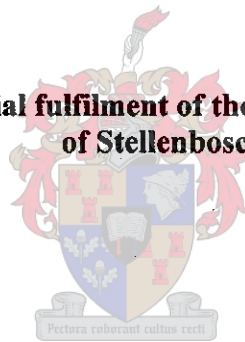


**THE RELEVANCE OF THE SOUTH AFRICAN SECTIONAL
TITLES LAW IN INTERPRETATION AND APPLICATION
OF THE SECTIONAL TITLES LEGISLATION OF
BOTSWANA: AN ANALYSIS OF PROVISIONS
PERTAINING TO ESTABLISHMENT OF SCHEMES**

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**Thesis submitted in partial fulfilment of the LLM degree at the University
of Stellenbosch**



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April 2004

DECLARATION

I the undersigned declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature.....*DL*.....

Date.....*12/03/04*.....

ABSTRACT

The concept of sectional ownership has been unknown in the Botswana common law because of the maxim *superficies solo cedit*, which does not recognize separate ownership of apartments in a building. The law must always serve the felt and real needs of the times, and in order to give effect to those needs, the Botswana Sectional Titles Act was enacted in 1999. It is based on the South African Sectional Titles Act of 1986, as amended, which repealed the 1971 Act.

In this thesis, a comparative analysis of the South African and Botswana sectional titles law is made to determine whether and, if so, how the existing position in the South African sectional titles law could aid interpretation and application of the sectional titles legislation of Botswana, specifically pertaining to aspects of establishment of sectional title schemes. The main focus is on the legislative provisions of both jurisdictions. However, South African case law is also considered.

Landownership and sectional titles is discussed, to determine whether sectional ownership is genuine ownership. This entails a discussion on the publicity principle, which in the case of land is normally achieved by means of registration in the Deeds Registries. The thesis analyses the Botswana and South African statutes on the requirements and procedures involved in the establishment of sectional title schemes to bring to light any shortcomings that may exist in either of the two statutes. An understanding of the shortcomings of the South African statute is relevant to the interpretation and application of the Botswana statute. An examination of the procedural aspects of establishment of a sectional title scheme, as well as the roles of the parties involved in the establishment thereof is undertaken, so as to identify consequences that may ensue if they fail to comply with the requirements of either of the statutes. Consequently, a comparative analysis on the effect of registration of the sectional plan and opening of the sectional title register is made.

Although it is not suggested that the Botswana Act should be completely similar to the South African Act, as Botswana may have its own peculiar circumstances, suggestions as to the amendment of the Botswana statute are made. Amendments would make the Botswana Act even more flexible, and would open up the possibilities of development to achieve

greater access to land. Further more improvements to the Act will have to be made, some before its implementation, and some after a period of application of the Act, as real practical problems become apparent.

OPSOMMING

Die konsep van deeltitel was tot dusver in Botswana se gemenerereg onbekend weens die *maxim superficies solo cedit*, wat nie aparte eienaarskap van woonstelle in 'n gebou erken nie. Die wet moet altyd die werklike behoeftes van die tyd dien, en om te voldoen aan daardie behoeftes is die Botswana Wet op Deeltitels in 1999 uitgevaardig. Dit is baseer op die Suid-Afrikaanse Wet op Deeltitels van 1986, soos gewysig, wat die 1971 Wet herroep het.

In hierdie tesis word 'n vergelykende studie gedoen van die Suid-Afrikaanse Wet op Deeltitels en die gelyknamige Wet in Botswana om te bepaal of, en indien wel, hoe die bestaande posisie in die Suid-Afrikaanse Wet op Deeltitels kan help met die interpretasie en toepassing van die deeltitel wetgewing van Botswana, veral waar dit gaan oor die vestiging van deeltitelskemas. Die tesis fokus op die wetgewende bepalings in albei lande, maar konseentreer op probleemareas in die nuwe Deeltitel wet van Botswana.

Grondeienaarskap en deeltitels word bespreek om te bepaal of deeltiteleienaarskap werklike eienaarskap is. Dit behels 'n bespreking van die publisiteitsbeginsel, waaraan gewoonlik, in die geval van grond, voldoen word deur registrasie in die Aktereregister. Die tesis ontleed die Suid-Afrikaanse statuut en die statuut van Botswana wat gaan oor die vereistes en prosedures betrokke by die vestiging van deeltitelskemas en enige tekortkominge wat bestaan in enige van die twee statute. Dit is belangrik om die tekortkominge van die Suid-Afrikaanse statuut te begryp, as die statuut van Botswana geïnterpreteer en toegepas moet word. Die prosedures wat gevolg word in die vestiging van 'n deeltitelskema, asook die rolle van die verskillende partye betrokke, word bespreek sodat die gevolge as daar nie aan die vereistes van die statuut voldoen word nie, identifiseer kan word. Gevolglik word 'n vergelykende ontleding gedoen van die effek van registrasie van die deeltitelplan en die opening van die deeltitelregister. Die slotshoofstuk bevat aanbevelings vir verdere navorsing.

Alhoewel daar nie voorgestel word dat die wet in Botswana identies aan die Suid-Afrikaanse wet moet wees nie, (Botswana het te make met ander omstandighede) word voorstelle aan die hand gedoen vir die wysiging van die wet in Botswana. Hierdie

wysigings sal die wet meer buigsaam maak en daar sal meer moontlikhede wees vir ontwikkeling wat groter toegang tot grond sal bewerkstellig. Verder sal daar verbeterings aan die wet aangebring moet word nadat dit eers in werking getree het en die werklike probleme kop uitsteek.

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DEDICATION

TO GOD BE THE GLORY

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CHAPTER ONE

1 1 Introduction

In this thesis, a comparative analysis of the South African and Botswana sectional titles law is made to determine whether and, if so, how the existing position in the South African sectional titles law could aid interpretation and application of the Botswana sectional titles legislation, specifically pertaining to aspects of establishment of schemes. The main focus is on the legislative provisions of both jurisdictions, but South African case law is also analysed with a view to developing the interpretation and application of the Botswana sectional titles law. A brief introduction to the legislative history is provided in order to understand better the subsequent comparison of the two systems.

1 2 Legislative history

As a result of a steady flow of the population from the rural areas to urban areas in Botswana in the last 15 years, a scarcity of accommodation is being experienced in urban areas. To alleviate the shortage of accommodation, the Botswana Housing Corporation¹ was prompted to build blocks of flats in some of the urban areas. Such flats were leased to tenants. By leasing instead of selling the flats, however, much needed capital, which could have been used in building more flats, was locked up. Tenants could not buy the apartments they occupied, since the law did not allow for individual ownership of apartments in a building. This anomaly necessitated the government to pass a law enabling the Botswana Housing Corporation and other developers to sell the flats they have built and individuals to buy such flats.

Because of the maxim *superficies solo cedit*,² the concept of sectional ownership was unknown in the Botswana common law. This maxim does not recognise separate ownership of apartments in a building. Only the ownership of the land on which a

¹ A statutory corporation established under the Botswana Housing Corporation Act 75 of 1970 to promote the provision of housing and related matters.

² Which considers a landowner to be owner of any building erected on his or her land.

building is erected, was recognised. According to the Botswana Deeds Registry Act,³ a piece of land is transferred without reference to buildings or improvements on the land. Legislative intervention has thus become necessary to introduce a system of *condominium*⁴ in Botswana. The law must always serve the felt and real needs of the times. If there is a need for sectional ownership, the law should give effect to that need; any attempt to stand in the way of the need is as futile as Canute's attempts to hold back the ocean tides.⁵

In response to this need, the Botswana Sectional Titles Act⁶ was enacted in 1999. The Bill first came before the Botswana Parliament on 22 September 1998. The Regulations to the Act were published on 23 September 2002,⁷ and the Act commenced on 1 May 2003.⁸ The commencement of the Act was delayed to provide time for the Deeds Registry and other stakeholders to prepare for its implementation. The Act enables landowners or developers to build blocks of flats or convert existing buildings into sections for the purpose of selling them. It is based on the second South African Sectional Titles Act as amended.⁹

In South African law before 1971, according to the maxim *superficies solo cedit*, which was taken over from Roman-Dutch law, a landowner was considered to be owner to be owner of any buildings on his or her land. The result was that, like in Botswana, the law did not recognise separate ownership in a building or parts of a building apart from the ownership of the land on which the building was erected.¹⁰ According to the South African Deeds Registries Act,¹¹ a piece of land was transferred without any reference to the building or improvements on the land. This is due to the fact that the building or

³ Act 36 of 1960.

⁴ Sectional ownership.

⁵ Paulik "Zur Dogmatick des Wohnungseigentums nach dem Wohnungseigentumgesetz vom 15. März 1951" in AcP 1952/53 420 quoted by Cowen "The South African Sectional Titles Act in historical perspective: an Analysis and Evaluation" 1973 (6) *CILSA* 35.

⁶ No 7 of 1999.

⁷ Under Statutory Instrument No 77 of 2002 published on the Botswana Government Gazette Extraordinary Gazette dated 23 September 2002.

⁸ See Statutory Instrument No 18 of 2003.

⁹ No 95 of 1986.

¹⁰ *Macdonald Ltd v Radin and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Van Wezel's Trustees* 1924 AD 409.

¹¹ Sec. 16, Act 47 of 1936.

improvements on the land were regarded as integral parts of the land.¹² It was thus necessary to introduce legislation to allow for sectional ownership, or ownership of parts of land and buildings in South Africa.

The idea of introducing sectional ownership was first discussed in the early 1950s.¹³ Committees were appointed to investigate the introduction of sectional ownership. The reports showed that the institution enjoyed lukewarm support.¹⁴ A committee appointed in 1968 showed in its report in 1969, *inter alia*, that many individuals who bought flats by way of share-block schemes were in serious danger of suffering financial harm if they could not obtain registered title to such flats.¹⁵

In October 1970, a commission of inquiry was appointed, which recommended in its report to the State President in 1971 that the Sectional Titles Act be drafted. The Sectional Titles Act¹⁶ was assented to on 19 June 1971 and promulgated on 30 June 1971. The Act introduced the concept of sectional ownership into South African law at last and became operative in 1973.¹⁷ The regulations under this Act were also promulgated in 1973¹⁸ and came into operation simultaneously with the Act.

During the time of its operation, from 1973 to 1986, certain shortcomings came to light, and after consultation with interested parties and bodies, it was decided to repeal the Act and replace it with the second Sectional Titles Act,¹⁹ which has been subjected to a series of amendments.²⁰ The most important amendments occurred in 1997.²¹ The amendments, which affected the establishment of sectional title schemes and the subsequent administration of the scheme, have made life easier for developers, sectional owners and

¹² Van der Merwe *Sectional Titles* ch 1-7.

¹³ Van der Merwe & Butler *Sectional Titles, Share Blocks and Time-sharing* (1985) 5-7 for the legislative history of the STA. Draft Bills were introduced in 1956, 1957 and 1964.

¹⁴ See Van der Merwe *Sectional Titles* ch 1, 7-8; De Wet & Tatham "Die Wet op Deeltitels" 1972 *DRP* 205 for a negative commentary on sectional ownership, where it was referred to as a "nebulous something".

¹⁵ Van der Merwe *Sectional Titles* ch 1-8.

¹⁶ 66 of 1971.

¹⁷ It was promulgated by proc R18 Government Gazette 3776 of 2 February 1973. The Act was mainly based on the Strata Titles of New South Wales.

¹⁸ Promulgated by Government Gazette 3822 GN R 474 of 30 March 1973.

¹⁹ Act 95 of 1986, which was promulgated in 1986 (G G 10440, 17 Sept 1986) and came into operation on 1 June 1988 (Proc. R 63 GG 11240 of 8 April 1988). The regulations to this Act were promulgated by Government Gazette 11245 GN R 664 of April 1988.

²⁰ Sectional Titles Amendment Act no 67 of 1991, Act no 7 of 1992, Act no 15 of 1993, Act no 44 of 1997.

²¹ Act no 44 of 1997, published under GN 1301, Government Gazette 18334. This Act commenced on 3 October 1997.

body corporates alike. The primary aims were to speed up the process of establishing a sectional title scheme, reduce costs of various processes, remove provisions and requirements that did not add value, make processes and procedures simple, and address gaps in the law that became noticeable with the application of the Act.²²

Some of the changes involved the elimination of the local authority's involvement in the approval of schemes, allowing a developer to reserve a real right to extend the scheme after the sectional plan has been registered, and before the body corporate has been established, as well as allowing a developer or the body corporate to make rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate.²³ In this way a mechanism was introduced for establishing a type of exclusive use area by means of rules and for providing for obligatory arbitration in the case of disputes among sectional owners and the body corporate.²⁴

Further amendments to the Act have been made,²⁵ which aim at expediting the process of developing sectional title schemes with greater effectiveness for the public benefit. The amendments seek to substitute certain definitions, repeal redundant provisions, make certain textual alterations and make provision with regard to registration of extensions to sectional title schemes and with regard to exclusive use areas. The changes among others involve the deletion of sections requiring the architect or land surveyor to certify that an incomplete building complies with the building regulations.

1 3 Possible benefits of sectional ownership

The following benefits of sectional ownership apply equally in Botswana and South Africa.

²² Kilbourn "Oiling the Conveyancing Wheels: The Recent Amendments to the Sectional Titles Act Discussed" February 1998 *Butterworths Property Law Digest* 5.

²³ Kilbourn February 1998 *Butterworths Property Law Digest* 5.

²⁴ Butler "The Arbitration of Disputes in Sectional Title Schemes Under Management Rule 71" 1998 (9) *Stell LR* 256.

²⁵ For more recent amendments see GG No 25217 of 25 July 2003 and Act No 29 of 2003 dated 14 November 2003.

1 3 1 Provision of accommodation

Sectional ownership provides urgently needed residential accommodation for all income levels in cities. As mentioned earlier, the massive flow of population from rural areas to urban centres creates an acute shortage of residential accommodation. In this situation, sectional ownership provides a more rapid turnover of development capital. A developer can dispose of various apartments in the scheme as soon as they have been built, and can use the proceeds to build more blocks of flats. As a result more people can be accommodated, and can have an option to buy their rented apartments.²⁶

1 3 2 Efficient construction and utilisation of land

The institution of sectional ownership enables the optimum use of land, and spreads the high costs of construction.²⁷ If the land is used for high-rise residential development, the density can be far higher and the cost of the land for each unit far less than when the land is used for a single-family housing.²⁸ The purchase price of such a unit would be lower than the purchase price of conventional housing with similar interior dimensions.²⁹

1 3 3 Home ownership

Sectional ownership also gives accommodation seekers security of tenure, and satisfies their psychological need for home ownership, which is not fulfilled by renting a flat. The aim is to place apartment ownership and house ownership on an equal footing so that people may have the option to buy apartments and have title to such apartments. Some people may prefer staying in apartments rather than conventional housing, due to a closer social life, additional amenities and the security it offers. Sectional owners could share and enjoy amenities, such as swimming pools, nursery schools and all other facilities that

²⁶ Van der Merwe *Sectional Titles* ch 1-11.

²⁷ Van der Merwe *Sectional Titles* ch 1-10.

²⁸ Van der Merwe *Sectional Titles* ch 1-10.

²⁹ Van der Merwe *Sectional Titles* ch 1-10.

may be available for a particular scheme. Since higher density is utilised, the estimated monthly levy for a sectional title unit should, on average not be more than approximately one-half of the running costs of a conventional house with comparable amenities.³⁰

1 3 4 Protection against inflation

Sectional ownership also protects people against increases in rentals. Buying an apartment in a sectional title scheme could increase a sectional owner's interest in the apartment, which could cause that person to add more value to the apartment with the knowledge that it could be sold if desired.³¹ Apart from providing residential accommodation, sectional ownership also benefits small businessmen and professional people by providing them with the opportunity to purchase rather than rent premises. Commercial companies could also provide accommodation for their employees in this way.³²

1 4 Aims, objectives and value of the research

The detailed analysis of Botswana and South African sectional titles law pertaining to establishment of schemes undertaken in this study aims at determining how the existing position in South African sectional titles law can aid interpretation and application of the sectional titles law of Botswana. Since the Sectional Titles Act of Botswana is based on the South African Sectional Titles Act, the structure of both statutes is more or less the same. Both recognise a concept of sectional ownership that consists of three elements, that is, individual ownership of a section, collective ownership³³ of the common parts of the sectional title scheme and membership of the body corporate.

An analysis of the provisions of the Botswana and South African statutes on the requirements and procedures involved in the establishment of sectional title schemes will

³⁰ Van der Merwe *Sectional Titles* ch 1-12.

³¹ Van der Merwe *Sectional Titles* ch 1-11.

³² Van der Merwe *Sectional Titles* ch 1-13.

³³ Van der Merwe *Sectional Titles* ch 2-16.

bring to light some shortcomings, which may exist in either of the statutes. An understanding of the shortcomings of the South African statute may be relevant to the interpretation and application of Sectional Titles Act of Botswana. However, the role of all parties involved in the establishment of a scheme also needs to be examined. To point out the consequences that may ensue in case of failure to comply with the requirements of the provisions of the Act, the duties of role players also need to be identified and discussed. Upon registration of the sectional plan and the opening of the sectional title register, the land and the building(s) become subject to the provisions of the Sectional Titles Act.³⁴ The rights of the developer, tenants and people who buy sectional units will thus be affected. An investigation of the effect of registration of the sectional plan and the opening of the sectional title register therefore concludes the analysis. The comparison of the two statutes should be of interest to both South African and Botswana lawyers.

1 5 Sequence of chapters

Chapter two contains a discussion on landownership and sectional titles, to determine whether sectional ownership is genuine ownership. This entails a discussion on the publicity principle, which in the case of land is normally achieved by means of registration in the Deeds Registries. Chapter three contains an analysis of the Botswana and South African statutes on the requirements involved in the establishment of sectional title schemes to bring to light any shortcomings that may exist in either of the two statutes. A discussion of the shortcomings of the South African statute may be relevant to the interpretation and application of the Botswana Sectional Titles Act. In chapter four the procedural aspects of establishment of a sectional title scheme are scrutinised, while in chapter five a comparative analysis of the roles of the parties involved in the establishment of schemes is undertaken with a view to identifying some consequences that may ensue if they fail to comply with the requirements of either of the statutes. The sixth chapter contains a comparative analysis on the effect of registration of the sectional

³⁴ Sec. 18 (1) (a) Botswana STA, sec. 13 (1) SA STA.

plan and the opening of the sectional title register, and it provides a summary and conclusions and makes recommendations for further research.

CHAPTER TWO

LANDOWNERSHIP AND SECTIONAL TITLES

2 1 Introduction

The sectional titles legislation has introduced many new concepts into the Botswana and South African law of things and has given rise to some innovations to the system of land registration in the two countries.³⁵ These changes are dealt with in more detail in appropriate chapters of this thesis. This chapter serves as a brief theoretical overview of the demands placed on the ordinary property law by the introduction of the sectional titles legislation in both Botswana and South Africa. Consideration is given in particular to security of title provided by registration. Registration is fundamental to the law of property, as it enables sectional owners to enforce and protect their rights against the general public.

2 2 Innovations brought by the Sectional Titles Acts³⁶

The following are the theoretical and practical innovations brought about by the introduction of the sectional titles legislation: a building comprised in a scheme and the land on which building is situated, may be divided into sections and common property in accordance with the provisions of the Acts.³⁷ By providing for the division of land and buildings into sections and common property, both Acts have created new composite *res*. This new legislative creation is called a “unit” and it is made up of a section (an apartment or commercial premises) and an undivided share in the common property (the

³⁵ For a discussion on innovations brought to the SA law see in general Cowen “The South African Sectional Titles Act in Historical Perspective: an Analysis and Evaluation” (1973) 6 *CILSA* 7-13; Benjamin, Rorke & Walwyn *The Sectional Titles Act 1971* (1974) 3-4; Jones *The Law and Practice of Conveyancing in South Africa 3 ed* (1985) 577; Van der Merwe *Sectional Titles* ch 1-26

³⁶ The Botswana Act 7 of 1999 and SA Act 66 of 1971 repealed by Act 95 of 1986.

³⁷ Sec. 4 of the Botswana STA and sec. 2 of the SA STA.

land and the common parts of the buildings).³⁸ Both the section and common property are clearly demarcated on the sectional plan. A completely new form of composite ownership is created consisting of separate ownership of a section together with joint ownership of the common property.³⁹ Not only ownership but also limited real rights like notarial leases, mortgage bonds and servitudes can now be registered concerning parts of buildings under a sectional title scheme.⁴⁰ A new kind of association, namely the body corporate which is made up of all the sectional owners as members has been provided for.⁴¹ The association comes into being subsequent to the transfer of the first unit in a scheme by the developer.

2 3 Changes to the system of land registration⁴²

Far-reaching changes were brought to the two countries' land registration systems. Both Acts provide for the opening of a new sectional title register with regard to the land and buildings subject to the scheme and as shown on the sectional plan.⁴³ This means that entries with regard to the land subject to a sectional title scheme must be closed in the land register as the land and buildings thereon has been converted to sections and common property.⁴⁴ The sectional title register⁴⁵ is opened by means of a sectional title

³⁸ See definition of "unit" in sec. 2 of the Botswana STA and sec. 1 of the SA STA.

³⁹ Sec. 4 of the Botswana STA and sec. 2 of the SA STA.

⁴⁰ Sec. 4 (e) and sec. 18 of the Botswana STA and sec. 2 (e) and sec. 15B (1) of the SA STA. In both Botswana and South Africa before the enactment of the Sectional Titles Acts (Botswana STA No 7 of 1999 and SA STA No 66 of 1971) the system of registration related to land only and not portions of buildings situated on the land. In terms of reg. 11 (2) of the Botswana Deeds Registry Act (No 36 of 1960) and reg. 28 (2) of the SA Deeds Registries Act (Act 47 of 1937), in describing land no reference shall be made in a deed conferring title to land or in a mortgage bond to any building or other property, movable or immovable, which may be on or attached to the land. In South Africa, the court pointed out in *Rosen v Rand Townships Registrar* 1939 WLD 5 that there is nothing unusual or absurd in describing a building as land. Hence the court permitted the registration of leases in respect of parts of buildings. The decision in this case was however not followed in deeds registry practice. In terms of sec. 2 of the Botswana Deeds Registry Act and sec. 102 of the South African Deeds Registries Act a general plan represents the relative positions and dimensions of two or more pieces of land, hence no mention is made of plans with regard to portions of buildings.

⁴¹ Sec. 39 of the Botswana STA and sec. 36 of the SA STA.

⁴² See further Van der Merwe *Sectional Titles* ch 1-27.

⁴³ Sec. 13 (1) (b) of the Botswana STA and sec. 12 (1) (b) of the SA STA.

⁴⁴ Sec. 14 of the Botswana STA and sec. 13 of the SA STA.

⁴⁵ As contemplated in sec. 13 (1) (b) of the Botswana STA and sec. 12 (1) (b) of the SA STA.

file, the form of which is prescribed by the Act.⁴⁶ There is nothing in the sectional title register that corresponds with the folio of the land register under conventional registration procedure on which transactions with regard to units or portions of units are entered.⁴⁷ Both Acts provide for sections of buildings to be shown on a sectional plan prepared by a land surveyor or architect or both,⁴⁸ whereas subdivisions of land are shown on a general plan of subdivision.⁴⁹ The two Acts provide for sectional owners to be issued with sectional title deeds⁵⁰ as opposed to title deeds provided for under the Deeds Registries Acts.⁵¹

2 4 Security of title in sectional titles

Since buildings comprised in the scheme and the land on which the buildings are situated may be divided into sections and common property,⁵² separate ownership of the sections or an undivided share thereof may be acquired in accordance with the provisions of the Sectional Titles Acts.⁵³ The owners of the sections own the common property in undivided shares in accordance with the provisions of the Acts.⁵⁴ Any real right may be acquired in or over any such section or an undivided share therein or the common property in accordance with the provisions of the Sectional Titles Acts.⁵⁵ Such a right may be registered in the Deeds Registries in accordance with the provisions of the

⁴⁶ Reg. 11 (1) of the Botswana STA and reg. 13 (1) of the SA STA. Regulation 11 (1) of the Botswana STA erroneously refers to Form D which is for a certificate of registered sectional title issued under section 12 (3) (f) of the Act. In South Africa the prescribed form is Form D, which explains the error.

⁴⁷ For documents to be filed in the sectional title file see regulation 11 of the Botswana STA and reg. 13 of the SA STA.

⁴⁸ Sec. 7 (3) (d) and sec. 7 (5) of the Botswana STA and sec. 5 (3) (d) and sec. 5 (5) of the SA STA.

⁴⁹ Sec. 46 of the Botswana Deeds Registry Act (Act 36 of 1960) and sec. 46 of the SA Deeds Registries Act (Act 47 of 1937).

⁵⁰ Sec. 13 (1) (d) of the Botswana STA and sec. 12 (1) (d) of the SA STA.

⁵¹ Sec. 5 (d) of the Botswana Deeds Registry Act (Act 36 of 1960) and sec. 3 (1) (d) of the SA Deeds Registries Act (Act 47 of 1937).

⁵² Sec. 4 (1) (a) of the Botswana STA and sec. 2 (a) of the SA STA.

⁵³ Sec. 4 (1) (b) of the Botswana STA and sec. 2 (b) of the SA STA.

⁵⁴ Sec. 4 (1) (c) of the Botswana STA and sec. 2 (c) of the SA STA.

⁵⁵ Sec. 4 (1) (d) of the Botswana STA and sec. 2 (d) of the SA STA.

Sectional Titles Acts.⁵⁶ The sectional titles legislation has thus created a new form of composite ownership.⁵⁷

After the sectional plan has been registered and the sectional title register opened, the Registrar issues certificates of sectional title for individual sections to the developer who is now the registered owner of all the individual sections and their undivided share in the common property.⁵⁸ The developer can lease or mortgage such sections, or register other real rights over them. He can also transfer ownership of such sections and their undivided share in the common property. Any person who buys such units from the developer shall have the same rights that the developer had in the units.⁵⁹ This means that he can sell, lease, mortgage or even enter into notarial deeds of servitude with regard to his or her unit.

The rights that an owner has over his or her unit thus amount to ownership. The legislature for both Botswana and South Africa has created a new type of composite ownership.⁶⁰ A basic principle of both the Botswana and South African Sectional Titles Acts is that the purchaser taking transfer of a unit becomes the owner of his or her section.⁶¹ Ownership is in principle the most extensive right to a thing known in the law of the two countries.⁶² Inherent in ownership are powers of control, use, enjoyment and disposal.⁶³

The concept of ownership in each community provides a unique way in which the relationship between legal subjects regarding the control of things is recognised.⁶⁴ The

⁵⁶ Sec. 4 (1) (e) of the Botswana STA and sec. 2 (e) of the SA STA.

⁵⁷ Van der Merwe *Sectional Titles* ch 2-4.

⁵⁸ Sec. 13 (1) (d) of the Botswana STA and sec. 12 (1) (d) of the SA STA.

⁵⁹ This is the obvious result of the principle *nemo plus juris ad alium transferre potest quam ipse habet* (No one can transfer to another a greater right than he has himself).

⁶⁰ Sec. 18 (1) (a) of the Botswana STA and sec. 15B (1) (a) of the SA STA provides for the transfer of "ownership in a unit". Sec. 39 (1) of the Botswana STA and sec. 36 (1) of the SA STA provides that a body corporate is established from the date when any person other than a developer becomes "owner of a unit". Sec. 4 (1) (c) of the Botswana STA and sec. 2 (c) of the SA STA provides that sectional owners shall "own the common property in undivided shares..".

⁶¹ See definition of owner in sec. 2 (1) of the Botswana STA and sec. 1 (1) of the SA STA.

⁶² Van der Walt and Pinaar *Introduction to the Law of Property* 56.

⁶³ Van der Merwe *Sectional Titles* ch 2-15.

⁶⁴ Van der Walt & Pinaar *Introduction to the Law of Property* 55.

common-law⁶⁵ description of ownership appears in case law where various decisions define ownership as the most complete real right that a legal subject can have with regard to a thing, or as the real right which gives the owner the most complete and absolute entitlements to a thing. It can however be limited by objective law and by the rights of others. Examples include limited real rights or creditors' rights.⁶⁶ This means that as far as immovable property⁶⁷ is concerned, a person can do what he likes with his or her property. Apparently this unlimited freedom is not entirely true as various factors can restrict an owner's entitlements to his or her property. These restrictions include statutory limitations, personal rights of third parties against the owner, limited real rights of third parties with regard to the thing and the law of neighbours.⁶⁸ Since no owner has the unlimited right to exercise his or her entitlements in absolute freedom and in his or her own discretion, ownership is related to both the relationship between a legal subject and the thing and with the relationship between legal subjects with regard to the thing.⁶⁹ These relationships are undefined in that they may differ from time to time or from relationship to relationship.

With the said common-law descriptions of ownership based on entitlements, as found in case law, the content of ownership must be determined within the context of each individual case.⁷⁰ In doing so, consideration must be given to two aspects, namely the entitlements of the owner and limitations on ownership.⁷¹ Certain entitlements are generally recognised. Firstly, the entitlement to: control, which enables an owner to physically control and keep a thing; secondly, the entitlement to use and draw benefit

⁶⁵ Although Botswana was a British protectorate, English property law and English common law were not chosen for general application in non-tribal matters. It was the law applicable in the Colony of the Cape of Good Hope, presumed to be "Roman-Dutch Law", which was selected as the common law of the Protectorate. See further Ng'ong'ola "Land Tenure Reform in Botswana: Post-colonial Developments and Future Prospects" 1996 11 SAPR/PL 2; section 19 of the General Administration Proclamation of June 1891. For further discussions on the reception of Roman Dutch law in Botswana, see Pain "The Reception of English and Roman-Dutch Law in Africa with reference to Botswana, Lesotho and Swaziland" (1978) 11 CILSA 137-167; Sanders "Legal Dualism in Lesotho Botswana and Swaziland" (1985) 1 (1) *Lesotho LJ* 47-67.

⁶⁶ *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

⁶⁷ In terms of sec. 4 (4) of the Botswana STA and sec. 3 (4) of the SA STA a unit shall be deemed to be land, hence reference to immovable property includes a unit.

⁶⁸ Van Wyk *Planning Law-Principles and Procedures of Land Use Management* (1999) 75.

⁶⁹ Van der Walt & Pienaar *Introduction to the Law of Property* 57.

⁷⁰ *Elektrisiteitsvoorsieningskommissie v Fourie en Andere* 1988 2 SA 627 (T).

⁷¹ Van der Walt & Pienaar *Introduction to the Law of Property* 58.

from a thing; thirdly, the entitlement to encumber, which enables an owner to grant limited real rights in respect of the thing; fourthly, the entitlement to alienate or transfer the thing to someone else; and finally the entitlement to vindicate, which enables the owner to claim the thing from another person. Ownership without any of these entitlements is inconceivable, since such a right would be meaningless for the owner.⁷²

The fact that a sectional owner is entitled to the control or use of his or her unit as well as the entitlement to encumber, alienate or vindicate or claim the unit from another person, is proof that he or she has ownership rights over the unit. When a person purchases an apartment in a sectional title scheme, he or she enters into a threefold legal relationship.⁷³ Firstly, he or she becomes the owner or title-holder of the apartment. Secondly, he or she becomes the joint owner or common owner of the land and parts of the building which do not form part of the apartment. Thirdly, he or she becomes a member of the body corporate, which is entrusted with the task of maintaining the common property, and managing the sectional title community.

Even though the institution of sectional ownership has its basis on the traditional institutions of ownership, co-ownership and associational membership, these institutions acquire special characteristics since they are part of the threefold unity of sectional ownership.⁷⁴ The common ownership created in terms of both the Botswana and South African Acts differs from ordinary co-ownership, in that a sectional owner's right to demand the partition of the scheme is restricted to the special circumstances required for terminating a scheme.⁷⁵ The undivided share in the common property allocated to each owner in proportion to his or her participation quota can only be alienated or disposed of, together with the apartment to which it is inextricably linked. The undivided share in the common property is indivisibly linked to a specific apartment.⁷⁶

The body corporate in terms of the sectional title scheme differs from a commercial company. Membership of the body corporate is inextricably linked to ownership of an

⁷² Van der Walt & Pienaar *Introduction to the Law of Property* 59.

⁷³ Van der Merwe "Is Sectional Ownership True Ownership?" (1992) 3 *Stell L R* 131-136.

⁷⁴ Van der Merwe (1992) 3 *Stell L R* 131. See also Van der Merwe *Sectional Titles* ch 2-16 for a more detailed discussion, where he uses the term "collective ownership" to designate the special type of common ownership acquired by sectional owners in respect of the common property.

⁷⁵ In terms of sec. 51 and 52 of the Botswana STA and sec. 48 and 49 of the South African STA.

⁷⁶ Van der Merwe & Butler *Sectional Titles* 36.

apartment, and can only be terminated by alienation of an apartment⁷⁷ or dissolution of the body corporate.⁷⁸ It is clear that membership of the body corporate is obligatory. Sectional owners are obliged to cooperate in the management of the scheme, and to share in the expenses thereof.⁷⁹

In determining whether a unit owner has ownership in respect of his or her unit, it is necessary to determine whether he or she acquires the same extensive powers of use and enjoyment of his or her apartment in terms of the Sectional Titles Acts as a traditional owner acquires over his or her house on a separate piece of land.⁸⁰ A question can be asked whether a sectional owner can genuinely occupy, use and enjoy the apartment at his or her own discretion, prohibit other persons from encroaching on it, freely dispose of and alienate the apartment, burden it with mortgages or other real and personal rights and remain the reversionary owner of the apartment if the legal interests therein had been burdened in favour of third parties.⁸¹

To answer the above question, it is necessary to review the restrictions imposed on apartment ownership the common law and the Sectional Titles Acts so as to determine how far these powers differ from those of a conventional owner of land.⁸² However, only a brief overview of such restrictions is undertaken in these paragraphs. Generally the common law of nuisance and the rules of neighbour law prevent an apartment owner from abusing his or her apartment ownership rights.⁸³ An apartment owner is prohibited from carrying out certain activities that will prejudice his or her neighbour's rights. He or she is also not allowed to perform any abnormal, unnatural or socially unacceptable activities in his or her apartment.⁸⁴ Examples of such activities are where a sectional

⁷⁷ In terms of sec. 39 (9) of the Botswana STA and sec. 36 (2) of the SA STA.

⁷⁸ In terms of sec. 52 of the Botswana STA and sec. 49 of the SA STA.

⁷⁹ In terms of sec. 40 of the Botswana STA and sec. 37 of the SA STA.

⁸⁰ Sec. 4 (1) (b) and (e) of the Botswana STA and sec. 2 (b) and (e) of the SA STA provide that "notwithstanding anything to the contrary in any law (or the common law contained) (b) separate ownership may be acquired in accordance with the provisions of this Act;...(e) the registrar may, in accordance with the provisions of this Act, register in a deeds registry a title deed whereby ownership in any such section is acquired".

⁸¹ Van der Merwe 1992 *Stell L R* 132.

⁸² In terms of sec. 4 (4) of the Botswana STA and sec. 3 (4) of the SA STA, a unit is deemed to be land.

⁸³ Van der Merwe 1992 *Stell L R* 133.

⁸⁴ Van der Merwe 1992 *Stell L R* 133.

owner allows water from the bathroom or kitchen to overflow into a section below, or where his or her actions endanger the structural soundness of the building.⁸⁵

Both the Botswana and South African Acts have provisions placing general restrictions on the use and enjoyment of an apartment.⁸⁶ A sectional owner is obliged to allow reasonable access to the management body to repair and replace common facilities, to inspect the apartment, and to ensure compliance with the rules of the scheme.⁸⁷ A sectional owner is obliged to maintain his or her section in a good state of repair.⁸⁸ He or she must carry out all work with regard to the section which has been ordered by any competent public or local authority, and pay all charges, expenses and assessments which may be payable with regard to his or her section.⁸⁹ A sectional owner must refrain from using his or her section in such a manner or for such purpose which will cause a nuisance to any occupier of any other section.⁹⁰ An owner must not, except with the written consent of all the owners, use his or her section or permit it to be used for any other purpose than that shown expressly or by implication on a registered sectional plan.⁹¹

Apartment ownership is further limited by existing servitudes, other real rights and restrictive conditions filed with the sectional plan.⁹² Subsequent registration of servitudes burdening a particular section may also limit the use and enjoyment of that particular section.⁹³ Since sectional ownership therefore is to some extent burdened by the provisions of the Act, the rules and the resolutions of the body corporate, and several other liabilities not known to conventional owners, it has been doubted whether ownership of a section should be regarded as genuine ownership.⁹⁴ However the basic features of sectional ownership justify not only stricter limitations on the ownership of an

⁸⁵ Such actions cannot, however, warrant the expulsion of the culprit from his or her section, as this would flout the principle of absolute ownership.

⁸⁶ See also Van der Merwe 1992 *Stell L R* 133.

⁸⁷ Sec. 47 (1) (a) of the Botswana STA and sec. 44 (1) (a) of the SA STA.

