die toepassing van bestuursreëls van deeltitelskemas" (2007) 3 *TSAR* 437 442 for the high costs of litigation.

<sup>64</sup> CG Van der Merwe "Sectional –Title Courts as an Alternative to Arbitration for the Settlement of Disputes in a Sectional-Title Scheme" (1999) 116 *SALJ* 624 624; see also D Butler "The Arbitration of disputes in Sectional Title Schemes under Management Rule 71" (1998) 9 *Stell LR* 256 257.

<sup>65</sup> G Paddock "Options for Resolving Sectional Titles Disputes" (January 2009) *Paddocks* 1 2.

may negatively affect the community spirit and social cohesion in a sectional title scheme.<sup>66</sup>

Therefore, alternative dispute resolution mechanisms such as negotiation, conciliation, arbitration and mediation may be attractive alternatives for addressing non-compliance with social obligations. It is, however, important to note that intervention by a competent court might be required in some instances. Prescribed management rule 71(1) of Annexure 8 provides for such intervention in the form of interdicts or other forms of urgent relief obtained from a court of competent jurisdiction.

The goals that can be achieved by alternative dispute resolution are numerous. They include saving time and money; rescuing the judicial system from being overloaded; having a more open, flexible and responsive process; achieving more appropriate results that serve the real needs of the participants or society; enhancing community involvement in the dispute resolution process; and broadening access to justice.<sup>67</sup>

Various foreign law jurisdictions therefore resort to alternative dispute resolution to address non-compliance with social obligations. For example, the Puerto Rican Law on Condominiums of 25 June 1958 requires that the general meeting appoint a special conciliation committee, consisting of three members, to solve disputes amongst unit owners, tenants and the association (body corporate) relating to the use of apartments and the common property. Recourse to a court is only allowed once the dispute has been submitted to the conciliation committee. If the committee is unable to solve a dispute the complainant can submit the dispute to the consumer affairs department where an administrative judge will attempt resolution subject to judicial review.<sup>68</sup>

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<sup>66</sup> Pienaar *Sectional Titles* 221, See also J Nel “Afdwing van deeltitelskema’s” (October 2003) 427 *De Rebus* 29 31 where he warns that an interdict against a neighbour will shatter the harmony of the scheme.

<sup>67</sup> H Batchelder “Mandatory ADR in Common Interest Developments: Oxymoronic or Just Moronic” (2000-2001) 23 *T. Jefferson. L. Rev.* 227 228.

<sup>68</sup> Arts 42(a)(1) and (cc) (codified in § 1293f) and 48 (codified in § 1294) of the Puerto Rican Law on Condominiums (*Ley de condominios*) of 25 June 1958 (Puerto Rico Laws Ann. Tit. 31 §§ 1291-1294d (2005)). See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 253.

The New South Wales Strata Titles Act 68 of 1973 also introduced a formal and comprehensive alternative dispute resolution system.<sup>69</sup> Firstly, there is the strata titles commissioner who is empowered to make orders for the settlement of a dispute or the rectification of a complaint with respect to the exercise or performance of, or the failure to exercise or perform, any duty or function in terms of the act by any owner or official of the scheme.<sup>70</sup> The powers of the commissioner include the investigation of the matter and enforcing any order, including an order for the payment of damages.<sup>71</sup> Secondly, there is the strata titles board, which is constituted by a Magistrate and deals with matters referred to it by the commissioner.<sup>72</sup> The strata titles board has additional jurisdiction over a number of specific matters which include the reasonableness of the original allocation of share values; the amendment or repeal of a by-law that does not serve the interests of the sectional owners; and disputes regarding the adoption of exclusive-use by-laws and inadequate or excessive levies.<sup>73</sup>

In terms of South African law disputes arising out of non-compliance with social obligations can be settled by one of the following alternative dispute resolution mechanisms: negotiation, conciliation, arbitration or mediation. Each of these mechanisms will now be examined to determine whether they provide a workable solution for addressing non-compliance with social obligations. This part will be concluded with a brief review of how disputes will be resolved by the newly introduced ombud service once the CSOSA comes into operation.

#### **7 4 2 Negotiation**

The most informal way to resolve a dispute is through direct negotiation between the parties involved. This process can become more formal if each party is represented by attorneys. Negotiation involves sitting down with the parties concerned and trying to come to an agreement that is acceptable to all. The negotiator must objectively analyse the situation in order to overcome subjective positions. In this way the

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<sup>69</sup> See in general Pienaar *Sectional Titles* 226.

<sup>70</sup> S 105 of the New South Wales Strata Titles Act 68 of 1973.

<sup>71</sup> Ss 101 and 105(1A).

<sup>72</sup> S 118.

<sup>73</sup> Ss 119-127.

needs, desires and concerns are emphasized rather than the position parties assume to satisfy their own expectations. Successful negotiation can only be achieved if all the parties involved co-operate in agreeing to a negotiated settlement. Furthermore, the settlement reached will not be binding unless the parties take steps to make it enforceable.<sup>74</sup>

### **7 4 3 Conciliation**

Conciliation is a process whereby a conciliator, a neutral third party not involved in the dispute, assists the parties concerned to settle the dispute themselves. The conciliator assists the parties in defining the dispute and achieving a settlement. The focus is thus on consensus or agreement between the parties. The conciliator does not impose a settlement on the parties but encourages the parties to agree to a settlement that is mutually acceptable.<sup>75</sup>

The CSOSA makes provision for conciliation. This act provides that on acceptance of an application, and receipt of submissions from affected persons and responses from the applicant, a regional ombud must refer the matter to conciliation if he considers that there is a reasonable prospect that the dispute in question can be resolved by a negotiated settlement.<sup>76</sup> If the conciliation fails the ombud must refer the application, together with any submission and responses, to an adjudicator for mediation.<sup>77</sup>

The shortcomings of conciliation are twofold. Firstly, conciliation will only commence once the parties have agreed on a suitable conciliator. This means that either one of the parties can easily delay the process. Secondly, the settlement agreement if attained, lacks any binding effect and is not easily enforceable. Therefore, this process will in all probability not be ideal for the settlement of disputes involving the enforcement of social obligations in the sectional title context.

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<sup>74</sup> Paddock (January 2009) *Paddocks* 1, 3 and 4.

<sup>75</sup> AC Basson, MA Christianson, C Garbers, PAK Le Roux, C Mischke and EML Strydom *Essential Labour Law* 4ed (2005) 336.

<sup>76</sup> S 47 of the Community Schemes Ombud Service Act 9 of 2011.

<sup>77</sup> S 48(1).

#### 7 4 4 Arbitration

Arbitration proceedings in terms of the Act is not always based on agreement between the parties,<sup>78</sup> but is a form of statutory arbitration based on the provisions of regulation 39, Annexure 8 management rule 71 and section 40 of the Arbitration Act 42 of 1965. The arbitration procedure in terms of model management rule 71 is, therefore, compulsory in all matters if demanded by one of the parties, provided that court intervention is not required.<sup>79</sup>

The words 'may demand' in model management rule 71(2) could create the impression that arbitration is voluntary upon demand of one of the parties and that such dispute may also be resolved by litigation.<sup>80</sup> However, in *Body Corporate of Greenacres v Greenacres Unit 17 CC*<sup>81</sup> Cloete JA held that in determining the extent of matters that may be referred to arbitration, the wording of rule 71(1) should be interpreted widely to include almost every dispute that might arise between a body corporate and a sectional owner, or between the sectional owners themselves. This interpretation is implied by the broad understanding of the operative part of the rule containing the word 'any' and the phrases 'arising out of', 'in connection with' and 'related to' the provisions of the Act and the management and conduct rules of the scheme.<sup>82</sup> The Supreme Court of Appeal thus opened up the possibility that most disputes may be adjudicated by arbitration unless explicitly reserved in the Act or management and conduct rules for litigation.<sup>83</sup> Van der Merwe, therefore, suggests that model management rule 71(2) should be amended by the developer or body corporate to read that the dispute 'shall' be determined in terms of management rule 71(1) if the complaint or dispute has not been resolved between the parties, and further steps in solving the dispute are required by one of them.<sup>84</sup>

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<sup>78</sup> Van der Merwe *Sectional Titles* 9-46.

<sup>79</sup> *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 3 SA 167 (SCA) paras 9-10.

<sup>80</sup> Pienaar *Sectional Titles* 222.

<sup>81</sup> 2008 3 SA 167 (SCA).

<sup>82</sup> Para 5.

<sup>83</sup> Pienaar *Sectional Titles* 222-223.

<sup>84</sup> Van der Merwe *Sectional Titles* 9-54.



The procedure required for arbitration can be summarised as follows.<sup>85</sup> As a first step, the aggrieved party must notify the affected party or parties in writing of the nature of the complaint or dispute, and serve copies of such notification on the trustees and managing agent. In the event that an owner declares a dispute with the body corporate, notification will be sufficient if served on the trustees and managing agent, thereby dispensing the need to serve notice on each of the other owners.<sup>86</sup> In the case of a dispute between the body corporate and more than one owner, or between a number of owners arising out of substantially the same cause of action, or where substantially the same order is sought against all the parties against whom the dispute is declared, such parties are automatically joined in the arbitration proceedings by receipt of the original notification of the dispute.<sup>87</sup>

If the dispute or complaint is not resolved within fourteen days, either of the parties may demand that the matter is referred to arbitration.<sup>88</sup> The second step is, therefore, to decide on an arbiter. In this regard the nature and complexity of the dispute or complaint, and the costs that may be involved in the adjudication thereof, must be taken into consideration. The arbiter sought to be appointed must be an independent and suitably experienced and qualified person.<sup>89</sup> If the parties cannot agree to the appointment of an arbitrator within three days after arbitration has been demanded, in terms of management rule 71(3) the chief registrar of deeds or his nominee must upon written application and subject to the payment of a prescribed fee, appoint an arbitrator in writing. This must be done within seven days to facilitate the arbitration being held and concluded without delay.<sup>90</sup>

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<sup>85</sup> See in general Pienaar *Sectional Titles* 223-225.

<sup>86</sup> Annexure 8 r 71(2) of the Sectional Titles Act 95 of 1986.

