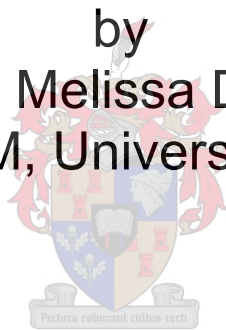


Comparative perspectives on
the role of the trustees
and the managing agent as
dramatis personae in the
governance of sectional title
schemes in South Africa

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DECLARATION

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ABSTRACT

Ownership of affordable housing is made possible through the concept of sectional title, which maximizes the number of available homes per square meter and makes optimum use of available land. The utilization of sectional title schemes to provide housing to a broader base of South Africans would only be successful if schemes are provided with an efficient management structure. Besides the general meeting, the two most important *dramatis personae* in the management of sectional title schemes are the trustees and the managing agent. This thesis will focus on the role played by these administrators in the governance of sectional title schemes.

The discussion will commence with an exposition of the legal status of both these role players followed by an examination of the reasons for their election and appointment to perform the day-to-day management functions of the body corporate. In order for these role players to carry out their functions effectively they need to be suitably qualified and should have the personal qualities required to execute the task. Furthermore, the role players should be properly elected or appointed to their positions by established administrative procedures. The powers, functions and duties of the trustees and the managing agent must be clearly defined with the minimum overlap between their tasks to ensure certainty, and to avoid a situation where a certain function is either not performed at all, or where a single function is performed by two or more of the role players. Due to the fact that these role players should be held accountable for abuses or negligence in the performance of their functions, the fiduciary position and instances of indemnification of trustees for negligent execution of their duties will then be dealt with. This will be followed by an examination of the remuneration payable to trustees and managing agents and their claims for expenses incurred in the performance of their functions. Finally, the terms of appointment of the managing agent will be scrutinized and the circumstances in which his appointment and the office of trustees may be terminated will be placed on the table.

The thesis will regularly identify particular deficiencies in the Sectional Titles Act 95 of 1986 and the prescribed management rules relating to trustees and managing agents. Where appropriate and practicable, reference will be made to the manner in which New South Wales, Singapore, Malaysia, China and Germany deal with particular shortcomings. The aim is to search for potentially more appropriate solutions to iron out such problems, and thereby to regulate the governance of sectional title schemes in South Africa more effectively.

Where a sectional title scheme faces financial ruin or experiences flagrant managerial mismanagement, the Sectional Titles Act provides for the appointment of an administrator. This measure of last resort should be avoided by ensuring that properly elected, qualified and accountable managerial role players administer the scheme. Therefore, I propose that the Sectional Titles Act 95 of 1986 (or rather the future Sectional Titles Schemes Management Act 8 of 2011) should be amended to make provision for the mandatory appointment of a professional manager as the sole executive organ of the body corporate assisted by an elected board of trustees consisting of sectional owners, and who act merely in a advisory capacity. The status of the managing agent would be elevated to that of an executive organ of the body corporate. This will mean greater responsibilities for the managing agent, but would result in more efficient management of South African sectional title schemes.

OPSOMMING

Die instelling van deeleiendom verwesenlik die droom van menige Suid-Afrikaners om eiendomsreg van n bekostigbare woning te verkry, aangesien dit meer wonings per vierkante meter deur die optimale benutting van grond verseker. Die gebruik van deeltitelskemas om behuising te voorsien aan 'n wyer spektrum van Suid-Afrikaners sal egter slegs met sukses bekroon word indien voorsiening gemaak word vir 'n doeltreffende bestuurs struktuur. Afgesien van die algemene vergadering, berus die bestuur van deeltitelskemas by twee belangrike rolspelers, naamlik die trustees en die bestuursagent. Hierdie tesis sal fokus op die rol wat hierdie twee *dramatis personae* speel in die administrasie van deeltitelskemas.