⁸⁸ Sec. 47 (1) (c) of the Botswana STA and sec. 44 (1) (c) of the SA STA. In terms of Annexure 8 r 68 (1) (vii) of the SA STA, a sectional owner must maintain the hot water installation which serves his or her section.

⁸⁹ Sec. 47 (1) (b) of the Botswana STA and sec. 44 (1) (b) of the SA STA.

⁹⁰ Sec. 47 (1) (e) of the Botswana STA and sec. 44 (1) (e) of the SA STA.

⁹¹ Sec. 47 (1) (g) of the Botswana STA and sec. 44 (1) (g) of the SA STA. See also Annexure 8 r 68 (1) (v) of the SA STA.

⁹² Sec. 12 (2) (b) of the Botswana STA and sec. 11 (2) (b) of the SA STA.

⁹³ Sec. 18 (1) (d) of the Botswana STA and sec. 15B (1) (d) of the SA STA.

⁹⁴ See for example Dulckeit quoted by Cowen 1973 *CILSA* 35.

apartment, but also limitations of a different kind to those placed on the ownership of land.⁹⁵

The characteristic features of apartment ownership are the following:⁹⁶ the object of apartment ownership is an apartment which form part of a destructible building, rather than indestructible land as is the case with landownership; the apartments of a sectional title building are structurally interdependent, and not structurally individualised; the community life is more intensified than the community life of a group of neighbouring landowners; the community life of apartment owners is more or less permanent and is terminated only upon dissolution of the sectional title scheme. These extraordinary features explain limitations and restrictions on the powers and entitlements of a sectional owner in respect of his or her unit. Apartment ownership therefore is a special type of ownership, coloured by the characteristic features of the institution, and it still remains genuine ownership. Sectional ownership should therefore be placed on the same footing as landownership.⁹⁷

Sectional ownership rights are real rights, and are registrable in a deeds registry in accordance with the Deeds Registries Acts.⁹⁸ The existence of such rights, their extent and the identity of their holder must be advertised to the world at large.⁹⁹ In the case of real rights with regard to land, publicity is normally achieved by means of their registration in the Deeds Registries.¹⁰⁰ Registration thus gives effect to the principle of publicity essential to the law of property. It provides holders of such rights with the necessary security of title as they can enforce and protect their rights against the public at large.¹⁰¹ The Deeds Registries Acts make provision for ownership in land to be conveyed from one person to another by a process of publicising and recording the transfer at the

⁹⁵ Van der Merwe 1992 *Stell L R* 135.

⁹⁶ Van der Merwe 1992 *Stell L R* 135.

⁹⁷ Van der Merwe 1992 *Stell L R* 135. See also Van der Merwe *Sectional Titles* ch 2-15.

⁹⁸ Sec. 60 of the Botswana Deeds Registry Act (Act 36 of 1960) and sec. 63 of the SA Deeds Registries Act (Act 37 of 1937).

⁹⁹ Badenhorst, Pienaar & Mostert *Silberburg and Schoeman's The Law of Property* 75.

¹⁰⁰ In terms of sec. 9 of the Botswana Deeds Registry Act "DRA" and sec. 7 of the SA Deeds Registries Act (DRA), "The registrar shall on conditions prescribed ... permit any person to inspect the public registers and other public records in his registry or to make copies of those records or extracts from those registers..."

¹⁰¹ Mostert "The Diversification of Land Rights and its Implications for a New Land Law in South Africa" in Cooke (eds) *Modern Studies in Property Law* 3.

Deeds Registry.¹⁰² Since the rights to ownership are publicised through registration, they are enforceable against third parties. The registration of ownership rights in units ensures security of title and access to land and housing as envisaged by the South African Constitution,¹⁰³ and the Sectional Titles Acts.¹⁰⁴

To conclude this discussion, it is necessary to refer to ownership in terms of a Deed of Fixed Period State Grant in Botswana. This discussion is important when taking into consideration the definition of ownership and the various entitlements that go with it referred to above. Land in Botswana falls under three main categories, namely freehold, state land and tribal land. The term “freehold” was presumably initially employed in the belief that it conveyed the same idea as the Roman-Dutch law concept of “*dominium*” or “ownership”.¹⁰⁵ Freehold thus signifies the greatest possible interest a person may have in or over a thing.¹⁰⁶ Freehold also confers fairly exclusive and unrestricted control over that thing.¹⁰⁷ Its other standard incidents include the right to use, the right to manage, the right to income and capital, and the right to security.¹⁰⁸ Freehold land is therefore ideal for the establishment of a sectional title scheme.

State land consists of “unalienated”¹⁰⁹ and “reacquired”¹¹⁰ state land. Ownership of reacquired state land vests in the Republic¹¹¹ and certificates of registered state title are issued and registered in terms of the Deeds Registry Act.¹¹² The President has the power to dispose of state land or to authorise any person in writing to exercise it on his behalf.¹¹³ State land is disposed of under an instrument bearing the signature of the President or the person authorised by him. Any contract for the sale or other disposition of state land or any interest in state land, which does not comply with this requirement, shall not be of

¹⁰² Sec. 17 of the Botswana DRA and sec. 16 of the SA DRA.

¹⁰³ Sec. 25 of Act 108 of 1996.

¹⁰⁴ Botswana STA No 7 of 1999 and SA STA No 95 of 1986.

¹⁰⁵ Ng’ong’ola “Land Tenure in Botswana: Post-colonial Developments and Future Prospects” (1996) 11 *SAPR/PL* 2.

¹⁰⁶ Honore “Ownership” in AE Guest (ed) *Oxford Essays in Jurisprudence* Oxford (1961) 108.

¹⁰⁷ Wessels J in *Johannesburg Municipal Council v Rand Township Registrar* 1910 TS 131, 1319.

¹⁰⁸ Honore 112-113.

¹⁰⁹ See definition of unalienated state land in sec. 2 of State Land Act (Law 29 of 1966) (“SLA”)

¹¹⁰ See definition of reacquired state land in sec. 2 of the SLA.

¹¹¹ Sec. 2 of the SLA.

¹¹² See proviso to sec. 17 of the DRA.

¹¹³ Sec. 3 and 4, SLA.

any force and effect.¹¹⁴ One of the ways in which the state can dispose of this land is through the issuance of a deed of fixed period state grant,¹¹⁵ which is registrable in the Deeds Registry. A deed of fixed period state grant vests ownership of the property in the purchaser for a fixed period, upon payment of a lump sum at the beginning of the term from the date of registration in the Deeds Registry.¹¹⁶ The fixed period for urban areas is 99 years for residential properties and 50 years for commercial or industrial properties. Subject to compliance with stipulated development covenants,¹¹⁷ the grantee has the right to cede, assign, transfer, lease, sell, mortgage or otherwise deal with the property during the period of ownership, always provided that at the end of the fixed period the property together with all the improvements thereon, shall revert to the state absolutely without any compensation being payable for improvements or otherwise.¹¹⁸

Given the definition of ownership, it is strange from a legal perspective for ownership to be granted for a fixed period. Ownership should be absolute and perpetual; absolute in the sense that no greater interest may exist in a thing beyond it.¹¹⁹ Ownership must in principle also be able to last indefinitely, even though it may be terminated in a number of ways.¹²⁰ The fixed period does not confer the greatest possible interest in the land in that the state retains ownership in the land, and the grantee is effectively given another real right less than ownership.¹²¹ The provision of a fixed term and the reversion of improvements to the state make it less attractive than an ordinary lease which can allow for conventional or tacit relocation at termination, and for the payment of compensation for improvements that cannot be removed.¹²² It is likely to be unconstitutional for the state to attempt to take possession of such properties without any payment of compensation.¹²³

¹¹⁴ Sec. 10, SLA.

¹¹⁵ For other methods of disposal see Ng'ong'ola (1996) 11 SAPR/PL.

¹¹⁶ See condition 1 of a deed of fixed period state grant.

¹¹⁷ In terms of condition 2 of the deed.

¹¹⁸ See condition 1 of the deed and subsequent deed of transfer.

¹¹⁹ Birks "The Roman Law Concept of Dominium and the Idea of Absolute Ownership" 1985 *Acta Juridica* 1.

¹²⁰ For example by expropriation or prescription.

¹²¹ Ng'ong'ola (1996) 11 SAPR/PL 12.

¹²² Cooper *Land lord and tenant* Juta 2nd ed 1994, ch 21.

¹²³ Ng'ong'ola (1966) 11 SAPR/PL 12.

An attempt to salvage the abnormal situation has however been made by the issuance of a Presidential Directive of 2000.¹²⁴ The Presidential Directive reflects that the Fixed Period State Grant should remain the standard land tenure under which state land should be allocated; state land allottees be allowed a period of ten years before the expiry of the Fixed Period State Grant to indicate their intentions to renew or not, and negotiations should be concluded not later than seven years before the expiry of the Fixed Period State Grant; upon expiry of Fixed Period State Grant, a fee to be determined and approved by Government be charged for renewal of the Fixed Period State Grant; in the case where a citizen allottee/holder does not want/wish to renew the Fixed Period State Grant or where Government declines to renew, Government should pay compensation for the property at the prevailing market price; in the case where a non-citizen allottee or holder does not wish to renew the Fixed Period State Grant or where Government declines to renew, Government shall pay compensation only for the developments on the plot at the prevailing market price.

Despite the changes brought by the abovementioned Presidential Directive, the Fixed Period State Grant still remains a lease. A developer who holds property in terms of such a right cannot apply for the opening of a sectional title scheme over his or her property as he or she is not owner in terms of the Act.¹²⁵ Neither a long term lease, nor perpetual quitrent, nor any other interest in the land that does not amount to ownership enables a person to qualify as a developer.¹²⁶ An amendment of the Act to extend the meaning of “developer” or “owner” in order to include people with leasehold or quitrent interest in land may not be a good idea for the following reasons: American experience regarding leasehold *condominiums* has not always been satisfying;¹²⁷ fundamental principles emanating from the fact that a sectional owner is a true owner of his or her unit would be

¹²⁴ CAB 11 (b)/2000.

¹²⁵ In terms of sec. 2 (1) of the Botswana STA “developer” means a person who is the registered owner of land... “Owner” means in relation to immovable property, the person registered as owner or holder thereof and includes the trustee in an insolvent estate, or the liquidator of a company or close corporation which is an owner, and the executor of an owner who has died, or the representative, recognised by law, of a owner who is a minor or of unsound mind or is otherwise under disability, if such trustee, liquidator, executor or representative is acting within the scope of his authority. See also ch 3 para 3 2 4.

¹²⁶ Van der Merwe *Sectional Titles* ch 3-19.

¹²⁷ See Risk 16; Rosentein 666 on so-called “*leasehold condominium*.”

difficult to accommodate in a leasehold scheme;¹²⁸ notwithstanding the fact that the Fixed Period State Grant is renewable and the holder can be compensated for improvements thereon, the unit would become less marketable as the end of the term draws near;¹²⁹ if for some reason the fixed period is not renewed, the scheme would terminate. Termination of the scheme would cause problems for the lessees and mortgagees; and as the end of the term draws near lending institutions may find it difficult to finance projects involving such leasehold *condominiums*. One workable option would be for the Government to revise its policy with regard to state land tenure. A revision of policy would entail allocation of part or all of state land under freehold tenure. Freehold tenure is ideal for sectional titles as section owners would be true owners of their apartments as envisaged by sectional titles law. Freehold title would also be attractive to local and foreign investors alike. Financial institutions would also be willing to finance projects involving such properties, and as more people invest in sectional title developments, access to land would be achieved. The revision of tenure would also enable the Botswana Housing Corporation and other developers to convert existing buildings currently held by them under fixed period to sectional title schemes.

2 5 Summary of findings

It is clear that both the Botswana and South African Sectional Titles Acts have introduced new concepts to the two countries law of things, and introduced some innovations to the two countries' system of land registration. Apartment ownership rights are real rights registrable in a deeds registry, and are enforceable against the public at large. People acquiring such rights have access to land and housing as envisaged by the South African Constitution and both the Botswana and South African Sectional Titles Acts. In terms of both statutes, a developer must be the owner of the property over which a sectional title development is planned. In the case of Botswana a person who has a fixed period "ownership" would not qualify as developer in terms of the current Act.

¹²⁸ Van der Merwe *Sectional Titles* ch 3-19.

¹²⁹ Rosentein "Inadequacies of Current Condominium Legislation-A Critical Look at the Pennsylvania Unit Property Act" 1974 *Temple Law Quarterly* 667.

CHAPTER THREE

REQUIREMENTS FOR ESTABLISHMENT OF A SECTIONAL TITLE SCHEME IN TERMS OF THE SOUTH AFRICAN AND BOTSWANA SECTIONAL TITLES ACTS

3 1 Introduction

In this chapter the provisions of the Botswana and South African sectional titles legislation relating to the requirements involved in the establishment of a sectional title scheme are discussed and compared. As introduction, a comparison is made of the establishment of a sectional title scheme and the establishment of a township development.

In both Botswana and South Africa the development of a sectional title scheme is similar in many respects to the establishment of a new township on a vacant piece of land. The sectional plan performs the same function in a sectional title scheme as the general plan does in a new township development. Both a sectional title development and a new township development cause new entities to be registered in the deeds registry.¹³⁰ In a sectional title development units are registered in the deeds registry, whereas in a new township development lots are registered and title deeds issued.¹³¹ Real rights may be registered in respect of these new entities. The establishment of a new township provides access to land to residents of both Botswana and South Africa and in both countries the draft sectional plan of a sectional title scheme and the general plan for a new township have to be approved by the Director of Surveys and Mapping¹³² or Surveyor-General¹³³ respectively. Since the introduction of sectional title legislation in South Africa, sectional title has proved to be an opportunity for making optimum use of the available land and

¹³⁰ Lots are registered and title deeds issued against them, whereas units are registered and certificates of sectional title issued against the individual units.

¹³¹ Sec. 46 of the Botswana Deeds Registry Act and sec. 46 of the South African Deeds Registries Act.

¹³² Sec. 9 (1) of the Botswana STA.

¹³³ Sec. 7 (1) of the SA STA.

has assisted in spreading the high costs of construction.¹³⁴ The establishment of sectional title schemes in Botswana is therefore also likely to provide an opportunity of making optimum use of the available land and to assist in spreading the high costs of construction.

However, the development of a sectional title scheme and a new township differ in that a general plan is involved with the vertical division of land, whereas a sectional plan is concerned with the division of land and buildings into units.¹³⁵ In Botswana¹³⁶ the architect or land surveyor must ensure that the scheme complies with the Town and Country Planning Act and the Building Control Act and their regulations,¹³⁷ whereas in South Africa,¹³⁸ the scheme must comply with the relevant town planning schemes and building by-laws. The position in South Africa is such that if during the process of establishing a scheme certain irregularities come to light, the developer can approach the local authority for condonation of such irregularities.¹³⁹ There is however no similar provision in the Botswana statute.

The Botswana Act¹⁴⁰ only provides that after preparation of the “draft sectional plan,” the land surveyor or architect must submit the prescribed number of copies of the draft sectional plan to the Director for approval, as well as a certificate stating that the proposed division into sections and common property complies with the provisions of the Town and Country Planning Act, the Building Control Act and the regulations related to these laws.¹⁴¹ The land surveyor or architect must also issue a certificate to the effect that the building to which the scheme relates was erected in accordance with approved building plans.¹⁴²

¹³⁴ Van der Merwe *Sectional Titles* ch 1-10. See Schreiber “The Lateral Housing Development: Condominium or Home Owners Association?” (1976) 117 *University of Pennsylvania Law Review* 1107: “Condominiums should be utilised by society to remould our physical environment in order to achieve a more satisfactory and efficient utilization of land resources and to bring about a more widespread distribution of economic wealth.”

¹³⁵ Van der Merwe *Sectional Titles* ch 6-3.

¹³⁶ Sec. 9 (1) of the Botswana STA.

¹³⁷ Sec. 9 (1) of the Botswana STA.

¹³⁸ Sec. 4 of the SA STA.

¹³⁹ Sec. 4 (5) STA.

¹⁴⁰ Sec. 9 (2) (a) of the Botswana STA.

¹⁴¹ Sec. 9 (2) (a), STA.

¹⁴² Sec. 9 (2) (a), STA.

A question may be asked as to what happens in Botswana if the building does not comply with the provisions of the Town and Country Planning Act¹⁴³ and the Building Control Act.¹⁴⁴ For example, additions might have been made without approved plans having been obtained. In such cases, the Building Control Act provides that if any work to which building regulations are applicable contravenes those regulations, the local authority may give notice requiring the owner either to demolish or remove the work.¹⁴⁵ The owner may also be called upon to effect the necessary alterations to make the building(s) comply with the regulations.¹⁴⁶ In South Africa the problem would be addressed by referring the applicant to the local authority for condonation of such irregularities.¹⁴⁷ The South African Act¹⁴⁸ provides further that no certificate shall be issued for condonation of non-compliance with a national building regulation regarding the strength and stability of any building unless a deviation has been permitted or an exemption has been granted in terms of section 18 (2) of the National Building Regulations and Building Standards Act.¹⁴⁹ In Botswana a provision to allow for condonation of irregularities would be a welcome development, especially where compliance would be costly or even impossible.¹⁵⁰ An amendment of the Botswana Sectional Titles Act to allow for condonation by the local authority of irregularities that may come to light during the process of establishment of a scheme is suggested.

Where landowners propose to convert an existing building on their land into sections or to build a block of flats for the purpose of selling, letting or dealing with it, they are required, in both Botswana and South Africa, to comply with the procedures prescribed by the respective Sectional Titles Acts and their regulations.¹⁵¹ In South Africa a scheme is also registered in accordance with the practice manual issued to land surveyors and architects by the chief Surveyor-General from time to time. Particular schemes may also

¹⁴³ Act 11 of 1977.

¹⁴⁴ Act 7 of 1962.

¹⁴⁵ Sec. 8 (1) of the Building Control Act (BCA).

¹⁴⁶ Sec. 8 (1), BCA.

¹⁴⁷ Sec. 4 (5) STA.

¹⁴⁸ Sec. 4 (5) STA.

¹⁴⁹ Act No 103 of 1977.

¹⁵⁰ If the Act were to be amended to allow for condonation of irregularities by the local authority, the strength and stability of the building(s) must however be taken into account.

¹⁵¹ Sec. 6 (1) of the Botswana STA and sec. 4 (1) of the SA STA.

be subject to legislation applicable only to them.¹⁵² In both countries, the developer must also cause a draft sectional plan to be prepared by the land surveyor or architect, showing the building or buildings that are to be divided into sections and common property.¹⁵³ This plan must identify the land, on which the buildings are situated,¹⁵⁴ the boundaries of the sections, the common property and exclusive use areas.¹⁵⁵ As such, it contains the only authoritative statement of each section's participation quota.¹⁵⁶ The participation quota is important for the calculation of the contributions of the sectional owner to the maintenance and administration of the scheme.¹⁵⁷ It determines the sectional owner's share in the common property as well as his or her voting rights regarding the affairs of the scheme.¹⁵⁸ Developers in both countries must, with the assistance of their professional advisors, also comply with the legal requirements for the establishment of a sectional title scheme. A sectional plan must therefore be prepared in accordance with the Sectional Title Acts.¹⁵⁹

3 2 Statutory requirements

The following paragraphs contain a discussion on the most important statutory requirements to be considered in the establishment of a sectional title scheme. The provisions of the Sectional Titles Acts¹⁶⁰ pertaining to the Deeds Registries Acts¹⁶¹ are discussed since the Deeds Registries Acts¹⁶² apply to all documents registered or intended to be registered in the Deeds Registries.¹⁶³

¹⁵² Eg. Regulations and Ordinances by local authorities.

¹⁵³ Sec. 6 (1) of the Botswana STA and sec. 4 (1) of the SA STA.

¹⁵⁴ Sec. 7 (1) of the Botswana STA and sec. 5 (3) (a) of the SA STA.

¹⁵⁵ Sec. 7 (3) (a) (f) of the Botswana STA and sec. 5 (3) (a) (f) of the SA STA.

¹⁵⁶ Sec. 7 (3) (g) of the Botswana STA and sec. 5 (3) (g) of the SA STA.

¹⁵⁷ 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 L R* 338.

¹⁵⁸ Van der Merwe *Sectional Titles* ch 4-7.

¹⁵⁹ Sec. 7 (1) of the Botswana STA and sec. 5 (1) of the SA STA.

¹⁶⁰ Botswana Act No 7 of 1999 and SA Act No 95 of 1986.

¹⁶¹ The Botswana Act No 36 of 1960 and the SA Act No 47 of 1937.

¹⁶² The Botswana Act No 36 of 1960 and the SA Act No 47 of 1947.

¹⁶³ Both Botswana and SA Deeds Registries.

3 2 1 The Deeds Registries Acts¹⁶⁴

Sectional title law has introduced many new concepts to the South African Law of Things.¹⁶⁵ Sectional title is a specialised form of landownership. It originated in South Africa with the enactment of the first Sectional Titles Act.¹⁶⁶ In property law, sectional titles encouraged the much-needed revision of some of the traditional principles of classic Roman-Dutch law as applied in South Africa.¹⁶⁷ It is expected that the same will hold true for Botswana law. Some innovations have also been introduced into the two countries' system of land registration. Both the Botswana and South African statutes provide for the division of land and buildings comprised in the development scheme into sections and common property.¹⁶⁸ They have thus created a new composite *res*, which is called the "unit". A unit consists of a part of a building (a section) and an undivided share in the common parts of the building(s) and land comprising the scheme.¹⁶⁹

A new form of composite ownership has also been created. This form of composite ownership is composed of a separate ownership of a section together with joint ownership of the common property and membership of the Body Corporate.¹⁷⁰ According to the two statutes, not only ownership can be registered regarding portions of buildings under a sectional title scheme; limited real rights like notarial leases, mortgage bonds and servitudes can also be registered over portions of buildings under a sectional title scheme.¹⁷¹ According to the Sectional Titles Acts,¹⁷² the Deeds Registries Act shall apply to the registration of all such documents with such adaptation as may be necessary. The Deeds Registries Acts will also apply in relation to all other documents registered or filed

¹⁶⁴ Botswana Act 36 of 1960 and SA Act 47 of 1937.

¹⁶⁵ See Cowen "The South African Sectional Titles Act in Historical Perspective: an Analysis and Evaluation" (1973) 6 *CILSA* 7-13; Jones *The Law and Practice of conveyancing in South Africa* 3 ed (1985) 577; ch 2 par 2 2 and 2 3 above.

¹⁶⁶ Act 66 of 1971.

¹⁶⁷ Mostert "The Alienation and Transfer of Rights of Exclusive Use in Sectional Title Law" (1997) 8 *Stell L R* 265-284, 265.

¹⁶⁸ Sec. 4 (1) (a) of the Botswana STA and sec. 2 (a) of the SA STA.

¹⁶⁹ See sec.2 of the Botswana STA and sec. 1 of the S A STA for definition of "unit". See further Mostert "The Alienation and Transfer of Rights of Exclusive Use in Sectional Title Law" (2002) 13 *Stell L R* 265-284, 266.

¹⁷⁰ Sec. 4 read with sec. 39 of the Botswana STA and sec. 2 read with sec. 36 of the SA STA.

¹⁷¹ Sec. 18 (1) of the Botswana STA and sec. 15B of the SA STA.

¹⁷² Sec. 5 (1) of the Botswana Act and sec. 3 (1) of the SA STA.

or intended to be registered or filed in terms of the Sectional Titles Acts.¹⁷³ The registration of all such documents may, however, be provided for in the Sectional Titles Act or any other law.¹⁷⁴ The South African Act¹⁷⁵ provides further that the Deeds Registries Act shall apply to the registration of such documents save as the context indicates.

The Registrar may reproduce any document referred to above by means of microfilming or any other process that, in his or her opinion, accurately and durably reproduces such a document.¹⁷⁶ The Registrar may preserve such reproduction in place of such document.¹⁷⁷ Such reproductions shall be deemed to be the original document for purposes of the Deeds Registries Act.¹⁷⁸ A copy of such reproduction, if it has been certified by the Registrar as a true copy of such reproduction, shall be admissible in evidence. It shall also have effect as the original document. The Deeds Registries Act applies to all such acts involving a unit since a unit is deemed to be land.¹⁷⁹

The implication is that the relationship between the Deeds Registries Act and the Sectional Titles Act is complementary. The enabling clause to both the Botswana and South African Sectional Titles Acts provides that the Acts apply in so far as the division of buildings into sections and common property is concerned. Once the building or buildings have been divided into sections and common property, the sectional title plan has been registered and a sectional title register opened, separate ownership in sections together with joint ownership in common property can be acquired.

The Registrar of Deeds shall issue certificates of sectional title for individual sections to the developer who is now the registered owner of all the individual sections and the common property.¹⁸⁰ The developer can sell, lease, and mortgage the sections. He or she can also transfer ownership of sections and register sectional mortgage bonds and other real rights against them. Any person who buys from the developer shall have the same

¹⁷³ Sec. 5 (1) of the Botswana STA and sec. 3 (1) of the SA STA.

¹⁷⁴ Sec. 5 (1) of the Botswana STA and sec. 3 (1) of the SA STA.

¹⁷⁵ Sec. 3 (1) of the SA STA.

¹⁷⁶ Sec. 5 (2) of the Botswana STA and sec. 3 (2) of the SA STA.

¹⁷⁷ Sec. 5 (2) of the Botswana Act and sec. 3 (2) of the SA STA.

¹⁷⁸ Sec. 5 (3) of the Botswana Act and sec. 3 (3) of the SA STA.

¹⁷⁹ Sec. 5 (4) of the Botswana Act and sec. 3 (4) of the SA STA.

¹⁸⁰ Sec. 13 (1) (d) of the Botswana STA and sec. 12 (1) (d) of the SA STA.

rights that the developer had in the units. This means that he or she can sell, lease, mortgage or even enter into notarial deeds of servitude relating to his or her unit. The Deeds Registries Act will apply to the registration of all these transactions since they are intended to be registered in the Deeds Registries.¹⁸¹

3 2 2 The land, building and development scheme

In Botswana and South Africa, in order for the sectional title scheme to be approved by the Registrar of Deeds, the land on which the scheme is to be developed must comply with the provisions of the Sectional Titles Act.¹⁸² From the provisions of the two statutes and their definitions of a development scheme, a scheme may be composed of more than one building.¹⁸³ In terms of the South African Act, where a scheme comprises more than one building, any such building may be divided into a single section and common property.¹⁸⁴ This means that a scheme may consist of free-standing houses, with each house serving as a section. This development came about with the enactment of the second Sectional Titles Act.¹⁸⁵ It was necessary to do away the requirement that every building forming part of a sectional title scheme must be capable of division into two or more sections, so as to afford developers freedom to be innovative in designing schemes.

One of the problems inherent in the provisions of the first South African Sectional Titles Act¹⁸⁶ requiring every building forming part of a sectional title scheme to be capable of division into two or more sections was that developers had to try to get around the provision by artificially joining separate sections into one building by way of walls, roofs and so on.¹⁸⁷ Local authorities¹⁸⁸ often had to approve sectional title schemes involving

¹⁸¹ Registration of leases, deeds of transfers, certificates of title to land, cessions, cancellation of mortgage bonds, cessions are among the duties of the Registrar of Deeds as stated in sec. 5 of the Botswana Deeds Registry Act and sec. 3 of the SA Deeds Registries Act.

¹⁸² Sec. 4 (1) (a) of the Botswana STA and sec. 2 (a) of the SA STA.

¹⁸³ Sec. 4 (2) of the Botswana STA and sec. 4 (2) of the SA STA.

¹⁸⁴ Sec. 2 (a) of the STA.

¹⁸⁵ Act 95 of 1986.

¹⁸⁶ Act 66 of 1971.

¹⁸⁷ Nel *The Sectional Titles Act, 1971 (Act No 66 of 1971) and the Adequacy of the Changes to be Introduced into the South African "Condominium" System by the New, "Second Generation" Sectional*

such buildings to accommodate further developments within their respective areas of jurisdiction.¹⁸⁹ Many sectional titles developers turned their backs on sectional title schemes and opted for other forms of housing such as share-blocks, group housing, cluster housing and others. This amendment¹⁹⁰ has made it possible for individual buildings to qualify as separate sections in terms of the Act. Each such building can be divided into one section and common property. Since one building may be divided into a single section and common property, the common property would be the roof structure, the outer halves of the exterior walls and the land below the median line dividing the floors from the ground surface.¹⁹¹ The amendment has also brought South African sectional titles legislation in line with that of other western countries.¹⁹²

The Botswana Act does, however, not have a provision whereby a whole building can form a single section and common property. Such a provision would be a welcome development in the sectional titles legislation of Botswana, as it would afford developers freedom to be innovative in designing sectional title schemes. It would make it possible for an owner of a lot to build more than one house on his or her lot and register a sectional title scheme over such a development as long as it complies with the requirements for the establishment of a sectional title scheme.¹⁹³ People who buy units in this kind of scheme would be afforded the opportunity to enjoy common amenities and services, which they might not be able to afford on their own. The insertion of such a section would make it possible for whole new suburbs to be developed within the framework of sectional title developments.

Although one of the aims of sectional titles is to afford people a community-orientated living, it does not necessarily mean that the sections have to be physically close to each other for this aim to be achieved. Some people may be opposed to the idea of sectional

Titles Act, 1986 (Act No 95 of 1986) (A research report submitted at the University of the Witwatersrand) 22.

¹⁸⁸ Before the Sectional Titles Amendment Act No 44 of 1997, the local authority was responsible for approval of sectional titles schemes. The responsibility for approving draft sectional plans has been shifted from the local authority to the Surveyor-General by sec. 2(a) (1) of Act No 44 of 1997.

¹⁸⁹ Nel *The Sectional Titles Act* 22.

¹⁹⁰ Sec. 2 (a) (1) of Act No 44 of 1997.

¹⁹¹ Nel *The Sectional Titles Act* 38.

¹⁹² Nel *The Sectional Titles Act* 39.

¹⁹³ Sec. 4 (1) (a) of the Botswana STA.

titles because of the fear of loss of privacy. Not all people want their neighbours to hear or know what is going on in their homes and the mere thought of being surrounded on all sides by neighbours, who are just a double brick wall or a concrete slab away, may be reason enough to put most people coming from a conventional suburban house off sectional titles forever. If such people are sure of a reasonable distance from their neighbours, they may be prepared to buy sections in these types of schemes, live in harmony with their neighbours and share common amenities with them. This calls for an amendment in the Botswana Sectional Titles Act for a provision to the effect that where a scheme comprises more than one building, any such building may be so divided into a single section and common property. The introduction of such a provision must be subject to the provisions of the Sectional Titles Act¹⁹⁴ with regard to the definition of the boundaries of a section.

3 2 2 1 Land

Both the Botswana and South African sectional titles statutes define “land” as “the land comprised in a scheme as shown on a sectional title plan.”¹⁹⁵ Only land situated within the area of jurisdiction of a local authority can be developed as a sectional title scheme.¹⁹⁶ The Botswana Sectional Titles Act does not have a provision in terms of which “local authority” is defined. A definition of “local authority” is necessary in the Act so that it is clear who the local authority is. As there is no such definition in the Sectional Titles Act¹⁹⁷ or any other enactment, it is presumed that the “local authority” would be the local councils exercising administrative duties over their respective jurisdictions.

¹⁹⁴ In terms of sec. 7 (5) of the Botswana STA, the boundaries of a section are defined by reference to the floors, walls and ceilings or as may be prescribed. In respect of a part of a section (such as a stoep, porch, balcony, atrium or projection) of which the boundaries cannot be defined in terms of the floors, walls and ceilings, but being appurtenant to a part of that section which can be defined in term of the floors, walls and ceilings.

¹⁹⁵ Sec. 2 (1) of the Botswana STA and sec. 1 of the SA STA.

¹⁹⁶ This is clear from the definition of developer as seen on sec. 2 (1) of the Botswana STA and sec. 1 of the SA STA.

¹⁹⁷ Act No 7 of 1999.

The definition of local authority in the original South African Act was lengthy.¹⁹⁸ An amendment was effected in 1991,¹⁹⁹ but the definition was later substituted by the Sectional Titles Amendment Act of 1997.²⁰⁰ The 1997 version is much shorter. Under that Act, local authority is now defined as a municipality contemplated in section 151 of the Constitution of the Republic of South Africa of 1996,²⁰¹ which exercises jurisdiction where the land is situated. It was necessary to amend the definition of local authority in South Africa so as to avoid the need to distinguish between local authorities established in terms of section 84 (1) (f) of the old Provincial Government Act²⁰² and those established under section 1 of the Black Local Authorities Act²⁰³ and section 30 of the Black Administration Act.²⁰⁴ However, for purposes of the Sectional Titles Act, local

¹⁹⁸ “local authority” was described as any institution or body contemplated in section 84 (1) (f) of the Provincial Government Act, 1961 (Act No 32 of 1961), and any municipality or village management board established or constituted or deemed to be established or constituted under the Municipal Ordinance, 1963 (Ordinance No 13 of 1963, of the territory of South-West Africa). See also Van der Merwe *Sectional Titles* ch 3-28 regarding the evolution of the definition.

¹⁹⁹ Sec. 1 (d) of Act No 63 of 1991 which defined the local authority as “any local authority as defined in section 1 of the Black Administration Act, 1972 (Act No 38 of 1972), exercising jurisdiction over an area in which land is situated, including any other institution or body performing work of any such institution or body and so exercising jurisdiction”.

²⁰⁰ Sec. 1 (e) of Act No 44 of 1997.

²⁰¹ Act 108 of 1996.

²⁰² Act 32 of 1961. Institutions and bodies contemplated by sec. 84 of the Provincial Government Act will be considered transitional authorities. These transitional authorities include municipal councils, divisional councils, peri-urban councils, village management boards and health communities. The Cape Province falls under the jurisdiction of one or other divisional council. The Sectional Titles Act will therefore apply to the whole of the Cape Province, including farmland and other rural land. Where similar local authorities do not exist in other provinces, it means that the Sectional Titles Act will not apply in certain areas in these provinces. The Sectional Titles Act will apply to most of the rural areas in the Transvaal and Natal which fall under the jurisdiction of the Transvaal Board for the Development of Peri-urban Areas and Natal Health Commission respectively. A developer intending to develop a resort sectional title scheme in any of the provinces must first ascertain whether the site is situated within the area of jurisdiction of a local authority.

²⁰³ Act 102 of 1982. Sec. 1 defines local authority as a city council, a town committee or a local authority committee established under sec. 2 (1) (a) of the Act (See sec. 1 for the definition of city council, town council, town committee and local authority committee). The Premier of the region where the local authority is situated may, with the consent of his executive committee, establish a city council, a town committee or a local authority committee, by notice in the Official Gazette under a name mentioned in the notice for an area defined by him (sec.2 (1) (a)). Existing town or city councils may be town or city councils for the purpose of this Act (sec. 2 (1) (b)).

²⁰⁴ Act 38 of 1927. See sec. 30 (1) (a) as read with sec. 30 (2) (a). Local government bodies established therein are government bodies for development trust land set apart as towns by the Minister of Education and Development Aid. Section 30 of the Black Administration Act was repealed by sec. 8 of the Abolition of Racially Based Land Measures Act 108 of 1991. However, all regulations which applied prior to the amendment of sec. 8, still apply until repealed by sec.8 (2). For purposes of the Sectional Titles Act, all local government bodies established on development trust land prior to 1991 would still be considered transitional local authorities.

authorities established under these Acts would in the meantime serve as local authorities until formally established as local authorities in terms of the Constitution.²⁰⁵

According to section 151 (1) of the South African Constitution, the local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic. Where they had not been established yet, the relevant transitional authorities in the meantime carried out the functions of such municipalities.²⁰⁶

For purposes of the Sectional Titles Act, the Minister of Land Affairs may declare any institution or body established by or under the provisions of any other law a local authority. The Minister may do so if they exercise powers or duties performed by a local authority.²⁰⁷ In light of the new definition of local authority, it is doubtful whether the power given to the minister to declare an institution or body exercising the functions of a local authority, a local authority for purposes of the Sectional Titles Act is still necessary.²⁰⁸

According to both the Botswana²⁰⁹ and the South African²¹⁰ Sectional Titles Acts, a scheme may relate to more than one building erected or to be erected on the same piece of land. It may also relate to more than one piece of land, whether contiguous or non-contiguous. In terms of both statutes,²¹¹ however, the building or buildings to be divided shall be situated only on one such piece of the land. Such buildings may also be situated on two or more contiguous pieces of land registered in the name of the same person.²¹² In terms of the Botswana Act,²¹³ a certificate of consolidated title must have been registered in respect of such pieces of land. This means that if the developer intends to develop a scheme on land consisting of two or more pieces of land, he or she must apply for a certificate of consolidated title in respect of such pieces of land before a sectional plan

²⁰⁵ Van der Merwe *Sectional Titles* ch 3-28.

²⁰⁶ Van der Merwe *Sectional Titles* ch 3-27. See also Van der Merwe "A Critical Analysis of the Innovations Introduced by the Sectional Titles Act of 1997" (1998) 61 *Journal on Contemporary Roman Dutch Law (THRHR)* 171-193, 173.

²⁰⁷ Sec. 1 (4) of the SA STA.