<sup>87</sup> Annexure 8 r 71(8) of the Sectional Titles Act 95 of 1986. The Arbitration Act 42 of 1965 does not provide for the joinder of parties without their consent thereto, but the procedure to join affected parties to the arbitration is explicitly provided for by this sub-rule.

<sup>88</sup> Annexure 8 r 71(2) of the Sectional Titles Act 95 of 1986.

<sup>89</sup> Annexure 8 r 71(3).

<sup>90</sup> Annexure 8 r 71(4) of the Sectional Titles Act 95 of 1986. This sub-rule does not mention what would happen if the appointment authority fails to make an appointment within the seven day period. In terms of s 12 of the Arbitration Act 42 of 1965, the court has the power to appoint an arbitrator, but it is not clear whether this power extends to situations where a third party vested with the power of appointment fails to act. If the court needs to be approached valuable time would be lost and even if the court takes a robust view and makes the appointment, this should be a last resort. Even if one argues that the power to make an appointment lapses on the expiry of the seven day period, and that any appointment made thereafter would be invalid, this could not have been the intention of the legislator in view of the stated object of management rule 71(4), namely, to enable the arbitration to be held and concluded without delay. See Van der Merwe *Sectional Titles* 9-55.

The third step is to conduct the arbitration process without unnecessary formalities in accordance with the procedure determined by the arbitrator. The provisions of the Arbitration Act are only applicable to the process insofar as they can be applied.<sup>91</sup> Security for the costs of arbitration may be required by the arbitrator and where possible, the arbitration must be concluded within twenty-one days after the matter has been referred to arbitration, or security for costs has been furnished.<sup>92</sup>

The final step is for the the arbitrator to make an award within 7 days from completion of the arbitration process in accordance with the principles laid down in terms of the rules.<sup>93</sup> This includes an appropriate cost order bearing in mind the outcome of the arbitration.<sup>94</sup> The decision of the arbitrator is final and binding, and any party to the arbitration or any affected party may apply for the decision to be made an order of the High Court.<sup>95</sup>

There are several advantages to statutory arbitration for the settlement of disputes in sectional titles affairs. Compared with an ordinary court procedure, arbitration is a relatively swift and cost-effective way to settle disputes.<sup>96</sup> It is also less formal than court proceedings and less destructive to the community spirit in sectional title schemes.<sup>97</sup> Furthermore, the application of the Arbitration Act insofar as it is not contradictory to the provisions of the Act, ensures that it is procedurally fair.<sup>98</sup> Moreover, it is possible to appoint an appropriate professional with sufficient knowledge regarding the specific dispute. Finally, entrusting the settlement of disputes to the trustees, the managing agent or even the general meeting may fail to

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<sup>91</sup> Reg 39 of the Sectional Titles Act 95 of 1986. See also Van der Merwe (1999) *SALJ* 624-625.

<sup>92</sup> Annexure 8 r 71 (5) of the Sectional Titles Act 95 of 1986.

<sup>93</sup> Annexure 8 r 71(6) of the Sectional Titles Act 95 of 1986. The arbitrator's jurisdiction would lapse if he fails to make an award within the seven day period, unless the parties extend the time for making the award by agreement or the time is extended by the court. However, where the arbitration is complex, the parties should consider granting an extension of time if the arbitrator so requests. See Van der Merwe *Sectional Titles* 9-57.

<sup>94</sup> Annexure 8 r 71(6) of the Sectional Titles Act 95 of 1986.

<sup>95</sup> Annexure 8 r 71(7).

<sup>96</sup> Van der Merwe *Sectional Titles* 9-45 and Pienaar *Sectional Titles* 225. However, Maree argues that the period of times to appoint an arbitrator and for the conclusion of the arbitration are invariably too short and that further delays are caused by the practice to hire an attorney to represent parties. See T Maree "Arbitration: Is it Worth the Effort?" (October 2007) 27 *MCS Courier Newsletter* 3 3-4.

<sup>97</sup> Ryan & Pienaar (2007) *TSAR* 444.

<sup>98</sup> Reg 39 of the Sectional Titles Act 95 of 1986. See also Van der Merwe (1999) *SALJ* 624-625

ensure impartiality and consistency in the application of rules. In the case of arbitration, such impartiality is at least ensured.<sup>99</sup>

Disadvantages<sup>100</sup> of arbitration are, however, that the arbitration hearing is not held in public and the results of the proceedings are confidential. Furthermore, unlike a judgment of a court, the reasoning behind an arbitrator's award, due to its confidential nature, does not constitute a binding precedent even if the award was made a judgment of the court. Finally, arbitration is only available in disputes between the body corporate and sectional owners or between the sectional owners themselves.

#### **7 4 5 Mediation**

In mediation all the parties involved in a dispute meet and try to settle the matter with the help of an impartial mediator.<sup>101</sup> The mediation of disputes is often handled by an ombudsman, established by legislation or agreement, which provides ombud services for a specific sector and to whom a dispute is referred for mediation.<sup>102</sup> In other instances parties may refer a dispute to a mediator chosen by them according to a mutually agreed procedure.<sup>103</sup> The public and the financial sector generally have a positive attitude towards these ombud services. The increased number of disputes referred for mediation rather than making use of litigation in court or arbitration bears testimony to this.<sup>104</sup> Above, at 7 4 3, we have seen that if conciliation fails in terms of section 48(1) of the CSOSA the ombud must refer the application together with any submission and responses to an adjudicator for mediation. This implies that mediation should be seen as a measure of last resort to settle disputes regarding social obligations in terms of the CSOSA.

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<sup>99</sup> Van der Merwe *Sectional Titles* 9-45 and Pienaar *Sectional Titles* 225.

<sup>100</sup> See in general Butler (1998) *Stell LR* 257-258; Van der Merwe *Sectional Titles* 9-45 – 9-46 and Pienaar *Sectional Titles* 225.

<sup>101</sup> Paddock (January 2009) *Paddocks* 5.

<sup>102</sup> Pienaar *Sectional Titles* 226. For examples of these ombuds services in the financial sector see Ryan & Pienaar (2007) *TSAR* 445-447.

<sup>103</sup> Pienaar *Sectional Titles* 226 n 545.

<sup>104</sup> Ryan & Pienaar (2007) *TSAR* 447 and Pienaar *Sectional Titles* 226.

Resolving disputes by mediation will be more cost effective than either litigation or arbitration and even though it normally takes some time to mediate the dispute properly, it will usually be less time-consuming than litigation.<sup>105</sup> Furthermore, mediation occurs in private and is of a simple and informal nature. Finally, the parties have some control over the process and outcome which entails that they can make settlements that might not have been possible in court.<sup>106</sup>

#### **7 4 6 Sectional title ombud dispute resolution service**

The new and exciting CSOSA introduced an ombud service to resolve disputes in sectional schemes. Before examining the ombud's functions; structure; the particular prayers for relief with regard to the enforcement of social obligations; and the procedure provided to adjudicate disputes, a general background of the CSOSA needs to be sketched.

After 2004, the Department of Land Affairs (now the Department of Rural Development and Land Reform) examined the possibility of alternative dispute resolution measures in the case of sectional title disputes. They appointed the firm Paddocks as Lead Consultants on a tender basis to investigate the possibility of the establishment of a sectional title ombudsman and the separation of consumer issues from registration issues.<sup>107</sup> The rationale for such an investigation was that access to courts to settle sectional title disputes is too expensive and time-consuming, and that the arbitration mechanism provided for in prescribed management rule 71, of Annexure 8, is ineffective in practice.<sup>108</sup> The mandate of the consultants was threefold: to investigate, consult on and recommend an appropriate dispute resolution system; to draft and assist the Department in the passing of appropriate dispute resolution legislation and regulations; and to draft legislation to remove

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<sup>105</sup> T Maree "How to Achieve the Impossible" (October 2001) 405 *De Rebus* 13 13-14; J Maluleke "Department considers Sectional Titles Ombudsman" (March 2005) 440 *De Rebus* 43 43; and Ryan & Pienaar (2007) *TSAR* 447.

<sup>106</sup> Paddock (January 2009) *Paddocks* 2.

<sup>107</sup> Pienaar *Sectional Titles* 227.

<sup>108</sup> Maree (October 2001) *De Rebus* 13-14; Maluleke (March 2005) *De Rebus* 43; and Ryan & Pienaar (2007) *TSAR* 447.

management issues from the Act.<sup>109</sup> The investigation has, however, been transferred from the Department of Rural Development and Land Reform to the Department of Housing (now the Department of Human Settlements) which caused considerable delays in the implementation of the process.<sup>110</sup> This eventually led to the promulgation in 2011 of both the Sectional Titles Scheme Management Act 8 of 2011 (the STSMA), which separated registration and management matters by repealing the management provision of the Act and re-enacting these provisions in the STSMA, and the CSOSA which introduced a new dispute resolution mechanism to replace arbitration in terms of the Act. The latter act makes provision for the establishment of an ombud service as an independent juristic person that will be known as the Community Schemes Ombud Service.<sup>111</sup>

The functions of the Community Schemes Ombud Service include the facilitation of dispute resolution in a wide range of sectional title and other community scheme projects;<sup>112</sup> the training of adjudicators and other employees;<sup>113</sup> the monitoring and quality control of all scheme governance documentation;<sup>114</sup> the custody of the scheme governance documentation in order to preserve and provide public access to such documents;<sup>115</sup> the provision of educational material, information and documentation pertaining to community schemes;<sup>116</sup> and the monitoring of community scheme governance.<sup>117</sup>

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<sup>109</sup> G Paddock, CG Van der Merwe & J Maluleke *Sectional Title Ombudsman investigation: Consultation paper to inform the design of a sectional titles dispute resolution system* (2005) 6.7 unpublished report to Department of Housing.

<sup>110</sup> Pienaar *Sectional Titles* 227.

<sup>111</sup> S 3(1) of the Community Schemes Ombud Service Act 9 of 2011.

<sup>112</sup> S 4(1)(a) of the Community Schemes Ombud Service Act 9 of 2011. Community scheme is defined in s 1 as any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing co-operative as contemplated in the South African Co-operative Act 14 of 2005 and "scheme" has the same meaning.

<sup>113</sup> S 4(1)(b) of the Community Schemes Ombud Service Act 9 of 2011.