Die bespreking sal aanvang neem met 'n uiteensetting van die regs status van die twee rolspelers, gevolg deur 'n omvattende ondersoek van hoekom hulle verkies of aangestel word om die daaglikse bestuursfunksies van die regspersoon te verrig. Ten einde hulle funksies doeltreffend uit te voer, moet albei rolspelers oor toepaslike kwalifikasies en gepaste persoonlike eienskappe beskik vir die soort werk wat aan hulle toevertrou word. Verder moet trustees behoorlik verkies en bestuursagente behoorlik aangestel word ingevolge gevestigde administratiewe prosedures. Die magte, funksies en verpligtinge van elke rolspeler moet ook duidelik uiteengesit word ten einde te verhoed dat bepaalde funksies nie uitgevoer word nie, of dat die trustees en die bestuursagent koppe stamp oor die uitvoering van 'n bepaalde taak. Aangesien die rolspelers aanspreeklik gehou word vir enige misbruik van mag of nalatigheid in die uitvoering van hulle funksies, word die vertrouensverhouding tussen die rolspelers en deeleienaars bespreek, sowel as die vrywaring van trustees vir alle verliese wat in die verrigting van hul funksies sonder growwe nalatigheid aan hulle kant veroorsaak word. Dit sal gevolg word deur 'n ondersoek na die vergoeding van trustees en bestuursagente, met verwysing daarna dat hulle betaling vir hulle uitgawes kan eis. Ter afsluiting sal die bepalinge wat die aanstelling van die bestuursagent raak, asook die omstandighede waarin trustees van hul amp onthef, of die aanstelling van die bestuursagent beëindig kan word, behoorlik ondersoek word.

Hierdie tesis sal deurgaans bepaalde tekortkominge in die Wet op Deeltitels 95 van 1986 en die reëls wat verband hou met trustees en bestuursagente aandui. Waar doenlik, sal regsvergelijkend verwys word na oplossings wat die regstelsels van Nieu-Suid Wallis, Singapore, Maleisië Sjina en Duitsland bevat om soortgelyke probleme die hoof te bied. Die doel is om die bestaande tekortkominge uit te stryk en dus die bestuur van Suid-Afrikaanse deeltitelskemas meer doeltreffend te beheer.

Indien 'n deeltitelskema finansiële ondergang of verregaande wanbestuur in die gesig staar, maak die Wet op Deeltitels voorsiening vir die aanstelling van 'n administrateur. Dit is die laaste uitweg en behoort vermy te word, deur die bestuur van 'n deeltitelskema in die hande te plaas van behoorlik verkose, gekwalifiseerde rolspelers wat verantwoordelik gehou kan word vir wanbestuur. Daarom stel ek voor dat die Wet op Deeltitels 95 van 1986 (of eerder die Wet op die Bestuur van Deeltitelskemas 8 van 2011) gewysig word om voorsiening te maak vir die aanstelling van 'n professionele bestuurder as die enigste uitvoerende orgaan van die regspersoon bygestaan deur 'n raad van trustees bestaande uit deeleienaars in 'n raadgewende hoedanigheid. Dit sal die status van die bestuursagent verhoog tot dié van 'n uitvoerende orgaan van die regspersoon wat groter aanspreeklikheid sal meebring en terselfdertyd doeltreffender bestuur van suid-afrikaanse deeltitelskemas tot gevolg sal hê.

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Chapter 1: Introduction

The South African government is faced with the daunting challenge of providing housing for previously disadvantaged persons who were debarred by racially discriminatory legislation from purchasing and owning a home in certain parts of South Africa during the Apartheid era.¹ The tumultuous political changes that occurred in South Africa in the 1990's stimulated rapid and uncontrolled urbanization.² Promises by political parties of free housing created a sense of dependence as well as unrealistic and escalating expectations. The goal of achieving one home for each family is becoming more unattainable as time passes which, in turn, creates a large backlog. The increase in illegal immigrants streaming into cities; crime and corruption; planning difficulties; social and political instability; and non-inclusion into the tax base aggravate this challenge.³ There is a shortage of land available in urban areas for such housing and suitable land is becoming scarcer as time passes. Rezoning is time consuming, while building costs are just escalating. It is for these reasons that informal housing settlements (otherwise known as "squatter camps") are growing substantially. Added to this is the fact that squatters living in informal settlements choose to remain outside the formal housing sector in order to avoid regulation and having to pay taxes. Some recipients even choose to remain in squatter camps in return for the money received from letting or selling their free housing. Security of tenure alone does not lift people out of the doldrums of poverty. Capital creation in the form of formal housing does stimulate the economy.⁴ Participation in the formal economy ensures a more stable society of law abiding, prosperous, responsible, self-sufficient, and tax-paying citizens.⁵

¹ Group Areas Act 36 of 1996 and the Black Communities Development Act 4 of 1984; GJ Pienaar *Sectional Titles*

² T Maree "Rapid urbanisation – the high road and a low road" (April 2010) 36 *MCS Courier* 9.