²⁰⁸ Van der Merwe *Sectional Titles* ch 3-29. See further Van der Merwe 1998 *THRHR* 173.

²⁰⁹ Sec. 4 (2) of the Botswana STA.

²¹⁰ Sec. 4 (2) of the SA STA.

²¹¹ Sec. 4 (2) of the Botswana STA and sec. 4 (2) of the S A STA.

²¹² Sec. 4 (2) of the Botswana STA and sec. 4 (2) of the S A STA.

²¹³ Sec. 4 (3).

can be registered. The South African Sectional Titles Act,²¹⁴ however, provides that such pieces of land must have been notarially tied.²¹⁵ If they have not been already notarially tied, the developer must apply for a certificate of consolidated title.²¹⁶

In Botswana consolidation shall comply with the provisions of section 38²¹⁷ of the Deeds Registry Act²¹⁸ whereas in South Africa consolidation shall comply with the requirements of section 40 (1) of the Deeds Registries Act.²¹⁹ In both jurisdictions an application for the issuance of a certificate of consolidated title can be lodged simultaneously with the application for the opening of a sectional title register. However, neither jurisdiction requires consolidation to be made prior to the preparation of the sectional plan. The South African Act and regulations also do not require a notarial tie agreement to be made prior to the preparation of the sectional plan.

It would, however be advisable in both jurisdictions to show on the sectional plan that consolidation will be effected before the opening of the sectional title register, if the pieces of land proposed for a sectional title scheme have not already been consolidated. It is also advisable in the South African case to show on the sectional plan that a notarial tie agreement will be effected before the opening of the sectional title register, if the pieces of land proposed for a sectional title scheme have not been notarially tied. If a sectional title scheme is proposed for two or more pieces of land that have not been consolidated or

²¹⁴ Sec. 4 (2).

²¹⁵ A notarial tie agreement is entered into by the local authority and the owners of the land. The owner or owners of the properties subject to the tie agreement agree with the local authority that none of the properties shall be allowed to be sold or transferred separately from each other, other than to the same transferee, except with the prior written consent of the local authority which has an absolute discretion to grant or withhold such consent. Since the agreement is registered against the title deeds of such properties it binds the owners and their successors in title. Notarial tying seems to be a more efficient mechanism to achieve the same results as consolidation. It is simple, saves time and costs. This is so because none of the requirements of consolidation are to be complied with. Resurveying is not necessary, hence there is no need to draw up a new diagram or to register a new consolidated title.

²¹⁶ Van der Merwe *Sectional Titles* ch 3-29.

²¹⁷ Sec. 38 (1) provides that such pieces of land must be contiguous to each other. Alternatively they should be contiguous to any portion of each other even though those portions have been separated from other portions by intervening deductions. Such pieces of land must be owned by the same person or by two or more persons in the same undivided shares in each such pieces of land. Such pieces of land must be registered in the same property register, and the title deed or deeds of the said pieces of land may be superseded by a certificate of consolidated title issued by the Registrar of Deeds.

²¹⁸ Act No 17 of 1960.

²¹⁹ Sec. 40 (1) of Act No 47 of 1937 provides that such pieces of land must be contiguous to each other, owned by the same person or by two or more persons in the same undivided shares in each such piece of land, registered in the same property register and situated in the same administrative district.

notarially tied, it may also be advisable to show on the sectional plan that consolidation or a notarial tie will be applied for before the opening of the sectional title register.²²⁰ It will therefore be convenient to lodge the application for the issuance of a certificate of consolidated title or the registration of a notarial tie agreement simultaneously with the application for the opening of the sectional title register.

Even though the Botswana Act²²¹ provides that a scheme may relate to more than one piece of land, whether contiguous or non-contiguous, this will not be possible because of the provisions of the Deeds Registry Act,²²² with which consolidation must comply. The requirement of section 38 (1) of the Botswana Deeds Registry Act that pieces of land to be consolidated must be contiguous to each other renders the establishment of a sectional title scheme impossible in respect of non-contiguous pieces of land belonging to the developer. This requirement can be extremely restrictive to both residential and non-residential schemes. The latter would benefit most if it were possible for a development scheme to be established over non-contiguous pieces of land. This would mean that land across a street could be included in a development scheme. Adequate parking facilities may be vital for the success of a commercial sectional title scheme, but where there is no space contiguous to the buildings, it would be convenient to provide parking on other available land in close proximity.²²³ An amendment to the Botswana statute to give effect to the provision that a scheme may relate to more than one building erected or to be erected on non-contiguous²²⁴ pieces of land, belonging to the developer is suggested.

In South Africa the Sectional Titles Act was amended in 1986²²⁵ to provide that a sectional title scheme could be established on more than one piece of land whether contiguous or non-contiguous.²²⁶ There was, however, a proviso to the effect that the buildings to be divided into sections shall be situated only on one piece of land or on two or more contiguous pieces of land registered in the name of the same person and

²²⁰ Van der Merwe *Sectional Titles* ch 3-30.

²²¹ Sec. 4 (2).

²²² Sec 38 (1) of Act 36 of 1960.

²²³ *Castle Enterprises v Registrar of Property* 1963 Puerto Rico Supreme Court 87; Van der Merwe *Sectional Titles* ch 3-30.

²²⁴ Sec. 4 (2) of the Botswana STA.

²²⁵ Act 95 of 1986.

²²⁶ Sec. 4 (2) of the STA.

notarially tied.²²⁷ Although this was a welcome improvement from the repealed 1971 Act,²²⁸ it appears that no attention was paid to a situation where the properties subject to a notarial tie agreement are not all bonded, or where such properties are bonded to different mortgagees.²²⁹

According to the South African Deeds Registries Act,²³⁰ if a portion of the land subject to consolidation is bonded, the bond must first be cancelled before a certificate of consolidation can be issued. The consolidated land may, however, be substituted for the land originally mortgaged under the bond with the consent of the mortgagee. Similarly if different pieces of land are mortgaged to different mortgagees, the certificate may not be issued unless the bonds are cancelled.

In terms of the South African Sectional Titles Act,²³¹ upon the registration of a sectional plan any mortgage bond then affecting the land shown on the sectional plan shall be deemed to be converted into a bond registered against the sections and common property. The provision of section 40(5) of the Deeds Registries Act describes the procedure as to how the conversion should take place. It is not clear, however, how such conversion will take place if the pieces of land are subject to a notarial tie agreement. A provision in the Sectional Titles Act to clarify this issue would be another welcome development from which Botswana could learn.

In both Botswana and South Africa, where only one piece of land out of several held by one title deed is developed, a certificate of registered title must be registered in terms of the Deeds Registries Act in respect of the piece prior to the registration of a sectional title

²²⁷ Sec. 4 (2) read with sec. 26 of the SA STA. Sub-sec 1 of sec. 26 was substituted by sec. 19 (a) of Act No 44 of 1997 which states that a body corporate may be authorized in writing by all of its members to purchase land for the purpose of providing amenities and facilities to its members.

²²⁸ Sec. 5 (2) (a) of Act No 66 of 1971 provided that if the building has been or is to be erected on land consisting of two or more pieces of land within the meaning of section 40 (1) of the Deeds Registries Act, the developer shall apply for a certificate of consolidated title in respect of the said pieces of land.

²²⁹ In the Sectional Titles Memorandum by SAPOA (South African Property Owners Association) it was suggested that a provision should be inserted in the Act corresponding with the provisions of sec. 40 (5) of the Deeds Registries Act, 1937 which deals with a situation where the properties subject to the tie agreement are not all bonded or where such properties are bonded to different mortgagees (par 11.1). SAOPA further suggested that the proviso to section 4 (2) should be amended so that it may be possible for a sectional title scheme to be registered in respect of two or more developed pieces of land which are separated, for example by a road, as long as they are notarially tied. See also Van der Merwe *Sectional Titles* ch 3-30.

²³⁰ Sec. 40 (5).

²³¹ Sec. 13 (3) of the SA STA.

plan.²³² The reason for this is the requirement that a sectional plan must delineate the boundaries of the land in accordance with the relevant diagram or general plan.²³³ This means that, if a proposed scheme involves only one of several pieces of land held by one title deed, the developer must apply for a certificate of registered title for that piece of land prior to the registration of the sectional plan.

Since only land situated within the area of jurisdiction of a local authority is capable of being developed as a sectional title scheme in both countries, the developer must ensure that the land to be developed is situated within the area of jurisdiction of a local authority. He or she must make sure that the certificate of title correctly describes the land on which the scheme is to be developed.²³⁴ The developer must also make sure that the proposed scheme complies with the conditions of title. For example, a scheme will be ruled out if one of the conditions of title provides that only a single-family residence shall be built on the piece of land concerned. In Botswana, if a scheme is proposed in respect of such a piece of land, the developer must have this restriction removed in terms of the Immovable Property (Removal of Restrictions) Act²³⁵ prior to the application for the registration of a sectional plan. In South Africa, the same must be done in terms of the Removal of Restrictions Act.²³⁶ Only land that is registered in the name of the developer can be developed under a sectional title scheme. Land that is held under a lease cannot be developed as a sectional title project.²³⁷

3 2 2 2 Building

In terms of the Botswana and South African Sectional Titles Acts,²³⁸ a building is defined as a structure of a permanent nature, erected or to be erected, which is shown on a

²³² Sec. 7 (3) (a) of the Botswana STA and sec.5 (3) (a) of the Sec. 5 (3) (a) of the SA STA provides that the boundaries of the land must be delineated in accordance with the relevant diagram or general plan.

²³³ Sec. 7 (3) (a) of the Botswana STA and sec. 5 (3) (a) of the SA STA.

²³⁴ This takes into consideration the consolidation of two or more pieces of land or the isolation of a portion of land for purposes of sectional title development.

²³⁵ Sec. 2 of Act 27 of 1967.

²³⁶ Sec. 6 of Act 84 of 1947.

²³⁷ Van der Merwe *Sectional Titles* ch 3-31. Land held under a fixed period state grant in Botswana cannot be developed as a sectional title project. See also ch 2 par 2 4.

²³⁸ Sec. 2 (1) of the Botswana STA and sec. 1 of the SA STA.

sectional plan as part of a scheme. This means that the structure must be of a durable quality and intended to last for a long time.²³⁹ In general the building must be constructed on a fixed foundation. The exact nature of the materials used in the building is immaterial as long as they are durable. Certain structures will not qualify as buildings, for example, a mobile house of timber that is not fixed to the ground, a prefabricated hut that can easily be dismantled, a caravan or tent.²⁴⁰

Notwithstanding anything to the contrary in any law, in terms of the Botswana statute, a building comprised in a scheme and the land on which the building is situated may be divided into sections and common property in accordance with the provisions of the Act.²⁴¹ This provision refers to “a building” comprised in a scheme. But a scheme may consist of more than one building. It would be logical for the provision to include more than one building, since most, if not all properties that may be subject to the Sectional Titles Act in Botswana,²⁴² consist of more than one building. For example, all flats owned by the Botswana Housing Corporation, which may be converted to sectional title schemes consist of more than one building.

In terms of the South Africa statute, notwithstanding anything to the contrary in any law or the common law, a building or buildings comprised in a scheme and the land on which such building or buildings is or are situated, may be divided into sections and common property.²⁴³ The Sectional Titles Act²⁴⁴ therefore allows for a building or buildings comprised in a scheme and the land on which such building or buildings are situated to be divided into sections and common property. In terms of the Botswana statute, a building must be divided or be capable of being divided into more than one section.²⁴⁵ According to the South Africa statute, however, a scheme may consist of more than one building and

²³⁹ Van der Merwe *Sectional Titles* ch 3-32. See also *Macdonald Ltd v Radin No and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454.

²⁴⁰ Jones *The Law and Practice of Conveyancing in South Africa* 3 ed (1985) 579; Cowen, “The Scope of the Sectional Titles Act with Special Reference to Group and Cluster Housing and Phased Developments” supplement to 1975 14 *Planning and Building Developments* 1.

²⁴¹ Sec. 4 (1) of the Botswana STA.

²⁴² Act No 7 of 1999.

²⁴³ Sec. 2 (a) of the SA STA. The requirement of the Sectional Titles Act of 1997 that a building must be divided or be capable of being divided into more than one section was deleted in Act No 95 of 1986.

²⁴⁴ Sec. 4 (1) of the Botswana STA and sec.2 (a) of the SA STA.

²⁴⁵ Sec. 4 (1) (a) of the Botswana STA.

any such building may be divided into a single section and common property.²⁴⁶ This means that in South Africa a developer may establish a holiday sectional title scheme which is made up of free-standing rondavels.²⁴⁷

In both Botswana and South Africa, since the building(s) must be divided or proposed to be divided into more than one section and common property,²⁴⁸ acquisition of separate ownership of sections together with joint ownership of common property must be possible. The sections must therefore be suitable for the intended purpose for which the scheme was established. Each section must be capable of being the object or subject matter of the rights envisaged by the Act.²⁴⁹ If separate ownership can be acquired against each section, then it means that sectional mortgage bonds and other real rights may also be registered against each section.

Since the building must be divided or proposed to be divided into sections,²⁵⁰ only a structure made up of floors, walls and ceilings can qualify as sectionalised buildings so that when such a structure is divided the common boundary line between sections or one section and the common property may be the median line of the dividing floors, walls or ceilings.²⁵¹ It is submitted, however, that the description of the boundaries of a section is wide enough to allow a parking garage complex to be divided into sections even though the complex may have no outer walls and no walls between the sections, but only beacons demarcating the various sections.²⁵² It is clear from the definition of a development scheme that a scheme cannot exist without a building.²⁵³ In both Botswana and South Africa the creation of so-called bare site condominiums will not be allowed, for example, where caravan sites are demarcated on the land.²⁵⁴

²⁴⁶ Sec. 2 (a) of the SA STA.

²⁴⁷ Van der Merwe *Sectional Titles* ch 3-32.

²⁴⁸ Sec. 4 (1) of the Botswana STA and sec. 2 (a) of the SA STA.

²⁴⁹ Cowen 1975 *supplement* 10.

²⁵⁰ Sec. 4 (1) of the Botswana STA and sec. 2 (a) of the SA STA.

²⁵¹ Cowen 1975 *supplement* 10.

²⁵² Van der Merwe *Sectional Titles* ch 3-33. The Botswana Sectional Titles Regulation 4 (1) (l) and the SA Sectional Titles Regulation 5 (1) (l) provide that if the boundaries of a section or of a part thereof cannot be defined by reference to its floors, walls and ceilings, such boundaries shall be defined in a manner acceptable to the Director or Surveyor-General.

²⁵³ See the definition of a development scheme in sec. 2 (1) of the Botswana STA and sec. 1 of the SA STA. See further ch 3 par 3 2 2.

²⁵⁴ See also Van der Merwe *Sectional Titles* ch 3-33.

3 2 2 3 Development scheme

In terms of the Botswana Sectional Titles Act,²⁵⁵ a development scheme denotes a plan in respect of which a building situated or to be erected on land within the area of jurisdiction of a local authority is, for the purposes of selling, letting or otherwise dealing therewith, to be divided into two or more sections. It is not clear why the definition refers only to a single building situated or to be erected on land within the area of jurisdiction of a local authority. It would only be logical for the definition to include more than one building, since the land which is to be the object of a sectional title scheme will, in practice, often more than one building.

The South African Act²⁵⁶ defines a development scheme as a scheme in terms of which a building or buildings situated or to be erected on land within the area of jurisdiction of a local authority is or are, for the purposes of selling, letting or otherwise dealing therewith to be divided into two or more sections or as contemplated in the proviso to section 2 (a). The proviso to section 2 (a) provides that where a scheme comprises more than one building, any such building may represent a single section and common property. It is clear from this definition that one or more than one building may be included in a development scheme. If the scheme consists of only one building, such building must be capable of being divided into two or more sections.²⁵⁷ If the scheme consists of more than one building, one or all the buildings may be divided into sections, but they need not necessarily be so divided. It is provided for expressly in the Act that any building can be divided into a single section and common property.²⁵⁸ It is clear from this provision that a scheme can for instance, consist of a number of free-standing rondavels.²⁵⁹ This is not possible in Botswana since from the definition of a development scheme, a building must be capable of being divided into two or more sections.²⁶⁰

²⁵⁵ Sec. 2 (1) of the Botswana STA.

²⁵⁶ Sec. 1 of the SA STA.

²⁵⁷ Sec. 1 of the SA STA.

²⁵⁸ See proviso to sec.2 (a) of the SA STA. See further Van der Merwe & Butler (1985) 62 for difficulties that arose because of the requirement of the Sectional Titles Act No 66 of 1971 that the building must be capable of being divided into two or more sections.

²⁵⁹ Van der Merwe *Sectional Titles* ch 3-34.

²⁶⁰ See definition of development scheme in sec. 2 (1) of the Botswana STA.

The Botswana and South African Sectional Titles Acts²⁶¹ do not put any restriction on the number of storeys of buildings included in a scheme. A scheme may thus be composed of high-rise buildings, or low-rise buildings such as maisonettes or duplex flats.²⁶² There is also no restriction on the maximum number of units and buildings to be comprised in a scheme. The sectional title practice in Germany has revealed that sectional title schemes comprising more than a thousand units can become unmanageable.²⁶³ Urgent representations to limit the number of units comprised in a scheme in Germany have been made to the legislature.²⁶⁴ The same problem has also been revealed in Israel. The Israeli statute was amended to provide that the registration of a *condominium*, which is made up of two or more buildings, is not permitted if it is practicable to register each building as a separate condominium.²⁶⁵ This was to promote smaller decentralised schemes that can be easily managed. This opposition to the inclusion of a number of buildings in a sectional title scheme can be understood in cases where there is no real connection between the buildings, and the combination is only a matter of convenience and economy to the developer.²⁶⁶ The development of a sensible scheme comprising, for example, a reasonable number of duplex buildings should not, however, be frustrated by this restriction.²⁶⁷

3 2 3 The developer

In terms of the Sectional Titles Acts²⁶⁸ a developer means a person who is the registered owner of the land, situated within the area of jurisdiction of the local authority, on which the proposed sectional title scheme is to be established. Therefore a person who has any other interest in the land that does not amount to ownership cannot qualify as a developer.

²⁶¹ The Botswana STA No 7 of 1999 and the SA STA No 86 of 1986.

²⁶² Van der Merwe *Sectional Titles* ch 3-34.

²⁶³ Van der Merwe *Sectional Titles* ch 3-34.

²⁶⁴ See Van der Merwe *Sectional Titles* ch 3-34.

²⁶⁵ Sec. 142 (b). See further Van der Merwe, "The South African Sectional Titles Act and Israeli Condominium Legislation" 1981 *CILSA* 137.

²⁶⁶ Van der Merwe *Sectional Titles* ch 3-34.

²⁶⁷ Van der Merwe *Sectional Titles* ch 3-34.

²⁶⁸ Sec. 2 (1) of the Botswana. STA and sec. 1 of the SA STA.

In South Africa, it has been suggested that the requirement is too restrictive and that sectional titles schemes should be allowed in leasehold land, for example in certain parts of Johannesburg and Kimberly where land is traditionally held under leasehold.²⁶⁹ The argument was that shortage of accommodation could be considerably alleviated if sectional titles schemes were to be allowed on land in Soweto and other Black areas where land was held on a 99-year leasehold system.²⁷⁰ The experience in North America with leasehold condominiums has not always been good²⁷¹ and the fundamental principles stemming from the fact that a sectional owner is the true owner of his unit²⁷² would be difficult to accommodate in such a sectional title scheme.

In both Botswana and South Africa, a developer or his or her successor in title may be the holder of the right of extension of a scheme by addition of sections.²⁷³ The developer can reserve such a right when he or she applies for the registration of a sectional plan and the opening of a sectional title register.²⁷⁴ If the developer has made no reservation at the time of registering the sectional plan and opening the sectional title register and the body corporate has not been formed²⁷⁵ he or she may apply to the Registrar of Deeds for a reservation of such a right.²⁷⁶ The right to extend the scheme may also be acquired by the body corporate with the written consent of all the members of the body corporate and the mortgagees of each unit in the scheme.²⁷⁷

A “developer” is also defined to include be the agent of any such person, or his or her successor in title, or any other person acting on behalf of any of them.²⁷⁸ This extended

²⁶⁹ Van der Merwe *Sectional Titles* ch 3-19.

²⁷⁰ The provision in section 55 of the Black Communities Development Act 4 of 1984 for the registration of sectional leaseholds in a sectional title scheme on land held under a 99-year leasehold in terms of that Act, has been amended by sec. 18 of Act No 52 of 1985 and repealed by Proclamation R.11 of 1994. .

²⁷¹ Risk “Condominiums and Canada” 1968 (1), *University of Toronto Law Journal* 1. See further Rosenstein “Inadequacies of Current Condominium Legislation-a Critical look at the Pennsylvania Unit Property Act” 1974 (74) *Temple Law Quarterly* 655.

²⁷² Van der Merwe *Sectional Titles*, ch 2-14, 8-15, 8-17.

²⁷³ Sec. 2 (1) of the Botswana STA and sec. 1 of the SA STA.

²⁷⁴ Sec. 27 (1) of the Botswana STA and sec. 25 (1) of the SA STA.

²⁷⁵ In terms of sec. 39 (1) of the Botswana STA and sec. 36 (1) of the SA STA a body corporate shall be deemed to be formed whenever any person other than the developer becomes an owner of a unit in a scheme.

²⁷⁶ Sec. 27 (7) of the Botswana STA and sec. 25 (6A) of the SA STA.

²⁷⁷ Sec. 27 (6) of the Botswana STA and sec. 25 (6) of the SA STA.

²⁷⁸ Sec. 2 (1) of the Botswana STA and sec. 1 of the SA STA.

definition will, for example, apply where certain units are sold by the developer²⁷⁹ in a rental building which has been converted to sectional title and where in terms of section 18 of the Botswana Sectional Titles Act and section 15B(3) of the South Africa Sectional Titles Act, the developer furnishes an affidavit to the Registrar as to whether the requirements of section 11 in terms of the Botswana Act and section 10 of the South African Act, if applicable, have been complied with concerning the unit which is being transferred. Where a building comprised in a scheme has been destroyed,²⁸⁰ in both Botswana and South Africa, the body corporate also qualifies to be a developer for purposes of rebuilding.²⁸¹ In this instance, a unanimous resolution to rebuild must have been adopted by the owners of units in a scheme. Since the body corporate is not the owner of the common property, but only administers it, the body corporate cannot ordinarily qualify as the developer.²⁸²

When a sectional title scheme is being formed, the developer plays a very important role. With the help of his or her professional advisors, the developer must plan the scheme and organise the finances. He or she must make use of the services of a land surveyor or architect, who will draw up a sectional plan²⁸³ and submit it to the Director or Surveyor-General for approval.²⁸⁴ In South Africa, if upon inspection of the property by the architect or land surveyor certain inconsistencies or irregularities come to light in the scheme, the land surveyor or architect must apply to the local authority for condonation.²⁸⁵

In terms of the Botswana Act, if the application is signed by another person authorised to sign on behalf of the developer, a written authority by the developer in which the person concerned is authorised to sign the application on behalf of the developer must be submitted together with the sectional plan.²⁸⁶ A similar provision in the South African statute has been deleted by the Sectional Titles Amendment Act No 29 of 2003.²⁸⁷ If the

²⁷⁹ In terms of section 11 of the Botswana STA and sec. 10 of the SA STA.

²⁸⁰ In terms of sec. 51 of the Botswana STA and sec. 48 of the SA STA.

²⁸¹ Sec. 2 (1) of the Botswana STA and sec. 1 of the SA STA.

²⁸² Van der Merwe *Sectional Titles* ch 3-21.

²⁸³ Sec. 6 (1) of the Botswana STA and sec. 5 (1) of the SA STA.

²⁸⁴ Sec. 9 (1) of the Botswana STA and sec. 7 (1) of the SA STA.

²⁸⁵ Sec. 4 (5) of the SA STA.

²⁸⁶ Sec. 9 (2) (b) of the Botswana STA.

²⁸⁷ Published in Government Gazette No 25719 of 14 November 2003 (sec. 3 (b)).

application relates to a rental building which is being converted to sectional title, an affidavit must be submitted to the effect that the requirements of section 6(2) of the Botswana Sectional Titles Act and section 4(3) of the South African Sectional Titles Act have been complied with.²⁸⁸

After approval, the developer must apply to the Registrar of Deeds for the registration of the sectional plan and opening of a sectional title register in respect of the land and the buildings comprised in the scheme.²⁸⁹ The South African Act states clearly that the developer must apply to the registrar in charge of the deeds registry in which the land comprised in the scheme is registered.²⁹⁰ The Botswana provision is general in that the developer must apply for the registration of the sectional plan and for the opening of a sectional title register in respect of the land and the buildings thereon to the Registrar. This may be due to the fact that until September 2002, there had been only one Deeds Registry in Gaborone servicing the whole country.²⁹¹ Since there are now more than one deeds offices in Botswana, it would be appropriate for the Act²⁹² to state clearly that the developer must apply for the registration of the sectional plan and for the opening of the sectional title register to the registrar in charge of the Deeds Registry in which the land in the scheme is situated.

On applying for the registration of the sectional plan and the opening of the sectional title register, in both Botswana and South Africa, the developer may reserve the right to develop the scheme in phases.²⁹³ He or she may also reserve rights of exclusive use over certain parts of the common property.²⁹⁴ Where a rental building is being converted to a sectional title scheme, the developer must convene a meeting of all the lessees in the

²⁸⁸ A tenants' meeting must (among other things) be held by the developer before he or she can submit the application for approval (Sec. 6 (2) of the Botswana STA and sec. 4 (3) of the SA STA).

²⁸⁹ Sec. 12 (1) of the Botswana STA and sec. 11 (1) of the SA STA. The provision in the Botswana Act is general since until the September 2002, there had been only one Deeds Office servicing the whole country.

²⁹⁰ Sec. 11 (1) of the SA STA.

²⁹¹ The second office has been established in Francistown on the September 2002 to service the northern part of the country, while the Southern part of the country remains to be serviced by the Gaborone office. Other deeds offices may be established in other areas of the country as and when the need arises depending on the availability of funds.

²⁹² Sec. 12 (1) of Act No 7 of 1999.

²⁹³ Sec. 27 (1) of the Botswana STA and sec. 25 (1) of the SA STA.

²⁹⁴ Sec. 29 (1) of the Botswana STA and sec. 27 (1) of the SA STA.

building so as to explain issues concerning the proposed conversion as well as their right of pre-emption with regard to their units.²⁹⁵

The developer can also play a vital role in determining the rules applicable to a particular scheme by adding his or her own rules.²⁹⁶ In Botswana the developer can add his or her own rules to those rules mentioned²⁹⁷ under section 38 (2) whereas in South Africa the developer can add his own rules to the rules prescribed in section 35 (2). In terms of both the Botswana and South African statutes, a scheme must as from the date of the establishment of the body corporate be controlled and managed, subject to the provisions of both statutes, by means of rules.²⁹⁸ The rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property of a scheme.²⁹⁹ In terms of both statutes, such rules shall comprise of management and conduct rules.³⁰⁰ In terms of the South African Act, such rules must be prescribed by regulation³⁰¹ whereas in terms of the Botswana Act, the Minister may make such rules by statutory instrument.³⁰² In terms of the Botswana Act, a developer may amend or substitute new rules when he submits an application for the opening of a sectional title register.³⁰³ In terms of the South African Act, such rules may be substituted, added to, amended or repealed by the developer to the extent prescribed by regulation³⁰⁴ when submitting an application for the opening of a sectional title register.³⁰⁵ The Botswana Act does not state specifically the extent to which such rules may be substituted or amended as they are not prescribed by regulation. It is suggested that the Botswana Act should have a provision setting out the extent to which management rules must be amended or substituted. Such a provision is important as there may be management rules which are the most important in that they form the backbone of a sound management structure. In terms of the Botswana Act, the association of a scheme may by unanimous

²⁹⁵ Sec. 6 (1) read with sec. 11 of the Botswana STA and sec. 4 (3) read with sec. 10 of the SA STA.

²⁹⁶ Sec. 12 (3) (e) of the Botswana STA and sec. 11 (3) (e).

²⁹⁷ Sec. 12 (3) (e) of the Botswana STA.

²⁹⁸ Sec. 38 (1) of the Botswana STA and sec. 35 (1) of the SA STA.

²⁹⁹ Sec. 56 (a) of the Botswana STA and sec. 35 (2) of the SA STA.

³⁰⁰ Sec. 38 (3) of the Botswana STA and sec. 35 (2) (a) (b) of the SA STA.

³⁰¹ Sec. 35 (2) (a) (b) of the SA STA.

³⁰² Sec. 56 (a) of the Botswana STA.

³⁰³ Sec. 38 (5) of the Botswana STA.

³⁰⁴ See reg. 30 (1) of the SA STA for certain management rules that may not be substituted, amended or withdrawn.

³⁰⁵ Sec. 35 (2) (a) of the SA STA.

resolution amend or substitute new management rules.³⁰⁶ According to the South African Act, management rules may be substituted, added to, amended or repealed by unanimous resolution of the body corporate only after the transfer of at least 50 per cent of the units in the scheme to persons other than the developer.³⁰⁷ An exception is made of a body corporate which is established in a scheme which was approved in terms of the Sectional Titles Act of 1971.³⁰⁸ The Botswana Act does not have a provision to determine when management rules may be substituted or amended by unanimous resolution of the association. It is imperative for such a provision to be included in the Botswana Act as it would guard against a few sectional owners making resolutions amending or substituting management rules, which may have adverse effects for the scheme. Both the Botswana and South African statutes grant complete freedom to the developer to alter any conduct rule when submitting his application for the opening of a sectional title register.³⁰⁹ The body corporate is also empowered to alter conduct rules by special resolution at a later stage.³¹⁰ In terms of both statutes, any amendment or substitution effected by a developer or body corporate must not be inconsistent or conflicting with the rules.³¹¹

In Botswana such rules have not been prescribed yet, even though the Sectional Titles Act commenced on 1 May 2003.³¹² It is imperative that such rules be prescribed to give effect to other provisions of the Act.³¹³ In addition to the sectional plan, the most important document of a sectional title scheme is the rules.³¹⁴ The rules are important in that the Act provides that a scheme shall as from the date of establishment of an association be governed by means of rules.³¹⁵ An association is deemed to be formed

³⁰⁶ Sec. 38 (6) (a) of the Botswana STA.

³⁰⁷ Reg. 30 (4) of the SA STA.

³⁰⁸ Reg. 30 (4) of the SA STA.

³⁰⁹ Sec. 38 (6) (b) of the Botswana STA and sec. 35 (2) (b) of the SA STA. Note that the phrase "as prescribed by regulation" which appears in sec. 35 (2) (a) does not appear in sec. 35 (2) (b) of the SA STA.

³¹⁰ Sec. 38 (6) (b) of the Botswana STA and sec. 35 (2) (b) of the SA STA.

³¹¹ Sec. 38 (7) (a) of the Botswana STA and proviso to sec. 35 (2) (b) of the SA STA.

³¹² See Statutory Instrument No 18 of 2003.

³¹³ Such provisions includes section 56 (a) of the Botswana STA which gives the Minister power to make rules providing for any matter which under the Act is to be provided for by rules or which otherwise relates to the control, management, administration, use and enjoyment of the sections and the common property of a scheme and sec. 38 (1) which provides for a scheme to be governed by means of rules on the formation of an association for the scheme.

³¹⁴ Van der Merwe *Sectional Titles* ch 13-4.

³¹⁵ Sec. 38 (1) of the Botswana STA.

whenever any person other than the developer becomes an owner in a scheme.³¹⁶ This means that an association comes into existence as soon as the developer sells a unit, and such unit is registered in the purchaser's name.³¹⁷ From this moment the rules regulate the control, management, administration, use and enjoyment of the sections and the common property of a scheme.³¹⁸ The rules thus contain provisions which regulate the operation of the body corporate and the behavior of trustees.³¹⁹ The rules are important in that they ensure that all members of the association are afforded an opportunity to participate in the control and management of the sectional title scheme in an organized manner, and that such management and control is appropriately effected in a way which protects the interests of all owners.³²⁰ The rules must also regulate the conduct of all owners and other occupants of sections in a scheme. They must thus set out the limitations the section owners must observe in their behavior both within their sections and on the common property.³²¹ Since the occupants of sections in a scheme live in close proximity to one another and share the use and enjoyment of the common property, it is necessary for each of them to be aware and considerate of the rights of the others. The rules thus protect the common right of all occupants of sections to peaceful and unobstructed use and enjoyment of their sections and the common property. Since the rules are vital for matters relating to the control, management, administration, use and enjoyment of the sections and common property of a scheme, they must be prescribed prior to establishment of sectional title schemes. It is imperative that the rules be in

³¹⁶ Sec. 39 (1) of the Botswana STA.

³¹⁷ See further Van der Merwe *Sectional Titles* ch 13-4; Paddock *The Sectional Title Handbook* 82.

³¹⁸ Sec. 56 (a) of the Botswana STA. In South Africa there are two types of model rules contained in Annexures 8 and 9 of the Regulations. Annexure 8 is composed of management rules which provide for the control, management and administration of the scheme. Annexure 9 contains conduct rules which deal mainly with the use and enjoyment of the sections and common property (See sec.1 (1) "rules" and sec. 35 (2). See further reg. 30 (1) and (5) and the headings of Annexure 8 and 9). Matters regulated includes: the keeping of animals, refuse disposal, the parking of vehicles on the common property, damage or alteration to the common property, littering, washing lines, storage of inflammable material and the eradication of pets (R 1-11). Annexure 8 deals mainly with administrative matters such as the election, meetings, powers and duties of trustees, (R 3-32 and 34-49). See also Van der Merwe *Sectional Titles* ch 14-65/14-78 for more detail) the governing of and the procedure at general meetings, (R 50-67) and the position of managing agents (R 46-49). Annexure 8 also contains a few provisions on non-administrative matters such as improvements to the common property (R 33) and the obligations of sectional owners regarding their sections and the common property (R68 and 70). Annexure 9 is composed of rules which regulate a sectional owner's conduct

³¹⁹ Paddock *Sectional Title Handbook* 82.

³²⁰ Sec. 56 (a) of the Botswana STA; Paddock *The Sectional Title Handbook* 82.

³²¹ Paddock *The Sectional Title Handbook* 82.

existence prior to the operation of the Act since when the developer applies for registration of a sectional plan and opening of a sectional title register, he or she must, together with all the other documents³²² lodge, a certificate by a conveyancer stating that the rules prescribed in terms of section 38 (2) of the Act are applicable. Rules binding upon all owners are necessary so as to have a harmonious community.³²³

The rules affect the rights of owners, but they can also be used by the developer or financial institutions like banks to protect their own interest. Financial institutions granting loans and registering mortgage bonds involving land or individual units endeavor to ensure that the rules of the scheme adequately protect their interests.³²⁴ On the other hand, potential purchasers should examine the rules to ensure that the scheme will be appropriately administered. In drawing up the rules, developers must take into account the interests of both financial institutions and potential purchasers, as failure to do so may adversely affect the marketability of the scheme.³²⁵

In terms of the South African Act, the body corporate shall, on the application of any owner or any person having a registered real right in or over a unit, or any person authorized in writing by such owner or person, make any rules then in force available for inspection to such owner, person or authorised person. The Botswana Act does not impose an obligation on the association to make its rules available for inspection. It is submitted that an inclusion in the Botswana Act of a provision to impose an obligation on an association to make its rules available for inspection is necessary as prospective owners or owners of sections or any person having a registered real right in or over a unit need to be familiar with the rules applicable to that particular scheme.

In terms of the South African Act, the rules are prescribed by regulation.³²⁶ The regulations made in terms of the Botswana Sectional Titles Act are inadequate in that they do not provide for the appointment of a Sectional Titles Regulation Board as

³²² See sec. 12 of the Botswana STA for a list of documents that must accompany an application for registration and opening of a sectional title register.

³²³ Van der Merwe *Sectional Titles* ch 13-3.

³²⁴ Van der Merwe *Sectional Titles* ch 13-3.

³²⁵ Van der Merwe *Sectional Titles* ch 13-3.

³²⁶ Sec. 35 (2) of the SA STA.

provided for by the Sectional Titles Act.³²⁷ The Sectional titles Regulation Board is important in that it must make recommendations to the Minister for the efficient implementation of the provisions of the Sectional Titles Act.³²⁸ The regulations must also specify the number of persons to be appointed to the Board, their remuneration and the period of holding office.³²⁹ If the Sectional Titles Regulation Board was catered for and appointed as provided for under the Act,³³⁰ it would play a very important role in the prescription of appropriate management and conduct rules as its role is to make recommendations to the Minister for the efficient implementation of the provisions of the Act.³³¹ It is submitted that it is imperative for such a Board to be catered for and appointed as provided for under the Act, as it would play a crucial role in the prescription of management and conduct rules.³³²

Upon the registration of the sectional plan and opening of the sectional title register, the developer can sell certain sections in a sectionalised building and let other sections or let all sections.³³³ In both Botswana and South Africa, the developer is the owner of any section in respect of which ownership is not held by any other person.³³⁴ As such, he or she plays a vital role in the management and administration of the scheme during the initial stages. Once the developer has sold and transferred all the units in the scheme either to another developer³³⁵ or to individual purchasers, he or she ceases to be a member of the body corporate.³³⁶

³²⁷ Sec. 55 of the Botswana STA. In South Africa, the Sectional Titles Regulations Board is established by a provision in the Act (Sec. 54). Sec. 54 among other things sets out the duties of the Board, appointment of its members and how it shall be regulated.