<sup>114</sup> S 4(1)(c) of the Community Schemes Ombud Service Act 9 of 2011. Scheme governance documentation is defined in s 1 as any rules, regulations, articles, constitution, terms, conditions or other provision that controls the administration or occupation of private and common areas in a community scheme.

<sup>115</sup> S 4(1)(d) of the Community Schemes Ombud Service Act 9 of 2011.

<sup>116</sup> S 4(2)(b).

<sup>117</sup> S 4(2)(c).

The structure of the Community Schemes Ombud Service and its governing board is stated in chapter 2 of the CSOSA.<sup>118</sup> The ombud service acts as a national public entity with its executive authority vested in the Minister of Human Settlements.<sup>119</sup> Regional offices for the ombud service are to be established, and all persons in the employ of the ombud services will become members of the Government Employees' Pension Fund.<sup>120</sup> The service is to be financed by money appropriated by parliament; levies collected from community schemes; fees for services rendered; interest on investments; loans and donations; and subsidies and grants from organs of state.<sup>121</sup>

The procedure to adjudicate disputes is provided for in chapters 3 to 5. It is stated that any person,<sup>122</sup> including an association,<sup>123</sup> may apply to the ombud service if such a person or association is a party to or materially affected by a dispute.<sup>124</sup> A dispute means any dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly.<sup>125</sup> The CSOSA does, however, not explicitly state whether such an application suspends any court or arbitration procedure in terms of model management rule 71, of Annexure 8, thus forcing the other party to partake in the ombud procedure. Pienaar, therefore, submits that if management rule 71 is not amended it would not be compulsory for a party to take part in the ombud procedure.<sup>126</sup>

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<sup>118</sup> Ss 2-37.

<sup>119</sup> S 3(2).

<sup>120</sup> S 21(5).

<sup>121</sup> Ss 22(1)(a)-(g).

<sup>122</sup> In terms of s 1 of the Community Schemes Ombud Service Act 9 of 2011 person is defined as including an association, partnership, trust, corporation, private or public entity and such person's representatives, successors and assignees.

<sup>123</sup> Association is defined in s 1 of the Community Schemes Ombud Service Act 9 of 2011 as any structure that is responsible for the administration of a community scheme, which includes bodies corporate of sectional titles schemes.

<sup>124</sup> S 38 of the Community Schemes Ombud Service Act 9 of 2011.

<sup>125</sup> S 1 sv "dispute".

<sup>126</sup> Pienaar *Sectional Titles* 230.

The applicant is required to set out the relief sought and the name and addresses of affected parties.<sup>127</sup> The particular prayers for relief with regard to the enforcement of social obligations are the following:

In respect of behavioural issues the following orders can be applied for: an order declaring that certain behaviour or the default of an owner or occupier constitutes a nuisance; an order declaring that an animal kept in a private area or in shared areas is causing a nuisance or hazard and is interfering with the use and enjoyment of a private area or shared areas necessitating measures to remedy the state of affairs or removal of the animal; an order declaring that an animal is kept in contravention of the scheme governance documentation; and an order requiring the removal of articles placed or attached illegally to parts of the common property.<sup>128</sup>

In respect of works pertaining to private or communal areas, the following orders are pertinent: an order requiring an owner or occupier to carry out specified repairs, or have specified repairs made, or to pay the applicant for repairs carried out or to be carried out in respect of the property by the applicant;<sup>129</sup> and an order obliging an owner or occupier to accept obligations in respect of a defined part of the common property.<sup>130</sup>

We have seen above that access to courts to settle sectional title disputes is expensive and time-consuming, and that the arbitration mechanism provided for in prescribed management rule 71, of Annexure 8, is ineffective in practice. In the future it would thus be wise for applicants to rather approach the Community Scheme Ombud Service's regional offices to settle disputes and enforce compliance with social obligations pertaining to behavioral and maintenance issues. This approach will be less expensive and will also deliver swifter results.

After examining the application and all other information required by the ombud office, including submissions by other affected persons, the ombud may reject the

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<sup>127</sup> S 38(3) of the Community Schemes Ombud Service Act 9 of 2011.

<sup>128</sup> Ss 39(2)(a)-(d).

<sup>129</sup> S 39(6)(b).

<sup>130</sup> S 39(6)(g).



application;<sup>131</sup> try to facilitate a settlement of the dispute (conciliation as discussed at 7 4 3 above);<sup>132</sup> or refer the application to an adjudicator for mediation (as discussed at 7 4 5 above).<sup>133</sup> If the application qualifies for waiver or discount of services fees, the ombud must refer the matter to an adjudicator appointed by the ombud. Where the application does not qualify for a waiver of service fees, the parties may agree on an adjudicator from the ombud's list and if such agreement is not forthcoming, the ombud must choose an adjudicator to adjudicate the matter.<sup>134</sup>

The adjudication procedure is relatively simple. In the investigation of the application, the adjudicator must observe the principles of due process of law and act quickly and with little formality without being obliged to apply the exclusionary rules of evidence.<sup>135</sup> The adjudicator also has specific investigative powers<sup>136</sup> and legal representation is allowed.<sup>137</sup> The order made by the adjudicator<sup>138</sup> is enforceable in a Magistrate's Court or High Court depending on the nature and extent of the relief granted.<sup>139</sup> It may unfortunately take some time to obtain an order of the Magistrate or High Court due to the considerably high workload of the clerks of the Magistrates' Courts and the registrars of the High Courts respectively. Finally, an order as to the costs of the application may be made against the applicant, any affected party or apportioned between the parties concerned.<sup>140</sup>

The complexity of sectional title disputes makes proceedings in ordinary courts an extremely lengthy and expensive process.<sup>141</sup> The provisions of the CSOSA which allows for alternative dispute resolution mechanisms in sectional title disputes in the form of conciliation<sup>142</sup> or mediation<sup>143</sup> must, therefore, be praised. Both these processes will not only be simpler and less time consuming than litigation, but it will

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<sup>131</sup> Ss 42(a)-(e).

<sup>132</sup> S 47.

<sup>133</sup> Ss 48(1)-(4).

<sup>134</sup> S 48(3).

<sup>135</sup> Ss 50(a)-(c).

<sup>136</sup> S 51.

<sup>137</sup> S 52.

<sup>138</sup> Ss 53 and 54.

<sup>139</sup> Ss 56(1) and (2)

<sup>140</sup> Ss 53(2) and 54(1)(b).

<sup>141</sup> Paddock (January 2009) *Paddocks* 1.

<sup>142</sup> S 47 of the Community Schemes Ombud Service Act 9 of 2011.

<sup>143</sup> S 48.

also prove to be less expensive than either litigation or arbitration. The ombud service would therefore significantly improve the efficient and effective enforcement of social obligations, which has been long overdue in the sectional title industry. The main drawback of mediation as a dispute resolution mechanism is that it is less binding on the parties than arbitration.<sup>144</sup> Fortunately, this is not the case with orders issued under CSOSA due to the fact that such orders are, depending on the amount of money involved and the relief ordered, enforceable in a Magistrate's Court or High Court.<sup>145</sup>

## **7 5 Foreign law suggestions for more efficient enforcement**

### **7 5 1 General**

In this section we shall first consider the less drastic measures for enforcing social obligations in sectional title or apartment ownership schemes in foreign jurisdictions. Thereafter we shall focus on the draconian sanctions of permanent or temporary exclusion from the community of sectional owners encountered in the German, Swiss, Austrian and Spanish apartment ownership statutes.

### **7 5 2 Less drastic measures**

One of the less drastic measures to force owners to comply with their social obligations is the suspension of certain facilities.<sup>146</sup> The British Columbia Strata Property Act of 1998, for example, provides that the strata corporation (body corporate) may, for a reasonable length of time, deny an owner, tenant, occupant or visitor the use of a common recreational facility if they have contravened a by-law or a house rule relating to the facility.<sup>147</sup> The strata corporation must follow the rules of

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<sup>144</sup> Pienaar *Sectional Titles* 388.

<sup>145</sup> Ss 56(1) and (2) of the Community Schemes Ombud Service Act 9 of 2011.

<sup>146</sup> See in general Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 256-257.

<sup>147</sup> S 134 of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43). See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 256.

due process.<sup>148</sup> A similar sanction is found in the Colombian Law on How to Expedite the Horizontal Property Regime of 3 August 2001, which provides that the defaulter may, after notification, be deprived of the use of non-essential common facilities such as meeting rooms and sport facilities.<sup>149</sup> Rules such as the above might encourage compliance with social obligations in a practical way. For example, the deterrent effect of a rule threatening suspension of the use of the common swimming pool during summer might prove an effective means to ensure compliance with special rules pertaining to the use of the swimming pool.<sup>150</sup>

A second less drastic measure is the so-called 'name and shame' sanctions which aim to embarrass offenders into complying with the social obligations of the scheme.<sup>151</sup> The Colombian Law on How to Expedite the Horizontal Property Regime provides that the offender must first be warned and given a time period within which to relent. In the case of further non-compliance, the council (trustees) may publish in an accessible location a list of offenders together with the reason for their names appearing on the list.<sup>152</sup> However, in chapter 4, at 4.4, we have seen that everyone has the right to privacy<sup>153</sup> and dignity<sup>154</sup> in terms of the Constitution and it is therefore difficult to see how the 'name and shame' sanction would survive a constitutional challenge.

A third and final less drastic measure is the imposition of monetary fines on sectional owners who contravene all or certain of their social obligations.<sup>155</sup> The British Columbia Strata Property Act provides that if the owner, tenant, or any person visiting them or occupying the unit contravenes a by-law or rule, the strata

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<sup>148</sup> S 135 of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43). See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 256.

<sup>149</sup> Art 59(3) of the Colombian Law on How to Expedite the Horizontal Property Regime (*Ley por medio de cual se expide el régimen de propiedad horizontal*) of 3 August 2001. See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 257.

<sup>150</sup> Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 257; see also Fierro (1999) *St. Johns's L. Rev.* 262-263.

<sup>151</sup> Van der Merwe *Sectional Titles* 9-31.

<sup>152</sup> Art 59 of the Colombian Law on How to Expedite the Horizontal Property Regime (*Ley por medio de cual se expide el régimen de propiedad horizontal*) of 3 August 2001. See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 257.