³ Maree (April 2010) *MCS Courier* 10.

⁴ 11.

⁵ 10.

Ownership of affordable housing could be made possible through the concept of sectional title. Each section can be individually bought and owned with joint ownership of the common property. This option has various advantages. There is a sense of exclusive ownership that engenders pride and a higher degree of responsibility and a duty of care. Joint ownership of common property creates a situation where the owners can have common facilities such as a swimming pool, while not having the sole expense of maintaining such a facility. Entering the formal housing market allows people to obtain related benefits such as mortgage finance and the market related profits on the sale of the property. It also broadens the tax base of municipalities. Furthermore, it provides authorities with a fixed address for service delivery and other administrative purposes, and the procurement of statistical data for example as a census. This goes toward counteracting illegality, corruption and crime.⁶ Most importantly it also counters the shortage of land argument, especially in cities, as the building comprising the sectional title scheme can be multi-storied, creating large floor areas without making use of much space on the ground. This makes optimum use of available land and maximizes the number of available homes per square meter. By the more efficient use of available land the possibility of residential home ownership in urban locations is brought within the reach of lower income groups in society.⁷ The state can offer subsidies and tax exemptions in order to encourage affordable sectional title developments.

Following the constitutional objective of promoting access to adequate housing⁸ for previously disadvantaged persons who were excluded from home ownership in certain areas, many municipalities have embarked on a strategy of making rental housing, previously owned by local authorities, available to be purchased and owned by tenants.⁹ This strategy can be a viable option as is illustrated by the eThekweni (Durban) Municipality which started an upgrade program whereby its low-cost rental housing stock is being upgraded to a high standard of habitability. This includes the installation

⁶ Maree (April 2010) *MCS Courier* 11.

⁷ CG Van der Merwe "Sectional Titles" in CG van der Merwe & JC Sonnekus (eds) *Sectional Titles, Share Blocks and Time-sharing* Volume 1 (Service Issue 18 2014) 1-11.

⁸ Constitution of the Republic of South Africa, 1996 s 26(1).

⁹ Maree (June 2006) *MCS Courier* 1.

of prepaid water and electricity meters, the writing off of rental arrears and outstanding municipal charges and a rates exemption. The tenant is given the option to take ownership, free of all costs. The arrears are endorsed on the title deeds and become payable if the owner decides to sell. The upgrade includes complete redecoration of all exterior walls, repainting, re-puttying and glazing of steel window frames, waterproofing of roofs, and replacement of certain sewer pipes, roofs, toilets and doors. Electrical re-wiring is also done in all the flats, as is waterproofing of bathrooms, and prepaid meters or flow limiters to control water consumption are installed for free. Despite all this, the schemes are showing signs of collapsing. The main reason is the mismanagement of these schemes and the inability of the members to pay the monthly levy.¹⁰

This illustrates that one of the essential elements for the success of such an initiative depends on an efficient management structure being put in place. Van der Merwe warns that such a large-scale initiative to supply affordable housing is doomed to failure unless it is supplemented by a strategy, which includes initial management by outside agencies and the gradual introduction of self-management, accompanied by effective and compulsory education and continual training.¹¹ Ideally these schemes should ultimately be self-managed, but this can only be achieved if the members of the newly formed bodies corporate are educated on the complicated concepts of sectional title law. The concept of sectional titles is relatively new in South Africa,¹² and there are complicated management matters relating to sectional titles. There are certain challenges such as management, maintenance, co-operative environment, levies and rules that are common to all sectional title owners, irrespective of their social or financial status. These matters all require some level of understanding, acknowledgement and commitment to make a scheme functional and efficient.¹³

The solution of using sectional title schemes to provide housing to a broader base of South African citizens would therefore not be effective, unless the scheme is initially

¹⁰ S Mohammed “The challenges of sectional title in the low cost sector” (July 2010) 5-7 *Paddocks Press Newsletter* 1.

¹¹ Van der Merwe *Sectional Titles* 1-30(13).

¹² The first Sectional Titles Act 66 of 1971 came into operation in 1973.