³²⁸ Sec. 55 (1) of the Botswana STA.

³²⁹ Sec. 55 (2) of the Botswana STA.

³³⁰ Sec. 55 of the Botswana STA.

³³¹ Sec. 55 (1) of the Botswana STA.

³³² In South Africa the Sectional Titles Regulations Board played a role in the prescription of the regulations as well. Sec. 55 of the SA STA provides for the Minister after consultation with the Sectional Titles Regulation Board to make regulations.

³³³ Sec. 36 of the Botswana STA and sec. 33 of the SA STA.

³³⁴ Sec. 37 (1) the Botswana STA and sec. 34 of the SA STA.

³³⁵ Sec. 36 (2) (3) of the Botswana STA and sec. 34 (3) (4) of the SA STA.

³³⁶ Sec. 36 (2) of the Botswana STA and sec. 34 (2) of the SA STA. A right to develop the scheme in phases may be exercised by the developer or his or her successor in title even though the developer or the successor in title, as the case may be, has no other interest in the common property (sec. 27 (5) of the Botswana STA and sec. 25 (5) of the SA STA.

The role played by the developer during the initial stages of the scheme is vital and whether the scheme succeeds or not will depend on the role played by him or her at these stages.³³⁷ In Botswana and South Africa, a developer is obliged to convene a meeting of the members of the body corporate not later than 60 days after the formation of the association.³³⁸ The management rules prescribe the agenda of the meeting.³³⁹ At the meeting the developer must furnish the members with a copy of the sectional plan, a certificate from the local authority to the effect that all rates due by the developer have been paid and proof of revenue and expenditure concerning the management of the scheme from the date of the first occupation of any unit until the date of the establishment of the body corporate.³⁴⁰ A developer who fails to comply with this obligation will be guilty of an offence and liable on conviction to a fine not exceeding P1000³⁴¹ and R1000³⁴² respectively.

3 2 4 Development in phases

A developer who intends to carry out a development scheme must instruct a land surveyor or architect to prepare a sectional plan which must be submitted to the Director of Surveys and Mapping or Surveyor-General for approval.³⁴³ According to the Sectional

³³⁷ The management of many earlier schemes in Australia was chaotic as the developer delayed in calling the first meeting of the body corporate and this resulted in a delay in an efficient management being put in place. The developers were not cooperative regarding the initial organisation of the scheme as their main interest was in marketing the scheme as soon as possible so that they could move to the next scheme. At times the developer voted against attempts to organise the scheme where he or she held the majority vote. This chaotic situation was only resolved by new owners who outvoted the developer and proceeded to elect trustees and to obtain contributions from sectional owners (Collins and Jackson *Strata Titles Units in New South Wales* (1974) Butterworths Sydney). The New South Wales Strata Titles Act has since imposed a duty on the developer to make sure that a viable structure has been created before leaving the scheme by restricting his or her power to abuse voting rights until at least one third of the units reckoned in value have been sold (sec. 66 of the Act). A duty has also been imposed on the developer to manage the scheme until a management structure has been established, which would generally be at the first annual meeting of the body corporate (sec. 57 of the Act).

³³⁸ Sec. 39 (6) of the Botswana STA and sec. 36 (7) of the SA STA.

³³⁹ Sec. 39 (6) of the Botswana STA and sec. 36 (7) of the SA STA.

³⁴⁰ Sec. 39 (6) of the Botswana STA and sec. 36 (7) (a) of the SA STA.

³⁴¹ Sec. 39 (8) of the Botswana STA.

³⁴² Sec. 36 (7) (b) of the SA STA.

³⁴³ Sec. 6 (1) of the Botswana STA and sec. 5 (1) of the SA STA.

Titles Acts,³⁴⁴ a “draft sectional plan” must be drawn up from actual measurements.³⁴⁵ This means that for a sectional plan to be drawn up, the physical boundaries of sections namely walls, floors and ceilings must at least be adequately completed. Therefore, for a sectional plan to be approved, registered in the deeds office and a sectional title register opened for the scheme, the proposed sectionalised buildings must actually have been built.³⁴⁶ After this has been done, the developer can then carry on with the transfer of units in the names of proposed purchasers. The developer may, as a result of this requirement, experience financial difficulties, for example, in a project involving one multi-storey residential building, the units in the building will generally be fit for human habitation and thus be capable of being sold at completion of the building.³⁴⁷

In both Botswana and South Africa, the harshness of this rule has been alleviated to a large extent by providing for the extension of a scheme by the addition of sections.³⁴⁸ The Sectional Titles Acts allows the developer to extend the scheme by a further building or buildings on the land comprised in the scheme, a horizontal extension of an existing building or by the vertical extension of an existing building, namely by adding one or more storeys to the building.³⁴⁹ The erection of an additional building or buildings on the land is the most commonly utilised form of phased development in South Africa.³⁵⁰ Phased development allows the developer to sell and transfer title of the units in the first stage as soon as they are completed and still retain the right to extend the scheme by a further development at a later stage. This right is a real right that can be mortgaged to finance successive development of additional stages.³⁵¹

In both Botswana and South Africa, the development of a scheme in phases benefits the developer in that he or she can get finances for the plot and the initial stage of the scheme, and then use the money generated from the sale of units from the first stage to

³⁴⁴ Botswana Act No. 7 of 1999 and SA Act No 95 of 1986.

³⁴⁵ Sec. 8 (1) of the Botswana STA and sec. 6 (1) of the SA STA.

³⁴⁶ Kilbourn “Oh the innocence of “Actual Measurements”: The implications of the wording of section 6(1) of the Sectional Titles Act” October 1998 *Butterworths Property Law Digest* October 9.

³⁴⁷ In SA, although units can be sold before they are registrable, the developer is not allowed in terms of sec. 26 of the Alienation of Land Act, to utilise the money received.

³⁴⁸ Sec. 27 of the Botswana STA and sec. 25 of the SA STA.

³⁴⁹ Sec. 27 (1) of the Botswana STA and sec. 25 (1) of the SA STA.

³⁵⁰ Van der Merwe *Sectional Titles* ch 12-3.

³⁵¹ Van der Merwe *Sectional Titles* ch 12-3.

develop the scheme further. The initial capital required is reduced since the developer does not have to finance the whole scheme at once. He is also ensured of steady incoming revenue from the proceeds of sales and transfer of units in the earlier stages. The developer can then invest this money in the construction of later stages. Phased development further benefits the developer in that a larger amount of money need not be tied up during development while on the other hand his costs, especially interest charges on borrowed funds, which continue to accrue pending opening of the sectional title register and receipt of money from the purchasers once the scheme is ready for occupation will be comparatively less. Phased development also allows the developer to transfer ownership on time on completion of each stage. This will save both the developer and purchaser financial loss and embarrassment.

It is particularly reasonable to develop a sectional title scheme in phases where it is difficult to predict from the beginning how popular a proposed development would be. Phased development in principle also provides flexibility.³⁵² The developer is enabled to plan and market a reasonable number and mixture of units in accordance with market demand and acceptance. Construction of units may also depend on the rate at which the market takes up the units already available. This whole process will also give the developer experience regarding future construction of successive units. Flexibility is thus important for developers who are still experimenting and who are not willing to commit themselves to more than one phase of a large development. Developers are also enabled to determine marketing packages best suited to the needs of the public.

In both Botswana and South Africa, if market conditions are not favourable, the developer may develop only a portion of the undeveloped land.³⁵³ He or she may lease or sell and transfer the undeveloped portion or common property or any part of it subject to amenities already existing on the common property which forms part of the initial phase,

³⁵² Van der Merwe *Sectional Titles* ch 12-5.

³⁵³ Sec. 20 of the Botswana STA and sec. 17 of the SA STA. In the United States, a developer has an option of 'withdrawal land' where he or she can reserve for himself the right to withdraw a portion of the land, of which the next stage was proposed to be developed, from the scheme where the developer does not have sufficient funding for the project (Van der Merwe *Sectional Titles* ch 12-15). The option is attractive to financial institutions in that if a developer decides not to go ahead with developing the remaining phases for the scheme, he or she can then subdivide that particular portion when financial difficulties are experienced. Mortgagees would then satisfy their debts from the subdivided portion. This option is not known to the South African and Botswana sectional titles law.

as it is necessary for the developer to comply with existing obligations to the existing sectional owners.³⁵⁴

Apart from benefiting the developer, phased development has got other advantages too. Land will be best utilised, if a large development scheme is established on a large lot. Since there are no internal boundaries, less land is being lost because of restrictions on building near boundaries, and as a result, high density may be achieved.³⁵⁵ This may reduce the prices of individual units. Large schemes that require development in phases may afford sectional title owners expensive common facilities, like swimming pools and tennis-courts.³⁵⁶

In principle, the Botswana and South African sectional titles legislation provides for an extension of a sectional title scheme by way of phased development.³⁵⁷ The developer may reserve such a right in terms of the Sectional Titles Acts.³⁵⁸ The procedure for the reservation of such a right is discussed below.

3 2 4 1 The reservation of a right of extension of a scheme

In both Botswana and South Africa, where the developer decides to develop the scheme in phases, he or she can in the application for the registration of the sectional plan and opening of the sectional title register, reserve the right to extend the scheme.³⁵⁹ Where such a right was not reserved when the scheme was opened, the Sectional Titles Acts of both jurisdictions give the developer a chance to do so before the transfer of any section of the scheme³⁶⁰ since the body corporate has not yet been established.³⁶¹ If the developer

³⁵⁴ Sec. 19 of the Botswana STA and sec. 17 of the SA STA.

³⁵⁵ Van der Merwe *Sectional Titles* ch 12-13.

³⁵⁶ Fouche *Report of the commission of inquiry into housing matters* RP 74/1977 (1977) Government Printer Pretoria.

³⁵⁷ Sec. 27 of the Botswana STA and sec. 25 of the SA STA.

³⁵⁸ Sec. 27 of the Botswana STA and sec. 25 of the SA STA.

³⁵⁹ Sec. 27 of the Botswana STA and sec. 25 of the SA STA.

³⁶⁰ Sec. 27 (7) of the Botswana STA and sec. 25 (6A) of the SA STA. The application by the developer must be in the prescribed form, which is Form C of the schedule to the Botswana Regulations and Form B of Annexure 1 in SA.

³⁶¹ In terms of sec. 39 (1) of the Botswana STA and sec. 36 (1) of the SA STA, a body corporate comes into existence whenever any person other than the developer becomes an owner in a scheme.

has not reserved such a right, and the body corporate has come into existence, the body corporate can apply to the Registrar of Deeds for a reservation of such a right with the written consent of all members of the body corporate.³⁶² The certificates of real right obtained by the developer and the body corporate are set out in the schedule³⁶³ and Annexure 1³⁶⁴ to the Regulations.

In both Botswana and South Africa, when making an application for the registration of a sectional plan and opening of a sectional title register, the developer may by a condition in the schedule³⁶⁵ reserve the right to extend the scheme.³⁶⁶ He or she may by a schedule certified by a conveyancer set out the servitudes and conditions of title burdening or benefiting the land.³⁶⁷ The developer must state in a condition the period within which the scheme must be completed.³⁶⁸ In both Botswana and South Africa, no maximum time limit has been set within which the developer must have completed the scheme. The argument against a maximum time period is that the developer's right to extend may simply be defeated by the passing of time, and the developer's ability to hypothecate the right of extension could adversely be affected.³⁶⁹ The developer must also specify the part of the common property over which the extension would be carried out.³⁷⁰

Although the South African Sectional Titles Act of 1971 has been repealed,³⁷¹ the developer could still apply to the Registrar of Deeds for the issuance of a certificate of real right to extend the scheme in terms of section 25 of the current Act with regard to a right of extension of a building acquired in terms of section 18 of the Sectional Titles Act of 1971. Upon compliance with section 25, the Act could still be applicable as if the reservation had been made in terms of the Act. The certificate in terms of section 18 of

³⁶² Sec. 27 (6) of the Botswana STA and sec. 25 (6) of the SA STA.

³⁶³ Form F and G respectively. See Reg. 12 (1) (2).

³⁶⁴ Form F and R respectively. See Reg. 14 (1) (2).

³⁶⁵ Sec. 12 (2) of the Botswana STA and sec. 11 (2) of the SA STA.

³⁶⁶ Sec. 27 (1) of the Botswana STA and sec. 25 (1) of the SA STA.

³⁶⁷ Sec. 12 (2) read with sec. 12 (3) (b) of the Botswana STA and sec. 11 (2) read with sec. 11 (3) (b) of the SA STA.

³⁶⁸ Sec. 27 (1) of the Botswana STA and sec. 25 (1) of the SA STA.

³⁶⁹ Van der Merwe *Sectional Titles* ch 12-33.

³⁷⁰ Sec. 27 (1) of the Botswana STA and sec. 25 (1) of the SA STA. In terms of Form F of the schedule of the Botswana Regulations and Form F in Annexure 1 of the SA Regulations, the specified portion of the common property would be indicated on the plan filed in the sectional title file number, referred to in sec. 27 (2) (a) of the Botswana STA and sec. 25 (2) (a) of the SA STA, filed in the deeds office.

³⁷¹ By the SA STA No 95 of 1986.

the Sectional Titles Act of 1971 could only be issued on the following three conditions: (i) if the right of extension still vested in the developer;³⁷² (ii) if a certificate by a conveyancer stated that the consent of all owners of units in the scheme and of all mortgagees to the proposed extension had been obtained which consent should not unreasonably be withheld;³⁷³ and (iii) if the developer obtained the certificate of real right to extend the scheme within a period of 24 months after the commencement of the Sectional Titles Amendment Act of 1997, or such extended period as may be prescribed by regulation.³⁷⁴

In *Bandle Investment (Pty) Ltd v Registrar of Deeds*,³⁷⁵ the applicant wished to extend the scheme in terms of a right reserved in terms of section 18 of the old Sectional Titles Act.³⁷⁶ The majority of owners of units in the scheme did not consent to the proposed extension. Facing the 3 October 1999 deadline,³⁷⁷ the applicant approached the court for an interim order authorising the applicant to convert its right to extend the areas referred to in the certificate of registered real right to a right under section 25 of the new Act. The court found that the relief sought was interim since the purpose of the relief sought was to secure the right, subject to a finding by the court in due course whether the conduct of the parties who withheld their consent to the proposed extension was unreasonable, which dispute could not be resolved before 3 October 1999. The court found that granting the relief sought would not amount to extending the stipulated time period of 24 months. The court also found that the relief sought was analogous to that of a temporary interdict and that the requirements for such remedy were complied with. It could not be decided on the papers whether the conduct of the respondents was reasonable or not, but in the context of the matter, the applicant had established a *prima facie* right. The court pointed out that the refusal of the applicant's relief would cause the loss of the applicant's right. Such a

³⁷² Proviso to sec. 60 (1) (b) (i) of the SA STA.

³⁷³ Sec. 60 (1) (b) (ii) of the SA STA.

³⁷⁴ Sec. 60 (1) (b) (iii) of the SA STA. The right would lapse if the developer failed to obtain the certificate of real right to extend the scheme within the prescribed period. The commencement date of the Sectional Titles Amendment Act 44 of 1997 was 3 October 1997. The period had been extended to 31 December 2001 by GNR 1357 of 19 November 1999.

³⁷⁵ 2001 (2) SA 203 (SE).

³⁷⁶ Sec. 18 of the SA STA No 66 of 1971.

³⁷⁷ See n 371 *supra*

right would revert to the body corporate, which would as a result acquire an extremely valuable right. As the applicant had no other remedy, the court granted the relief sought.

The characteristics of a right to extend the scheme in terms of section 18 of the old Act were not expressly alluded to. Hence in *Erlax Properties (Pty) Ltd v Registrar of Deeds*,³⁷⁸ the Appellate Division found it necessary to consider the nature and content of this right. Joubert JA concluded that the right to extend the scheme in terms of the 1971 Act was a personal servitude, hence inalienable.³⁷⁹ Although Elarx was entitled to obtain a certificate of real right with regard to this right it could not be transferred.³⁸⁰ This undesirable state of affairs led the legislature to amend section 60 (1) so as to bring the position under the 1971 Act in line with that under the 1986 Act.³⁸¹ The Act was thus amended in 1993.³⁸² This amendment strengthened the developer's right to extend the scheme acquired in terms of section 18 of the old Act in the following respects: first, it provides that a certificate of real right can be obtained in respect of such a right;³⁸³ secondly, it states that such a right will for all purposes be deemed to be a right to urban immovable property which is capable of being mortgaged; and thirdly, it provides that such a right is capable of being transferred by the registration of a notarial deed of cession. The Act was further amended in 1997³⁸⁴ to provide for the developer to obtain such a certificate of real right within a period of 24 months after the commencement of the 1997 Amendment Act, or such extended period as may be prescribed by regulation, failing which this right shall lapse.

If the reservation to extend the scheme has been made, the application for the registration of a sectional plan of extension shall, in addition to the usual documents required,³⁸⁵ be accompanied by the following in both Botswana and South Africa:³⁸⁶ (a) a plan to scale of the building or buildings showing the part of the common property affected by the

³⁷⁸ 1992 1 SA 879 (A).

³⁷⁹ *supra* at 887E.

³⁸⁰ See also Van der Merwe *Sectional Titles* ch 12-24.

³⁸¹ See *Memorandum* (1993) 6 par 4.

³⁸² Sec. 4 of Act 15 of 1993.

³⁸³ This was already accepted in *Erlax Properties (Pty) Ltd v Registrar of Deeds* (*Supra* at 888-889B).

³⁸⁴ Sec. 28 (a) of Act 44 of 1997.

³⁸⁵ Sec. 12 (3) of the Botswana STA and sec. 11 (3) of the SA STA.

³⁸⁶ Sec. 27 (2) (a)-(g) of the Botswana STA and sec. 25 (2) (a)-(g) of the SA STA. See also Kilbourn "Perspective of a Real Right of Extension of a Sectional Title Scheme as Envisaged in section 25 of the Sectional Titles Act 95 of 1985" April 1997 *Butterworths Property Law Digest* 17.

reservation; the siting, height and coverage of all buildings; the entrances and all exits to the land; the building restriction areas, if any; the parking areas and the typical elevation treatment of all buildings;³⁸⁷ (b) a plan to scale showing the manner in which the building to be erected is to be divided into a section or sections and any exclusive use areas;³⁸⁸ (c) a schedule indicating the estimated participation quotas of all the sections in the scheme after such section or sections have been added to the scheme;³⁸⁹ (d) particulars of any substantial difference between the materials to be used in the construction of the building to be erected and those used in the construction of the existing building;³⁹⁰ (e) particulars of the expenses which will be borne by the developer in respect of the common property which is to be utilised for the extension of the scheme from the date of the establishment of the body corporate until the sectional plan of the extension is registered;³⁹¹ (f) the certificate of real right in relation to the extension;³⁹² and such other documents and particulars as may be prescribed.³⁹³

The procedure for the application for registration of the sectional plan is the same in Botswana and South Africa. In South Africa,³⁹⁴ the local authority had to approve building plans before they could be submitted with the application for the registration of the sectional plan. This procedure was proved to be unreasonably intricate and as a result, the developer incurred enormous expenses.³⁹⁵ The developer was faced with a mammoth task of appointing architects, engineers and quantity surveyors, at the first stage, so as to draft building plans for the whole project. The developer was often required to resubmit

³⁸⁷ Sec. 27 (2) (a) of the Botswana STA and sec. 25 (2) (a) of the SA STA. See Form F in the schedule to the Botswana Regulations and Form F in Annexure 1 of the SA Regulations.

³⁸⁸ Sec. 27 (2) (b) of the Botswana STA and sec. 25 (2) (b) of the SA STA. Sec 27 (1) of the Botswana Act and sec. 25 (1) of the SA Act refers to the common property, which is not referred to in this subsection; this is presumably an omission.

³⁸⁹ Sec. 27 (2) (c) of the Botswana STA and sec. 25 (2) (c) of the SA STA.

³⁹⁰ Sec. 27 (2) (d) of the Botswana STA and sec. 25 (2) (d) of the SA STA.

³⁹¹ Sec. 27 (2) (e) read with sec. 40 (1) of the Botswana STA and sec. 25 (2) (d) read with sec. 37 (1) (a) of the SA STA. The developer will be liable for a proportionate share of the expenses mentioned in sec. 40 (1) (a) of the Botswana STA and sec. 37 (1) (a) of the SA STA as well as expenses relating to with the development of the next phase (e g providing for sewage and entrances).

³⁹² Sec. 27(2) (f) of the Botswana STA and sec. 25(2) (f) of the SA STA.

³⁹³ Sec. 27 (2) (g) of the Botswana STA and sec. 25 (2) (g) of the SA STA.

³⁹⁴ Before the Sectional Titles Amendment Act of 1991. See also sec. 25 (2) (a) of the SA Act of 1986, which required the developer to lodge an approved building plan.

³⁹⁵ Van der Merwe *Sectional Titles* ch 12-17.

building plans for approval since approved building plans are valid for one year only. This caused the developer to recover the costs from the sales from the initial stages.³⁹⁶

In 1989 SAPOA submitted two memoranda to Government. In the second Memorandum SAPOA suggested that a building plan should no longer be required, but instead, a plan to scale.³⁹⁷ The suggestions by SAPOA were based on its interpretation of section 25 (13)³⁹⁸ at that time. The intention of SAPOA was that the plans referred to in section 25 (2) (a) and (b) should be “site development plans” laying out the general intent and purpose of the proposed development plan.³⁹⁹ The suggestions by SAPOA were in fact taken into account by the Legislature in that the revised wording of section 25 (2) (a) (b) which was substituted by section 15 (b) of Act 63 of 1991, was based on the wording of the Natal Ordinance regarding a site development plan.⁴⁰⁰ By the introduction of section 15 (b),⁴⁰¹ the legislature intended to safeguard the interests of both the developer and the consumer. Instead of submitting building plans, the developer only has to submit plans to scale containing the details specified above.⁴⁰² Delays experienced in obtaining the local authority’s approval for building plans are now avoided. Should the developer decide to proceed with the extension of the scheme, the building plans will, however, still have to be approved by the local authority.⁴⁰³

Section 25 (2) (a) and (b) however still pose difficulties to developers due to the interpretation given to the provisions by various Registrars of Deeds that any deviation from those plans when a sectional plan of extension is lodged for registration, will not be permitted.⁴⁰⁴ A need arises therefore to balance the interests of the consumer to be informed as well as that of the developer not to be restricted by a plan that was made

³⁹⁶ See Stern “Major Changes Affecting the Preparation of Plans for Sectional Title Schemes” 1988 *Juta’s South African Journal of Property* 50; SAPOA Memorandum (1993) par 5.2.

³⁹⁷ See SAPOA Memorandum 1993 par 5.3.

³⁹⁸ Which required the developer or his successor in title, or the body corporate exercising the reserved right to erect and divide the building into sections strictly in accordance with documents and plans submitted at the application for reservation of the right of extension, due regard being had to changed circumstances which would make compliance impracticable.

³⁹⁹ SAPOA Memorandum 1993 par 5.3. Subsequent wording of section 25 (2) (a) which was substituted by section 25 (b) of Act 63 of 1991, was based on the wording of Natal Ordinance of a site development plan.

⁴⁰⁰ SAPOA Memorandum par 5.3.

⁴⁰¹ Act No 63 of 1991.

⁴⁰² See further sec. 25 (2) (a) (b) of the SA STA.

⁴⁰³ See Van der Merwe *Sectional Titles* ch 12-28.

⁴⁰⁴ SAPOA Memorandum para 5.5.

years ago in view of the changed circumstances of today.⁴⁰⁵ SAPOA argues that there is no provision in the Sectional Titles Act⁴⁰⁶ that the Registrar can refuse to register a sectional plan of extension if there is a deviation from the plans in terms of section 25(2) (a) and (b), subject to the Registrar's right to acquire proof of "changed circumstances" as envisaged by section 25 (13), in terms of section 4 (1) (a)⁴⁰⁷ of the Deeds Registries Act.⁴⁰⁸ The developer has thus an obligation to comply strictly with section 25 (2) (a) and (b) plans. The developer is, however, allowed to deviate if there are changed circumstances that would make compliance impracticable. There must be a balance between a developer's desire to be flexible in implementing the extension and the purchaser's right to an informed decision whether to buy or not buy into the scheme.⁴⁰⁹

In terms of the Botswana statute, a developer or his or her successor in title who exercises a reserved right to extend a scheme by addition of sections,⁴¹⁰ must erect and divide the buildings into sections strictly in accordance with section 27 (2) (a) and (b) plans. Furthermore, in both Botswana and South Africa, an owner of a unit in the scheme who is prejudiced by the developer's failure to comply with this requirement may apply to court, which may order proper compliance with the terms of the reservation, or grant such other relief, including damages, as it may deem fit.⁴¹¹

In *Knoetze v Sadlewood CC*,⁴¹² the plaintiff sought an order for the cancellation of the agreement of sale on the basis that when the defendant constructed phase 2, it did not comply with the provisions of the Act⁴¹³ and, on the contrary, committed material breaches of the contract which entitled her to cancellation and damages. The defendant countered on the basis that the "changed circumstances" as envisaged in the Act rendered

⁴⁰⁵ SAPOA Memorandum para 5.4. See also Van der Merwe & Butler *Sectional Titles* 194.

⁴⁰⁶ SA STA No 95 of 1986.

⁴⁰⁷ In terms of Section 4 (1) (a) of the S A Deeds Registries Act the Registrar has the power to require the proof upon affidavit or otherwise of any facts necessary to be established in connection with any matter or thing sought to be performed or effected in his registry.

⁴⁰⁸ SAPOA Memorandum 1993 para 6.2.

⁴⁰⁹ SAPOA Memorandum 1993 para 7.4.

⁴¹⁰ In terms of sec. 27 (1) of the Botswana STA.

⁴¹¹ Sec. 27 (15) of the Botswana STA and section 25 (13) of the SA STA.

⁴¹² 2001 (1) All SA 42 (SE).

⁴¹³ Sec. 25 (13) of the STA 95 OF 1986, which provides that a developer who exercises a reserved right to extend a sectional title plan must erect the buildings strictly in accordance with approved plans and specifications, due regard being had to changed circumstances which would make strict compliance impractical.

strict compliance with the approved building plans impracticable. The changed circumstances relied upon were: firstly, that strict compliance would have resulted in eliminating or disrupting the sea view of the owners in Phase 1; that it was no longer economically viable to build the units in strict compliance with the original plans; and that strict compliance would have been impossible or highly impractical, taking into account the natural slope of adjoining properties.

The court had to decide what the legislature meant by changed circumstances, and whether the ordinary meaning of the words had been altered by the Act. Jones J⁴¹⁴ noted that the Act does not define “changed circumstances,” and that there is no case law and that there is very little commentary on the topic. Due to such lack of guidance, the court had to consider the ordinary meaning of the words in the section with regard to their context and the background and history of the Act. Although an implied type of phased development was permitted in the 1971 Act,⁴¹⁵ a scheme had to be planned and fully developed before a sectional title register could be opened. The court pointed out⁴¹⁶ that the requirement that the scheme had to be fully planned and developed before a sectional plan could be opened, was good for purchasers as they could see what the finished product was before buying. On the other hand, it did not assist developers, as they could not use the finances raised by the first sales to construct more units.

As the case of *Knoetze v Saddlewood* indicates, the 1986 amendment was introduced for the benefit of developers, but it resulted in the loss of protection for purchasers, particularly as the Act does not impose restrictions on the extent of deviations by the developer once circumstances change. However, purchasers still enjoy some protection as deviation from the plans is permissible only when there are changed circumstances, which make strict compliance impracticable. Jones J⁴¹⁷ stated that by using the term “changed circumstances,” the legislature had deliberately chosen wide language. He continued to say that the only limitation imposed by the Act is that the changed circumstances make strict compliance impracticable. He found there was nothing in the Act, its wording or spirit, to impose a restrictive interpretation, and that the defendant

⁴¹⁴ *Supra* at 46.

⁴¹⁵ Sec 18 of Act No 66 of 1971.

⁴¹⁶ *Supra* at 47.

⁴¹⁷ *Supra* at 47.

should not be precluded from relying on changed circumstances because he is responsible for bringing it about.

In addition, the court found that changed circumstances also include market conditions. To hold otherwise, would be to ignore commercial reality, as no developer would build units he is unable to sell. The court found that the evidence presented made strict compliance with the original plan impractical, with the result that the plaintiff was not entitled to the statutory remedy, assuming that the section gives cancellation of a contract as statutory remedy. The court also found out that the changed circumstances upon which the defendant relied defeat an argument that the defendant's deviation from the original plan is a breach of contract. The plaintiff maintained that the contract explained exactly how the units in Phase 2 and 3 were to be built, and that there was no agreement for the variation of these terms as required by paragraph 18 (a standard non-variation clause), and that the defendant's performance was not in accordance with those terms.

The court examined the contract and ascertained that there was reference to the developer's reserved right in terms of section 25 of the Act to extend the scope of the development. The contract entitled the defendant to exercise all rights conferred upon a developer in terms of that section. The court found that if the breach of contract action had to be imposed on the developer, it would lead to an absurd situation. The defendant would have reserved a statutory right to deviate from the plan where strict compliance is impractical, but would be unable to exercise that right unless the plaintiff, or any other owner who has already purchased subject to a non-variation clause, agreed to the variation in writing.

From the discussion of the above case, it is clear that section 25 (13) of the South African Sectional Titles Act and section 27 (15) of the Botswana Sectional Titles Act benefit developers, and results in a loss of protection for purchasers, particularly as the Acts do not impose restrictions on the extent of deviations by the developer, once circumstances change. The loss of protection to purchasers occurs especially if a wide interpretation such as that in *Knoetze v Saddlewood* is afforded the "changed circumstances." However, purchasers do still enjoy some protection as inroads into their protection are permissible only when there are changed circumstances, which make strict compliance impracticable.

3 2 4 2 Developer's duty of disclosure

Statutory provisions on phased development should attempt to balance a developer's desire for flexibility to expand the scheme in line with market demands against a purchaser's interest in having adequate information so that he or she is enabled to make an informed choice as to whether to purchase in a phased development or not.⁴¹⁸ This means that the interests of the developer should be looked into as well as the protection of the purchasers. If the developer is constrained by a prearranged scheme, flexibility might be lost, and as a result developers may be discouraged from carrying out large coordinated developments in future. On the other hand, the legislature would be failing in its duty to provide a certain measure of protection to the consumer where it is most needed, if the purchaser, when making a decision to purchase is not adequately informed of the options reserved by the developer.⁴¹⁹

In both Botswana and South Africa, where a developer or an association has a real right of extension of a scheme, such a right shall be disclosed in the agreement by which the unit is sold, to every purchaser of a section in the scheme concerned.⁴²⁰ An agreement by which a unit is sold conditionally without disclosing the existing real right of extension shall be voidable at the option of the purchaser.⁴²¹ Neither the Botswana nor the South African Sectional Titles Acts⁴²² specifically provide that any details of a further development must be disclosed in a sale agreement, it merely requires disclosure of the right of extension.⁴²³ Additional information about the proposed extension is contained in the conditions reserving such right in the schedule filed with the sectional plan⁴²⁴ and in the documents which must accompany the application to register the sectional plan in order to register the real right of extension reserved in the condition.⁴²⁵

⁴¹⁸ Van der Merwe *Sectional Titles* ch 12-31.

⁴¹⁹ See SAPOA *Memorandum* (1993) para 5.1.

⁴²⁰ Sec. 27 (16) of the Botswana STA and sec. 25 (14) of the SA STA.

⁴²¹ Sec. 27 (17) of the Botswana STA and sec. 25 (15) of the SA STA.

⁴²² The Botswana Act No. 7 of 1999 and the SA Act No 95 of 1986.

⁴²³ Sec. 27 (16) of the Botswana STA and sec. 25 (14) of the SA STA.

⁴²⁴ See sec. 12 (3) (b) of the Botswana STA and sec. 11 (3) (b) of the SA STA.

⁴²⁵ The information which is thus indirectly disclosed to purchasers in the first phase includes information stated in sec. 27 (1) (2) of the Botswana STA and sec. 25 (1) (2) of the SA STA.

It is thus clear that the Botswana and South African sectional titles legislation has endeavored to protect the purchasers of units in the first phase. The fact that developers are indirectly forced to disclose certain aspects of successive stages, to some extent enables purchasers to make informed decisions as to whether or not to buy a unit in a phased development. There are, however, serious gaps that exist in the protection afforded by these provisions to purchasers in the first stage. The shortcomings are the following:⁴²⁶ first, there is no requirement that information regarding future stages should be disclosed more directly to the purchasers by way of a prospectus or as vital provisions in the deed of alienation.⁴²⁷ Second, although the time limit envisaged for the completion of future stages must be stated in the condition reserving the right to extend the scheme, no maximum time limit is laid down. Third, no provision is made for a situation where the developer is unable to, or chooses not to proceed with the development. Fourth, no details are required of the nature of new facilities to be erected during the development of future stages which could seriously affect the running costs of the scheme.⁴²⁸ Fifth, the information furnished concerning exclusive use areas on the land is vague.⁴²⁹ Sixth, no information is provided as to whether all or some of the future units would be utilised for residential or commercial use. Finally, although differences in materials used in the construction of the additional stages must be disclosed, there is no guarantee that the future additional buildings will be in harmony with the existing buildings in the scheme as far as architectural style, quality of construction and size are concerned.⁴³⁰

On the other hand, both the Botswana and South African statutes⁴³¹ do not give the developer adequate capacity to develop the scheme according to market conditions. The

⁴²⁶ See Van der Merwe *Sectional Titles* ch 12-33; Cowen "Questions and Answers on Sectional Titles" 1974 (6) *Planning and Building Development* 43.

⁴²⁷ In terms of sec. 25 (14) of the SA STA the developer or body corporate is only required to disclose their real right to extend the scheme in the deed of alienation. This places the responsibility on the purchaser to investigate the details in the Deeds Registry and it is not sufficient. The developer or body corporate should therefore be obligated to describe in simple terms what the proposed extension would involve. The developer or body corporate should thus disclose the information contained in the conditions and the plan to scale.

⁴²⁸ See also Fouche *Report of the Commission of Inquiry into Housing Matters* RP 74/1977 (1977) Government Printer Pretoria.

⁴²⁹ Sec. 25 (2) (a) (v) contains a vague reference to "parking areas" and sec. 25 (2) (b) only concern exclusive use areas inside a building.

⁴³⁰ Sec. 25 (2) (ii) and (iv) do not clarify this point. See also SAPOA *Memorandum* (1993) para 7.6.

⁴³¹ Sec. 27 of the Botswana STA and sec. 25 of the SA STA.

developer is constrained as to the number and size of the sections these buildings are to be divided into.⁴³² The developer can diverge from the plan to scale which he has submitted when the scheme was established, should changed circumstances make strict compliance with the plan impracticable.⁴³³ However the fact that an owner of a unit in the scheme who is prejudiced by the developer's failure to comply strictly with the plan may apply to court, which may order proper compliance with the terms of the reservation, including the plan to scale, or grant such other relief including damages as the court may deem fit,⁴³⁴ proves to be unduly restrictive.⁴³⁵ However, in *Knoetze v Saddlewood CC*,⁴³⁶ the court found that the developer should not be precluded from relying on changed circumstances because he or she is deliberately responsible for bringing them about.

3 2 5 Exclusive use areas

In both Botswana and South Africa, an exclusive use area is defined as a part or parts of the common property for the exclusive use by the owner or owners of one or more sections.⁴³⁷ Exclusive use areas are taken out of the common property of the scheme, and from the above definition, they are used to provide some or all the unit owners with, among other things, exclusive parking, garden areas, courtyards, patios, storerooms, balconies, attics, basements and even outer shells of the buildings for advertising purposes.⁴³⁸ It is clear from the definition that exclusive use areas are always part of the common property.⁴³⁹ There is a difference, however, between an owner's share in the

⁴³² See sec. 27 (2) (b) (c) of the Botswana STA and sec. 25 (2) (b) (c) of the SA STA. The developer must only identify the area of common property intended to be developed at a later stage. This does not recognise the fact that purchasers should be accorded enough information regarding future features of the scheme so that they may make informed decisions as to whether to purchase units in the scheme or not.

⁴³³ Sec. 27 (15) of the Botswana STA and sec. 25 (13) of the SA STA; *Knoetze v Saddlewood CC* 2001 (1) All SA 42.

⁴³⁴ Sec. 27 (15) of the Botswana STA and sec. 25 (13) of the SA STA.

⁴³⁵ Van der Merwe *Sectional Titles* ch 12-34.

⁴³⁶ 2001 (1) All SA 47(SE).

⁴³⁷ Sec. 2 (1) of the Botswana STA and sec. 1 (1) of the S A STA.