<sup>153</sup> S 14 of the Constitution of the Republic of South Africa, 1996.

<sup>154</sup> S 10.

<sup>155</sup> See in general Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 257-259.

corporation (body corporate) may fine the owner or tenant.<sup>156</sup> The offender must first be warned or given a chance to comply with the by-law or rule.<sup>157</sup> The by-laws or regulations may contain various limitations on fines for different contraventions, as well as detailing the frequency at which fines may be imposed for a continuing contravention.<sup>158</sup> The maximum amount and the frequency for the imposition of fines must not exceed the parameters set out in the regulations.<sup>159</sup> According to the British Columbia Strata Property Regulations the maximum fine is set at \$200 for each contravention of a by-law, and \$50 for the contravention of a rule.<sup>160</sup> However, the maximum fine for the renting out of a residential strata unit in contravention of a by-law is \$500.<sup>161</sup> The regulations also state that the maximum frequency for a fine for the on-going infringement of a by-law or rule is every 7 days.<sup>162</sup> The strata corporation may collect the fine from the tenant, the tenant's landlord if the unit is sublet, or the owner. In the event that the landlord or owner pays the fine or a part thereof levied against the tenant, the tenant will be liable to repay that amount to the landlord or owner.<sup>163</sup>

The strata corporation may only act if it has received a complaint about the contravention and has given the owner or tenant the particulars of the complaint, as well as reasonable opportunity to address the complaint. Furthermore, written notice of the complaint must be given to the owner if the offender is a tenant and to the landlord if the offender is a subtenant.<sup>164</sup> The strata corporation must then, as soon as is reasonably possible, notify the offender in writing of its decision. If the offender is a council member (trustee), he is not allowed to participate in the decision.<sup>165</sup>

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<sup>156</sup> Ss 130(1) and (2) of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43). See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 257.

<sup>157</sup> Ss 130-132 of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43). See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 257.

<sup>158</sup> S 132 of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43). See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 257.

<sup>159</sup> S 132(3) of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43).

<sup>160</sup> Regs 7.1(1)(a) and (b) of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43).

<sup>161</sup> Reg 7.1(2).

<sup>162</sup> Reg 7.1(3).

<sup>163</sup> S 131 of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43). See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 257-258.

<sup>164</sup> S 135(1) of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43). See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 258.

<sup>165</sup> S 136(1) of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43). S 136(2) provides that this does not apply if all the owners are on the council. See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 258.

When it comes to persistent contraventions, the strata corporation may impose further fines without resorting to the above-mentioned requirements.<sup>166</sup>

The United States of America's Uniform Common Interest Ownership Act of 2008 (the UCIOA) also imposes reasonable fines for violations of the declaration, by-laws, rules and regulations of the association (body corporate). Appropriate notice as well as an opportunity to be heard must be given to the offender.<sup>167</sup> Fines need not be established in advance for every violation and it need not be based on the expected damage caused by the violation. These fines are not construed as personal obligations owed by unit owners, but rather as automatic liens against the unit that arise upon notice being given to the offender of the fine and the amount thereof.<sup>168</sup> If the offender fails to pay the fine, the association can take advantage of the expedited foreclosure or holdover tenant procedures available in local jurisdictions to collect the fine.<sup>169</sup> Alternatively, the association can decide to do nothing and simply use the lien to prevent the sale of the unit until the fine is paid.<sup>170</sup>

It could be argued that the imposition of fines for non-compliance with social obligations may not always achieve the desired results. Firstly, wealthy offenders might see the fine as an acceptable price to pay for their non-compliance, reducing the deterrent effect. Secondly, less affluent offenders might pay the fine grudgingly and, therefore, minimise the sanction's rehabilitative effect. A culture of imposing fines in a sectional title scheme will most likely lead to suspicion and disharmony between the ordinary residents and the body corporate.<sup>171</sup>

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<sup>166</sup> S 135(2) of the British Columbia Strata Property Act of 1998 (SBC 1998 c.43). See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 258.

<sup>167</sup> S 3-102(a)(11) of the United States of America's Uniform Common Interest Ownership Act of 2008. See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 258.

<sup>168</sup> S 3-116(a) of the United States of America's Uniform Common Interest Ownership Act of 2008. See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 258.

<sup>169</sup> S 3-116(k) of the United States of America's Uniform Common Interest Ownership Act of 2008. See also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 258.

<sup>170</sup> See AB Elberg "Remedies for Common Interest Development Rule Violations" (December 2001) 101-8 *Columbia Law Review* 1958 1975; see also Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 258.

<sup>171</sup> Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 259.

## 7 5 3 More drastic measures

### 7 5 3 1 Introduction

We have seen, at 7 3 3 above, that the effect of *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others*<sup>172</sup> is that a body corporate would only have the power to evict an unruly sectional owner or occupant, if the Act or perhaps the Annexure 8 or 9 model rules grant the body corporate such power. Until then the only recourse for bodies corporate, besides inefficient sanctions, is to launch a court application for a mandatory or prohibitory interdict or to recover fines from the offender on condition that a suitable management or conduct rule authorises this.<sup>173</sup> This case highlights the problem of having to enforce social obligations without effective sanctions. It is indeed unfortunate that the only relief the court feels capable of granting is a criminal sanction for contempt of court, established in a roundabout way after a certain sequence of events.<sup>174</sup>

Various foreign law statutes have, however, adopted more radical measures to enforce compliance with social obligations. These measures include the permanent or temporary exclusion of a unit owner from the sectional title scheme.<sup>175</sup> In the following analysis these more drastic measures will be examined to determine whether they may provide a workable solution for the enforcement of social obligations in the South African sectional title context.

### 7 5 3 2 Permanent exclusion from sectional title scheme

Permanent exclusion from the sectional title community of owners is without doubt the most drastic measure of enforcing an owner's social obligations. Therefore, this measure needs to be critically examined to determine whether such a sanction is efficient and effective, as well as reasonable and justifiable in certain cases of grave

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<sup>172</sup> 2003 5 SA 1 (C).

<sup>173</sup> Van der Merwe *Sectional Titles* 9-38 – 9-39.

<sup>174</sup> Badenhorst *et al The Law of Property* 490.

<sup>175</sup> Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 259-260.

non-compliance. In this regard, the relevant provisions of the German, Swiss and Austrian apartment ownership statutes will be subjected to critical analysis.

In terms of the German Law on Apartment Ownership of 15 March 1951, a chronic troublemaker can be forced to leave the apartment ownership scheme after a majority resolution to this effect has been adopted at a general meeting.<sup>176</sup> Such a meeting must be specially convened by the manager of the scheme, the chairman of the advisory board or by the manager at the request of a quarter of all the members of the scheme. All the members present at the meeting are entitled to vote, except for the member against whom the resolution is aimed. Voting then takes place according to 'one member one vote', irrespective of the value of his or her vote. If a scheme consists of more than one building all the owners are entitled to vote, irrespective of whether the troublemaker is resident in another building. The resolution is then carried if half of the *total number* of owners entitled to vote in the scheme vote in favour thereof.<sup>177</sup>

The general principle is that an owner can be excluded from the community if he has caused such a serious breach of the obligations owed to his fellow owners that they cannot be expected to continue living in the same community with him.<sup>178</sup> A breach of duty is evidenced when the reputation of the particular community is negatively affected or where the internal harmony of the community or the fiduciary relationship amongst the apartment owners is interfered with.<sup>179</sup> Case law has found the following breaches as having sufficient cause:<sup>180</sup> permanent unjustifiable non-compliance with administrative measures; grave defamation of other owners; serious neglect to maintain an apartment; breaking into the cellars of other owners; exploiting an apartment as a brothel; and sexual molestation of other occupants. Apart from the general principle, provision is also made for special cases that concern grave breaches of an owner's duties in terms of section 14 of the German

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<sup>176</sup> § 18(3) of the German Law on Apartment Ownership (*Wohnunseigentumsgesetz*) of 15 March 1951.

<sup>177</sup> CG Van der Merwe "Sanctions in terms of the South African Sectional Titles Act and the German *Wohnungseigentumsgesetz*: Should the South African statute be given equally sharp teeth?" (1993) 26-1 *CILSA* 85-90.

<sup>178</sup> § 18(1) of the German Law on Apartment Ownership (*Wohnunseigentumsgesetz*) of 15 March 1951.

<sup>179</sup> Van der Merwe (1993) *CILSA* 91.

<sup>180</sup> C Mohr *A Comparative Analysis of the Permanent Exclusion of a Troublemaker from the Apartment Ownership Community* LLM mini thesis University of Stellenbosch (2010) 10; See also Van der Merwe (1993) *CILSA* 91.



Law on Apartment Ownership. This section requires an owner to perform the following duties: to maintain and use the apartment and the common property with due consideration of the rights of other apartment owners; to see to it that members of his family, persons in his employ and persons to whom he has granted the right to use the apartment or the common property comply with the obligations; to allow use of an apartment and the common property within prescribed limits; and to allow admission to and use of apartments in so far as such admission and use are necessary for the maintenance and repair of the common property.

If an apartment owner, despite repeated warnings, continues to commit serious breaches of these duties, he can be excluded from the apartment ownership community. To warrant expulsion, a breach of at least one of the duties mentioned above is required, followed by a warning against non-compliance with that specific duty. Thereafter, at least two similar offences must occur. One offence will only form grounds for expulsion when the offence is so serious that the other apartment owners cannot reasonably be expected to continue living in the same community with the troublemaker.<sup>181</sup>

If an owner does not challenge the resolution taken at a general meeting to exclude him, he is obliged to sell the apartment. If this is done out of free will, the owner automatically ceases to be a member of the community; if not, legal proceedings must be instituted in order to give effect to the majority resolution. The court must then consider whether the formal and material requirements for exclusion from the community have been complied with. If this is found to be the case, the troublemaker is ordered to sell his apartment. If the court order is not complied with, the apartment must be sold in execution at a public auction.<sup>182</sup>

Like the German Law on Apartment Ownership the Swiss Civil Code of 1907 expressly requires the agreement of the majority by a resolution of the general meeting, and that this resolution must be obtained prior to legal proceedings being instituted for the exclusion of the troublemaker. The Swiss Civil Code specifically

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<sup>181</sup> Van der Merwe (1993) *CILSA* 93.