¹³ Mohammed (July 2010) *Paddocks Press Newsletter* 1.

established by a competent developer, and then managed by an efficient management structure. Regulation of these role players and refinement of the provisions that apply to them are necessary to ensure the success, congeniality and efficacy of sectional title schemes in South Africa. It is imperative that the emerging generation of sectional title owners be educated on all the matters regarding the administration, control and management of the scheme. The Community Schemes Ombud Service, once established, will be perfectly placed to provide the training and education to owners as set out in section 4 of the Community Schemes Ombud Service Act 9 of 2011 (the “CSOSA”) that deals with the functions of the Service.¹⁴

The initiative to supply affordable housing in the form of sectional titles will not work if it is not accompanied by a programme that includes subsidized initial management by professional outsiders leading to the gradual introduction of self-management. Training will only be successful with the full participation of stakeholders such as government, municipalities, and investors such as banks.¹⁵ Success will not only be measured on the number of housing units supplied, but also by the durability of the scheme and the long-term benefits to the recipients. Therefore, the security of tenure needs to be converted into socio-economic growth.¹⁶ Failure will have grave socio-economic and political consequences.

Although I am aware that proper management of sectional title schemes cannot guarantee access to housing, it is my submission that if sectional titles were to play a role in providing an option to secure the constitutional right to adequate housing it would not be a viable option if bodies corporate were not managed properly. The sustainability of sectional title schemes relies on the various role players to properly administer the scheme and maintain the building in a good condition.

In terms of the Sectional Titles Act 95 of 1986 (the “STA”) sectional ownership consists of three elements which are inextricably linked, namely individual ownership in a

¹⁴ CSOSA s 4(2)(b).

¹⁵ Maree (June 2006) *MCS Courier* 2.

¹⁶ 2.

section;¹⁷ joint ownership in the common property of the sectional title scheme¹⁸ and membership of the community of owners.¹⁹ The unit owners' interests are indivisibly linked in an intensified and diverse community of property.²⁰ Once a sectional title scheme has been legally established the success or failure of the scheme depends largely on the effective and efficient establishment and management of the scheme.²¹ Shared ownership of the common property gives rise to the need for collective decision-making.²² The sectional owners have to sacrifice some of their independence and individual decision-making in the interests of the community as a whole.²³ This requires collective action in the form of a central management body.²⁴ The lack of organization can create insoluble disputes between the owners and other role players, and can make maintenance and management of the sectional title scheme virtually impossible. The inevitable chaos caused by the lack of a well-organized management structure is illustrated by the earliest type of apartment ownership schemes in Germany, called the *Stockwerkseigentum*.²⁵ These residential buildings did not have a centralized management structure to organise maintenance, which caused endless disputes amongst the residents.

The South African sectional title legislation creates a management structure. As soon as any person other than the developer becomes the registered owner of a unit, a body corporate is formed. Each sectional unit owner automatically becomes a member of this central management body when the unit is registered in his or her name.²⁶ This juristic body is tasked with the “control, management and administration of the scheme.”²⁷ The

¹⁷ STA s 2(b).

¹⁸ STA s 2(c).

¹⁹ STA s 36(1) [STSMA s 2(1)].

²⁰ Van der Merwe *Sectional Titles* 14-5.

²¹ CG Van der Merwe “The South African Sectional Titles Act Compared with the Singapore Land Titles (Strata) Act” (1999) 3 *Singapore Journal of International & Comparative Law* 172.

²² L Chen *The Making of Chinese Condominium Law* (2010) 109.

²³ Van der Merwe *Sectional Titles* 14-6.

²⁴ 14-6.

²⁵ CG Van der Merwe “Apartment ownership” in N Drobnig & K Zweigart (eds) *International Encyclopaedia of Comparative Law* VI Chapter 5 “Property and Trust” (1994) 3 141; Van der Merwe *Sectional Titles* 14-5.

²⁶ STA s 36(1) [STSMA s 2(1)].

²⁷ STA s 36(4) [STSMA s 2(5)].