⁴³⁸ Mostert 1997 *Stell L R* 324; *Body corporate of the Solidatus Scheme No SS23/90 v De Waal* 1997 (3) All SA 91 (T) where 76 parking areas, eight patios or stoeps and eight balconies were allocated as exclusive use areas.

⁴³⁹ Sec. 2 (1) of the Botswana STA and sec. 1 (1) of the SA STA.

common property and the right to exclusive use of a part of it.⁴⁴⁰ An owner of a section is entitled to an undivided share in the common property by virtue of his or her ownership of the composite *res*, whereas the right to exclusive use of part of the common property is usually a real right, which is obtained by the owner through registration of a notarial deed of cession, and it does not form part of the sectional owners' units.⁴⁴¹ Sectional owners who have exclusive use rights can use the parts of the common property subject to those rights freely to the exclusion of all others without, however, interfering with the control of the common property by the body corporate.⁴⁴²

The location of these areas on the sectional plan will depend on whether they are situated on the land or in a part of the building that forms part of the common property.⁴⁴³ This means that exclusive use areas on the land will be shown on the block plan, whereas those situated in a part of a building will be shown on the relevant floor plans of the sectional plans.⁴⁴⁴

There are two ways in which exclusive use areas can be created in both Botswana and South Africa. They can be created either as independent real rights which can be registered in the sectional title register, or as mere personal rights which can be included in the rules of a scheme.⁴⁴⁵ As real rights they can be created by the developer when applying for the opening of a sectional title register and the registration of the sectional plan,⁴⁴⁶ or subsequently provided the body corporate has not yet been established.⁴⁴⁷ The developer can then cede such rights to the owner or owners to whom they are allocated by the registration of a unilateral notarial deed in their favour.⁴⁴⁸ As real rights they may also be created by the body corporate, which shall transfer the right to such exclusive use

⁴⁴⁰ Mostert 1997 (8) *Stell L R* 325.

⁴⁴¹ Mostert 1997 (8) *Stell L R* 325.

⁴⁴² Mostert 1997 (8) *Stell L R* 325.

⁴⁴³ Van der Merwe *Sectional Titles* ch 3-13.

⁴⁴⁴ Reg. 4 (2) (c) (viii) of the Botswana STA and Reg. 5 (2) (b) (vi) and 5 (2) (c) (viii) of the SA STA. See also *Manual* para 1.8. The Botswana Act does not however have Reg. 4 (2) (b) (vi) which provides for the delineation of exclusive use areas. It is strange that Reg. 4 (2) (e) of the same Act mentions the provisions of Reg. 4 (2) (b) (vi) which does not in fact exist in the Regulations to the Act. This seems to be an omission which needs to be rectified in the Regulations to the Botswana STA as delineation of exclusive use areas on the sectional plan is vital.

⁴⁴⁵ Sec. 29 and 30 of the Botswana STA and sec. 27 and 27A of the SA STA.

⁴⁴⁶ Sec. 29 (1) of the Botswana STA and sec. 27 (1) of the SA STA.

⁴⁴⁷ Sec. 29 (3) of the Botswana STA and sec. 27 (1A) of the SA STA.

⁴⁴⁸ Sec. 29 (2) of the Botswana STA and sec. 27 (b) of the SA STA.

areas to the owner or owners on whom they have been conferred by the registration of a notarial deed, if it has been authorised by a unanimous resolution of its members.⁴⁴⁹ The exclusive use areas must be clearly shown on the sectional plan, together with the purpose for which they are to be used,⁴⁵⁰ and they must be uniquely numbered.⁴⁵¹ In terms of the sectional titles legislation of both Botswana and South Africa, exclusive use areas may be transferred from one sectional owner to another owner in the scheme by registration of a notarial deed of cession entered into by the parties.⁴⁵²

The South African Sectional Titles Act of 1971 did not provide for the creation of rights of exclusive use to the common property.⁴⁵³ This means that all sectional owners were entitled to make reasonable use of the common property comprised in the scheme. Appropriation of any part of the common property for their exclusive use was unlawful, as it would amount to unreasonable use.⁴⁵⁴ Developers therefore manipulated the rules of the scheme by amendments thereto, so as to create exclusive use areas. Mechanisms like notarial leases and servitudes were also used to achieve the same purpose.⁴⁵⁵ It was very common for developers to establish exclusive areas for themselves in the rules of the scheme by the introduction of a new rule supplementing the original rules.⁴⁵⁶ The new rule made reference to a sketch plan that showed the exact location of different types of exclusive use areas established by such rule.⁴⁵⁷ The usual practice was for the rule to be inserted into the old schedule 1 rules, as this would make it capable of being amended by a unanimous resolution only.⁴⁵⁸ The introduction of this new rule enabled the developer to acquire the right to sell or lease exclusive use areas to sectional owners or even to

⁴⁴⁹ Sec. 29 (5) of the Botswana STA and sec. 27 (2) of the SA STA.

⁴⁵⁰ Sec. 29 (1) of the Botswana STA and sec. 27 (1) of the SA STA.

⁴⁵¹ Reg. 4 (1) (k) (v) of the Botswana STA and Reg. 5 (1) (k) (v) of the SA STA.

⁴⁵² Sec. 29 (7) of the Botswana STA and sec. 27 (4) of the SA STA. See further Van der Merwe "A Critical Analysis of the innovations introduced by the Sectional Titles Amendment Act of 1997" 1997 *THRHR* 325; Mostert "The Regulation of Exclusive Use Areas in terms of the Sectional Titles Act 95 of 1986: An Evaluation of the existing position and suggested alternatives" 1997 *Stell L R* 324-347.

⁴⁵³ STA 66 of 1971. See also Paddock *The Sectional Title Handbook* 2 ed (1990) 55.

⁴⁵⁴ Mostert *Stell L R* 326; Van der Merwe *Sectional Titles* ch 11-14.

⁴⁵⁵ Van der Merwe & Butler (1985) 177-180; Mostert 1997 *Stell L R* 326; Van der Merwe *Sectional Titles* ch 11-14.

⁴⁵⁶ Van der Merwe *Sectional Titles* ch 11-14; Mostert 1997 *Stell L R* 326.

⁴⁵⁷ See rr 72 and 73 of the old SAPOA rules published in Guidelines for Sectional Title Rules.

⁴⁵⁸ In terms of sec. 27 (2) (a) (i) of Act 66 of 1971, rules contained in Schedule 1 could not be amended, added to or repealed except by a unanimous resolution of the members of the body corporate.

outsiders to the scheme.⁴⁵⁹ People who purchased such exclusive use areas obtained rights to the exclusive use of specific areas of the common property, and their security was entrenched in the rules contained in Schedule 1, which could only be altered, amended or repealed by a unanimous resolution of the members of the body corporate.⁴⁶⁰ These rights could not be mortgaged, and they were not taken into account if the section was valued for purposes of granting a loan.⁴⁶¹

A number of malpractices occurred on the part of developers since the creation and management of exclusive use areas were not regulated by the Act.⁴⁶² These included sales of exclusive use areas to outsiders who did not have a personal interest in the scheme; letting rather than selling of exclusive use areas resulted in escalation of rentals due to demand; collection of the cost to maintain these exclusive use areas from levies paid by sectional owners towards maintenance of the property; and retention of these exclusive use areas by developers after they had left the scheme, only to be sold by them at a later stage when the demand and prices of these areas were high.

Due to these malpractices, the creation and regulation of exclusive use areas were accorded statutory recognition with the coming into effect of the second Sectional Titles Act.⁴⁶³ Under this Act,⁴⁶⁴ the registration of rights of exclusive use is comprehensively provided for,⁴⁶⁵ and most of the malpractices of the past have thus been eliminated. The procedure to be followed in the establishment of exclusive use areas is extensively provided for in this Act⁴⁶⁶ and its accompanying regulations.⁴⁶⁷ Unlike under the original Act,⁴⁶⁸ Registrars of Deeds were not allowed to accept rules that included the establishment of exclusive use areas.⁴⁶⁹ The establishment of these areas now involves

⁴⁵⁹ Van der Merwe *Sectional Titles* ch 11-14.

⁴⁶⁰ Sec. 27 (2) (a) (i) of Act 66 of 1971.

⁴⁶¹ Kaplan *The Sectional Titles Act 85 of 1986: A Consideration of some of the Sections of the Act which bring about Fundamental Changes to the Law and Issues which The Act has Failed to Address* (Thesis).

⁴⁶² Van der Merwe *Sectional Titles* ch 11-14.

⁴⁶³ Act 95 of 1986 which repealed and replaced Act 66 of 1971.

⁴⁶⁴ SA Act 95 of 1986.

⁴⁶⁵ Sec. 27 of the SA Act 95 of 1986.

⁴⁶⁶ Sec. 27 of the SA STA Act 95 of 1986.

⁴⁶⁷ Reg. 28 of the SA STA.

⁴⁶⁸ SA Act 66 of 1971.

⁴⁶⁹ Manual for the Preparation of Draft Sectional Plans (October 1990) together with Addendum to the Manual for the Preparation of Draft Sectional Plans (December 1992) issued by the Chief Surveyor-General para 1.8. See further Mostert 1997 *Stell LR* 327.

their delineation on the sectional plan.⁴⁷⁰ They must then be transferred by notarial deed.⁴⁷¹ Both the developer⁴⁷² and body corporate⁴⁷³ must follow one essential procedure to establish exclusive use areas, although minor differences exist between establishment by the developer and establishment by the body corporate.

Although most of the malpractices of the past have been eradicated by the introduction of section 27, the introduction thereof has also caused new problems with regard to the regulation of exclusive use areas,⁴⁷⁴ which include the high cost of surveying and registering exclusive use areas.⁴⁷⁵ As a result, the South African Property Owners Association (SAPOA) and the Sectional Titles Regulations Board suggested the restoration of the old practice of inclusion of exclusive use areas in the rules of the scheme, as an optional alternative to the registration procedure.⁴⁷⁶ This suggestion was implemented by the legislator through section 21 of the Sectional Titles Amendment Act of 1997.⁴⁷⁷ This amendment caused the insertion of section 27A in the Sectional Titles Act of 1986.⁴⁷⁸ In practice, a register of these exclusive use areas will have to be kept by the trustees, who will also record changes in ownership.⁴⁷⁹ Allocation of these exclusive use areas to sectional owners does not give such owners real rights over them. They can therefore not be mortgaged as security for a loan, unlike genuine rights of exclusive use. In South Africa, therefore, exclusive use areas can either be established through registration⁴⁸⁰ or by means of special rules.⁴⁸¹ The Botswana Sectional Titles Act⁴⁸² has adopted the provisions of the South African Sectional Titles Act⁴⁸³ pertaining to the regulation of exclusive use areas.

⁴⁷⁰ Sec. 27 of the SA STA 95 of 1986.

⁴⁷¹ Sec. 27 (1) (2) read with sec. 5 (3) (f) and sec. 11 (2) of the SA STA.

⁴⁷² When applying for the opening of the sectional title register in terms of sec. 29 (1), read with sec. 60 (3) of the SA STA.

⁴⁷³ In terms of sec. 27 (2), after the establishment of the scheme.

⁴⁷⁴ Mostert 1997 *Stell L R* 326.

⁴⁷⁵ Van der Merwe *Sectional Titles* ch 11-15.

⁴⁷⁶ SAPOA *Memorandum* (1991) para 1. 1. 2

⁴⁷⁷ SA STA Act 44 of 1997 enacted on 3 October 1997.

⁴⁷⁸ SA STA 95 of 1986.

⁴⁷⁹ See Van der Merwe *Sectional Titles* ch 11-23.

⁴⁸⁰ Sec. 27 of the SA STA.

⁴⁸¹ Sec. 27A of the SA STA.

⁴⁸² Sec. 29 and 30 of the Botswana STA.

⁴⁸³ Sec. 27 and 27A of the SA STA.

The Botswana statute does not, however, include any obligation on the holder of exclusive use rights to make additional contributions to the administrative fund.⁴⁸⁴ The South African statute provides that every owner who is entitled to the exclusive use of an area of common property must be required to pay such levies as are estimated to be necessary to defray the costs of rates and taxes, insurance and maintenance with regard to that exclusive use area unless in terms of the Rules,⁴⁸⁵ the owner concerned is already responsible for such costs.⁴⁸⁶ It is necessary for the Botswana Act to include a provision requiring the holders of exclusive use rights to make additional contributions to the administrative fund so as to defray the costs of rates, taxes, insurance and maintenance with respect to such areas.

In both Botswana and South Africa, differences exist between genuine and non-genuine exclusive use areas. There are differences in technical requirements as far as establishment is concerned; genuine exclusive use areas must be depicted on a survey diagram while non-genuine exclusive use areas must only be shown on a lay-out plan. Genuine exclusive use areas require delineation on a sectional plan while non-genuine exclusive use areas are to be incorporated in the rules of the scheme. Unlike rights to non-genuine exclusive use areas, the rights to genuine exclusive use areas are real rights. This means that they can be mortgaged and are enforceable against the whole world. A right to a non-genuine exclusive use area is a personal right and is enforceable against other sectional owners and the body corporate, and not the world at large. Transfer of a genuine exclusive use area is effected by means of a notarial deed of cession and it has to be shown on the sectional plan. On the other hand a transfer of a non-genuine exclusive use area is done by means of a bilateral cession. It is important to indicate who the new holder of the right is, and in this regard an amendment will also be made to the rules and the register of trustees.⁴⁸⁷ It is however surprising for the rules to be amended each time a non-genuine exclusive use area changes hands, as entry in the trustees' register is sufficient.

⁴⁸⁴ Established under sec. 40 of the Botswana STA.

⁴⁸⁵ Some rules which provide for exclusive use rights provide also that the owners entitled to such rights have to pay a levi in addition to the levy payable with regard to their section on account of the common property expenses attributable to that exclusive use area.

⁴⁸⁶ Sec. 37 (1) (b) of the SA STA. See also Paddock *The Sectional Title Handbook* 63.

⁴⁸⁷ See Van der Merwe *Sectional Titles* ch 11-24.

3 2 6 The sectional plan

In the following paragraphs, the sectional plan is defined, its purpose discussed and the preparation thereof analysed.

3 2 6 1 Definition

In both Botswana and South Africa, a sectional plan in relation to a scheme means a plan approved by the Director⁴⁸⁸ or Surveyor-General,⁴⁸⁹ which is described as a sectional plan.⁴⁹⁰ A sectional plan must be prepared in accordance with the requirements of section 7 read with regulation 4 of the Botswana Sectional Titles Act and section 5 read with regulation 5 of the South African Sectional Titles Act.⁴⁹¹ It must show the building(s) and the land comprised in the scheme, as divided into two or more sections and common property.⁴⁹² A sectional plan includes the original plan of the development scheme as well as a sectional plan of subdivision, consolidation or extension as provided for in the Acts.⁴⁹³ In South Africa, prior to approval by the Surveyor-General, a sectional plan is referred to as a “draft sectional plan”.⁴⁹⁴ The Botswana Act does not have a definition of a “draft sectional plan”. Such a definition is necessary as it may guard against the confusion that may occur in reference to a “draft sectional plan” and a sectional plan. An amendment is thus proposed for the insertion of a definition of a draft sectional plan in the Botswana statute. For the sake of consistency, reference to a sectional plan in the process of being approved will be to a “draft sectional plan”, regardless of whether the Botswana or South African situation is under discussion.

⁴⁸⁸ In terms of sec. 2 (1) of the Botswana STA, a Director means the Director of Surveys and Mapping appointed under the Land Survey Act.

⁴⁸⁹ In terms of section 1 (1) of the SA STA Surveyor-General means a Surveyor-General appointed in terms of section 4 of the Land Survey Act, 1927 (Act No 9 of 1927).

⁴⁹⁰ See definition of sectional plan on Sec. 2 (1) of the Botswana STA and sec.1 (1) of the SA STA.

⁴⁹¹ See sec. 2 (1) of the Botswana STA and sec. 1 (1) of the SA STA.

⁴⁹² See sec. 2 (1) of the Botswana STA and sec. 1 (1) of the SA STA.

⁴⁹³ See sec. 2 (1) of the Botswana STA and sec. 1 (1) of the SA STA.

⁴⁹⁴ See section 1 (1) for definition of a sectional plan.

3 2 6 2 Purpose

The definition of a sectional plan⁴⁹⁵ in the Botswana and South African statutes indicates clearly that a sectional plan serves similar purposes with regard to the division of the land and building(s) of a sectional title scheme into sections and common property⁴⁹⁶ as a general plan for a conventional subdivision of a township into lots.⁴⁹⁷ A sectional plan provides a correct record of how the land and building(s) comprised in the scheme are divided into independent entities called units, each made up of a section and an undivided share in the common property.⁴⁹⁸ On the other hand, a general plan shows how the land allocated for a new township is divided into lots.⁴⁹⁹ The registration of a sectional plan has the same effect as the registration of a general plan in that the land comprised in the scheme will no longer be shown as an entity in the land register, as it will be replaced by the different units shown on the sectional plan.⁵⁰⁰

A sectional plan has similar functions as a general plan, but they are also different from each other in so many other ways. A sectional plan reflects the land and building(s) as divided into units⁵⁰¹ whereas a general plan shows the division of land into lots.⁵⁰² Three-dimensional data⁵⁰³ will thus be contained in a sectional plan whereas a general plan will show only the vertical division of land. Boundaries of lots on ordinary diagrams or general plans are defined with reference to beacons and co-ordinates, and those on sectional plans with reference to building(s), namely the walls, floors and ceilings of an

⁴⁹⁵ See definition of a sectional plan in sec. 2 (1) of the Botswana STA and sec. 1 (1) of the SA STA.

⁴⁹⁶ In terms of sec. 4 (1) (a) of the Botswana STA and sec. 2 (a) of the SA STA.

⁴⁹⁷ In terms of sec. 46 of the Botswana Deeds Registry Act and sec. 46 of the South African Deeds Registries Act.

⁴⁹⁸ Sec. 4 (1) (a) of the Botswana STA and sec. 2 (a) of the SA STA.

⁴⁹⁹ Sec. 46 of the Botswana Deeds Registries Act and sec. 46 of the SA Deeds Registries Act.

⁵⁰⁰ Sec. 14 (1) of the Botswana STA and sec. 13 (1) of the SA STA. See also sec. 46 (1) of the Botswana Deeds Registry Act and sec. 43 (3) of the SA Deeds Registries Act.

⁵⁰¹ Sec. 4 (1) (a) of the Botswana STA and sec. 2 (a) of the SA STA.

⁵⁰² Sec. 46 of the Botswana Deeds Registry Act and sec. 46 of the SA Deeds Registry Act.

⁵⁰³ This information is shown on the block plan, floor plan and cross-section plan. See also Van der Merwe *Sectional Titles* ch 5-3.

apartment.⁵⁰⁴ In this regard, the actual boundaries of a section as indicated in a sectional plan can be related to physical features.⁵⁰⁵

Sectional title deeds are issued for each section on the basis of a sectional plan, hence a sectional plan forms the foundation of a sectional owner's title.⁵⁰⁶ The sectional title deed contains the description of the area concerned and refers to the registered sectional plan and no attachment of a diagram is required as is the case with the original deed for a conventional subdivision.⁵⁰⁷ The fact that the sectional plan is registered and filed with the Deeds Registries in both Botswana and South Africa gives the sectional owner an opportunity to look at the registered sectional plan for the full information with regard to the survey relating to his or her unit.

3 2 6 3 Preparation of a sectional plan

A sectional plan must be prepared and signed by a land surveyor⁵⁰⁸ or architect⁵⁰⁹ in accordance with the provisions of section 7 of the Sectional Titles Act in Botswana and the provisions of the Sectional Titles Act in South Africa.⁵¹⁰ The block plan and any delineation of an exclusive use area of which the boundaries are not represented by physical features of a permanent nature must be prepared by a land surveyor and signed by him.⁵¹¹ This means that other parts of the plan can be prepared either by an architect or

⁵⁰⁴ Sec. 7 (5) (a) of the Botswana STA and sec. 5 (5) (a) of the SA STA.

⁵⁰⁵ The corners of the lot in a subdivision of land are determined from the different beacons, which remain its physical features. Even if the pegs are lost, the beacons will remain physical features. The boundary lines of a subdivision of land are however non-physical and thus do not correspond to the physical features which show the boundaries of a section. See further Van der Merwe *Sectional Titles* ch 5-4; Cowen "The Sectional Titles Act: a Challenge for the Professions of Land Surveying and Architecture" 1973 5 *Planning and Building Developments* 17.

⁵⁰⁶ Van der Merwe *Sectional Titles*, ch 5-4.

⁵⁰⁷ Sec. 18 (3) of the Botswana STA and sec. 15B (2) of the SA STA.

⁵⁰⁸ In terms of sec. 2 (1) of the Botswana STA land surveyor has the meaning assigned to it under the Land Survey Act, and in terms of the SA STA a land surveyor is a person registered as a professional land surveyor in the register prescribed in sec. 7 (4) (a) of the Professional Land Surveyors' Act 40 of 1984.

⁵⁰⁹ In terms of sec. 2 (1) of the Botswana STA architect means a person holding a professional qualification recognised by Architects Association of Botswana, and in terms of sec. 1 (1) of the SA STA architect means a person registered as an architect in terms of sec. 19 of the Architects' Act, 1970 (Act No 35 of 1970).

⁵¹⁰ Sec. 7 (1) of the Botswana STA and sec. 5 (1) of the SA STA.

⁵¹¹ Sec. 7 (3) (a) of the Botswana STA and sec. 5 (1) of the SA STA.

land surveyor.⁵¹² The outer surface boundaries of the land included in the scheme and the location of the buildings in relation to those boundaries must be shown on the block plan.⁵¹³ A plan prepared by or under the direction of a land surveyor is valid even if an architect did not assist in its preparation.⁵¹⁴ The services of both may however be necessary where large projects are involved, as architects specialise in buildings, while land surveyors specialise in detailed measurement of land. Where necessary, the land surveyor's services should be engaged to relocate the boundary pegs of the land, to prepare the block plan and to do some work with regard to the registration of servitudes and encroachments on the land.⁵¹⁵ The land surveyor can also be more properly entrusted with the completion of the first sheet of the sectional plan containing general information.⁵¹⁶ On the other hand, measurement of sections for the preparation of the floor plans of sections, the cross-section plans and the calculation of the participation quotas should be executed by an architect.⁵¹⁷

3 2 6 4 Accuracy of sectional plans

In both Botswana and South Africa sectional title deeds are issued on the basis of the registered sectional plan, thus it is vital for the plan to be drawn up as accurately as possible. Numerous provisions have thus been introduced to both Acts aiming at precision and accuracy. A land surveyor or architect is thus required to prepare a sectional plan from actual measurements⁵¹⁸ undertaken by that person or under his or her direction in such manner as to ensure accurate results, in accordance with the provisions

⁵¹² Sec. 7 (1) of the Botswana STA and sec. 5 (1) of the SA STA.

⁵¹³ Sec. 7 (3) (a) of the Botswana STA and sec. 5 (3) (a) of the SA STA. See further Van der Merwe *Sectional Titles* ch 5-19.

⁵¹⁴ Van der Merwe *Sectional Titles* ch 5-5.

⁵¹⁵ Van der Merwe *Sectional Titles* ch 5-5.

⁵¹⁶ Shrand *On the Sectional Titles Act (1972)*; Nix "The Role of the Architect in the Preparation of Sectional Plans" 1974 6 *Planning and Building Development* 38; Cowen "The Sectional Titles Act: a Challenge for the Professions of Land Surveying and Architecture" 1973 5 *Planning and Building Developments* 17.

⁵¹⁷ Van der Merwe *Sectional Titles* ch 5-5.

⁵¹⁸ See Kilbourn October 1998 *Butterworths Property Law Digest* 9-13 for the meaning of "actual measurements".

of the Acts.⁵¹⁹ In South Africa sectional plans were in the past often prepared on the basis of building plans at a stage when the building was not yet completed. After the building(s) had been completed, the data was frequently not verified to ensure the correct factual situation.⁵²⁰

In South Africa there is a requirement that an architect or land surveyor must sit for a prescribed examination on the preparation of draft sectional plans.⁵²¹ The land surveyor or architect concerned must have passed the examination in order for the “draft sectional plan” to be accepted by the Chief Surveyor-General.⁵²² The Botswana Act does not have such a provision. Such a provision is vital as it would guard against uncertainty and confusion that may arise through sectional plans being drawn up inaccurately due to inexperience and lack of skill in the preparation of such plans. An amendment of the Botswana Act to include a provision requiring land surveyors or architects to sit for a prescribed examination is suggested.

Both statutes have disciplinary measures in place for an architect or land surveyor who is found guilty of certain prescribed forms of improper conduct in the preparation of the draft sectional plan.⁵²³ In terms of the Botswana Act, an architect or land surveyor shall be guilty of an offence and liable on conviction to a fine not exceeding P2000 or to a term of imprisonment not exceeding 12 months, or to both.⁵²⁴ In terms of the South African Act, in the case of land surveyors, the Director-General of Land Affairs or in the case of architects, the Director-General of Public Works, or any other official authorised by the Director-General concerned, may refer a complaint in this regard to the relevant Council for investigation and for it to take such steps as the council may deem fit.⁵²⁵ Such offence or improper conduct shall include the following acts and omissions committed by an architect or land surveyor: (i) signature of a plan on which he or she has not carried out or

⁵¹⁹ Sec. 8 (1) of the Botswana STA and sec. 6 (1) of the SA STA.

⁵²⁰ Van der Merwe *Sectional Titles* ch 5-6.

⁵²¹ Sec. 5 (2) of the SA STA. See also reg. 43 on the Sectional Titles Examination Committee and the syllabus for the examination. It must be noted that the Chief Surveyor-General had the discretion to exempt land surveyors and architects experienced in preparing plans from the examination. See further Van der Merwe *Sectional Titles* ch 3-16.

⁵²² In term of sec. 1 (1) of the SA STA the Chief Surveyor-General is the Chief Surveyor-General appointed in terms of sec. 1 (1) of the Land Survey Act 9 of 1927.

⁵²³ Sec. 10 of the Botswana STA and sec. 8 of the SA STA.

⁵²⁴ Sec. 10 of the Botswana STA.

⁵²⁵ Sec. 8 of the SA STA.

supervised the measurements without carefully examining the plan to ensure the correctness of the entries and calculations;⁵²⁶ (ii) signature of a defective plan with knowledge of the defect;⁵²⁷ (iii) where he or she repeatedly performs sectional title surveys without applying adequate checks;⁵²⁸ (iv) the making of an entry in a field record or other document purported to have been derived from actual field measurements, when it was in fact not so derived;⁵²⁹ (v) the furnishing of incorrect information with regard to any scheme to the Director or Surveyor-General knowing it to be erroneous;⁵³⁰ (vi) where he or she performs duties in a manner which the Chief Surveyor-General, after investigation, considers to be incompetent or unsatisfactory;⁵³¹ or (vii) where he or she contravenes any provisions of the Acts.⁵³² In both Botswana and South Africa forms of improper conduct hence cover a wide field and this together with the fear of disciplinary measures should result in sectional plans being drawn up with great caution.

In terms of the Botswana and South African statutes a sectional plan⁵³³ or “draft sectional plan,” prepared by an architect or land surveyor must be approved by the Director or Surveyor-General.⁵³⁴ In South Africa, it is only after approval by the Surveyor-General that a “draft sectional plan” becomes a sectional plan.⁵³⁵ The vast experience and many years that the Director or Surveyor-General has in examining plans and diagrams, and his or her input in approving draft sectional plans should contribute to sectional title being accorded the same measure of security as land title.⁵³⁶ Although there may be delays and additional costs involved in this procedure, it should result in an accurate system of sectional title registration for the developer, sectional title owner and the public in general.

⁵²⁶ Sec. 10 (a) of the Botswana STA and sec. 8 (a) of the SA STA.

⁵²⁷ Sec. 10 (b) of the Botswana STA and sec. 8 (b) of the SA STA.

⁵²⁸ Sec. 8 (c) of the SA STA. There is no similar provision in the Botswana Act.

⁵²⁹ Sec. 10 (c) of the Botswana STA and sec. 8 (d) of the SA STA.

⁵³⁰ Sec. 10 (d) of the Botswana STA and sec. 8 (e) of the SA STA.

⁵³¹ Sec. 8 (f) of the SA STA. The Botswana Act does not have a similar provision.

⁵³² Sec. 10 (e) of the Botswana STA and sec. 8 (g) of the SA STA.

⁵³³ It must be noted that the Botswana Act refers to the plan as a sectional plan, whether it has been approved or not.

⁵³⁴ Sec. 9 (1) of the Botswana STA and sec. 7 (1) of the SA STA.

⁵³⁵ See sec. 1 (1) of the SA STA for definition of “sectional plan” and “draft sectional plan”.

⁵³⁶ Van der Merwe *Sectional Titles* ch 5-7.

3 2 6 5 Stage of preparation of draft sectional plan

In terms of both the Botswana and South African statutes an architect or land surveyor is required to submit the “draft sectional plan” for approval to the Director or Surveyor-General.⁵³⁷ Both Acts require an architect or land surveyor to prepare the “draft sectional plan” from actual measurements undertaken personally or under his or her direction in such manner as to ensure accurate results.⁵³⁸ The wording of these sections implies that a sectional plan can be prepared only once a building(s) has been sufficiently completed for the actual measurements of the floors, walls, ceilings and the height of sections to be taken.⁵³⁹ In South Africa this fact is corroborated by the deletion of the provisions of the original Act⁵⁴⁰ from the second Sectional Titles Act, relating to the preparation of sectional plans for buildings that had not been erected.⁵⁴¹ This must not however be interpreted to mean that the building must be sufficiently completed for occupation.⁵⁴²

In South Africa, practice has shown that architects and land surveyors record only the floor area on the sectional plan.⁵⁴³ It is however clear from an analysis of section 5 and 6 as well as other sections of the Act that in defining the boundaries of a section, reference should be made not merely to the floor area, but also the floors, walls and ceilings. An analysis of section 7 and 8 of the Botswana Act also reveals that the boundaries of a section are defined by reference to the floors, walls and ceilings, not merely the floor area. Even though it is not expressly stated in both statutes that “actual measurements” mean actually measuring the floor, walls and ceilings of a section, it is clear from the

⁵³⁷ Sec. 6 (1) read with sec. 9 (1) of the Botswana STA and sec. 4 (1) read with sec. 7 (1) of the SA STA.

⁵³⁸ Sec. 8 (1) of the Botswana STA and sec. 6 (1) of the SA STA.

⁵³⁹ Sec. 6 (5) (a) of the Botswana STA and sec. 4 (5A) (i). See also *Memorandum* (1991) 28 par 2 which stated that unnecessary delays would be caused by the full completion of the building before application for approval to the local authority.

⁵⁴⁰ SA STA No 66 of 1971.

⁵⁴¹ In terms of section 7 (1) (b) of the South African Sectional Titles Act 66 of 1971, where the building had not been erected the sectional plan had to be prepared from building plans and once the building had been completed, an architect or land surveyor had to certify that the building(s) as erected corresponded with the sectional plan or the plan as amended by him or her.

⁵⁴² In the case of a building(s) which had not yet been erected when the scheme was approved, in terms of section 5 (3) (e) of the SA STA 66 of 1971 an application for the opening of the sectional title register had to be accompanied by a certificate by an architect or land surveyor that the building(s) has been erected in accordance with the sectional plan and is sufficiently completed for occupation.

⁵⁴³ Kilbourne October 1998 9 *Butterworths Property Law Digest* 13; Van der Merwe *Sectional Titles* ch 5-7.

provisions of both statutes that the boundaries of a section in the sectional plan should be defined with reference to the floors, walls and ceilings.⁵⁴⁴ The literal and intention-based interpretation of both statutes on the whole does not leave room for the argument that “actual measurements” means measurements of the floor area only. Before signing draft sectional plans, architects and land surveyors should measure the floor area, walls and ceilings. This means that at the time of submission of the draft sectional plan to the Director or Surveyor-General for approval the entire “shell” of the building should actually exist.⁵⁴⁵

3 3 Summary of findings

An analysis for the requirements of a sectional title scheme show some similarities and differences existing in both jurisdictions. Unlike in Botswana, the role of the local authority in terms of the South African statute includes condonation of building irregularities and infringements. The local authority in South Africa is defined, whereas in Botswana, it is not. Unlike the Botswana statute, the South African statute allows for a building to be divided into a single section and common property.

In terms of the Botswana statute, sectionalised buildings must be situated on two or more contiguous pieces of land, which have been consolidated, whereas, in terms of the South African statute, such pieces of land must be notarially tied. A sectional title scheme in Botswana cannot be established over two or more pieces of land which are non-contiguous, contrary to a provision in the Botswana Act that a sectional title scheme may be established over two or more such contiguous pieces of land. Unlike in Botswana, a distinction is made in South Africa of a sectional plan before and after approval. Land surveyors and architects in South Africa must sit for a prescribed examination whereas in Botswana, there is no such provision.

⁵⁴⁴ Sec. 7 (3) (d) read with sec. 7 (5) (a) of the Botswana STA and sec. 5(3) (d) read with sec. 5 (5) (a) of the SA STA.

⁵⁴⁵ See also Van der Merwe *Sectional Titles* ch 5-8; Kilbourne October 1998 *Butterworths Property Law Digest* 9-13; Kalk “Some Implications of Sectional Titles Development and the Act” May 2000 *Butterworths Property Law Digest* 19.

The Botswana statute does not include any obligation on the holder of exclusive use rights to make additional contributions to the administrative fund. In terms of the South African statute every owner who is entitled to the exclusive use area of common property must pay levies necessary to defray the costs of rates and taxes, insurance and maintenance in respect of that exclusive use area unless in terms of the Rules the owner concerned is already responsible for such costs.

In terms of the South African Act, the developer must apply for the registration of a sectional plan and the opening of a sectional title register to the Registrar in charge of the deeds registry in which the land comprised in the scheme is registered. According to the Botswana statute, the application must be made to the Registrar. In South Africa, the rules are prescribed by regulation, whereas in Botswana the rules have not been prescribed yet. In terms of the South African Act, the rules may be altered by the developer to the extent prescribed by regulation when submitting an application for the opening of a sectional title register. The Botswana statute on the other hand does not specify the extent to which such rules may be altered. According to the South African Statute, management rules may be altered by unanimous resolution of the body corporate only after the transferr of at least 50 per cent of the units in the scheme whereas, the Botswana statute does not have a provision to determine when management rules may be substituted or amended. The Botswana Act does not impose an obligation on an association to make its rules available for inspection to any owner or person with a registered real right in or over a unit or any person authorised by such owner or person whereas, in terms of the South Africa statute the body corporate must make its rules available for inspection by such persons.

In South Africa, The Sectional Titles Regulation Board is established by a provision in the Act, which also sets out its duties, appointment of its members and how it shall be regulated.⁵⁴⁶ The Botswana statute provides⁵⁴⁷ for the regulations to be prescribed which regulations must provide for the appointment of a Sectional Titles Regulation Board. The regulations made do not, however, provide for the appointment of such a Board.

⁵⁴⁶ Sec. 54 of the SA STA.

⁵⁴⁷ Sec. 55 of the Boswana STA.

Botswana and South African statutes do not specifically provide that any details of a further development must be disclosed in the sale agreement; they merely require disclosure of the right of extension.⁵⁴⁸ Although in terms of both statutes the developer is constrained as to the number and size of the sections contained in the extension to the scheme into which the buildings are to be divided, he or she can diverge from the plan to scale, which he or she has submitted when the scheme was established, if changed circumstances makes strict compliance impracticable.⁵⁴⁹

⁵⁴⁸ See ch 3 par 3 2 4 2.

⁵⁴⁹ See ch 3 par 3 2 4 2.

CHAPTER FOUR

PROCEDURAL ASPECTS OF ESTABLISHMENT OF A SECTIONAL TITLE SCHEME

4 1 Introduction

Steps to be taken by the developer prior to the lodgement of the application for the opening of a sectional title scheme are discussed in this chapter. This entails a discussion of the meeting with the lessees, the application to the Director or Surveyor-General and the documents to be submitted to the deeds office. Due consideration is also given to the amendment and cancellation of the sectional plan.

4 2 Conversion of rental housing to sectional title: requirements

The sectional titles legislation of Botswana and South Africa allows conversion of existing rental buildings to sectional title.⁵⁵⁰ Currently, conversion of existing rental buildings to sectional title is the type of sectional title development largely preferred by developers in South Africa.⁵⁵¹ The conversion process affects a number of parties, namely, the existing tenants, purchasers of units and the developer. Conflicts of interest occur due to conversions, it should therefore be the aim of legislation to resolve such conflicts according to public policy.⁵⁵²

Conversion, on the one hand extends considerable economic and practical advantages to landlords, developers and purchasers of units.⁵⁵³ Landlords can benefit economically by

⁵⁵⁰ See definition of “developer” and “development scheme” in sec. 2 (1) of the Botswana STA and sec. 4 of the Botswana STA and sec. 1 (1) and sec. 4 of the SA STA.

⁵⁵¹ Van der Merwe *Sectional Titles* ch 7-14. It is estimated that 75% of all the existing sectional title schemes in South Africa are conversions from rental buildings (Van der Merwe *Sectional Titles* ch 7-14).