<sup>182</sup> 93-94.

states that a resolution by the majority of all the owners is required, and not only of the owners present or represented at the general meeting.<sup>183</sup> The first draft of the Swiss Civil Code required a majority in value (calculated in accordance with participation quotas) and in number. This provision was, however, substituted by the requirement of a majority in number only, which makes exclusion from the community easier. In order to avoid a conflict of interest the troublemaker is not entitled to vote.<sup>184</sup> Furthermore, if the community consists of only two co-owners, either of them can approach the court for an order to force the other owner to leave the community.<sup>185</sup> In such a case a resolution is not required.

The Swiss Civil Code also makes provision for a general ground of exclusion. It states that a joint owner can be excluded from the community by a court order if his behaviour or the behaviour of another person, whom he allows to use the apartment or for whom he is responsible, results in a breach of his obligations to all the other members, or to particular members of the community, in such a serious manner that the continuation of his presence in the community is no longer reasonable.<sup>186</sup> Unlike the German Law on Apartment Ownership, the Swiss Civil Code does not make provision for special cases in which an owner can be expelled from the scheme. However, the model Swiss by-laws (*Reglement für Stockwerkeigentümer*), although without legislative status, provide important indications of what is meant by the latter provision. Paragraph 51 of the rules stipulate that an apartment owner can be excluded from the scheme in the following particular cases:<sup>187</sup> if the apartment owner seriously breaches his duty to maintain his apartment, so that the reputation or the condition of the building is affected; if he persistently refuses inspection or maintenance of common installations or elements in his apartment; if the apartment owner carries out alterations to common parts of the apartment ownership scheme, which affect his fellow owners or the community and refuses to remove the alterations and to restore the building to its former condition or to pay compensation for the damaged caused; if the violent, harmful or malicious behaviour of an

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<sup>183</sup> Art 649 para II of the Swiss Civil Code (*Zivilgesetzbuch*) of 1907.

<sup>184</sup> Art 649 para II of the Swiss Civil Code (*Zivilgesetzbuch*) of 1907. See also Mohr *Permanent Exclusion of a Troublemaker* 26.

<sup>185</sup> Art 649 para II of the Swiss Civil Code (*Zivilgesetzbuch*) of 1907.

<sup>186</sup> Art 649 para I.

<sup>187</sup> Mohr *Permanent Exclusion of a Troublemaker* 9.

apartment owner, or such behaviour of a person for whom he is responsible, makes harmonious co-existence in the community no longer possible; and if the apartment owner, despite repeated warnings, refuses to obey the manager's order to expel a chronic offender whom he has granted the use of his apartment.

As is the case in Germany, an order of the court is necessary to enforce the majority resolution to exclude the troublemaker from the scheme. If such an order is not complied with the apartment must be sold by public auction.<sup>188</sup>

In terms of the Austrian Law on Apartment Ownership of 2002 an apartment owner can be excluded from the apartment ownership community by an action of the majority of the apartment owners.<sup>189</sup> The statute does not describe the procedure by which the agreement of the majority of the other owners must be obtained. It may be that a majority resolution of the general meeting is not required and that an informal agreement of the majority of the owners might be sufficient to approach the court for the troublemaker's exclusion. Therefore, the court must determine whether the owners who institute the proceedings form the majority opinion of all the apartment owners.<sup>190</sup>

However, if a directly prejudiced owner does not find the support of the majority for excluding the offender such an owner can institute an action to compel the troublemaker to stop his offensive conduct. If the offender perseveres in his conduct, despite a court order, the prejudiced owner is allowed to institute an action for an order of exclusion of his own accord.<sup>191</sup> This is a novel idea not catered for in the German Law on Apartment Ownership or the Swiss Civil Code.<sup>192</sup>

Like the German Law on Apartment Ownership and Swiss Civil Code provision is also made for a general ground of exclusion. An owner can generally be excluded,

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<sup>188</sup> Art 649 para III of the Swiss Civil Code (*Zivilgesetzbuch*) of 1907.

<sup>189</sup> § 36(1) of the Austrian Law on Apartment Ownership (*Wohnunseigentumsgesetz*) of 2002. See also Mohr *Permanent Exclusion of a Troublemaker* 27.

<sup>190</sup> Mohr *Permanent Exclusion of a Troublemaker* 27-28.

<sup>191</sup> § 36(5) of the Austrian Law on Apartment Ownership (*Wohnunseigentumsgesetz*) of 2002.

<sup>192</sup> CG Van der Merwe "Apartment Ownership" in *International Encyclopaedia of Comparative Law* Vol VI "Property and Trust" (1994) s 259.

when he does not fulfill his obligations to the community.<sup>193</sup> 'Obligations to the community' refers to all kinds of obligations, including the performance of certain duties as well as desisting from certain conduct. These obligations are based on the close relationship between the owners of the apartment ownership community irrespective of whether they exist in relation to the community or to an individual owner.<sup>194</sup> Similar to the German Law on Apartment Ownership, the Austrian Law on Apartment Ownership makes provision for two special cases in which an owner can be expelled from the scheme. Firstly, an owner can be excluded if he uses the apartment or the common property in such a way that seriously prejudices the interests of the other owners.<sup>195</sup> Breaches that have been considered sufficient in case law are the following: structural alteration and change of use of the apartment which affects the allocation of the utility area; the failure to repair water damage inside the apartment to such an extent that water seeps through and affects other apartments and/or the common property; cultivation of plants on the balcony, with the result that the roots or watering of the plants cause serious damage to the apartment below; the nuisance caused by allowing prostitution in an apartment which lowers the reputation of the building and endangers the ethical values of children; and the repeated removal of resolutions of the management body (trustees) from the notice board.<sup>196</sup> Secondly, an owner may be expelled from the apartment ownership community if his inconsiderate, objectionable or otherwise grossly improper conduct unsettles the otherwise harmonious community or if he commits a serious offence against the property, the accepted moral standards of the community or the physical integrity of another owner or occupant of the apartment ownership scheme.<sup>197</sup> It does not matter whether the offence has been committed by the owner himself, by his or her spouse, by other family members living in his household or by persons to whom he has granted the use of his apartment or whom he has allowed to use parts of the common property, provided he has failed to restrain these persons from committing the offence.<sup>198</sup>

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<sup>193</sup> § 36(1) of the Austrian Law on Apartment Ownership (*Wohnunseigentumsgesetz*) of 2002.

<sup>194</sup> Mohr *Permanent Exclusion of a Troublemaker* 10.

<sup>195</sup> § 36(1) second case of the Austrian Law on Apartment Ownership (*Wohnunseigentumsgesetz*) of 2002. See also Mohr *Permanent Exclusion of a Troublemaker* 18.

<sup>196</sup> Mohr *Permanent Exclusion of a Troublemaker* 19.

<sup>197</sup> § 36(1) third case of the Austrian Law on Apartment Ownership (*Wohnunseigentumsgesetz*) of 2002. See also Mohr *Permanent Exclusion of a Troublemaker* 19.

<sup>198</sup> § 36(3) of the Austrian Law on Apartment Ownership (*Wohnunseigentumsgesetz*) of 2002.

In order to give effect to the decision of the majority a court order is once again required to consider whether the formal and material requirements for the exclusion from the community have been complied with. If it is found to be the case, the troublemaker is ordered to sell his apartment. The Austrian Law on Apartment Ownership gives the troublemaker at least three months to comply with the order to leave the community.<sup>199</sup> This time limit allows the troublemaker a reasonable opportunity to alienate his apartment voluntarily, before the apartment must be sold in execution at a public auction.<sup>200</sup>

From the above discussion of the provisions of the German, Swiss and Austrian statutes, it becomes evident that there are three main steps for the exclusion of a troublemaker for non-compliance with social obligations. Firstly, an apartment owner's behaviour must cause his fellow apartment owner or owners to raise a complaint. Secondly, an application must be made to the court and if the court finds that the material requirements are met, it must order the troublemaker to alienate his apartment. Lastly, if the offender does not comply with the court order, the apartment must be sold by way of public auction.<sup>201</sup>

It is debatable whether permanent exclusion from the apartment ownership scheme is an appropriate mechanism to enforce the social obligations of sectional owners. Before one can reach a conclusion on this issue the arguments for and against permanent exclusion must be considered.

Various arguments can be advanced in favour of such a drastic remedy. First, most apartment ownership statutes require less than a unanimous resolution for the sale or termination of condominium ownership. This justifies forfeiture of ownership without the consent of all the owners of the scheme. Again, when an owner acquires his apartment he is presumed to have committed to honouring the provisions of the apartment ownership act and by-laws. Therefore, no owner should be allowed to conduct himself in a way that is wholly incompatible with the condominium lifestyle. If this is allowed, the very fabric of the community would be threatened. Moreover,

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<sup>199</sup> § 36(4).

<sup>200</sup> Mohr *Permanent Exclusion of a Troublemaker* 34-35.

<sup>201</sup> 34-35.

the repeated exercise of other remedies, such as deprivation of voting rights, monetary fines, 'name and shame' sanctions, and exclusion from facilities, may prove to be ultimately ineffective in extreme cases. Such an outcome would leave the offender un-rehabilitated and damage the morale of the community. Furthermore, if the non-conforming member claims a right of dissent, the remaining members have a stronger right to claim that an owner who threatens the very essence of apartment ownership life should be excluded from the community. In addition, there is generally no express statutory bar against the insertion of an exclusion clause in the scheme's by-laws or rules. Finally, the public interest in stable, harmonious apartment ownership communities must be considered when weighing up the competing property rights of the offender and the remaining owners. The outcome would surely be that the property rights of the other owners would be regarded worthier of protection than those of the offender.<sup>202</sup>

On the other hand there are economic and dogmatic arguments against excluding a serious offender permanently from the apartment ownership scheme. Economically, the wrong signals may be sent out to prospective purchasers since they would in all probability harbor grave suspicion of purchasing an apartment with a title that is susceptible to forfeiture. Moreover, institutional lenders may not regard a title with such an inherent potential risk as adequate security. This might create a situation where such lenders are cautious to grant loans to prospective purchasers in apartment ownership schemes. Furthermore, the dogmatic question arises of whether an apartment owner really acquires genuine ownership of an apartment when ownership is subject to forfeiture.<sup>203</sup>

### **7 5 3 3 Temporary exclusion from use of a unit**

Some foreign statutes offer a less drastic solution than the permanent expulsion of the owner from the apartment ownership scheme. These statutes settle for the

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<sup>202</sup> Van der Merwe & Muñoz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 262-263; see also Mohr *Permanent Exclusion of a Troublemaker* 39.