STA sets out a non-exhaustive list of functions and powers of the body corporate.²⁸ The body corporate has administrative, accounting and secretarial duties. It is a juristic body without an intellect, voice or other human attributes and therefore performs such functions through its principal organs, namely the owners in the general meeting and the board of trustees. The trustees are appointed at the annual general meeting by the body corporate to act as its representatives.²⁹ Whereas the function of the general meeting is mainly legislative, the trustees have an executive and administrative function.³⁰ The general meeting sets the standards and policies for the management and administration of the scheme. The trustees handle the day-to-day administration by performing the functions and exercising the powers prescribed by the management rules of the scheme, by giving effect to resolutions of the general meeting of the body corporate, and by exercising the statutory functions and duties of the body corporate.³¹ Their duties and powers are subject to any restriction imposed, or direction given at a general meeting.³² The trustees perform these functions and duties with the possible assistance of a managing agent.

A successful management structure is of the utmost importance to the community of owners and the financial institutions with an interest in the scheme. It also ensures the durability of the scheme.³³ The value of a sectional title scheme and its individual units is very closely connected to the quality of scheme management. The value of the units in the scheme will depend not only on criteria such as the location, size, and age and quality of the building comprising the scheme, but also on the condition of the common property. Unless maintenance is done regularly and adequately the building will fall into a state of disrepair. Sound management also requires proper financial administration, which includes the collection of levies that are added to an administrative fund for the maintenance of the scheme. When banks are assessing unit values for the purpose of

²⁸ Section 37 and 38 of the STA, which has been replaced by section 3, 4 and 5 of the STSMA.

²⁹ It is important to note that in bodies corporate that have just been established, all the owners are trustees and the developer is the chairman of the trustees until the first formal meeting is held; M Constat & K Bleijs *Demystifying Sectional Title* 2 ed (2009) 17.

³⁰ Van der Merwe *Sectional Titles* 14-112.

³¹ STA s 39(1) [STSMA s 7(1)].

³² STA s 39(1) [STSMA s 7(1) and s 7(3)].

³³ Van der Merwe *Sectional Titles* 14-5.

bond applications and mortgage finance they will consider certain matters such as whether the levies are sufficient to cover the expenses of the body corporate; whether sufficient provisions are made for a reserve fund to defray future and incidental expenses; whether annual general meetings are held regularly and timeously and the agenda requirements for these meetings are complied with; whether the financial statements are up to date and duly audited; whether the arrears ratio is within acceptable limits and whether effective steps are taken to collect arrear levies; and whether the scheme is adequately insured and the premiums are paid up to date. In order to combat the “cycle of decline” it is essential that trustees ensure that realistic budgets are adopted; that all statutory and administrative requirements for prudent management are complied with; that maintenance is performed regularly and meticulously and that levy defaulters are dealt with decisively.³⁴

The underlying assumption to this thesis is that the success or failure of a sectional title scheme depends largely on the effective and efficient management of that scheme.³⁵ Various role players undertake these tasks. The research for this thesis will focus on the two role players that I consider play the most significant role in this context, namely the trustees and the managing agent. I will propose that it is better to appoint a professional manager as the executive organ to manage the scheme rather than to leave this task to the trustees. The reasons for this proposal will become clear after the role of the trustees and the managing agent are critically and comparatively examined. Where a sectional title scheme is under pressure of financial ruin or there is serious managerial mismanagement, there is a court procedure for the appointment of an administrator. This is a measure of last resort and should be avoided by ensuring that properly elected, qualified and accountable managerial role players administer the scheme.

In order for these role players to perform these tasks in such a way that the sectional title scheme can flourish and have a long-term future, certain assumptions need to be made. The first assumption is that these role players need to be suitably qualified and

³⁴ T Maree “What are the determinants of value for sectional title homes?” (April 2010) 36 *MSC Courier* 6.

³⁵ CG Van der Merwe “The South African Sectional Titles Act Compared with the Singapore Land Titles (Strata) Act” (1999) 3 *Singapore Journal of International & Comparative Law* 172.

should have the qualities required for fulfilling their functions. Secondly, the role players should be properly elected or appointed to their positions by established administrative procedures. Thirdly, the powers, functions and duties of each role player must be clearly defined with the minimum overlap between tasks to ensure certainty, so as to avoid a situation where a task is either not performed at all or where a single task is performed by two or more of the role players. If the assumptions are met it will increase the efficiency of the governance of the sectional title scheme. Furthermore, the role players should be held accountable for abuses or negligence in the performance of one or more of their functions. Additionally, there should be some form of publicity of the fact that the person has been appointed or elected to that role. This will ensure that owners, tenants, third parties and all other interested parties are informed of whom they should be dealing with. Finally, there is an assumption that there needs to be a set of rules in place that regulates the termination of appointment of a particular role player. If these assumptions are correct then the relevant regulations in South African law relating to the role players and their functions in respect of the administration and governance of a sectional title scheme need to be discussed and developed in order to improve deficiencies and facilitate the best possible solutions.