⁵⁵² See in general Fine “The Condominium Conversion Problem: Causes and Solutions” 1980 *Duke Law Journal*, 306; Kamer “Conversions of Rental Housing to Unit Ownership - a Noncrisis” 1982 10 *Real Estate Law Journal* 187.

⁵⁵³ See Fine 1980 (10); *Duke Law Journal* 312 ff; Kamer 1982 (10) *Real Estate Law Journal* 191 ff.

converting their rental buildings into sectional title schemes themselves or by selling them to developers for conversion. In this way, they will make profit as well as being relieved from the escalating maintenance costs and the burden of managing the building. Conversion therefore offers an attractive alternative to the construction of new sectional title projects as it offers quick profits to landlords and developers as compared to the construction of a new sectional title development, which can be more lengthy and costly. Furthermore, conversion is an advantage to purchasers of units in that, it gives them the opportunity to buy units at reasonable prices in city centres, as compared to buying units in newly erected units far from the city centre.⁵⁵⁴ To middle-class tenants, who due to financial constraints may not be able to buy a conventional house, it affords sociological and psychological benefits of home ownership. The purchase of a converted unit also offers a sound hedge against inflation, and a wise long-term investment, as sectional title units appreciate in value.⁵⁵⁵

On the other hand, the existing tenants may experience difficulties due to conversion of a rental building to sectional title. The most vulnerable groups of people who may be adversely affected are the elderly and poor tenants who may not have sufficient money to purchase the units that they occupy and still make contributions to the levy fund.⁵⁵⁶ Each conversion reduces the available rental accommodation, and it causes displaced tenants to go around in search of comparable alternative accommodation. It forcefully causes a relocation of tenants who are either unable or unwilling to purchase the units they occupy. Such dislocations may cause significant sociological and psychological problems. The most adversely affected would be the elderly tenants who may, due to the number of years they have occupied those buildings, have strong and long-standing emotional ties to the premises.⁵⁵⁷

It must also be recognised that municipalities and local authorities, and hence the general public benefit from conversion in various ways, for example, it offers a long-term

⁵⁵⁴ Van der Merwe *Sectional Titles* ch 7-14.

⁵⁵⁵ Van der Merwe *Sectional Titles* ch 7-14.

⁵⁵⁶ See in general Gliwa "Fifth Amendment takings and *Condominium* Conversion Regulations that Restrict Owner Occupancy Rights" 1982 62 *Boston University Law Review* 467.

⁵⁵⁷ Van der Merwe *Sectional Titles* ch 7-14.

solution to urban decay.⁵⁵⁸ This is so because conversion usually accompanies physical improvements to older rental buildings which would otherwise be destroyed. It also initiates movement back into the city centres. It allows the buildings to be occupied by home owners who have a vested long-term interest as opposed to temporary interests in the units.

In both Botswana and South Africa, where an existing building which is to be converted into a sectional title scheme is a residential building occupied by tenants, the developer must notify all tenants about his or her intention to convert the building into a sectional scheme, before he or she can submit the “draft sectional plan” for approval to the Director or Surveyor-General.⁵⁵⁹

4 2 1 Meeting with lessees

The developer must provide the tenants or lessees with sufficient information regarding the proposed scheme. In both Botswana and South Africa he or she must in this regard notify every tenant in writing by a letter delivered either personally or by registered post, of a meeting of all tenants⁵⁶⁰ or lessees⁵⁶¹ to be held at a date, at least 14 days after the delivery of the letter.⁵⁶² The venue of the meeting must be specified in the letter; it must be in the building in which the scheme is to be established, or in a building within a reasonable distance from it.⁵⁶³ Such a building must be located within the area of jurisdiction of the local authority concerned.⁵⁶⁴

In the South African statute, it is expressly provided that the developer must, together with the notice also furnish the tenants with a certificate containing the prescribed

⁵⁵⁸ Van der Merwe *Sectional Titles* ch 7-14.

⁵⁵⁹ Sec. 6 (2) of the Botswana STA and sec. 4 (3) (a) of the SA STA.

⁵⁶⁰ In terms of sec. 6 (3) of the Botswana STA, a tenant means a tenant who is a party to a tenancy agreement entered into with the developer or any of his or her predecessors in title.

⁵⁶¹ In terms of sec. 4 (3A) of the SA STA, a lessee means a lessee who is a party to a lease entered into with the developer or any of his or her predecessors in title.

⁵⁶² Sec. 6 (2) of the Botswana STA and sec. 4 (3) (a) (i) of the SA STA.

⁵⁶³ Sec. 6 (2) of the Botswana STA and sec. 4 (3) (a) (i) of the SA STA.

⁵⁶⁴ Sec. 6 (2) of the Botswana STA and sec. 4 (3) (a) (i) of the SA STA.

particulars concerning the proposed scheme.⁵⁶⁵ The Botswana Act does not have such a provision. The tenants are only notified in writing by a letter of a meeting to be held at least 14 days after the delivery of the letter.⁵⁶⁶ This means that the tenants will only be furnished with full particulars of the proposed scheme by the developer or his agent at the meeting.⁵⁶⁷ The tenants would benefit much if there was a provision that the developer must together with the notice for the meeting provide the tenants with a certificate containing full particulars of the proposed scheme. They could thus have sufficient information about the proposed scheme, and ample time to consider whether to purchase the units they occupy or not. It is suggested that the Botswana Act should be amended to include a provision to require the developer to furnish the tenants with the notice for the meeting together with a certificate containing a certificate containing the prescribed particulars concerning the proposed scheme.

Full particulars to be furnished by the developer or his or her agent at the meeting in terms of the Botswana Act,⁵⁶⁸ and in terms of the certificate by the developer under the South African Act⁵⁶⁹ must indicate among other things the following: (i) the name of the scheme; (ii) the description and extent of the land comprised in the scheme as shown in the title deed of the land; (iii) the full name and address of the developer; (iv) the title deed number of the land;⁵⁷⁰ (v) the number and description of every separate category of units in the building(s) comprised in the scheme; (vi) the number of garages and parking places provided in the scheme; (vii) common facilities available as common property; (viii) a copy of a report by an architect or a professional engineer in respect of the common property relating to the general physical condition of the building(s) comprised in the scheme, with specific reference to any defects in the buildings and the services and facilities relating thereto; (ix) and a specific estimate by the developer or his or her agent of the annual expenditure in respect of the repair, upkeep, control, management and

⁵⁶⁵ Sec. 4 (3) (a) (ii) of the SA STA.

⁵⁶⁶ Sec. 6 (2) (a) of the Botswana STA.

⁵⁶⁷ Sec. 6 (2) (b) of the Botswana STA.

⁵⁶⁸ Reg. 3 of the Botswana STA.

⁵⁶⁹ Reg. 4 of the SA STA.

⁵⁷⁰ Regulation 3 of the Botswana STA however does not require the indication of the number of the title deed in respect of the land concerned. This could be an omission as the title deed is important, as it contains among other things, the description of the land, and contains the conditions of title concerning the land. The title deed number is therefore important in that it provides all the details about the land and conditions that may be of importance to the tenants or any person who may buy a unit in the proposed scheme.

administration of the common property, the payment of rates, taxes and other local authority charges in respect of the building(s) and land concerned, charges for the supply of electricity, gas, water, fuel and sanitary and other services to the building(s) and land concerned, insurance premiums and all other costs in respect of the common property.

The report by the architect or professional engineer regarding the physical condition of the building(s) and how suitable they are for sectional title is vital in Botswana and South Africa. Tenants who have an interest in purchasing the units they occupy would know exactly what they are purchasing, and also what their undivided share in the common property would be. If the building is dilapidated, it is highly unlikely that tenants would purchase units in such a building.

The developer or his or her agent must in terms of section 6 (2) of the Botswana Sectional Titles Act and section 4 (3) (a) (i) (aa) of the South African Sectional Titles Act be available at the meeting to provide the tenants with full particulars of the scheme as may reasonably. The developer must inform them of their right of pre-emption.⁵⁷¹ The submission of the draft sectional plan for approval by the Director or Surveyor-General in both Botswana and South Africa must be accompanied by (among other things) an affidavit by the developer to the effect that section 6 (2) of the Botswana Act or section 4 (3) of the South African Act has been complied with, a copy of the notice of the tenants' meeting, the certificate regarding the physical state of the building, where applicable, a certificate from the conveyancer stating that all tenants have consented in writing that they do not wish to purchase the units they occupy.⁵⁷² In both Botswana and South Africa, if section 6 (2) of the Botswana Act or section 3 (4) of the South African Act is not applicable, the developer must furnish an affidavit to that effect.⁵⁷³ The Director or Surveyor-General shall not approve a sectional plan unless the applicable documents have been submitted to him or her, and the plan has been prepared in accordance with the Acts.⁵⁷⁴

⁵⁷¹ Sec. 6 (2) (c) of the Botswana STA and sec. 4 (3) (a) (i) of the SA STA.

⁵⁷² Sec. 9 (2) (e) of the Botswana STA and sec. 7 (2) (e) of the SA STA.

⁵⁷³ Sec. 9 (2) (e) of the Botswana STA and sec. 7 (2) (f) of the SA STA.

⁵⁷⁴ Sec. 9 (5) of the Botswana STA and sec. 7 (4) of the SA STA.

In South Africa, the legislature created the possibility of eliminating the meeting of tenants designed to give as much information as possible about the proposed scheme in an attempt to speed up the process of registration of a sectional title scheme.⁵⁷⁵ The developer need not hold such a meeting if all lessees have stated in writing that they are aware of their rights as set out in their statement, and that they do not wish to purchase the units they occupy.⁵⁷⁶ The conveyancer must certify in writing that such statements have been received in respect of all the units.⁵⁷⁷ The conveyancer's certificate will in practice, be lodged with the Surveyor-General upon the submission of the draft sectional plan and other documents.⁵⁷⁸ In terms of the Botswana Act, the developer may also submit the application to the Director, if all the tenants have stated in writing that they do not wish to acquire the units they occupy, and a conveyancer has certified in writing that all such statements have been received in respect of all the units concerned.⁵⁷⁹ It should be noted that at this stage, the tenants have received an invitation to the meeting only and have not been furnished with full particulars of the proposed scheme, as the meeting has not been convened yet.

4 2 2 The right of pre-emption

In terms of the sectional titles legislation of Botswana and South Africa, tenants have a right of pre-emption in respect of the units they occupy.⁵⁸⁰ The developer is required to offer a unit for sale in writing to the tenant occupying it before he or she can offer it to any other person.⁵⁸¹ The written offers should be handed to tenants after the meeting has been convened since the disclosure requirements would have been complied with.⁵⁸² In order for somebody to qualify for a right of pre-emption, he or she must be the person

⁵⁷⁵ Sec. 4 (3) (b) of the SA STA.

⁵⁷⁶ Sec. 4 (3) (b) of the SA STA.

⁵⁷⁷ Sec. 4 (3) (b) of the SA STA.

⁵⁷⁸ See Kilbourn June Conveyancer's Certificate for Sectional Title Tenants June 1998 *Butterworths Property Law Digest* 16 for an example of the certificate by the conveyancer.

⁵⁷⁹ Sec. 6 (2) (4) of the Botswana STA.

⁵⁸⁰ Sec. 11 of the Botswana STA and sec. 10 of the SA STA.

⁵⁸¹ Sec. 11 (1) of the Botswana STA and sec. 10 (1) of the SA STA. The written offer must be made to every tenant, and they may not in principle be handed simultaneously to all tenants.

⁵⁸² Van der Merwe *Sectional Titles* ch 7-23.

who qualifies for notification of a general meeting of tenants, at which information on the proposed scheme is provided. This right is personal to tenants occupying the units, and cannot be ceded.⁵⁸³ For somebody to qualify for a right of pre-emption, he must in addition to being a resident tenant occupying the unit at the time the developer despatches the required notices.⁵⁸⁴ This implies that a residential tenant, who has surrendered his lease or has sublet his unit, would not be entitled to a right of pre-emption even if he was otherwise entitled to such a right. The same will apply to a person who becomes a residential tenant after the developer has despatched the required notice to tenants.⁵⁸⁵ The definition of lessee or tenant in both the Botswana and South African Acts implies that only lessees or tenants, and not subtenants or sublessees are entitled to a right of pre-emption.⁵⁸⁶

In principle, co-tenants of a residential apartment are also entitled to a right of pre-emption. This right will be enjoyed by each one of them in proportion to their undivided share in the unit.⁵⁸⁷ This has not been expressly provided for in the Botswana or South African Act. The inclusion of such a provision in both Acts would be practical in that where one of the co-tenants decides not to purchase, for whatever reason, the remaining co-tenant would have a right of pre-emption to the other tenant's proportionate share also. The legislature should not however allow less than the entire unit to be conferred on one co-tenant where the other has elected not to take up his or her proportionate share.⁵⁸⁸

The tenant is given three months or 90 days within which to consider the offer, in terms of both the Botswana and South African Acts.⁵⁸⁹ In South Africa before 1999, the period of acceptance of the offer was determined by the type of lessee. In this regard, an ordinary lessee was given 90 days within which to accept the offer while a lessee who occupied controlled premises⁵⁹⁰ in terms of the Rent Control Act⁵⁹¹ was given 365 days.

⁵⁸³ Sec. 11 (1) of the Botswana STA and sec. 10 (1) of the SA STA.

⁵⁸⁴ Sec. 11 (1) of the Botswana STA and sec 10 (1) of the SA STA.

⁵⁸⁵ Van der Merwe *Sectional Titles* ch 7-25.

⁵⁸⁶ See definition of tenant and lessee on sec. 6 (3) of the Botswana STA and sec. 4 (3A) of the SA STA.

⁵⁸⁷ Van der Merwe *Sectional Titles* ch 7-24.

⁵⁸⁸ Van der Merwe *Sectional Titles* ch 7-24.

⁵⁸⁹ Sec. 11 (i) (b) of the Botswana STA and Sec. 10 (1) of the SA STA.

⁵⁹⁰ In terms of the Rent Control Act, rent controlled premises were premises in buildings erected and occupied prior to 20 October 1949, and premises erected and occupied prior to 31 May 1966, provided such

A tenant who was 65 years or older, who occupied controlled premises and whose monthly income did not exceed the maximum amount from time to time as stipulated in the Rent Control Act⁵⁹² was granted special protection. If such tenant continued to occupy his or her unit, and his or her monthly income did not exceed the maximum amount stipulated in the Rent Control Act, such unit could be offered for sale or sold to the lessee only. If such a unit was offered and sold to any other person, such offer or sale was made subject to the condition that the unit must first be offered to such lessee for 365 days and subject to the right of such lessee to continue to occupy that unit for as long as his income did not exceed the above-mentioned maximum amount.⁵⁹³ This means that individual elderly lessees were given actual life tenancies of the units they occupied. The special protection given to the elderly guarded against them being exposed to emotional stress caused by the fear of possible eviction. On the other hand it reduced the availability of rental housing for the elderly since landlords with long-term conversion plans may be unwilling to let to the elderly persons.⁵⁹⁴ The Rent Control Act⁵⁹⁵ was repealed by the Rental Housing Act,⁵⁹⁶ which eliminated rent control. Section 10 of the Sectional Titles Act was thus amended by section 18 of the Rental Housing Act which eliminated reference to lessees in rent controlled premises. In effect, therefore, the protection of tenants of rent-controlled premises over the age of 65 has been done away with, leaving them only with the protection afforded to all other tenants. The continued reference to the Rent Control Act in section 10 (3) of the South African Sectional Titles Act therefore has no effect since the enactment of the Rental Housing Act. In terms of both the Botswana and South African statutes, a tenant is given three months or 90 days within which to

premises were occupied by a protected tenant whose monthly income did not exceed the maximum laid down by Proclamation in terms of the Rent Control Act 80 of 1976.

⁵⁹¹ 80 of 1976.

⁵⁹² Sec. 52 (1) of Act 80 of 1976. In terms of Proc 32 GG 8816 of 25 March 1983 the maximum amount for a lessee who was single was set at R300 per month and for a lessee with dependants at R540 per month. These amounts were increased to R450 and R850 per month respectively by proc 99 GG 8782 of July 1983, to R750 and R1 250 per month respectively by proc 24 GG 10614 of February 1987 and proc 169 GG 11519 of September 1988 and to R1 200 and R2 000 per month respectively by proc 51 GG 13285 of 30 May 1991. Proc 32 GG 8816 of 25 March 1983 was amended by proc 24 GG 10614 of 20 February 1987 to make the provisions of the Rent Control Act applicable to a lessee who was 70 years or older, regardless of his or her income, as long as he or she complied with the provisions of the proclamation.

⁵⁹³ Sec 10 (4) of the Rent Control Act.

⁵⁹⁴ See Van der Merwe *Sectional Titles* ch 7-25.

⁵⁹⁵ 80 of 1976.

⁵⁹⁶ 50 of 1999.

consider the offer.⁵⁹⁷ The elderly tenants are afforded the same protection as all other tenants.

The developer must deliver the offer to sell the unit either personally or by registered post.⁵⁹⁸ If the tenant does not accept the offer or the period stipulated in the offer within which he or she must accept has expired without the offer being accepted, the developer can then sell such a unit to any other person other than such lessee.⁵⁹⁹ Both the Botswana and South African Acts have mechanisms in place to discourage irrational offers by developers. The developer is not allowed to sell the unit to any other person during the subsequent six months or 180 days respectively at a higher price to the offeree than the price offered to the tenant, where the tenant declines to purchase the unit or has failed to accept the offer within the stipulated period unless the developer has again extended the offer first to the tenant, who must then refuse the offer within a period of three months or 60 days from that date, or on the expiration of that period has failed to accept the offer.⁶⁰⁰ These provisions offer tenant protection, but the two statutes could still be amended so as to include offers stipulating substantially more favourable terms in addition to the stated lower prices.

4 2 3 Period of grace

In both Botswana and South Africa, a tenant may not be asked to vacate the unit before the expiry of the periods of three months or 90 days or six months or 180 days, as the case may be.⁶⁰¹ The tenant may however be required to vacate the unit if he or she has been guilty of non-payment of rent, or has done material damage to the unit, or has been guilty of conduct, which is a nuisance to occupiers of other units in the building.⁶⁰² In terms of the South African Act, it is expressly provided that during this time when the

⁵⁹⁷ Sec. 11 (i) (b) of the Botswana STA and sec. 10 (i) of the SA STA.

⁵⁹⁸ Sec. 11 (1) (a) of the Botswana STA and sec. 10 (1) of the SA STA.

⁵⁹⁹ Sec. 11 (1) of the Botswana STA and sec. 10 (1) of the SA STA.

⁶⁰⁰ Sec. 11 (2) of the Botswana STA and sec. 10 (2) of the SA STA.

⁶⁰¹ Sec. 11 (3) of the Botswana STA and sec. 10 (3) of the SA STA.

⁶⁰² Sec. 11 (3) of the Botswana STA and sec. 10 (3) of the SA STA.

tenant has been notified of the meeting, until the expiry of the period of 180 days referred to in section 10 (2) or where applicable, the period of 60 days referred to in section 10 (2), whichever date occurs last, the tenant shall continue to occupy the relevant unit and to comply with the conditions of the relevant lease.

The period of grace in terms of both statutes remains until the date of expiry of the period of six months or 180 days or, three months or 60 days respectively, where applicable, whichever date comes to pass last.⁶⁰³ According to both the Botswana and South African statutes, the developer is not allowed to increase the rent for the unit concerned, during the period of grace.⁶⁰⁴ A developer who fails to comply with restrictions on sale of units occupied by tenants, and to allow tenants the period of grace as outlined in section 11 (1)-(3) of the Botswana Act and section 10 (1)-(3) of the South African Act, shall be guilty of an offence, and liable on conviction to a fine not exceeding P 2000 or R 2000, to imprisonment for a term not exceeding 12 months, or to both.⁶⁰⁵

In conclusion, the Botswana and South African Acts both allow the developer to terminate an existing lease if a tenant has violated its terms, and to offer for sale a unit to a purchaser at the same or a higher price after the expiry of 3 months or 90 days. On the other hand, the lessee is allowed an additional period of six months or 180 days, within which he or she must find alternative accommodation.

4 3 Application for approval of “draft sectional plan”

In terms of both statutes, the developer is required to cause a draft sectional plan to be submitted for approval to the Director or Surveyor-General. This will be after compliance with the formal requirements for the scheme and buildings, and in the case of South

⁶⁰³ In South Africa, this period of grace was criticised in Hansard of 30 May 1983 8447, on the grounds that tenants might wait until after the expiry of the whole period and then accept the offer and then sell at a profit.

⁶⁰⁴ Sec. 11 (3) (a) of the Botswana STA and sec. 10 (3) (b) of the SA STA.

⁶⁰⁵ Sec. 11 (8) of the Botswana STA and sec. 10 (6) of the SA STA.

Africa inconsistencies condoned by the local authority.⁶⁰⁶ In terms of the original South African Sectional Titles Act,⁶⁰⁷ approval of the “draft sectional plan” by the Surveyor-General was not required. The task of supervising and controlling the compilation of sectional plans was thus left to the local authority and the Registrar of Deeds. The lack of clear demarcation of the functions of the two bodies in this regard resulted in each setting its own requirements, which were generally different and conflicting, as neither of the two bodies was qualified for the task.⁶⁰⁸ The legislator recognised this and it has entrusted the task to the Surveyor-General, who is the most appropriate official for it.

The Director in Botswana or the Surveyor-General in South Africa is the most appropriate official to approve “draft sectional plans” since he or she has experience in scrutinising diagrams and general plans. This enhances the security of sectional title schemes and justifies the additional costs involved and the delays caused by requiring such approval.⁶⁰⁹

The architect or land surveyor on behalf of the developer must submit the “draft sectional plan” for approval to the Director or Surveyor-General.⁶¹⁰ In Botswana the submission of a “draft sectional plan” for approval must be in the form of Form AB in the schedule.⁶¹¹ In South Africa the application can take any form since the prescribed form has been deleted by an amendment of the Regulations in 2000.⁶¹² Applicants are left in the dark as to what form the application must take and what particulars should be included.⁶¹³ The documents, which must accompany submission of the “draft sectional plan” in both Botswana and South Africa, are described in the following separate paragraphs.

⁶⁰⁶ Sec. 4 (5) of the SA STA.

⁶⁰⁷ SA STA 66 of 1971.

⁶⁰⁸ Van der Merwe *Sectional Titles* ch 6-11.

⁶⁰⁹ Van der Merwe *Sectional Titles* ch 6-10.

⁶¹⁰ Sec. 9 (1) read with reg. 5 (1) of the Botswana STA and sec. 7 (1) read with reg 6 (1).

⁶¹¹ Reg. 5 (1) of the Botswana STA.

⁶¹² GN 830 GG 21483 of 25 August 2000 (sec 6 (c)).

⁶¹³ Van der Merwe *Sectional Titles* ch 6-11.

4 3 1 Documents to accompany submission in Botswana

The following documents are lodged by the land surveyor or architect with the Director:⁶¹⁴ (i) one paper copy and two copies of the “draft sectional plan” on approved durable drawing material; (ii) the field plan or book in which measurements taken on site are indicated; (iii) the median dimension plan which indicates the boundaries and the final dimensions of each section as derived from the field measurements and the consistency adjustments, showing the boundaries of each section for the calculation of the areas of the section; (iv) the calculations⁶¹⁵ made by the land surveyor/architect when taking the field measurements, including the calculations of the dimensions of the sections to the median lines, sufficient calculations to indicate how the area of each section or exclusive use area was determined and checked and the calculation of the participation quota of each section; (v) the report by the land surveyor/architect on the purpose of the survey;⁶¹⁶ (vi) the necessary certificates from the land surveyor concerned that the scheme is not in conflict with any building line restrictions appearing in the relevant title deed(s); (vii) a copy of the schedule certified by a conveyancer setting out the servitudes and conditions of title burdening or benefiting the land; (viii) a list of co-ordinates of at least two corners or identified permanent features of each building. The distances between such corners or features must be adequate to provide an adequate determination of the position of each building and the co-ordinates must be listed on the copy of the block plan; (ix) a copy of the block plan on which the corners or identified permanent features are indicated and described; (x) the calculations relevant to the fixing and checking the position of the buildings in relation to the boundaries of the land and exclusive use areas with regard to the building, section or boundaries of the land.

In addition to the “draft sectional plan” and the application form signed by the developer or authorised agent, the documents mentioned hereunder must also accompany the

⁶¹⁴ Reg. 5 of the Botswana STA .

⁶¹⁵ As prescribed by reg. 5 of the Botswana STA.

⁶¹⁶ See also Geldenhuys *An Overview of the Procedures Involved in the Establishment of a Sectional Title Scheme in terms of the Sectional Titles Act No 95 of 1986, as Amended* (Written assignment for LLM 2001).

submission to the Director.⁶¹⁷ It is necessary to submit a certificate issued by an architect or land surveyor stating that the proposed division into sections and common property complies with the provisions of the Town and Country Planning Act and the building Control Act and their regulations, and that the building to which the scheme relates, was erected in accordance with approved building plans.⁶¹⁸ If the developer does not sign the application personally, a written authority by the developer in which the signatory is authorised to sign the application on behalf of the developer must be submitted. If at the time of the application, the building is still in the process of erection, a certificate from the architect or land surveyor is necessary to the effect that the building is sufficiently completed for actual measurements to be taken and that the building and land comply with the provisions of the Town and Country Planning Act and the Building Control Act and their regulations and that the building to which the scheme relates, was erected in accordance with approved building plans. If the application concerns the conversion of a rental building to a sectional title scheme, an affidavit by the developer stating that the requirements for the tenants' meeting⁶¹⁹ have been complied with must be submitted. A copy of the notice of the tenants' meeting must also be submitted.⁶²⁰ If all the tenants have indicated in writing that they do not wish to purchase their units, it is necessary to submit a certificate by a conveyancer to that effect.⁶²¹ If the scheme does not involve the conversion of a rental building to a sectional title scheme,⁶²² the developer must submit an affidavit to the effect that the provisions on the tenants' meeting are not applicable.⁶²³

4 3 2 Documents to accompany submission in South Africa

The amendment of the Regulations of the South African Sectional Titles Act in 2000 has to a large extent simplified the documents, which must accompany the submission of the

⁶¹⁷ Sec. 9 (2) (a)-(e) of the Botswana STA.

⁶¹⁸ The certificate shall be in the form of Form B of the schedule.

⁶¹⁹ In terms of sec. 6 (2) of the Botswana STA.

⁶²⁰ Sec. 6 (2) (a) of the Botswana STA.

⁶²¹ Sec. 6 (4) of the Botswana STA.

⁶²² Sec. 6 (2) of the Botswana STA.

⁶²³ Sec. 9 (2) (e).

“draft sectional plan.”⁶²⁴ This amendment substituted regulation 6 (1) of the regulations and deleted the old Form AB in Annexure 1 of the regulations.⁶²⁵ The following documents must now be submitted to the Surveyor-General: (i) a certificate from the land surveyor concerned that the scheme is not in conflict with any building line restriction contained in the relevant title deed; (ii) a certificate by an architect or land surveyor that the boundaries of the sections and common property are physically defined in accordance with the provisions of the Act; (iii) the field book or field plan containing the original record of all measurements made in the field,⁶²⁶ the name of the person who made the measurements and the date on which the measurements were made; (iv) a list of co-ordinates of at least two corners or identified permanent features of each building;⁶²⁷ (v) a plan on which the corners or identified permanent features are indicated and described; and (vi) the median dimension plan which must indicate the boundaries and final dimensions of each section as derived from the field measurements and the consistency adjustments.

In addition to the “draft sectional plan” and the application, which may take any form,⁶²⁸ the documents mentioned hereunder must accompany the submission to the Surveyor-General. It is necessary to submit a certificate issued by an architect or land surveyor stating that the proposed division into sections and common property is not contrary to any operative town planning scheme, statutory plan or conditions subject to which a development was approved in terms of any law, or any other current planning or development initiatives by any authority with jurisdiction over the area. The certificate must further state that, in respect of matters other than the proposed use, the building is not contrary to any operative town planning scheme; in respect of matters other than buildings, any applicable condition of any operative town planning scheme has been complied with, and the building to which the scheme relates was erected in accordance

⁶²⁴ GN 830 GG 21483 of 25 August 2000 (sec. 6 (c)). See also Van der Merwe *Sectional Titles* ch 6-11.

⁶²⁵ Sec. 3 and sec. 6 (c) of GN 830 GG 21483 of August 2000.

⁶²⁶ See reg. 7 and *Manual* par 2 3.

⁶²⁷ The distances between such corners or features must be adequate to provide an accurate determination of the position of each building and the co-ordinates must be listed on the copy of the plan mentioned at (v) above.

⁶²⁸ See n 575.

with approved building plans.⁶²⁹ If condonation was granted, the certificate of the local authority, which condoned certain specified instances of non-compliance, must be submitted.⁶³⁰

If the application concerns the conversion of a rental building to a sectional title scheme, an affidavit by the developer stating that the requirements for the tenants' meeting⁶³¹ have been complied with, a copy of the notice of the tenants' meeting⁶³² and the certificate which contains the particulars of the proposed scheme,⁶³³ and if all the tenants have indicated in writing that they do not wish to purchase their unit, a certificate to that effect must be submitted.⁶³⁴ If the scheme does not involve the conversion of a rental building to a sectional title scheme,⁶³⁵ the developer must submit an affidavit to the effect that the provisions on the tenants' meeting are not applicable.⁶³⁶

The deletion of section 4 (5A) and 7 (2) (d) of the South African Sectional Titles Act⁶³⁷ is a welcome development as it takes care of the practical problem experienced by the land surveyor or architect as he or she was previously expected to certify that the incomplete building complies with the building regulations. The certificate was furthermore required to certify compliance with highly technical aspects of building regulations that fall outside his or her field of qualification, for example, structural stability of walls. A similar deletion is necessary to the sectional titles legislation of Botswana as the architect or land surveyor cannot practically certify that an incomplete building complies with the building regulations until such time that it has been completed. Furthermore, as the land surveyor or architect in Botswana⁶³⁸ is required to certify compliance with highly technical aspects of building regulations that fall outside his or her field of qualification, it may be necessary to obtain a structural engineer' report to support the certificate.

⁶²⁹ Sec. 7 (2) (a) (i)-(iv) of the SA STA.

⁶³⁰ Sec. 7 (2) (b) read with sec. 4 (5) of the SA STA.

⁶³¹ In terms of sec. 4 (3) of the SA STA.

⁶³² Sec. 4 (3) (a) (i) of the SA STA.

⁶³³ Sec. 4 (3) (a) (ii) of the SA STA.

⁶³⁴ Sec. 4 (3). For all these documents see sec. 7 (2) (e) of the SA STA.

⁶³⁵ Sec. Sec. 4 (3) of the SA STA.

⁶³⁶ Sec. 7 (2) (f) of the SA STA.

⁶³⁷ See sec. 2 and sec. 3 (b) of Act 29 of 2003.

⁶³⁸ See ch 4 par 4 3 1.

4 4 Approval by the Director or Surveyor-General

In terms of the sectional titles legislation of both Botswana and South Africa the Director or Surveyor-General shall not approve the “draft sectional plan” unless the applicable documents have been submitted and such plan has been prepared in accordance with the provisions of the Acts.⁶³⁹ Although the Director or Surveyor-General is not responsible for investigating the correctness or accuracy of any document submitted,⁶⁴⁰ he or she may at any time check the accuracy or correctness of a “draft sectional plan,” or any measurement recorded by a land surveyor or architect in the field.⁶⁴¹ If the Director or Surveyor-General finds a “draft sectional plan,” sectional plan, or any measurement to be incorrect, he or she may take such action, as appears appropriate in terms of the Acts.⁶⁴² The requirement that approval depends on the submission of the applicable documents⁶⁴³ and the threat of disciplinary steps against the architect/land surveyor who drafted the plans⁶⁴⁴ ensures strict and thorough scrutiny so as to guard against gross errors and inconsistencies.⁶⁴⁵

4 5 Application to the deeds registry

A developer may after approval of a sectional plan by the Director or Surveyor-General apply to the Registrar for the registration of the sectional plan, and for the opening of a sectional title register in respect of the land and building(s) in question, in both Botswana and South Africa.⁶⁴⁶ In terms of the South African statute, the application is made to the Registrar in charge of the deeds registry in which the land comprised in the scheme is

⁶³⁹ Sec. 9 (5) of the Botswana STA and sec. 7 (2A) of the SA STA.

⁶⁴⁰ Sec. 9 (4) of the Botswana STA and sec. 7 (2A) of the SA STA.

⁶⁴¹ Reg. 7 (1) of the Botswana STA and reg. 8 (1) of the SA STA.

⁶⁴² Reg. 7 (2) of the Botswana STA and sec. 8 (2) of the SA STA. Suitable action on the part of the Director or Surveyor-General may include either disciplinary steps in appropriate circumstances in terms of sec. 10 of the Botswana STA and sec. 8 of the SA STA or an order to alter or amend the “draft sectional plan” in terms of sec. 15 (1) and (4) of the Botswana STA and sec. 14 (1) and (4) of the SA STA read with reg. 13 (1) of the Botswana STA and reg. 15 (2) of the SA STA.

⁶⁴³ Sec. 9 (5) of the Botswana STA and sec. 7 (4) of the SA STA.

⁶⁴⁴ See Van der Merwe ch 3- 17 for a more detailed discussion.

⁶⁴⁵ See also Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's Law of Property* 4 Ed 423.

⁶⁴⁶ Sec. 12 (1) of the Botswana STA and sec. 11 (1) of the SA STA.

registered.⁶⁴⁷ It would be more convenient for the Botswana statute also to be more specific in this regard as there are currently two deeds offices in the country.⁶⁴⁸ An amendment to the Botswana statute to include a provision stating specifically that the application must be made to the Registrar in charge of the deeds registry in which the land comprised in the scheme is registered, would be more appropriate.

The opening of a sectional title register and registration of a sectional plan is similar to the procedure for the subdivision of land for a new township in terms of section 46 of the Botswana Deeds Registry Act⁶⁴⁹ and section 46 of the South African Deeds Registries Act.⁶⁵⁰ The subdivision of land into lots in a township involves the registration of a general plan and opening of a township register. The opening of a sectional title register means that the developer has to lodge separate certificates of registered sectional title for each unit with his or her application and the entry for the developer's title deed of the land in the relevant land register has to be closed by the Registrar. The sectional title register does not include a land registration folio for entering transactions in relation to sectional title units.⁶⁵¹

4 5 1 Documents which must accompany the application

The application must be in the form prescribed by the regulations in both Botswana and South Africa.⁶⁵² In both countries the application must be accompanied by the following documents, which subsequent to registration will be held at the deeds office and will be open to the public:⁶⁵³ (i) two copies of the sectional plan;⁶⁵⁴ (ii) a schedule certified by a conveyancer setting out the servitudes and conditions of title burdening or benefiting the land and other registrable conditions imposed by the developer, as well as other

⁶⁴⁷ Sec. 11 (1) of the SA STA.

⁶⁴⁸ The Gaborone deeds office which services the southern part of the country and the Francistown office which services the northern part of the country.

⁶⁴⁹ Botswana Act 36 of 1960.

⁶⁵⁰ SA Act 47 of 1937.

⁶⁵¹ Van der Merwe *Sectional Titles* ch 6-19; Benjamin, Rorke & Walwyn *Sectional Titles* 19.

⁶⁵² Reg. 8 (1) and Form C in the schedule of the Botswana STA and reg. 10 (1) and Form B in Annexure 1 of the SA STA.

⁶⁵³ Sec. 12 (3) and reg. 8 (2) of the Botswana STA and sec. 11 (3) and reg. 10 (2) of the SA STA.

⁶⁵⁴ Sec. 12 (3) (a) of the Botswana STA and sec. 11 (3) (a) of the SA STA.

particulars as may be prescribed;⁶⁵⁵ (iii) the title deed of the land;⁶⁵⁶ (iv) any mortgage bond over the land, together with the consent of the mortgagee to the opening of the sectional title register and to the endorsement of such bond to the effect that it attaches to the sections and common property shown on the sectional plan, to the real right reserved by the developer to develop the scheme in phases⁶⁵⁷ and to the real right in respect a right⁶⁵⁸ of exclusive use;⁶⁵⁹ (v) a certificate by a conveyancer stating that that the prescribed rules⁶⁶⁰ are applicable, and containing special rules, if any, substituted by the developer;⁶⁶¹ (vi) certificates of registered sectional title in the prescribed form⁶⁶² in respect of each section and its undivided share in the common property made out in favour of the developer;⁶⁶³ (vii) the title deed to any registered real right over the land which must be endorsed to the effect that the land, being subject to a development scheme, is registered in the sectional title register;⁶⁶⁴ (viii) and such other documents and particulars as may be prescribed.⁶⁶⁵

⁶⁵⁵ Sec. 12 (3) (b) of the Botswana STA and sec. 11 (3) (b) of the SA STA. Registrable conditions may be imposed by the developer in terms of sec. 12 (2) of the Botswana STA and sec. 11 (2) of the SA STA. In terms of reg. 8 (3) of the Botswana STA and reg. 10 (3) of the SA STA the schedule must contain the name of the scheme, the full name and address of the developer, the number of the title deed of the land concerned and the number of the title deed with which the diagram is filed, if the land is defined on an approved diagram. See also CRC 19 of 1990 par 2 where it is stated that this is the only schedule in which servitudes or conditions can be recorded.