<sup>203</sup> Van der Merwe & Muñoz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 263; see also Mohr *Permanent Exclusion of a Troublemaker* 39-40.

troublemaker's temporary rather than permanent exclusion from the occupation and use of his unit.<sup>204</sup>

The best example is the Spanish Law on Horizontal Property of 21 July 1960.<sup>205</sup> This Law provides that the president of the condominium council (body corporate) or any of the owners or occupiers of the scheme may require a disorderly owner to stop certain outlawed activities and warn him that court proceedings will follow if he does not comply with the request. Outlawed activities include all contraventions of by-laws which result in damage to property, all harmful, dangerous or illegal activities and all activities that are dangerous to the health of occupiers or cause a nuisance. An owner, who takes part in any of these activities, must first be warned. If the warning is ignored the general meeting can, by means of a majority resolution, institute an action in court with the object of depriving the owner and the other residents of the possession of the apartment. Depending on the seriousness of the offence and the injury caused to the community, the judge may exclude the owner from the use of his unit for a maximum period of three years. Such an order against the offending owner does not affect his remaining ownership entitlements.

Where the offender remains recalcitrant this mechanism can be repeated as often as necessary. If the offender is not the owner but an occupier, the general meeting can decide to institute court proceedings against him for either an eviction order or for the termination of the lease contract. An action like this can, however, only be embarked upon once the owner has been given reasonable time to evict the occupier (offender) himself or to terminate the lease. This time period must be fixed and clearly notified to the owner.<sup>206</sup>

## 7 6 Evaluation

The success of a sectional title scheme depends upon the co-operation and support of its members for ensuring compliance with their social obligations. Minor or

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<sup>204</sup> See in general Van der Merwe *Apartment Ownership* s 258.

<sup>205</sup> See art 7 para 2 of the Spanish Law on Horizontal Property (*Ley de Propiedad Horizontal*) of 21 July 1960.

<sup>206</sup> Van der Merwe *Sectional Titles* 9-41; Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 263-264; and Van der Merwe *Apartment Ownership* s 258.



unintentional breaches are susceptible to peer pressure, gentle reprimand and friendly admonition. More serious offences and chronic offenders can, however, cause grave disharmony in a sectional title scheme.<sup>207</sup> Consequently, it is clear that sectional title statutes must be given sufficiently sharp teeth to enforce social obligations imposed on sectional owners. This is not borne out by the current provisions of the Act and the model management and conduct rules annexed thereto.

Suspension of the sectional owner's right to vote is not an effective deterrent since general meetings are usually held only once or twice a year and the persons at whom this sanction is directed would probably rarely attend.<sup>208</sup> Furthermore, this sanction does not apply to unanimous or special resolutions and the sectional bondholder is entitled to vote as the offender's proxy at any general meeting.<sup>209</sup> The suspension of voting rights may also be unconstitutional if not preceded by a due process hearing, especially where resolutions of the general meeting affect the property rights of the sectional owner in terms of section 25 and 26 of the Constitution.<sup>210</sup> Again, the sanction in terms of model management rule 7, of Annexure 8, which prevents an offending owner from being nominated or elected as trustee, also lacks a deterrent effect since most sectional owners do not want to participate actively in the affairs of the body corporate and are therefore not interested in being nominated or elected as trustee. We have also seen that it is difficult to implement model conduct rule 3(2), of Annexure 9, which grants authority to the trustees to remove any vehicle parked standing or abandoned on the common property without their written consent.<sup>211</sup> In terms of the model rules the only measure of enforcement that might prove to be effective in practice is the sanction that the owner who breaches a conduct rule will be liable to pay all legal costs, including costs between attorney and client, expended on the enforcement of the rules.<sup>212</sup>

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<sup>207</sup> Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 249.

<sup>208</sup> Van der Merwe *Sectional Titles* 9-33.

<sup>209</sup> Annexure 8 r 64(b) of the Sectional Titles Act 95 of 1986.

<sup>210</sup> Van der Merwe & Muñiz-Argüelles (2006) *Liber Amicorum Festschrift Tugrul Ansay* 255.

<sup>211</sup> In terms of Annexure 9 r 3(2) of the Sectional Titles Act 95 of 1986. See 7 2 above.

<sup>212</sup> Annexure 8 r 31(5) of the Sectional Titles Act 95 of 1986.

Besides the special sanctions provided for in the Annexure 8 and 9 model rules, there is the possibility of resorting to the common law remedy of interdicts. Here a recalcitrant owner can be ordered to refrain from certain offensive conduct, or to perform some or other positive act in order to rectify an unlawful state of affairs which he brought about. It was pointed out in *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others*<sup>213</sup> that where the troublemaker willfully disobeys, refuses or fails to comply with such a court order, an order for contempt of court may be obtained and the offender may be arrested and imprisoned. However, in a sectional title scheme the interdependence and unavoidable requisite of harmonious co-existence between owners and occupants of units renders an interdict inadequate, and indeed inappropriate, in the sectional title context. A successful application for an interdict could thus permanently damage the harmony of the sectional title scheme. Moreover, the value of an interdict is limited as it must, in most instances, be sought in the High Court where the expense and protracted nature of the judicial process militates against its efficiency.<sup>214</sup>

We have seen, at 7 5 2, that the imposition of monetary fines may be a more efficient way to enforce social obligations than a lengthy court process. Care must, however, be taken to include a constitutionally acceptable rule in the model rules and the fine must be exacted in a constitutionally acceptable manner.<sup>215</sup> We have also seen, at 7 5 2, that the imposition of fines may lead to suspicion and distrust, ultimately harming the necessary communal spirit. Fines may only be effective if the offender is able to pay his monthly contributions regularly<sup>216</sup> and would ultimately prove to be inefficient in persuading a chronic offender to mend his ways or leave the scheme.

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<sup>213</sup> 2003 5 SA 1 (C).

<sup>214</sup> Van der Merwe *Sectional Titles* 9-36.

<sup>215</sup> See especially Van der Merwe *Sectional Titles* 9-42 - 9-43 for the formulation of a rule that makes provision for monetary fines for non-compliance with social obligations. A statutory basis for the provision of fines in the rules of a scheme can be found in s 38(i), Annexure 8 r 31(5), 64(b) and (70) and Annexure 9 r 3(2) of the Sectional Titles Act 95 of 1986. See Nel (October 2003) *De Rebus* 29. In *Murcia Lands CC v Erinvale Country Est Home Owners Association* 2004 4 All SA 656 (C) it was decided by implication that penalties contained in the constitution of a home owners association for not completing a building in a single title development within a specified time are enforceable. Therefore, Maree argues that this case is authority for the proposition that fines imposed in the rules of a sectional title scheme are also legitimate; See T Maree "Strafbepalings vir Boutydperke wettig?" (July 2008) 31 *MCS Courier Newsletter* 6 6-7.

<sup>216</sup> Van der Merwe *Sectional Titles* 9-44.

The permanent or temporary exclusion of a recalcitrant sectional owner is without doubt the most efficient and effective ways to guarantee strict compliance with the social obligations in a sectional title scheme because of its deterrent and final effect. Both these radical measures do, however, infringe upon the ownership rights of a sectional owner. For example, in the South African sectional title context such extreme measures by the body corporate in the case of residential units would be contrary to the constitutional requirements of section 26(3) of the Constitution, which provides that no one may be evicted from his or her home without an order of court made after considering all the relevant circumstances.

## Chapter 8: Conclusion

In my Introduction I mentioned, at 1 1, that there are more than 780 000 sectional title units throughout South Africa today<sup>1</sup> and that various economic and social factors will demand an increase in sectional title apartments over the years to come.<sup>2</sup> The importance of sectional ownership in providing residential accommodation and commercial units to thousands of South Africans can thus not be underestimated. It is, therefore, imperative that prospective buyers and sectional owners understand certain basic concepts pertaining to sectional title schemes and, even more importantly, that they have a thorough knowledge of their rights and especially their obligations when becoming part of a sectional title community.<sup>3</sup>

There are, however, many factors that need to be considered by a potential buyer before deciding to purchase a unit in a sectional scheme. These factors may include the finances at his disposal, the value of the property, as well as other miscellaneous factors such as security, location, view, building standards and neighbourhood.<sup>4</sup> Many prospective purchasers focus on these factors but fail to realise the accompanying financial and social obligations relative to sectional title schemes. Therefore, it is hardly surprising that non-compliance with financial and social obligations is a common occurrence in the South African sectional title context.

This thesis constantly highlights that non-compliance with sectional title obligations works against the incentive to strive for financial stability, as well as happiness and harmony in an intensified, diverse community where the individual units, the objects of ownership, are physically interdependent.<sup>5</sup> For this reason the success of a sectional title scheme ultimately depends upon the necessary co-operation and support of its members in complying with the obligations imposed upon them.<sup>6</sup>

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<sup>1</sup> CG Van der Merwe & JC Sonnekus *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 *Sectional Titles* (Service Issue 16 May 2013) 1-30(12).

<sup>2</sup> G Paddock *The Sectional Title Handbook* 2ed (1990) v; Van der Merwe *Sectional Titles* 1-10(1) – 1-13; and CG Van der Merwe, P Mohr & M Blumberg “The Bill of Rights and the Rules of Sectional Title Schemes: A Comparative Perspective” (2000) 11 *Stell LR* 155 155-156.

<sup>3</sup> Paddock *Sectional Title Handbook* vi.

<sup>4</sup> Van der Merwe, Mohr & Blumberg (2000) *Stell LR* 156.

<sup>5</sup> Van der Merwe *Sectional Titles* 9-32.

<sup>6</sup> 9-3.

In the introductory chapter, at 1 3, it was argued that financial instability and conflict in sectional title schemes can be avoided by following a simple three step approach to give the Sectional Titles Act 95 of 1986 (the Act) sharper teeth. This three step approach involved the following. Firstly, the importance of obligations in the sectional title context must not be taken lightly. Secondly, the various financial and social obligations must be identified and understood, which enables the recognition of weaknesses and the ability to work towards their rectification. Finally, the financial stability and social harmony envisaged by the imposition of these obligations can only be achieved if there are efficient and effective procedures in place for the enforcement of these obligations.

Chapter 3 identified the financial obligations imposed on sectional owners. We have seen that sectional owners are responsible for the payment of contributions to the administrative fund and the reserve fund in the form of ordinary levies,<sup>7</sup> special levies,<sup>8</sup> and additional levies.<sup>9</sup> The timeous payment of these levies is critical for the proper management of the sectional title scheme and the adequate and regular maintenance of the common parts of the building and the common facilities.<sup>10</sup> It is crucial that sectional owners should not withhold the payment of their contributions to off-set debts unless the matter has been adjudicated upon by an arbitrator or judge.<sup>11</sup> It is also significant that sectional owners are not entitled to a refund of contributions lawfully levied upon them.<sup>12</sup> The importance of compliance with financial obligations is evidenced when the non-payment of contributions leads to the unfortunate situation where sectional owners are held personally liable for the debts of the body corporate.<sup>13</sup>

In chapter 6 it was shown that sectional owners are also saddled with numerous social obligations pertaining to their sections, exclusive use areas and the common

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<sup>7</sup> S 37(2) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(2)).

<sup>8</sup> Annexure 8 r 31(4B) and ss 37(2A) and (2B) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(3)).

<sup>9</sup> S 37(1)(b) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 3(1)(c)).

<sup>10</sup> CG Van der Merwe & L Muñis Argüelles “Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme” (2006) 16 *Duke Journal of Comparative and International Law* 125 125.

<sup>11</sup> See 3 6 above.

<sup>12</sup> See 3 7 above.

<sup>13</sup> S 47(1) of the Sectional Titles Act 95 of 1986; (Sectional Titles Schemes Management Act 8 of 2011 s 15). See 3 5 above.

property in terms of the Act, the prescribed management and conduct rules and the common law of nuisance. This chapter persistently warned that strict compliance with social obligations is vital for the preservation of the physical features of the scheme, the protection of the harmonious external appearance of the building or buildings and the safeguarding of social harmony in the sectional title context.<sup>14</sup> Sectional owners should be aware that they have to surrender some of their personal independence and free will to preserve the peace and tranquility in the sectional title scheme which they have made their home. Such surrender is required because of the peculiar physical features of the building and the intensified community of owners gathered almost permanently within the confines of the scheme.<sup>15</sup>

It is thus evident that compliance with financial and social obligations cannot be taken lightly and effective procedures for enforcing such compliance are essential. Put simply, effective and efficient sanctions for the enforcement of financial and social obligations are a *sine qua non* for a viable and harmonious sectional title scheme.<sup>16</sup>

Unfortunately, only a few measures of enforcement in terms of the Act and the prescribed rules have proved to be satisfactory for the enforcement of financial obligations. In the event that arrear levies are recovered in a Magistrate's Court,<sup>17</sup> bodies corporate should act swiftly against levy defaulters to stay within the monetary claim value as determined by the Minister from time to time for Magistrates' Courts.<sup>18</sup> Furthermore, the threat of financial liability for legal costs, including costs between attorney and client, collection commission, expenses and charges incurred by the body corporate in the collection of arrear levies<sup>19</sup> might in practice force sectional owners to reconsider before defaulting on their levy payments.<sup>20</sup> The fact that the trustees are entitled to charge interest on arrear

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<sup>14</sup> See especially 6 2 4 and 6 3 4 above.

<sup>15</sup> See 6 5 above.

<sup>16</sup> Van der Merwe *Sectional Titles* 9-7.

<sup>17</sup> S 37(2) of the Sectional Titles Act 95 of 1986 read with Annexure 8 r 31(1)-(4).

<sup>18</sup> See 4 2 1 above.

<sup>19</sup> Annexure 8 r 31(5) of the Sectional Titles Act 95 of 1986.

<sup>20</sup> See 4 2 2 above.

amounts at such rate as they may from time to time determine should have a similar effect on sectional owners who are in a financially sound position.<sup>21</sup>

The available sanctions in terms of the Act and the prescribed rules for the enforcement of social obligations have proven to be even less effective. Alarmingly the only measure of enforcement that has proven to be satisfactory in practice is the liability of offending sectional owners for legal costs, including costs as between attorney and client, incurred by the body corporate in enforcing compliance with the model rules or the Act.<sup>22</sup>

Apart from the abovementioned sanctions the Act or the prescribed rules contain no other efficient and effective enforcement measures. Even the measures outside the confines of the Act have proven to be mostly inadequate. The attachment and sale in execution of the movables and rental income of a defaulting sectional owner is not always plain sailing;<sup>23</sup> emolument attachment orders, garnishee orders and administration orders are seldom used in practice;<sup>24</sup> and the different results of the attachment and sale in execution of units of either solvent or insolvent sectional owners, makes it very problematic for bodies corporate to decide when to attach the units of defaulters.<sup>25</sup> Finally, the use of mandatory and prohibitory interdicts for the enforcement of social obligations is not ideal because of the high costs and protracted procedure involved. The repercussions of this remedy usually destroy what is left of the harmonious relations in a sectional title community.<sup>26</sup>

The Sectional Titles Schemes Management Act 8 of 2011 (the STSMA), has facilitated compliance with financial obligations. Under this act, ordinary levies, additional levies, levies payable to the reserve fund and special levies will in future be recoverable by an application to a regional ombud.<sup>27</sup> This procedure will in all

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<sup>21</sup> Annexure 8 r 31(6) of the Sectional Titles Act 95 of 1986. See 4 2 3 above.

<sup>22</sup> Annexure 8 r 31(5) of the Sectional Titles Act 95 of 1986 . See 7 2 above.

<sup>23</sup> See 4 2 7 above.

<sup>24</sup> See 4 2 8 above.

<sup>25</sup> See 5 2 above.

<sup>26</sup> See 7 3 2 and 7 6 above.

<sup>27</sup> Ss 3(2) and (3) of the Sectional Titles Schemes Management Act 8 of 2011.



probability be cheaper and less time consuming than proceedings in the Magistrate's Court or a High Court.<sup>28</sup>

Furthermore, the Community Schemes Ombud Service Act 9 of 2011 (the CSOSA) provides that an adjudicator may in appropriate circumstances make an order to compel a tenant of a sectional owner who defaults on his levies to pay all or part of the rentals payable under a lease agreement to the body corporate until his landlord has satisfied his debt to the body corporate.<sup>29</sup> This would significantly improve the position of the body corporate in recovering arrear contributions, especially in schemes with a large number of absentee owners who let their apartments to tenants. This sanction is less problematic and more efficient than the attachment of the rental of the tenant as part of the incorporeal movable assets of the defaulting owner.<sup>30</sup>

The CSOSA provisions which allow for alternative dispute resolution mechanisms in the form of conciliation<sup>31</sup> or mediation<sup>32</sup> in sectional title schemes must also be welcomed. If attempts at conciliation and mediation fail, the regional offices of the Community Schemes Ombud Service would be able to resolve social disputes and enforce social obligations in a much swifter and less costly and burdensome manner than the courts. Further, experts in sectional title matters will adjudicate and be able to make several orders pertaining to behavioural and maintenance issues, as discussed above at 7 4 6, which could be enforced in Magistrates' Courts or the High Court. In future when it comes to the enforcement of social obligations pertaining to behavioural and maintenance issues it would be wise for bodies corporate to rather make use of the regional offices of the Community Schemes Ombud Service than employing the sanctions in terms of the Act, the prescribed rules or the mechanisms that fall outside the confines of the Act.

Due to the scarcity of efficient and effective enforcement measures in the South African sectional titles legislation, we might be forced to look at more robust foreign

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<sup>28</sup> See 4 2 1 above.

<sup>29</sup> S 39(1)(f) of the Community Schemes Ombud Service Act 9 of 2011.

<sup>30</sup> Van der Merwe *Sectional Titles* 9-30 - 9-31.

<sup>31</sup> S 47 of the Community Schemes Ombud Service Act 9 of 2011.

<sup>32</sup> S 48.

law sanctions to achieve certainty and consistency in the South African sectional title industry. The inclusion of some of these measures in the future might strengthen the Act without conflicting with constitutional requirements in the South African context.

With regard to the enforcement of financial obligations a swift solution is needed to place the body corporate in a position where it can manage the scheme effectively and not postpone necessary maintenance and repairs.<sup>33</sup> To obviate the unfairness of bodies corporate only being satisfied first in instances where the defaulting owner is insolvent, the legislator should seriously consider implementing a statutory hypothec in favour of the body corporate for 6 months' arrears. This hypothec would rank above first mortgages, as is the case in the United States of America's Uniform Common Interest Ownership Act of 2008 (the UCIOA). It was shown, at 5 5 above, that the UCIOA's super lien is a genuine attempt to protect the financial strength and vitality of bodies corporate. Such a super lien would address the concerns of institutional lenders, such as commercial banks, by the limitation of the statutory hypothec to a claim for six months arrear contributions. It also allays the fears of other unit owners that they would have to make up the shortfall in contributions. Moreover, we have seen that institutional lenders have various other means of protection, for instance by exacting additional deposits to be kept in trust. Some added risk would, therefore, not seem overly burdensome in exchange for the proper maintenance of common property, thereby protecting their collateral in several other units mortgaged by them in the scheme. A fair balance is thus struck between all the relevant parties involved.<sup>34</sup> In addition, this will eliminate the uncertainty of bodies corporate whether or not to attach the units of defaulters because of the difference in outcome according to whether the attached unit belongs to a solvent or insolvent defaulter. Such a super lien will enable the body corporate to promptly replace the defaulter with a solvent owner who is prepared to pay his contributions on time.<sup>35</sup> Another wise option would be to draw up a properly worded model rule that penalises owners for late payment, thereby reducing the body corporate's need to institute court proceedings for the collection of arrear levies. Unfortunately, the effect

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<sup>33</sup> Van der Merwe & Muñiz-Argüelles (2006) *Duke Journal of Comparative and International Law* 154.