⁶⁵⁶ Sec. 12 (3) (c) of the Botswana STA and sec. 11 (3) (c) of the SA STA.

⁶⁵⁷ In terms of sec. 27 (1) of the Botswana STA and sec. 25 (1) of the SA STA.

⁶⁵⁸ In terms of sec. 29 (1) of the Botswana STA and sec. 27 (1) of the SA STA.

⁶⁵⁹ Sec. 12 (3) (d) of the Botswana STA and sec. 11 (3) (d) of the SA STA. The requirement of the mortgagee's consent is understandable because of the division of the object of security. It must be noted that the consent of the holder of a lease or other real right on the land is not required (Van der Merwe, *Sectional Titles* ch 6-20).

⁶⁶⁰ In terms of sec. 38 (2) of the Botswana STA and sec. 35 (2) of the SA STA.

⁶⁶¹ Sec. 12 (3) (e) of the Botswana STA and sec. 11 (3) (e) of the SA STA.

⁶⁶² In terms of reg. 9 of the Botswana STA the certificate of registered sectional title must be in the form of Form D in the schedule and in terms of reg. 11 of the SA STA the certificate must be in the form of Form C in Annexure 1. These certificates must be signed, dated and sealed by the Registrar. They must also be on paper of durable and good quality of size A4 standard paper and shall be written, typed or printed in size not less than 2 mm, with black ink of good quality. Certificates of registered sectional title must be lodged in duplicate with the Registrar except in deeds registries where documents are reproduced and the reproduction kept instead of the original document.

⁶⁶³ Sec. 12 (3) (f) of the Botswana STA and sec. 11 (3) (f) of the SA STA.

⁶⁶⁴ Reg. 8 (2) of the Botswana STA and reg. 10 (2) (a) of the SA STA. If the title deed to such real right is not available, and the conveyancer has made a certification to that effect, the Registrar must endorse the registry duplicate of such title deed. If the title deed is later on lodged with the Registrar for any purpose, he must make a similar endorsement on it.

⁶⁶⁵ Sec. 12 (3) (g) of the Botswana STA and sec. 11 (3) (g) of the SA STA.

4 6 Amendment and cancellation of a registered sectional plan

In this section the procedures involving an amendment and cancellation of a registered sectional plan are considered.

4 6 1 Amendment

A number of mistakes may occur during the process of registration of a sectional plan. The actual measurements of the completed building may not correspond with measurements on the sectional plan, and this may result in the floor area of the sections and the participation quotas of sections being inaccurately reflected on the sectional plan. The boundaries between sections and sections and common property may have been inaccurately drawn. As a result, the floor area of the sections concerned and the participation quotas allotted to the sections may be affected.⁶⁶⁶ Such mistakes may call for an amendment of a sectional plan. A registered sectional plan may also be amended due to subsequent additional sections⁶⁶⁷ being created on the common property or land being added to the common property,⁶⁶⁸ or through the consolidation⁶⁶⁹ and subdivision⁶⁷⁰ of sections.

If a registered sectional plan is amended due to an error, which occurred during the process of registration, the Director or Surveyor-General must initiate the process of amendment of such a plan.⁶⁷¹ He or she may require the land surveyor, architect, developer or the body corporate, at a later stage to amend, alter or substitute any sectional plan found to be incorrect.⁶⁷² The body corporate or association may recover the costs incurred as a result of an alteration, amendment or substitution of a sectional plan from

⁶⁶⁶ See Van der Merwe *Sectional Titles* ch 6-27

⁶⁶⁷ In terms of sec. 27 of the Botswana STA and sec. 25 of the SA STA.

⁶⁶⁸ In terms of sec. 28 of the Botswana STA and sec. 26 of the SA STA.

⁶⁶⁹ In terms of sec. 25 of the Botswana STA and sec. 23 of the SA STA.

⁶⁷⁰ In terms of sec. 23 read with sec. 24 of the Botswana STA and sec. 21 read with sec. 22 of the SA STA.

⁶⁷¹ Sec. 15 of the Botswana STA and sec. 14 of the SA STA.

⁶⁷² Sec. 15 (1) of the Botswana STA and sec. 14 (1) of the SA STA. In terms of reg. 13 (1) of the Botswana STA and reg. 15 (4) of the SA STA the (draft) sectional plan which substitutes the registered sectional plan must comply with the provisions of reg. 4 of the Botswana STA and reg. 5 of the SA STA. In terms of reg. 13 (2) of the Botswana STA and reg. 15 (3) of the SA STA the Registrar must forward a copy of the sectional plan which substitutes the registered sectional plan to the local authority concerned.

the developer, land surveyor or architect concerned.⁶⁷³ If in the opinion of the Director or Surveyor-General any person is likely to be prejudiced by an incorrect sectional plan, he or she shall advise the Registrar as to which sections are affected by such defect. Consequently no transfer of such section and its undivided share in the common property or the registration of a real right therein shall be registered until the defect in the sectional plan has been rectified, unless the Registrar is satisfied that the delay in causing the defective sectional plan to be rectified will cause undue hardship and the person in whose favour transfer of the section and its undivided share in the common property or of a real right therein is to be registered, consents in writing to the transfer or other registration being effected prior to the rectification of the defect.⁶⁷⁴

According to the Botswana Sectional Titles Act, the Director shall advise the Registrar of any alteration, amendment or substitution of a sectional plan, which affects the description, or extent of any section.⁶⁷⁵ In terms of the South African statute the Surveyor-General advises the Registrar and the local authority as well.⁶⁷⁶ It would be logical for the Director to advise the local authority as well in Botswana since in terms of the regulations to the Act, the Registrar must forward a copy of the sectional plan, which substitutes a registered sectional plan to the local authority concerned.⁶⁷⁷ Such a plan is forwarded to the local authority only after the alteration. This means that the local authority is not consulted beforehand. An amendment in the Botswana statute to require the Director to advise the local authority as well of the alteration, amendment or substitution of a sectional plan would be consistent with Regulation 13 (2), and the local authority would also know beforehand that such process is underway before he receives an altered, amended or substituted copy from the Registrar.⁶⁷⁸

In terms of both statutes the Registrar must make the necessary endorsements indicating any change of description or extent upon the Deeds Registry copy of the sectional title

⁶⁷³ Sec. 15 (2) of the Botswana STA and sec. 14 (2) of the SA STA.

⁶⁷⁴ Sec. 15 (3) of the Botswana STA and sec. 14 (3) of the SA STA.

⁶⁷⁵ Sec. 15 (5) of the Botswana STA.

⁶⁷⁶ Sec. 14 (5) of the SA STA.

⁶⁷⁷ Reg. 13 (2) of the Botswana STA.

⁶⁷⁸ See also ch 6 par 6 5.

deed and upon any other document affected by such change.⁶⁷⁹ The Registrar must likewise endorse the owner's or holder's copy of that sectional title deed or any other registered document whenever subsequently lodged at the Deeds Registry for any purpose.⁶⁸⁰

If the Director or Surveyor-General does not initiate the proceedings for the alteration, amendment or substitution of a registered sectional plan, an interested party may apply to court to amend the sectional plan.⁶⁸¹ In this case the applicant shall, in terms of the South African Act, give a written notice to the Registrar or Surveyor-General concerned at least 21 days before the hearing of the application and such Registrar or Surveyor-General may submit to the court a report on the matter as he or she deems fit.⁶⁸² An amendment of the Botswana statute to include such a provision would be another welcome development. In the mean time, the provisions of the Deeds Registry Act with regard to notice to the Registrar of an application to court will apply, as this will be in accordance with the provisions of the Sectional Titles Act.⁶⁸³ It has been established by the South African case law that a party who has suffered prejudice as a result of an error in a registered sectional plan may claim delictual damages against an architect, land surveyor or conveyancer whose negligence caused the error.⁶⁸⁴ It has been suggested that provision should be made for a plan to be amended with the consent of all the owners of sections, since they are the ones mostly affected by an amendment of the sectional plan.⁶⁸⁵

⁶⁷⁹ Sec. 15 (5) of the Botswana STA and sec. 14 (5) of the SA STA. In terms of reg. 13 (3) of the Botswana STA and reg. 15 (4) of the SA STA the Registrar must make an endorsement on the sectional title deed to the effect that the amendment has been effected in accordance with an alteration, amendment or substitution of the registered sectional plan.

⁶⁸⁰ Sec. 15 (5) of the Botswana STA and sec. 14 (5) of the SA STA.

⁶⁸¹ Van der Merwe *Sectional Titles* ch 6-28.

⁶⁸² Sec. 56 of the SA STA. It must be noted that the period of notification does not correspond with that stated in sec. 97 of the SA Deeds Registries Act (Act No 47 of 1937) in which the Registrar must be given at least seven days notice before the hearing of an application. A harmonisation of the two provisions in this regard is important as it would guard against any confusion that may arise in giving notice to the Registrar or Surveyor-General.

⁶⁸³ In terms of sec. 93 of the Botswana Deeds Registry Act (Act No 36 of 1960) the Registrar must be given at least 30 days notice before the hearing of an application,

⁶⁸⁴ *Randaree v Dixon* 1983 2 SA 1 (A); *President Insurance Co Ltd v Retsos* 1988 1 SA 276 (A); *Kerbels Flooring and Carpeting (Pty) Ltd v Shrosbree and another* 1994 1 SA 655 (SE).

⁶⁸⁵ SAPOA *Memorandum* (1991) par 5 5.

4 6 2 Cancellation

In terms of both Botswana and South African statutes, a registered sectional plan may be cancelled by the Registrar or by the court.⁶⁸⁶ The Registrar may on application by a developer cancel a registered sectional plan.⁶⁸⁷ The application must be accompanied by a certificate by a conveyancer to the effect that all the units of a scheme are registered in the developer's name and that, if applicable, the developer is the holder of a right to develop the scheme in phases⁶⁸⁸ or of all rights of exclusive use in the scheme,⁶⁸⁹ and that no unit or any of the above-mentioned rights are encumbered by a sectional mortgage bond or a lease or in any other way.⁶⁹⁰ In terms of the Botswana Act the Registrar must notify the Director that the sectional title register has been closed, whereupon the Director shall cancel the original sectional plan and the Deeds Registry copy.⁶⁹¹ According to the South African Act the Registrar must notify the Surveyor-General as well as the local authority.⁶⁹² It would be reasonable for the Botswana statute to extend the notification to the local authority too, as such a provision would be consistent with other provisions of the Act.⁶⁹³ For the same reasons the Botswana statute should be amended to include a provision that the Registrar must notify the local authority of the cancellation of the registration of a sectional plan.

Subsequent to the closure of the sectional title register, the Registrar must make the necessary alterations, amendments, endorsements and entries on the developer's sectional title deeds and in the records kept by him or her and record such cancellation and the reversion of the land to the applicable land register.⁶⁹⁴ The Registrar must cause the

⁶⁸⁶ Sec. 15 (6)-(8) of the Botswana STA and sec. 14 (6)-(9) of the SA STA.

⁶⁸⁷ Sec. 15 (6) of the Botswana STA and sec. 14 (6) of the SA STA.

⁶⁸⁸ In terms of sec. 27 of the Botswana STA and sec. 25 of the SA STA.

⁶⁸⁹ In terms of sec. 29 of the Botswana STA and sec. 27 of the SA STA.

⁶⁹⁰ Sec. 15 (6) of the Botswana STA and sec. 14 (6) of the SA STA.

⁶⁹¹ Sec. 15 (6) of the Botswana STA.

⁶⁹² Sec. 14 (6) of the SA STA.

⁶⁹³ In terms of reg. 13 (2) of the Botswana Registrar must forward a copy of a sectional plan which is substituted for a registered sectional plan to the local authority concerned and in terms of sec.28 (4) of the Botswana STA, where the scheme is being extended by addition of land to common property, the Registrar must furnish a copy of the sectional plan of extension to the local authority.

⁶⁹⁴ In terms of reg. 13 (4) of the Botswana STA and reg. 15 (5) of the SA STA the Registrar must effect the necessary endorsement on each of the relevant title deeds, the titles to any real right, with the exclusion of mineral rights, and on the schedule of conditions in terms of sec. 12 (3) (b) of the Botswana STA and sec.

developer's old title deed⁶⁹⁵ to be revived⁶⁹⁶ or issue a certificate of registered title in the form prescribed by the Deeds Registries Acts for the land in question subject to servitudes, other real rights and conditions as are still applicable in respect of such land.⁶⁹⁷

Apart from the procedure described above⁶⁹⁸ and the procedure involved when the whole of the land consisting of the common property of the scheme is transferred by the body corporate,⁶⁹⁹ a sectional plan can only be cancelled upon an order of court.⁷⁰⁰ The Registrar must then make the necessary endorsements and entries in his or her records and notify the Director or Surveyor-General who must cancel the original sectional plan and the Deeds Registries copy thereof.⁷⁰¹ In terms of the South African Sectional Titles Act, the Registrar must then notify the local authority of the cancellation of the registration of a sectional plan.⁷⁰²

The owners of sections may by unanimous resolution also alienate the whole of the common property⁷⁰³ or choose not to rebuild the building, which under section 51 of the Botswana Act and section 48 of the South African Act is deemed to have been destroyed and the whole of the land then reverts to the land register.

11 (3) (b) of the SA STA. Reg. 13 (6) of the Botswana STA and reg. 15 (6) (a) of the SA STA provides that whenever the registration of the sectional plan is cancelled, the Registrar must effect the necessary alterations, amendments, endorsements and entries in the relevant land register and records to effect the reversion of the land to the land register. In terms of reg. 13 (5) (b) of the Botswana STA and reg. 15 (6) of the SA STA any entry referred to above must contain a reference to the number of the relevant sectional plan.

⁶⁹⁵ See sec. 12 (3) (c) of the Botswana STA and sec. 11 (3) (c) of the SA STA.

⁶⁹⁶ According to reg. 13 (6) of the Botswana STA and reg. 15 (7) of the SA STA such revival is effected by an appropriate endorsement on the title deed signed and dated by the Registrar.

⁶⁹⁷ Sec. 15 (7) of the Botswana STA and sec. 14 (7) of the SA STA.

⁶⁹⁸ In terms of sec. 15 (6) of the Botswana STA and sec. 14 (6) of the SA STA.

⁶⁹⁹ In terms of sec. 20 (14) of the Botswana STA and sec. 17 (5) of the SA STA.

⁷⁰⁰ Sec. 15 (8) of the Botswana STA and sec. 14 (8) of the SA STA.

⁷⁰¹ Sec. 15 (8) of the Botswana STA and sec. 14 (8) of the SA STA.

⁷⁰² Sec. 14 (9) of the SA STA.

⁷⁰³ In terms of sec. 20 (14) of the Botswana STA and sec. 17 (5) of the SA STA.

4 7 Summary of findings

Unlike the Botswana statute, the South African statute requires a developer to furnish the tenants with a certificate containing the full particulars concerning the proposed scheme, together with the notice of the general meeting. The Botswana statute prescribes a form for the submission of a “draft sectional plan,” whereas in South Africa a similar provision has been deleted. In terms of the South African statute, the developer must apply for registration and opening of a sectional title register to the Registrar in charge of the Deeds Registry in which the land comprised in the scheme is registered, whereas in Botswana it is not specified to which Registry the application should be addressed.

In terms of the Botswana statute, the Director must advise the Registrar of any alteration, amendment or substitution of a sectional plan, which affects the description, or extent of any section.⁷⁰⁴ According to the South African statute, the Surveyor-General advises the Registrar as well as the local authority.⁷⁰⁵ Where a registered sectional plan has been cancelled, the Registrar must, in terms of the Botswana statute, notify the Director⁷⁰⁶ that the sectional title register has been closed, whereas in terms of the South African statute, the Registrar must notify the Surveyor-General as well as the local authority.⁷⁰⁷

⁷⁰⁴ Sec. 15 (5) of the Botswana STA.

⁷⁰⁵ Sec. 14 (5) of the SA STA.

⁷⁰⁶ Sec. 15 (6) of the Botswana STA.

⁷⁰⁷ Sec. 14 (6) of the SA STA.

CHAPTER FIVE

THE ROLES OF OTHER PARTIES INVOLVED IN THE ESTABLISHMENT OF SECTIONAL TITLE SCHEMES

5 1 Introduction

Since the legal requirements and procedures for a development scheme and the preparation of a sectional plan have already been discussed, this chapter deals with the roles of the parties involved in the preparation of a development scheme. These include the local authority, land surveyor/architect, conveyancer, developer and the Registrar of Deeds

5 2 The local authority

A sectional title scheme in both Botswana and South Africa must be situated within the area of jurisdiction of a local authority.⁷⁰⁸ According to section 151 (1) of the Constitution of the Republic of South Africa,⁷⁰⁹ municipalities must be established for the whole territory of the Republic. Where they have not been established yet, the relevant transitional authorities carry out the functions of such municipalities.⁷¹⁰ As there are still areas in South Africa that do not fall under the jurisdiction of a local authority,⁷¹¹ a developer who wants to develop a sectional title scheme in a remote area must first

⁷⁰⁸ See sec. 2 (1) of the Botswana STA and sec. 1 (1) of the SA STA for definition of a “development scheme”. A local authority in terms of the SA STA means a municipality contemplated in sec. 151 of the Constitution of the Republic of South Africa, 1999 (Act No 108 of 1996), exercising jurisdiction in the area in which the land is situated. The Botswana Act does not have a definition of local authority, it is presumed that local authority would include councils exercising jurisdiction in the area in which the land is situated.

⁷⁰⁹ SA Act No 108 of 1996.

⁷¹⁰ See Van der Merwe *Sectional Titles* ch 3-27; Van der Merwe “A Critical Analysis of the Innovations Introduced by the Sectional Titles Act of 1997” 1998 (61) *THRHR* 171-193, 173.

⁷¹¹ Example remote parts of the Orange Free State, former Natal or Transvaal (Van der Merwe *Sectional Titles* ch 3-28).

ascertain whether the particular site is situated within the area of jurisdiction of a local authority.

In terms of both statutes, the submission of a draft sectional plan for approval to the Director or Surveyor-General must be accompanied by, among other things,⁷¹² a certificate by an architect or land surveyor stating that the building(s) to which the scheme relates was erected in accordance with approved building plans.⁷¹³ The local authority, within whose area of jurisdiction the land is situated, performs the function of approving building plans. The local authority in Botswana and South Africa is thus involved in the approval of the building plans in respect of new buildings to be erected or erected on the land on which the scheme is proposed or additions to existing buildings on such land.

Formerly in South Africa, a developer had to make an application to the local authority for the approval of a development scheme.⁷¹⁴ The local authority has been relieved of this function by the Sectional Titles Amendment Act of 1997, which imposes the duty to approve a draft sectional plan on the Surveyor-General.⁷¹⁵ This amendment reduced the involvement of a local authority in the process of establishing a sectional title scheme and imposed on it the function of condoning irregularities in a sectional title scheme, should the developer choose to approach it for such condonation.⁷¹⁶ The local authorities have been left out of the process of establishment of a scheme so as to save costs and to avoid red tape.⁷¹⁷ Local authorities have in the past exercised their powers subjectively as the Act⁷¹⁸ lacked guidance with regard to the nature and scope of the functions of local authorities. In the process of approving sectional title schemes, some local authorities abused their powers by correcting past mistakes while others regarded their approval as a mere formality. Local authorities at times asked for particulars so as to correct matters that could have been dealt with when the building plans were submitted for approval and

⁷¹² See sec. 9 (2) and reg. 5 of the Botswana STA and sec. 7 (2) and reg. 6 as substituted by sec. 3 of GN 830 GG 21483 of August 2000.

⁷¹³ Sec. 9 (2) of the Botswana STA and sec. 7 (2) of the SA STA.

⁷¹⁴ Sec. 4 (1) of the SA STA 95 of 1986.

⁷¹⁵ Sec. 2 (a) read with sec. 3 (a) of the SA Act 44 of 1997.

⁷¹⁶ Sec. 2 (d) of the SA Act No 44 of 1997.

⁷¹⁷ Van der Merwe *Sectional Titles* ch 6-3.

⁷¹⁸ SA Act 95 of 1986.

while the building was being erected. Developers were at times asked by local authorities to supply deviation plans or to apply for building line relaxations or even for rezoning.⁷¹⁹ This unnecessary bureaucracy resulted in local authorities taking between two weeks and six months to approve a sectional title scheme. Such delays caused the holding cost of the land to rise and consumers were expected to pay higher prices for units, thus developers were discouraged from establishing new sectional title schemes. The role of the local authority was thus reduced to simplify the process of establishment, eradicate unnecessary bureaucracy and to reduce rising costs caused by unnecessary delays.⁷²⁰

The local authority does not have the power to ask for further information to assist in exercising its discretion to condone non-compliance, if approached for condonation of discrepancies or infringements. The form of application for condonation should be regulated carefully so as to avoid the need for a request for further information, as it would cause unnecessary delays, hence defeating the spirit of the Amendment Act of 1997. The period within which the local authority is expected to have reached a decision on the application for condonation should at least be stated in the regulations. Failure to do so may cause further delays and may deny the applicant an effective right to demand a prompt decision.⁷²¹

Furthermore, the local authority has the discretion to grant or refuse condonation.⁷²² The developer no longer has a statutory remedy of appeal to the minister.⁷²³ If the local authority refuses to condone non-compliance, the developer must effect the necessary physical changes to the scheme so as to ensure compliance with applicable regulations and thus obtain the certificate of the architect or land surveyor to be submitted to the Surveyor-General.⁷²⁴ Where the local authority has refused to grant condonation, the applicant may apply to the High Court for a review of the decision. Such right of review would however have restricted application, as the local authority is not required to give

⁷¹⁹ Van der Merwe *Sectional Titles* ch 6-4.

⁷²⁰ See SAPOA *Memorandum* Sectional Titles and Group Housing Committee (1991) 4-5; SAPOA Proposed Amendments to the Sectional Titles Act of 1986 (1993) par 3.3.

⁷²¹ See Van der Merwe *Sectional Titles* ch 6-9.

⁷²² Sec. 4 (5) of the SA STA.

⁷²³ See repealed sec. 4 (10) and sec. 4 (11) of SA Act 95 of 1986.

⁷²⁴ In terms of sec. 7 (2) of the SA STA.

reasons for its refusal.⁷²⁵ Such review would only be successful if there is clear proof that the local authority acted with ulterior motives or such gross unreasonableness that it could not have applied its mind to the application.⁷²⁶ The local authority has the authority to refuse condonation for non-compliance with a national building regulation regarding the strength and stability of any building.⁷²⁷

5.3 Developer

Since the role of the developer has been discussed in detail above,⁷²⁸ only a summary of the developer's role is given in this paragraph. In both Botswana and South Africa, the developer must, with the assistance of his or her professional advisors, where necessary take certain basic steps to establish a sectional title scheme. He or she must (i) ensure compliance with the legal requirements for the establishment of a sectional title scheme;⁷²⁹ (ii) ensure that the conditions of title for the land are not in conflict with the scheme;⁷³⁰ (iii) consider how the development of the scheme is going to be financed, and particularly in the case of a large scheme, the developer must decide whether to develop the scheme in phases,⁷³¹ as he or she will not be able to reserve such a right once the first unit has been transferred to a third party;⁷³² (iv) must instruct an architect or land surveyor to prepare the sectional plan;⁷³³ (v) if the scheme concerns (a) building(s) wholly or partly let for residential purposes, he or she must comply with the statutory requirements to make the existing tenants aware of the proposed scheme and to inform

⁷²⁵ See Van der Merwe *Sectional Titles* ch 6-9.

⁷²⁶ See *The Administrator Transvaal and the Firs Investment (Pty) Ltd v Johannesburg City Council* 1971 1 SA 56 (A) 86.

⁷²⁷ Unless a deviation has been permitted or an exemption has been granted in terms of sec. 18 (2) of the National Building Regulations and Building Standards Act, 1977 (Act No 103 of 1977).

⁷²⁸ See chapter 3 par 3.2.3.

⁷²⁹ Such requirements are evident from the statutory definitions of, among other provisions, "developer", "land," "building" and "development scheme."

⁷³⁰ In Botswana conflicting conditions must be removed in terms of sec. 2 of Immovable Property (Removal of Restrictions) Act (Act 27 of 1967 and in SA in terms of sec. 2 of the Removal of Restrictions Act 84 of 1947.

⁷³¹ In terms of sec. 27 of the Botswana STA and sec. 25 of the SA STA. See also Van der Merwe *Sectional Titles* ch 12-3.

⁷³² In terms of sec. 27 (7) of the Botswana STA and sec. 25 (6A) of the SA STA.

⁷³³ In terms of sec. 7 (1) of the Botswana STA and sec. 5 (1) of the SA STA.

them of their rights;⁷³⁴ (vi) in the case of South Africa, instruct an architect or land surveyor to investigate whether aspects of the scheme comply with applicable town planning schemes and building by-laws;⁷³⁵ (vii) in the case of South Africa, if the investigations reveal any inconsistencies or irregularities, the developer may make an application to the local authority for condonation of such inconsistencies or irregularities;⁷³⁶ (viii) the land surveyor or architect must then on behalf of the developer submit the draft sectional plan to the Director or Surveyor-General for approval;⁷³⁷ (ix) if a draft sectional plan concerns a building which is in the process of being erected, the developer may only apply for the approval of the Director or Surveyor-General if such building is sufficiently completed for measurements to be taken, and if such building, whilst the erection is not completed, complies in Botswana with the provisions of the Town and Country Planning Act and the Building Control Act and their regulations, and in the case of South Africa, with any applicable scheme, by-laws or regulations and the proposed use of the property complies with any operative town planning scheme;⁷³⁸ (x) apply to the Registrar of Deeds for the registration of the sectional plan and the opening of the sectional title register.⁷³⁹

5 4 Land surveyor/architect

In terms of both the Botswana and South African statutes the developer is required to instruct an architect or land surveyor to prepare a draft sectional plan.⁷⁴⁰ The land surveyor or architect must prepare the draft sectional plan in accordance with the provisions of the Sectional Titles Acts.⁷⁴¹ In South Africa, a draft sectional plan is also

⁷³⁴ See ch 4 par 4 2 2.

⁷³⁵ Sec. 4 (5) of the SA STA.

⁷³⁶ Sec. 4 (5) of the SA STA.

⁷³⁷ Sec. 6 (1) read with sec. 9 (1) of the Botswana STA and sec. 4 (1) read with sec. 7 (1) of the SA STA.

⁷³⁸ Sec. 6 (5) of the Botswana STA and sec. 4 (5A) of the SA STA. In terms of sec. 5 (1) of SA STA 66 of 1971, before an application could be made for the registration of the sectional plan, the developer had to obtain a certificate from an architect or land surveyor to the effect that the building is sufficiently complete for occupation.

⁷³⁹ Sec. 12 of the Botswana STA and sec. 11 of the SA STA.

⁷⁴⁰ Sec. 6 (1) of the Botswana STA and sec. 4 (1) of the SA STA.

⁷⁴¹ Sec. 6 (1) of the Botswana STA and sec. 4 (1) of the SA STA.

prepared in accordance with the manual issued by the Surveyor-General from time to time. Any delineation of an exclusive use area of which the boundaries are not represented by physical features of a permanent nature must be prepared and signed by a land surveyor.⁷⁴² The architect or land surveyor must on behalf of the developer then submit the draft sectional plan for approval to the Director or Surveyor-General.⁷⁴³

The state or any state official cannot be liable for any defective measurement or work performed by any land surveyor or architect in relation to any sectional plan, even if the sectional plan has been approved by the Director or Surveyor-General.⁷⁴⁴ The professional responsibility of individual land surveyors and architects has, however, in terms of the Acts been increased as against the general public.⁷⁴⁵ The land surveyor or architect must prepare the draft sectional plan from actual measurements undertaken personally or under his or her direction in such manner as will ensure accurate results.⁷⁴⁶ The land surveyor or architect can face disciplinary action in terms of the Acts,⁷⁴⁷ and can also be held delictually liable for damages resulting from negligence or incompetence in preparing the sectional plan.⁷⁴⁸

The land surveyor or architect must execute the necessary investigations to be able to furnish the Director or Surveyor-General with the required certificate.⁷⁴⁹ In terms of the South African Titles Act, an architect or land surveyor must inspect the property, and if upon inspection it is revealed that inconsistencies or irregularities exist, he or she must inform the developer who must decide whether to bring an application to the local authority concerned for condonation for non-compliance.⁷⁵⁰

⁷⁴² Sec. 7 (2) of the Botswana STA and sec. 5 (1) of the SA STA.

⁷⁴³ Sec. 9 (1) of the Botswana STA and sec. 7 (1) of the SA STA.

⁷⁴⁴ Sec. 8 (2) of the Botswana STA and sec. 6(2) of the SA STA.

⁷⁴⁵ See sec 10 of the Botswana STA and sec. 8 of the SA STA, for a list of acts and omissions considered to be improper conduct of land surveyors and architects, and disciplinary actions that may be taken against them for such improper conduct.

⁷⁴⁶ Sec. 8 (1) of the Botswana STA and sec. 6 (1) of the SA STA. See also Kilbourn October 1998 *Butterworths Property Law Digest* 9-13.

⁷⁴⁷ Sec. 10 of the Botswana STA and sec. 8 of the SA STA. See also Cowen 1973 *Planning and Building Developments* 27; Nix "The Role of the Architect in the Preparation of Sectional Plans" 1974 6 *Planning and Building Developments* 34.

⁷⁴⁸ See *Perlman v Zoutendyk* 1934 CPD 151; *EG Electric Co (Pty) Ltd v Franklin* 1979 2 SA 702 (ECD) 705, where delictual liability for professional negligence has been recognised by South African Courts.

⁷⁴⁹ In terms of sec. 9 (2) of the Botswana STA and sec 7 (2) of the SA STA..

⁷⁵⁰ Sec. 4 (5) of the SA STA.

5.5 Conveyancer

The developer must comply with the provisions of the Sectional Titles Acts concerning the establishment of a sectional title scheme, in both Botswana and South Africa.⁷⁵¹ The developer must instruct a conveyancer⁷⁵² to assist, where necessary, in complying with these statutory duties. If the building(s) to be converted to a sectional title scheme involves a residential building occupied by tenants, the conveyancer may assist the developer to notify the tenants of the first general meeting⁷⁵³ and to inform them of their statutory rights in order for them to make an informed decision whether to buy or not buy the sections they occupy.⁷⁵⁴

The conveyancer must prepare and sign deeds to be lodged with the Registrar of Deeds.⁷⁵⁵ By signing such deeds or documents, he or she accepts the responsibility for the accuracy of the facts mentioned in such deeds or documents.⁷⁵⁶ The conveyancer being the agent of the developer must make an application to the Registrar of Deeds for the registration of a sectional plan and opening of a sectional title register and must issue the required certificates for submission with the sectional plan.⁷⁵⁷ The conveyancer must make the necessary investigations with regard to the conditions of title burdening or benefiting the land to determine whether there are conditions that prohibit the establishment of a sectional title scheme on the land. The conveyancer must issue a certificate setting out the servitudes and conditions of title burdening or benefiting the land and other registrable conditions imposed by the developer, as well as other particulars as may be prescribed.⁷⁵⁸ He or she must also issue a certificate stating that the prescribed rules are applicable, and containing other rules, if any, substituted by the developer for the prescribed rules.⁷⁵⁹ These certificates must, together with other

⁷⁵¹ Sec. 6 of the Botswana STA and sec. 4 of the South African STA.

⁷⁵² In terms of sec. 2 (1) of the Botswana STA “conveyancer” has the meaning assigned to it under the Legal Practitioners Act, and in terms of sec. 1 (1) of the SA STA “conveyancer” means a conveyancer as defined in the Deeds Registries Act.

⁷⁵³ In terms of sec. 6 (2) of the Botswana STA and sec. 4 (3) of the SA STA.

⁷⁵⁴ In terms of sec. 11 of the Botswana STA and sec. 10 of the SA STA.

⁷⁵⁵ Sec. 16 of the Botswana STA and sec. 15 of the SA STA.

⁷⁵⁶ Sec. 17 (1) of the Botswana STA and sec. 15A of the SA STA.

⁷⁵⁷ Sec. 12 of the Botswana STA and sec. 11 of the SA STA.

⁷⁵⁸ Sec. 12 (3) (b) of the Botswana STA and sec. 11 (3) (b) of the SA STA.

⁷⁵⁹ Sec. 12 (3) (e) of the Botswana STA and sec. 11 (3) (e) of the SA STA.

documents⁷⁶⁰ accompany the application to the Registrar for the application for the registration of the sectional title plan and opening of the sectional title register.

After registration of a sectional plan and opening of the sectional title register, the Registrar must not register transfer of a unit or of an undivided share therein unless the conveyancer has certified certain facts. Hence the Registrar must be furnished with a conveyancer's certificate that as at date of registration;⁷⁶¹ if a body corporate is deemed to be established,⁷⁶² that the body corporate has certified that all money due to the body corporate by the transferor in respect of the said unit has been paid, or that provision has been made to the satisfaction of the body corporate for the payment of such money. If a body corporate is not deemed to be established, the conveyancer must certify that no money is payable. He or she must also certify that no real right of extension of a scheme⁷⁶³ is registered in favour of a developer or the body corporate or, if such right is so registered, that it is disclosed in the deed of sale to the transferee⁷⁶⁴ or, if it is not so disclosed, that the transferee after the conclusion of the deed of sale has in writing exercised his or her option in terms of section 27 (17) of the Botswana Act or section 25 (15) of the South African Act. A conveyancer may also hold funds of purchasers of units in a trust account until the units are transferred to the purchasers.

5 6 Registrar of Deeds

Once the application for registration of a sectional plan and opening of a sectional title register has been lodged with the Deeds Registry, the Registrar must examine all the documents lodged to establish whether the provisions of the Sectional Titles Acts and any other law have been complied with.⁷⁶⁵ The Registrar must be satisfied that the development envisaged fall within the scope of the Acts. In terms of both the Botswana

⁷⁶⁰ See sec. 12 (3) of the Botswana STA and sec. 11 (3) of the SA STA for a list of all other documents that must accompany the application to the Registrar for the registration of the sectional plan and opening of the sectional title registrar.

⁷⁶¹ Sec. 18 (3) (a) of the Botswana STA and sec. 15B (3) (a) of the SA STA.

⁷⁶² In terms of sec. 39 (1) of the Botswana STA and sec. 36 (1) of the SA STA.

⁷⁶³ As contemplated in sec. 27 of the Botswana STA and sec. 25 of the SA STA.

⁷⁶⁴ As contemplated in sec. 27 (16) of the Botswana STA and sec. 25 (14) of the SA STA.

⁷⁶⁵ Sec. 13 (1) of the Botswana STA and sec. 12 (1) of the SA STA.

and South African statutes, once the draft sectional plan is drawn, it is submitted for approval to the Director or Surveyor-General.⁷⁶⁶ Since draft sectional plans are scrutinised by the Director or Surveyor-General, it is impossible for the Registrar to reject a plan on the ground that it is incorrectly prepared, or that it contains insufficient or too much information. He may refuse to register a sectional plan, if in his or her opinion the plan is dilapidated⁷⁶⁷ or on the ground that the conditions contained in the schedule filed in the main file or the certificates of real right which were drawn up, contain irregularities.⁷⁶⁸

If the Registrar is satisfied that the requirements of the Sectional Titles Acts and any other law have been complied with, he or she must⁷⁶⁹ register the sectional plan and allot to it a distinctive number.⁷⁷⁰ The Registrar must open a sectional title register in respect of the land and building(s) thereon in the manner prescribed.⁷⁷¹ The Registrar must also

⁷⁶⁶ Sec. 9 (1) of the Botswana STA and sec. 7 (1) of the SA STA.

⁷⁶⁷ Reg. 10 (3) of the Botswana STA and reg. 12 (3) of the SA STA.

⁷⁶⁸ Van der Merwe *Sectional Titles* ch 6-23.

⁷⁶⁹ Sec. 13 and reg. 10-12 of the Botswana STA and sec. 12 and reg. 12-14 of the SA STA.

⁷⁷⁰ Sec. 13 (1) (a) of the Botswana STA and sec. 12 (1) (a) of the SA STA. According to reg. 10 (1) of the Botswana STA and reg. 12 (1) of the SA STA, the number should be a consecutive number, starting each year with the figure "1", to be followed by an oblique line and the year in which the sectional plan is registered, for example No ST 1/2003.