<sup>34</sup> 153-154.

<sup>35</sup> 155-156.

would be limited in the case of poor owners who simply do not have the money to pay either their contributions or a monetary penalty.<sup>36</sup>

When it comes to the enforcement of social obligations, the imposition of fines would again reduce the need for the body corporate to institute court proceedings. Another practical solution with limited application would be to amend the conduct rules to prevent owners from using certain facilities if they contravene the applicable rules. A prohibition on the use of the sectional title swimming pool during the summer season would compel most owners and their children to obey the rules pertaining to the swimming pool. See the discussion above at 7 5 2.

Even so, the Act desperately needs a measure of last resort when all other measures have been exhausted without the desired results. In the previous chapter, at 7 6, I argued that the threat of permanent or temporary exclusion from the sectional title community is the most efficacious guarantee for strict compliance with the social obligations in a sectional title scheme. These measures can also be applied in the case of serious non-compliance with financial obligations. I did indicate, at 7 3 3 and 7 6, that such legislative measures would infringe upon the property rights of a sectional owner in terms of section 26(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution), which stipulates that no one may be evicted from their home without a court order.<sup>37</sup> Section 36 of the Constitution, however, makes provision for the limitation of rights in the Bill of Rights which includes the property rights of section 26(3) of the Constitution. Section 36(1) of the Constitution reads as follows:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;

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<sup>36</sup> 132.

<sup>37</sup> S 26(3) of the Constitution of the Republic of South Africa, 1996 states the following: “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

Therefore, two requirements must be complied with in order to justify the limitation of the rights mentioned in the Bill of Rights, in our case the property rights in terms of section 26(3).<sup>38</sup> Firstly, it must be a law of general application and, secondly, it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>39</sup>

With regard to the first requirement, ‘a law’ includes all forms of legislation (delegated or original) as well as common and customary law. ‘General application’ requires, firstly, that the law must be sufficiently clear, accessible and precise so that those affected can ascertain the extent of their rights and obligations and, secondly, that the law must apply objectively and equally to all and not be arbitrary in application.<sup>40</sup> Amending the Act to make provision for the permanent or temporary exclusion of a sectional owner would thus qualify as ‘law’ and it would also be of ‘general application’ since it would be applicable to all South African sectional owners.

The second requirement, that a law must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, means that ‘a law’ which restricts a fundamental right must do so for reasons that are acceptable to such a society. This law must take into account all relevant factors, including the nature of the right,<sup>41</sup> the importance of the purpose of the limitation,<sup>42</sup> the nature and extent of the limitation,<sup>43</sup> the relation between the limitation and its purpose,<sup>44</sup> and less restrictive means to achieve the purpose, thereby emphasizing the importance

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<sup>38</sup> In *First National Bank of SA LTD t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA LTD t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 110 it was held that neither the text nor the purpose of s 36 suggests that any right in the Bill of Rights is excluded from limitation under its provisions.

<sup>39</sup> I Currie & J De Waal *The Bill of Rights Handbook* 6ed (2013) 155 and AJ Van der Walt *Constitutional Property Law* 3ed (2011) 73-74.

<sup>40</sup> Currie & De Waal *The Bill of Rights Handbook* 155-156.

<sup>41</sup> S 36(1)(a) of the Constitution of the Republic of South Africa, 1996.

<sup>42</sup> S 36(1)(b) of the Constitution.

<sup>43</sup> S 36(1)(c) of the Constitution.

<sup>44</sup> S 36(1)(d) of the Constitution.

of minimalising the invasion of rights.<sup>45</sup> Furthermore, it must be shown that the law serves a constitutionally acceptable purpose and that there is proportionality between the infringement of the fundamental rights and the benefits it is designed to achieve.<sup>46</sup>

Various arguments can be advanced to justify the permanent exclusion of recalcitrant owners from a sectional titles scheme. Firstly, it must be kept in mind that this limitation is made to protect the property rights of those who are affected by the troublemaker. Secondly, sectional ownership was introduced to cater for the social, economic and sociological needs of society. The impetus was the provision of real property rights to a greater segment of the population and to thereby fulfill the psychological need for a home.<sup>47</sup> The need for a home to be a place of safety justifies permanent exclusion. This does not affect the perception that apartment ownership approximates home-ownership, because it is warranted by the demand for a final mechanism to permanently settle disputes, thereby restoring financial stability and social harmony in the sectional title community. Thirdly, the

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<sup>45</sup> S 36(1)(e) of the Constitution.

<sup>46</sup> Currie & De Waal *The Bill of Rights Handbook* 162-163. In *S v Makwanyane* 1995 3 SA 391 (CC) para 104 the Constitutional Court adopted the following approach in determining proportionality under s 33 of the interim Constitution (this applies with equal force to the interpretation of section 36 of the Constitution of the Republic of South Africa, 1996): “The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for ‘an open and democratic society based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, ‘the role of the Court is not to second-guess the wisdom of policy choices made by legislator.’” The latter paragraph has become a standard reference when the Constitutional Court considers the legitimacy of limitation. This was summarised as follows in *S v Bhulwana* 1996 1 SA 388 (CC) para 18: “In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.”

<sup>47</sup> CG Van der Merwe “Sanctions in terms of the South African Sectional Titles Act and the German *Wohnungseigentumsgesetz*: Should the South African statute be given equally sharp teeth?” (1993) 26-1 *CILSA* 85 97.

comparative study conducted, at 7 5 3 2, shows that an action for permanent exclusion is a long process subject to strict requirements before the court is allowed to order the exclusion and that the offender has the opportunity to stop legal proceedings by ending his offensive behaviour before a resolution to expel him is adopted at the general meeting. Furthermore, that permanent exclusion is regarded as a final measure which should only be adopted once all other sanctions have been exhausted provides protection for the troublemaker and guarantees that he will not be excluded prematurely and on spurious grounds. Even where the recalcitrant owner's unit is sold at a public auction, he obtains the proceeds paid by the highest bidder at the sale. Therefore, the permanent exclusion of a sectional owner from the sectional title scheme is not just a swift remedy, but a long process in which the court finally decides whether the exclusion is justified in the circumstances of the particular case.<sup>48</sup>

Amending the Act to make provision for permanent exclusion is thus supported by sound societal reasons which gainsay some of the economic and dogmatic arguments raised against such an expulsion.<sup>49</sup> Therefore, one can argue that permanent exclusion from the scheme serves a purpose that might be considered legitimate by all reasonable citizens in a constitutional democracy that values human dignity, equality and freedom above all other considerations. Put simply, such a law might be considered reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>50</sup>

However, permanent exclusion from the scheme seems too extreme because it invades property rights further than it needs in order to achieve its purpose. A more appropriate solution in the sectional title context would, therefore, be to deprive a troublesome owner and his family of the occupation and use of the apartment for a limited period of time, as discussed above at 7 5 3 3. In chapter 6, at 6 5, we have seen that ownership is no longer regarded as an absolute exclusive right, but rather as a privilege which must be exercised in the public interest. Ownership is still,

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<sup>48</sup> C Mohr *A Comparative Analysis of the Permanent Exclusion of a Troublemaker from the Apartment Ownership Community* LLM mini thesis University of Stellenbosch (2010) 43-44.

<sup>49</sup> See 7 5 3 2 above.

<sup>50</sup> Currie & De Waal *The Bill of Rights Handbook* 155 and Van der Walt *Constitutional Property Law* 73-74.

however, a protected constitutional right which can only be radically affected in exceptional circumstances. However, as long as the ultimate substance of ownership is not infringed, temporary deprivation of one of the entitlements of ownership, namely occupation and use of the object, should not be considered an unconstitutional infringement of ownership.<sup>51</sup> The fact that the High Court in *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others*<sup>52</sup> generally approved the idea that owners or occupiers should be deprived of their right of residence in a scheme for a limited period of time when they are guilty of persistent and deliberate contraventions of conduct rules or of non-payment of their levies adds weight to such an argument.<sup>53</sup> This is a less restrictive means to achieve the purpose of ensuring strict compliance with the obligations of a sectional title scheme. Therefore, I suggest, this indicates that such an amendment of the Act is more likely to pass constitutional muster when it eventually comes up for consideration by a court of law.

In conclusion, I am not arguing that all is doomed when it comes to the enforcement of obligations in sectional title schemes. However, what is clearly lacking is a measure of last resort where all other available measures have been exhausted without the desired results. In final analysis, the existence of a sanction for the temporary exclusion of a sectional owner in the most serious cases would apply constant pressure on all the owners of a scheme to consider the consequences of non-compliance with the obligations imposed upon them. Therefore, its deterrent and final effect cannot be underestimated. Consequently, I suggest that the temporary exclusion of a recalcitrant sectional owner from the sectional title community is the most efficient and effective way to guarantee financial stability and social harmony in sectional title schemes throughout South Africa.

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<sup>51</sup> Van der Merwe *Sectional Titles* 9-41; see also CG Van der Merwe & L Muñiz-Argüelles "Enforcement of Conduct Rules in a Condominium or Apartment Ownership Scheme" (2006) *Liber Amicorum Festschrift Tugrul Ansay* 247 264-265.

<sup>52</sup> 2003 5 SA 1 (C).

<sup>53</sup> 7F-G.



## LIST OF ABBREVIATIONS

<i>Alta. L. Rev.</i>	Alberta Law Review
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa
<i>Cin. L. Rev.</i>	Cincinnati Law Review
<i>Harv. L. Rev.</i>	Harvard Law Review
<i>JBL</i>	Juta's Business Law
<i>J. Marshall. L. Rev.</i>	John Marshall Law Review
<i>LAWSA</i>	The Law of South Africa
<i>LGB</i>	Local Government Bulletin
<i>Pepp. L. Rev.</i>	Pepperdine Law Review
<i>SALJ</i>	South African Law Journal
<i>SA Merc Law Jnl</i>	South African Mercantile Law Journal
<i>Stell LR</i>	Stellenbosch Law Review
<i>St. John's L. Rev.</i>	St. John's Law Review
<i>T. Jefferson. L. Rev.</i>	Thomas Jefferson Law Review
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg
<i>U. Ill. L. Rev.</i>	University of Illinois Law Review
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
<i>Wake Forest L. Rev.</i>	Wake Forest Law Review

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