⁷⁷¹ Sec 13 (1) (b) and reg. 11 of the Botswana STA and sec. 12 (1) (b) and reg. 13 of the SA STA. The sectional title register shall be opened by means of a sectional title file as set out in the form of Form D in the schedule in Botswana (reg. 11 (1)) and in Form D in Annexure 1 (reg. 13 (1)). Form D in the schedule of the Botswana STA however is a certificate of registered sectional title issued under sec. 12 (3) (f) of the STA, and not the sectional title register envisaged under sec. 13 (1) (b) of the Act. The error needs to be corrected. In South Africa, this form was simplified by GN R2653 of 1991 to include only the number and year of the sectional title file, the name of the scheme and the place where the building is situated. In terms of reg. 11 (4) of the Botswana STA and reg. 13 (2), the file number allotted to the sectional title file must also be allotted to the sectional plan. Documents that must be filed in the sectional title file are listed in reg. 11 (2) of the Botswana STA and reg. 13 (4) of the SA STA, namely; all the documents which must accompany an application in terms of sec. 12 (3) of the Botswana STA and sec. 11 (3) of the SA STA for the opening of a sectional title register, with the exception of the certificates of registered sectional title, the owner's copy of the title deed of the land and the bond. This means that the following documents must be filed: two copies of the sectional plan; a schedule setting out the servitudes and conditions burdening or benefiting the land; the certificate stating which rules are applicable. In addition the copy of any notice to the Director or Surveyor-General and the local authority concerned of the registration or cancellation of the registration of a sectional plan or the reversion of land to the land register as well as correspondence with regard to the scheme concerned as a whole. (reg. 11 (2) (b) and (c) of the Botswana STA and reg. 13 (4) (b) and (c) of the SA STA). Where a procedure is followed in the Deeds Registry, of reproducing documents and of keeping such reproductions instead of the original of such documents and maintains a register by means of a computer (See 13 (1) (c) of the Botswana STA and sec. 12 (1) (c) of the SA STA), the sectional title file may be substituted by such reproductions and register. The sectional title file may however be maintained for such other documents as the Registrar may determine (reg. 11 (2) (3) of the Botswana STA and reg. 13 (6) of the SA STA. See also CRC 6 of 1988 par 5.

keep by means of a computer or in any other manner such registers containing such particulars as are necessary for the purpose of carrying out the provisions of the Acts or any other law and of maintaining an efficient system of registration calculated to afford security of title and ready reference to any registered deed.⁷⁷² Simultaneously with the opening of the sectional title register, the Registrar must issue to the developer a certificate of registered sectional title in respect of each section and its undivided share in the common property, subject to any mortgage bond registered against the title deed of the land.⁷⁷³ He or she must also issue to the developer a certificate of real right with regard to any reservation made to develop the scheme in phases,⁷⁷⁴ subject to any mortgage bond registered against the title deed of the land. The Registrar must also issue to the developer a certificate of real right in respect of a right of exclusive use,⁷⁷⁵ subject to any mortgage bond registered against the title deed of the land; make the necessary endorsements on the title deed, any mortgage bond or other document, or in his or her records;⁷⁷⁶ and notify the Director or Surveyor-General of the registration of the sectional plan.⁷⁷⁷ In terms of the South African Act, the Registrar must also notify the local authority and furnish it with a copy thereof.⁷⁷⁸ It is important that the local authority be notified and furnished with a copy of a sectional plan so that the local authority has the same records with regard to the registered sectional plan as the Deeds Registry and the architect or land surveyor. It is also necessary that the local authority has information on a registered sectional plan, as it approves building plans in respect of sectional title schemes. An amendment to the Botswana Act in this regard is necessary as it would also

⁷⁷² Sec. 13 (1) (c) of the Botswana STA and sec. 12 (1) (c) of the SA STA. In terms of sec. 5 (1) of the Botswana STA and sec. 3 (1) of the SA STA, the provisions of the Deeds Registries Acts (Botswana Act No 36 of 1960 and SA Act No 47 of 1937) are applicable to all documents registered or filed in the Deeds Registry. According to sec. 5 (2) of the Botswana STA and sec. 3 (2) of the SA STA, any such document may (for example, a sectional plan) may be reproduced by means of microfilming or any other process which accurately and durably reproduces the document. The reproduced document may then be preserved by the Registrar instead of the original document. In terms of sec. 5 (3) of the Botswana STA and sec. 3 (3) of the SA STA, this reproduction is deemed to be the original document and a copy obtained by means of such reproduction, certified by the Registrar as a true copy of such reproduction has all the effects of the original document and shall be admissible in court.

⁷⁷³ Sec. 13 (1) (d) of the Botswana STA and sec. 12 (1) (d) of the SA STA. See reg. 9 (1) and Form D in the schedule of the Botswana STA and reg. 11 (1) and Form C in Annexure 1 of the SA STA for more details.

⁷⁷⁴ In terms of sec. 27 (1) of the Botswana STA and sec. 25 (1) of the SA STA.

⁷⁷⁵ Referred to in sec. 29 (1) of the Botswana STA and sec. 27 (1) of the SA STA.

⁷⁷⁶ Sec. 13 (1) (g) of the Botswana STA and sec. 12 (1) (g) of the SA STA.

⁷⁷⁷ Sec. 13 (2) of the Botswana STA and sec. 12 (2) of the SA STA.

⁷⁷⁸ Sec. 12 (2) of the SA STA.

be consistent with other provisions of the Act.⁷⁷⁹ Once registered, the sectional plan and all the other documents with regard to the scheme are open for inspection by the general public.

5 7 Summary of findings

From the foregoing discussion, it is clear that the roles of the abovementioned parties involved in the establishment of a sectional title scheme are similar, in both Botswana and South Africa, except that the roles of the local authority in Botswana do not include condonation of building irregularities and infringements.

⁷⁷⁹ Example, in terms of reg. 13 (2) of the Botswana STA a substituted sectional plan must be forwarded to the local authority.

CHAPTER SIX

THE EFFECT OF REGISTRATION OF A SECTIONAL PLAN AND OPENING OF A SECTIONAL TITLE REGISTER

6 1 Introduction

This chapter summarises the conclusions drawn from the foregoing discussion. The results of the analysis of the requirements for establishment of a sectional title scheme, and the procedures involved are discussed, as are the roles of the parties involved. It then juxtaposes sectional title with traditional title, focusing particularly on the effect of registration of the sectional plan, and opening of the sectional title register.

6 2 New requirements and procedures

It is clear from the foregoing discussion that the sectional titles legislation of both Botswana and South Africa has introduced many new concepts into the law of things, and brought some innovations to the systems of land registration of both jurisdictions.⁷⁸⁰ It is also clear that the South African sectional titles legislation can aid the interpretation and application of the sectional titles legislation of Botswana, specifically pertaining to aspects of establishment of schemes. The following paragraphs provide an overview on the results of an analysis with regard to aspects of establishment of a sectional title scheme for both countries. An analysis of the requirement and procedures for establishment of a sectional title scheme for the two countries show some similarities, as well as differences in the requirements and procedures for establishment of a sectional title scheme.

⁷⁸⁰ See ch 2 par 2 2-2 3.

6 2 1 Role of the local authority

In terms of the South African Act, if during the process of establishment of a sectional title scheme certain irregularities come to light, the developer can approach the local authority for condonation of such irregularities.⁷⁸¹ It is suggested that the Botswana Act be amended to allow for condonation by the local authority, especially where compliance would be costly or even impossible. This would render the Botswana Sectional Titles Act more flexible, and would open up possibilities for further development to achieve greater access to land.

6 2 2 Land to be developed

Only land, which is registered in the name of the developer, can be developed under sectional title in both jurisdictions. Such land must be situated within the area of jurisdiction of a local authority in both jurisdictions.⁷⁸² Unlike the Botswana Act, the South African Act defines a local authority. It is recommended that the Botswana Act be amended to insert a definition of local authority. An insertion of such a definition would make clearer the areas over which a development of sectional title schemes can be carried out. It is anticipated that it would also clarify doubtful issues, such as whether a local authority includes an authority exercising jurisdiction over tribal land.

6 2 3 More than one building

According to the two statutes, a scheme may be composed of more than one building. In terms of the South African Act, where a scheme comprises more than one building, any such building may be divided into a single section and common property.⁷⁸³ The Botswana Act does not have such a provision. An amendment is recommended for the

⁷⁸¹ See ch 3 par 3 1.

⁷⁸² See ch 3 par 3 2 2 1.

⁷⁸³ See ch 3 par 3 2 2 2.

Botswana Act to allow that a building may be divided into a single section and common property, where the scheme comprises more than one building. Such an amendment would give developers freedom to be innovative in designing sectional title schemes. If the Botswana Act could allow for a building to be divided into a single section and common property, it would mean that a scheme may be composed of free-standing houses. The Botswana Sectional Titles Act would be even more flexible, and sectional title schemes would be more attractive to both developers and potential purchasers. Flexibility would encourage developers to establish more sectional title schemes, and as more people buy sectional units, greater access to land would be achieved.

6 2 4 Contiguous or non-contiguous pieces of land

The Botswana and South African Acts have a similar provision, whereby a scheme may relate to more than one piece of land, whether contiguous or non-contiguous.⁷⁸⁴ In terms of the Botswana Act, sectionalised buildings must be situated on two or more contiguous pieces of land, which have been consolidated, whereas in terms of the South African statute, such pieces of land must be notarially tied.⁷⁸⁵ To give effect to the Botswana provision that a scheme may relate to two or more non-contiguous pieces of land, an amendment is recommended for the Botswana statute, to have a provision allowing for a notarial tie agreement.⁷⁸⁶ The amendment is vital as, in terms of the Botswana Deeds Registry Act, the pieces of land being consolidated must be contiguous.⁷⁸⁷ Such an amendment would render the Botswana Act even more flexible, and encourage establishment of sectional title schemes on two or more pieces of land. As a result, possible benefits of sectional ownership, namely, provision of accommodation, efficient construction and utilisation of land, as well as home ownership would be achieved, as more people buy apartments in such schemes

⁷⁸⁴ See ch 3 par 3 2 2 1.

⁷⁸⁵ See ch 3 par 3 2 2 1.

⁷⁸⁶ See ch 3 n 86 for a definition of a notarial tie agreement.

⁷⁸⁷ Sec. 38 (1).

6 2 5 Notarial tie agreement

The South African Act, on the other hand, does not provide for cases where the properties subject to a notarial tie agreement are not all bonded, or where such properties are bonded to different mortgagees.⁷⁸⁸ A provision in the South African Act to clarify how conversion of a bond should be undertaken, if the pieces of land are subject to a notarial tie agreement is recommended, as no such provision appears either in the the South African Deeds Registries Act or Sectional Titles Act. Such an amendment would be a welcome development in the South African sectional titles legislation, from which Botswana could learn, if a provision for a notarial tie agreement is to be introduced in the Botswana Act. Such a provision would also increase flexibility of the South African Act.

6 2 6 Exclusive use areas

In terms of both the Botswana and South African statutes there are differences between genuine and non-genuine exclusive use areas.⁷⁸⁹ There are differences in technical requirements as far as establishment is concerned: genuine exclusive use areas must be depicted on a survey diagram while non-genuine exclusive use areas must only be shown on a lay-out plan. Genuine exclusive use areas must be delineated on a sectional plan, whereas non-genuine exclusive use areas must be incorporated in the rules of the scheme. Unlike rights to non-genuine exclusive use areas, the rights to genuine exclusive use areas are real rights, which are enforceable against the world at large. On the other hand, the rights to non-genuine exclusive use areas are personal rights, which are enforceable only against sectional owners and the body corporate. In both countries, genuine exclusive use areas are transferred by means of a notarial deed of cession, while non-genuine exclusive use areas are transferred by means of a bilateral cession.

⁷⁸⁸ See ch 3 par 3 2 2 1 for a detailed discussion on the procedures and requirements, which must be complied with, if a sectional title scheme is established over one or more properties subject to a consolidation.

⁷⁸⁹ See ch 3 par 3 2 5.

The South African legislation requires the holder of an exclusive use right to make additional contribution to the administrative fund, whereas the Botswana legislation does not.⁷⁹⁰ It is necessary for the Botswana Act to include a provision requiring the holder of an exclusive use right to make additional contribution to the administrative fund so as to defray the costs of rates, taxes, insurance and maintenance in respect of such an area or areas.

6 2 7 Typographical errors and omissions

An analysis of the Botswana Act, pertaining to aspects of establishment of a sectional title scheme, has also revealed some typographical errors or omissions on the part of draftspeople. For example, the Botswana Act provides that, a building comprised in a scheme and the land on which the building is situated may be divided into sections and common property in accordance with the provisions of the Act.⁷⁹¹ This provision refers to a building, whereas more than one building may be comprised in a scheme. Most if not all premises in Botswana which may be subject to the Sectional Titles Act, have more than one building, hence it is logical for the provision to include more than one building. An amendment to this effect would render the Botswana Act even more flexible, and would open up possibilities for further development to achieve greater access to land, as well as efficient construction and utilization of land. For the same reasons mentioned above, the definition of a development scheme⁷⁹² in terms of the Botswana Act should also include more than one building. Such an amendment would further render the Botswana Act to be even more practical and realistic.

⁷⁹⁰ See ch 3 par 3 2 5.

⁷⁹¹ See ch 3 par 3 2 2 2.

⁷⁹² See ch 3 par 3 2 2 3.

6 2 8 Sectional title rules

In terms of both the Botswana and South African Acts, the developer can determine the rules applicable to a particular scheme by adding his or her own rules to those prescribed by the Acts.⁷⁹³ Although the Botswana Act gives the Minister of Lands power to make standard rules, such rules have not been made yet, even though the Act has commenced.⁷⁹⁴ It is recommended that the rules be prescribed urgently, as they are vital to an establishment of a sectional title scheme. Such rules must accompany the submission for registration of the sectional plan and opening of a sectional title register.⁷⁹⁵ It is also crucial that they be made before any attempt to establish a scheme, in that they relate to the control, management, administration, use and enjoyment of the sections and the common property of a scheme. Promulgation of such rules should provide purchasers with information with regard to the control, management, administration, use and enjoyment of the sections and common property of a scheme they intend buying into. Such information should encourage people to decide whether to buy or not buy units in a sectional title scheme. If more people buy, greater access to land would be achieved, and they would be protected against inflation, commonly experienced in rental buildings.

In terms of the South African Act, rules may be altered to the extent prescribed by regulation whereas, the Botswana statute does not state the extent to which management rules may be altered.⁷⁹⁶ It is imperative for the Botswana Act to have a provision restricting the alteration of management rules as some management rules may form the backbone of a sound management structure. The scheme must be properly managed in such a way that the interests of both financial institutions and potential purchasers are protected, as failure to do so may adversely affect the marketability of the scheme.

Unlike the Botswana Act, the South African Act provides for the alteration of management rules by the body corporate only after the transfer of at least 50 per cent of

⁷⁹³ See ch 3 par 3 2 3.

⁷⁹⁴ See ch 3 par 3 2 3.

⁷⁹⁵ See ch 3 par 3 2 3.

⁷⁹⁶ See ch 3 par 3 2 3.

the units in the scheme to persons other than the developer.⁷⁹⁷ It is imperative for the Botswana Act to have a provision to determine when management rules may be altered by unanimous resolution of the association, as it would guard against a few sectional owners making resolutions amending or substituting management rules, which may have adverse effects for the scheme.

Unlike the Botswana statute, the South African statute imposes an obligation on the body corporate to make the rules available for inspection to any owner or person having a registered real right in or over a unit. The imposition of an obligation on the association to make the rules available for inspection by any owner or person with a registered real right in or over a unit is important for the Botswana statute, as potential owners or owners of sections need to be familiar with the rules applicable to that particular scheme. Availability of the rules for inspection by potential purchasers will enable them to make an informed decision on whether to buy or not buy units in a particular scheme. Financial institutions on the other hand would know if their interests are protected. If both financial institutions and potential purchasers' interests are protected, financial assistance would be readily available, hence more apartments would be bought, and home ownership and access to land would be achieved.

6 2 9 Sectional titles regulation board

In terms of the Botswana Act, regulations may be made providing for the appointment of a Sectional Titles Regulation Board⁷⁹⁸ whereas, in South Africa the Sectional Titles Regulation Board has been established by a provision in the Sectional Titles Act.⁷⁹⁹ Since the regulations to the Botswana Act do not provide for the appointment of such a Board, it is necessary that such a Board be appointed as provided for under the Act. Its appointment is vital for the efficient implementation of the provisions of the Act, and it would also play a very important role in the prescription of management and conduct

⁷⁹⁷ See ch 3 par 3 2 3.

⁷⁹⁸ See ch 3 par 3 2 3.

⁷⁹⁹ See ch 3 par 3 2 3.

rules, which shall relate to the control, management, administration, use and enjoyment of the sections and the common property of a scheme.

6 2 10 Draft sectional plan

In terms of the South African statute, prior to the approval by the Surveyor-General, a sectional plan is referred to as a draft sectional plan.⁸⁰⁰ The Botswana statute refers to a sectional plan as a sectional plan prior to and after approval. To eliminate confusion, a recommendation is made for the amendment of the Botswana statute to include a definition of a “draft sectional plan,” referring to the plan before approval by the Director. Such an amendment could assist in distinguishing between a sectional plan before and after approval. It would also render the Botswana Act to be more practical and realistic.

6 2 11 Prescribed examination

Unlike the Botswana Act, the South African statute requires an architect or land surveyor to sit for a prescribed examination on the preparation of draft sectional plans. The land surveyor or architect concerned must have passed the examination in order to be capable of drafting sectional plans to be accepted by the Chief Surveyor-General.⁸⁰¹ An amendment of the Botswana statute to require an architect or land surveyor sit for and pass a prescribed examination on the preparation of draft sectional plans is recommended, as it would guard against uncertainty and confusion that may result in sectional plans being drawn up inaccurately due to inexperience and lack of skill in the preparation of such plans. It would also enhance accuracy in the drafting of sectional plans. This would result in the issuance of accurate sectional title deeds by the Registrar of Deeds. Certainty and accuracy of such plans and sectional title deeds are vital to the development of secure land tenure.

⁸⁰⁰ See ch 3 par 3 2 6 1.

⁸⁰¹ See ch 3 par 3 2 6 4.

6 2 12 Residential building occupied by tenants

In terms of both the Botswana and South African statutes, if an existing building which is to be converted into a sectional title scheme is a residential building occupied by tenants, the developer, after having caused a sectional plan to be drafted by the land surveyor or architect, must notify all tenants about his or her intention to convert the building into a sectional title scheme, before submitting the sectional plan to the Director or Surveyor-General.⁸⁰² It is clear from both statutes that the developer must notify every tenant in writing by a letter delivered either personally or by registered post of a meeting of all tenants to be held at a specified date at least 14 days after the delivery of the letter. The South African statute provides expressly that the developer must, together with the notice also furnish the tenants with a certificate containing the full particulars concerning the proposed scheme.⁸⁰³ In terms of the Botswana statute, tenants are furnished with full particulars of the proposed scheme by the developer or his or her agent at the meeting.⁸⁰⁴ It is recommended that the Botswana statute include a provision for the developer to furnish tenants with a certificate containing the prescribed particulars concerning the proposed scheme, together with the notice. The provision of tenants with such a certificate would enable tenants to have full particulars of the proposed scheme prior to the meeting. If tenants are provided with such information before the meeting, they can have even more time to acquaint themselves with details of the proposed scheme, and have ample time to consider whether or not to buy units in the scheme. These measures would fulfil an important consumer protection function.

6 2 13 Co-tenants of a unit

Both the Botswana and South African Statutes do not have an express provision whereby co-tenants of a unit are entitled to a right of pre-emption.⁸⁰⁵ If a unit is occupied by two

⁸⁰² See ch 4 par 4 2 1.

⁸⁰³ See ch 4 par 4 2 1.

⁸⁰⁴ See ch 4 par 4 2 1.

⁸⁰⁵ See ch 4 par 4 2 2.

tenants in a building over which a sectional title scheme is proposed, the right of pre-emption should be enjoyed by each of them in proportion to their undivided share in the unit. Such a provision in both the Botswana and South African Acts would enhance flexibility and practicability in the two Acts. If a right of pre-emption is enjoyed by two tenants, such tenants can jointly purchase the unit; and home ownership, access to land and protection of tenants against inflation would be achieved. Where one of the co-tenants decides not to buy, the remaining co-tenant would have a right of pre-emption to the other tenant's proportionate share as well.

6 2 14 Submission of draft sectional plan for approval

In terms of both statutes, the architect or land surveyor on behalf of the developer must submit the (draft) sectional plan for approval to the Director or Surveyor-General.⁸⁰⁶ The Botswana statute prescribes a form for the submission of a sectional plan for approval whereas in South Africa an application can take any form as the prescribed form has been deleted by an amendment of the regulations in 2000. The amendment of the Regulations of the South African Sectional Titles Act in 2000 has to a large extent simplified the documents, which must accompany submission of the draft sectional plan.

6 2 15 Application for registration of a sectional plan

The South African statute specifies that after approval of the sectional plan by the Surveyor-General, the developer must apply for registration of a sectional plan and opening of a sectional title register to the Registrar in charge of the Deeds Registry in which the land comprised in the scheme is registered, whereas in terms of the Botswana Act, the application must simply be made to the Registrar. An amendment to provide specifically that an application be made to the Registrar in charge of the Deeds Registry in which the land is situated is recommended. It is necessary for the Act to expressly state

⁸⁰⁶ See ch 3 par 3 2 6 4.

that the application must be made to the Registrar in charge of the Deeds Registry where the land comprised in the scheme is registered, since there are currently two Deeds Registries in the country, serving different areas.

6 2 16 Alteration, amendment, substitution and cancellation of a registered sectional plan

According to the Botswana statute, the Director shall advise the Registrar of any alteration, amendment or substitution of a sectional plan, which affects the description, or extent of any section. In terms of the South African statute, the Surveyor-General advises the Registrar and the local authority as well. An amendment of the Botswana statute to include a provision notifying also the local authority of the alteration, amendment or substitution of a sectional plan is recommended. It is necessary for the local authority to be notified, as it is the approving authority for building plans with respect to all buildings, including sectional title buildings. The local authority should also be informed of what is going on with established sectional title schemes, as the authority responsible for the issuance of rates clearance certificates. In terms of the regulations to the Botswana Act, the Registrar must forward a copy of such substituted plan to the local authority.⁸⁰⁷ Such an amendment would also be inconsistent with other provisions in the Act and regulations.⁸⁰⁸

In terms of the Botswana Act, the Registrar must notify the Director that the sectional title register has been closed, whereupon the Director shall cancel the original sectional plan and the Deeds Registry copy. According to the South African Act, the Registrar must notify the Surveyor-General as well as the local authority. An amendment of the Botswana statute to include a provision notifying the local authority of the closure of the sectional title register is recommended, as the local authority should be informed of what

⁸⁰⁷ See ch 4 par 4 6 1.

⁸⁰⁸ See ch 4 par 4 6 1. Further, in terms of section 25 (3) a local authority must be furnished with a copy of a sectional plan of consolidation.

is going on with respect to established sectional title schemes. The amendment would also be in consistent with other provisions of the Act and its regulations.⁸⁰⁹

6 2 17 Extension of a section

In terms the Botswana sectional titles legislation, an owner of a section may with the authority of a unanimous resolution⁸¹⁰ of an association extend the boundaries of his or her section,⁸¹¹ whereas the South African legislation requires only a special legislation⁸¹² of the body corporate.⁸¹³ It is understandable for the Botswana legislation to require the section owner to obtain authority of a unanimous resolution as the extension affects the proprietary rights of all other owners, particularly where the extension involves the incorporation into that section of an area of common property. The extension of any section in a scheme affects the participation quotas allocated to all sections. It is thus logical that all owners must know and consent to any such changes, more so that the participation quota of the extended section increases.⁸¹⁴

6 3 New kind of ownership

A sectional title register is in many respects like a township register. Real rights, interdicts, insolvencies, caveats are noted against individual units, and they are varied and cancelled in a similar manner. Sectional title registration is thus an extension of the traditional system of land registration in Botswana and South Africa, and it provides security of title to sectional owners.

⁸⁰⁹ See ch 4 par 4 6 1 and 4 6 2.

⁸¹⁰ See definition of unanimous resolution in sec. 2(1) of the Botswana STA and sec. 1 (1) of the SA STA.

⁸¹¹ Sec. 26 (1) of the Botswana STA.

⁸¹² See definition of special resolution in sec. 2 (1) of the Botswana STA and sec. 1 (1) of the SA STA.

⁸¹³ Sec. 24 (3) of the SA STA. Before the STA Act 44 of 1997 a unanimous resolution was required in terms of the deleted sec. 24 (1). SAPOA *Memorandum* (1991) par 9 recommended that consent of all sectional bondholders should not be necessary if a sectional owner wants to extend his section.

⁸¹⁴ See Paddock *The Sectional Title Handbook* 67 for the effects of the participation quota.

There has not been any obvious unfavourable effect on security of title as was initially feared in South Africa.⁸¹⁵ It was initially feared that the registration of a sectional plan would amount to placing land into cold storage and to replace ownership of the land with ownership of sections.⁸¹⁶ Such an idea is unjustified if it implies that no transactions will be entered into with regard to the land until its reversion to the land register.⁸¹⁷ The land becomes an integral portion of each unit to be used, enjoyed and dealt with by all members of the sectional title community. Owners of sections thus own the common property jointly in undivided shares proportionate to the quotas of their respective sections as specified in the sectional plan.⁸¹⁸

In terms of both the Botswana and South African sectional titles legislation, once the sectional plan has been registered, and the sectional title register opened, the building(s) and the land shown on the sectional plan become subject to the provisions of the Sectional Titles Acts.⁸¹⁹ The effect of registration of the sectional plan and opening of the sectional title register is that the building(s) and the land are deemed to be divided into sections and common property as shown in the sectional plan.⁸²⁰ Registration of the sectional plan and opening of the sectional title register has the effect of drawing the land from the ordinary land register and converting it to sectional title.⁸²¹ Specific portions of the building(s) and common property may be dealt with separately in so far as transfer to other persons or hypothecation is concerned, since such portions have become independent legal entities. Registration⁸²² of transfers, mortgage bonds or leases of these units may be effected as in the case of land, even though the registration procedures are somewhat different. The developer owns all the individual units, as he or she is no longer the owner of one entity, being the land with the buildings on it.

Upon the registration of the sectional plan, the sectional plan together with the schedule of servitudes and conditions⁸²³ are deemed to be part of the sectional title deed.⁸²⁴ An

⁸¹⁵ Van der Merwe *Sectional Titles* ch 6-26.

⁸¹⁶ De Wet & Tathan 1972 *De Rebus* 205.

⁸¹⁷ Van der Merwe *Sectional Titles* ch 6-26.

⁸¹⁸ Sec 19 of the Botswana STA and sec. 17 of the SA STA.

⁸¹⁹ Sec. 14 (1) of the Botswana STA and sec. 13 (1) of the SA STA.

⁸²⁰ Sec. 14 (1) of the Botswana STA and sec. 13 (1) of the SA STA.

⁸²¹ See Pienaar 1990 TSAR 33; *Botes v Toti Development Co (Pty) Ltd 1978 (1) SA 205 (T) 208F-G*.

⁸²² Sec. 18 of the Botswana STA and sec. 15B of the SA STA.

⁸²³ See sec. 12 (3) (b) of the Botswana STA and sec. 11 (3) (b) of the SA STA.

owner's title to the section and the undivided share in the common property shall be subject to or shall be benefited by the servitudes, other real rights or conditions, if any, which burden or benefit the land shown on the sectional plan, and shall also be subject to any registrable condition imposed by the developer.⁸²⁵ Once the sectional plan has been registered, any mortgage bond, lease, other real right or condition then registered against or affecting the land shown on the sectional plan, shall be deemed to be converted into a bond, lease, other real right or condition registered against or affecting the sections and common property shown on the sectional plan.⁸²⁶

The opening of the sectional title register further renders it possible for two or more persons to own a unit jointly.⁸²⁷ Also, it will be impossible for the two components of a unit, being the section and its undivided share in the common property to be dealt with separately, after the opening of the sectional title register.⁸²⁸ The developer remains the owner of any section which has not been sold or transferred to any other person,⁸²⁹ but ceases to have any share in the common property once he or she has transferred all the sections.⁸³⁰ The developer can choose to sell some units or let others;⁸³¹ and each section shall benefit and be subject to an implied servitude of lateral and subjacent support deemed to be included in the sectional title deed.⁸³²

A purchaser of a section on transfer acquires the right of ownership in the section and co-ownership in the common parts of the building and land comprised in the scheme.⁸³³ Such a right is a real right in the section and over the undivided share of the common property. This means that the owners of individual sections are joint owners of the common property in undivided shares proportionate to the participation quota of each

⁸²⁴ Sec. 14 (2) of the Botswana STA and sec. 13 (2) of the SA STA.

⁸²⁵ For conditions imposed by the developer see sec. 12 (2) of the Botswana STA and sec. 13 (2) of the SA STA.

⁸²⁶ Sec. 14 (3) of the Botswana STA and sc. 13 (3) of the SA STA.

⁸²⁷ Sec. 18 (4) of the Botswana STA and sec. 15B (4) of the SA STA.

⁸²⁸ Sec. 19 (3) of the Botswana STA and sec. 16 (3) of the SA STA.

⁸²⁹ Sec. 37 (1) of the Botswana STA and sec. 34 (1) of the SA STA.

⁸³⁰ Sec. 37 (2) of the Botswana STA and sec. 34 (2) of the SA STA.

⁸³¹ Sec. 36 of the Botswana STA and sec. 33 of the SA STA.

⁸³² Sec. 31 (1) (a) and sec. 31 (2) (a) of the Botswana STA and sec. 28 (1) (a) and sec. 28 (2) (a) of the SA STA.

⁸³³ See ch 2 par 2 4.

section. An owner of a unit can dispose of his or her right of ownership to another person in the same manner as an owner of any immovable property can.

Upon the sale of the first unit in the scheme, an association is deemed to be formed and any person who subsequently buys a section in the scheme becomes a member of the association.⁸³⁴ The association is a juristic person and is responsible for the enforcement of the rules⁸³⁵ and for the control, administration and management of the common property for the benefit of all sectional owners.⁸³⁶

6 4 Security of title

From the foregoing discussion, it is clear that the registration of the sectional plan and opening of the sectional title register has the effect of drawing the land from the land register and converting it to sectional title.⁸³⁷ Entries regarding the land subject to a sectional title scheme must be closed in the land register, as the land and buildings has been converted to sections and common property. Sections are shown on a sectional plan prepared by a land surveyor or architect or both, while subdivision of land is shown on a general plan of subdivision. Sectional owners are issued with sectional title deeds, as opposed to title deeds provided for in the Deeds Registries.⁸³⁸

Separate ownership of the unit, comprising its section and the undivided share in the common property, can be acquired.⁸³⁹ When a person purchases an apartment in a sectional title scheme, he or she becomes an owner of the apartment, joint owner of the common property and member of the body corporate.⁸⁴⁰ These elements are inextricably linked, and they cannot be alienated separately. Certain restrictions are imposed on apartment ownership by common law and the Sectional Titles Acts.⁸⁴¹ Sectional ownership, therefore, is to some extent burdened by the provisions of the Sectional Titles

⁸³⁴ See ch 2 par 2 4.

⁸³⁵ Referred to in sec. 38 of the Botswana STA and sec. 35 of the SA STA.

⁸³⁶ Sec. 39 (3) of the Botswana STA and sec. 35 (2) of the SA STA.

⁸³⁷ See ch 2 par 2 3.

⁸³⁸ See ch 2 par 2 4.

⁸³⁹ See ch 2 par 2 4.

⁸⁴⁰ See ch 2 par 2 4.

⁸⁴¹ See ch 2 par 2 4.

Acts, the rules and the resolutions of the body corporate, and several other obligations not known to conventional owners.⁸⁴² The extraordinary features of apartment ownership,⁸⁴³ however, justify stricter limitations and restrictions on the powers and entitlements of a sectional owner with regard to his or her unit. Such limitations and restrictions are of a different kind than those imposed on the ownership of land. Apartment ownership, therefore, is a special type of ownership, coloured by the characteristic features of the institution, and it thus remains genuine ownership, which should be placed on the same footing as landownership.⁸⁴⁴

Apartment ownership rights are real rights, and are registrable in a deeds registry.⁸⁴⁵ Registration of units completes the principle of publicity, which is essential to the law of property. Registration provides holders of such rights with the necessary security, in that they can protect their rights against the public at large.⁸⁴⁶ It also ensures security of title and access to land and housing as envisaged by the South African Constitution, and the Botswana and South African Sectional Titles Acts.⁸⁴⁷

In conclusion, a deed of fixed period state grant in Botswana vests ownership of the property in the purchaser for a fixed period, which is renewable at expiry.⁸⁴⁸ Since ownership of such properties vests in the state, the holders of such rights are nothing more than lessees. The holders of such rights do not qualify as developers in terms of the Act, and cannot apply for registration of sectional title schemes over such properties.⁸⁴⁹

6 5 Concluding Remarks

It is clear that despite their similarities, a number of differences also exist between the Botswana and South African statutes. The numerous amendments to the South African Act, especially the 1997 amendment has assisted in speeding up the process of

⁸⁴² See ch 2 par 2 4.

⁸⁴³ See ch 2 par 2 4, for a discussion on the characteristic features of apartment ownership.

⁸⁴⁴ See ch 2 par 2 4.

⁸⁴⁵ See ch 2 par 2 4.

⁸⁴⁶ See ch 2 par 2 4.

⁸⁴⁷ See ch 2 par 2 4.

⁸⁴⁸ See ch 2 par 2 4.

⁸⁴⁹ See ch 2 par 2 4.

establishing a sectional title scheme. These amendments have assisted in removing costs of various processes, provisions, and requirements that did not add value. They have also assisted in simplifying processes and procedures of establishing a sectional title scheme, and in addressing lacunae in the law that became noticeable with the application of the Act. It is clear from the above discussion that the South African Sectional Act can assist in the interpretation and application of the Botswana Sectional Titles Act. There is still room for improvement for both Acts, especially the Botswana Act, as it has recently been enacted. The real practical problems for the Botswana Act will, however, become noticeable with the operation of the Act, and as the years go by.

It is not suggested, however that the Botswana Act should be completely similar to the South African Act. Although the Botswana Act is based on the South African Act, the legislature must take into account the special circumstances existing in Botswana, which do not exist in South Africa. This would render the Botswana Act even more flexible and practical. In taking into account such special circumstances, however, some oversights and lack of insight occurred, in the actual drafting of the Act. For example, the Botswana Act provides that a sectional title scheme can be established over two or more non-contiguous pieces of land.⁸⁵⁰ This is, however, not possible as such pieces of land must first be consolidated.⁸⁵¹ In terms of the Botswana Deeds Registry Act, the pieces of land to be consolidated must be contiguous.⁸⁵² Consolidation thus would not be possible over non-contiguous pieces of land. Effectively, it would not be possible to establish a sectional title scheme over such non-contiguous pieces of land, unless some mechanism is put in place to give effect to such a provision. Such mechanisms would include a provision in the Act allowing for a notarial tie agreement.

There are also noticeable typographical errors and omissions, with regard to the drafting of the Act. Some sections refer to a building in the scheme, when in fact, reference should be made to a building or buildings,⁸⁵³ as a scheme may be established over more than one building. Noticeable omissions also include exclusion of sections or regulations, which must have been included in the Act. Regulation 4 (2) (e) of the Botswana Act

⁸⁵⁰ See ch 3 par 3 2 2 1.

⁸⁵¹ See ch 3 par 3 2 2 1.

⁸⁵² See ch 3 par 3 2 2 1.

⁸⁵³ See ch 3 par 3 2 2 1.

refers to the provisions of regulation 4 (2) (b) (vi), which does not exist in the regulations to the Act.⁸⁵⁴ Regulation 11 (1) also refers to a wrong form; it refers to a sectional title file, as set out in the form of Form D in the schedule, when in fact, Form D relates to a certificate of registered sectional title issued under section 12 (3) (f) of the Act.

Noticeable inconsistencies with regard to establishment of a sectional title scheme relate to notification and forwarding of a sectional plan to a local authority. The Act and its regulations do not provide for the Registrar to notify the local authority of the registration of the sectional plan, and the furnishing of such a plan to the local authority. It only provides for the forwarding of a substituted plan,⁸⁵⁵ plan of subdivision,⁸⁵⁶ plan of consolidation⁸⁵⁷ and plan of extension of a sectional title scheme by addition of sections⁸⁵⁸ and land⁸⁵⁹ to the local authority.

It is not surprising that such errors and omissions have occurred since the draftspeople were drafting a new law, which will bring innovations and introduce many new concepts to the law of property.⁸⁶⁰ On the other hand the draftspeople had to accommodate and reconcile many conflicting interests and points of view. They have thus executed their most difficult assignment evidently with fairness, skill and knowledge. Hence, the merits of their work far prevail over its defects. Improvements to the Act will have to be made, some before its implementation, and some after a period of application of the Act, as real practical problems become evident.

⁸⁵⁴ See n 276

⁸⁵⁵ Reg. 13 (1) of the Botswana STA.

⁸⁵⁶ Sec. 24 (3) of the Botswana STA.

⁸⁵⁷ Sec. 25 (3) of the Botswana STA.

⁸⁵⁸ Sec. 27 (13) (c) of the Botswana STA.

⁸⁵⁹ Sec. 28 (4) of the Botswana STA.

⁸⁶⁰ See ch 2 par 2 2-2 4.

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