This thesis will be structured in four stages. The first stage relates to the definition and description of the general concepts forming the basis of the thesis. Sectional title is a specialized field of property law with terminology that is unique to the field. This stage is significant in that it is essential for understanding the discussions that will follow in the next stages. These definitions and descriptions will be discussed in each chapter as the term or concept becomes relevant to the discussion.

The next stages deal with each of the two selected role players in the governance of sectional title schemes. The second stage, consisting of seven chapters, deals primarily with the governance of the sectional title scheme, with the trustees playing the most important role here. Chapter two starts by putting the management role of the trustees into perspective. I shall discuss the legal status of the trustees, and also show that, in Germany, the management of a scheme is entrusted to a professional manager instead

of to a group of persons consisting mainly of members of the body corporate. There will be an examination of the reasons for the election and the requirement for the existence of the trustees to perform the day-to-day management functions of the body corporate. Chapter three places an emphasis on the nomination and election of trustees. I will set out the possible provision in the legislation for the appointment of trustees in the initial period before the first annual general meeting is held in the scheme. Following on this I shall explore the important topic of eligibility of individuals who may be elected as trustees. I will then discuss and examine the allocation of the number of trustees required for a scheme, their nomination and election. The costly and time-consuming process of going to court to dispute the proper election of trustees will be criticized. I follow this by recommending the New South Wales and Singaporean provisions allowing for the removal of and the election of new trustees at a special general meeting. I will explore the consequences of the lack, in the STA or the prescribed management rules contained in Annexure 8 of the Regulations made under the STA, of any requirement for persons to possess certain qualities or qualifications to become a trustee. The next chapter will focus on the fiduciary duty of the trustees and the indemnification of the trustees. I will also discuss the consequences of the trustees' transactions with third parties. Chapter five focuses on the role played by trustees in the daily operation of sectional title schemes, with an emphasis on their powers, duties, rights and functions. The division of powers between the trustees and owners in the general meeting will be outlined. An important management and operating function of the trustees are the meetings that the trustees must hold to make various management decisions. In chapter six I will deal with trustee meetings. Chapter seven deals with the various office bearers that are elected to assist in the management of the sectional title scheme. These office bearers are the chairperson, secretary and treasurer. Further important matters such as the remuneration of trustees and payment of their expenses will be dealt with. The last chapter will focus on the term of office of trustees, which will include topics such as the duration of office; the filling of vacancies; the appointment of alternate trustees; the rotation of trustees and the removal of trustees. I will then discuss the circumstances under which a trustee can be disqualified from holding office. Finally,

I will set out a recommendation for a legislative procedure to recover books, records, accounts or other property from trustees who have left office.

The third stage deals with the management and administration of the sectional title scheme. The focus in this stage will be on how the managing agent should play the pivotal role in the management of the scheme. In some European countries a professional manager must by law be appointed to perform the executive functions of the body corporate.³⁶ In South Africa the executive powers are placed in the hands of the trustees.³⁷ Even though the appointment of a managing agent is not mandatory in South Africa,³⁸ the trustees³⁹ are empowered to appoint a managing agent to whom some or all of the duties of the the trustees are delegated in terms of a contract of employment⁴⁰ and must do so if required by the body corporate⁴¹ or a bank.⁴² The scope of the managing agent's functions and powers will depend on the terms of its contract of appointment. Therefore, the trustees handle the day-to-day administration and management of the sectional title scheme with the possible assistance of a managing agent. I will propose that it is better to appoint a managing agent to manage the larger sectional title schemes, rather than to leave this task to the trustees. Since at least half of the trustees of a sectional title scheme have to be owners or spouses of owners,⁴³ it is common practice in South Africa for the trustees to appoint a managing agent as they have limited time, experience and qualifications at their disposal to manage the scheme themselves. The nature and size of the scheme will determine whether the trustees require assistance in the performance of their functions and duties.

³⁶ L Chen & CG van der Merwe "Reflections of the role of the managing agent in South African and Chinese sectional title (condominium) legislation" (2009) 1 *TSAR* 22.

³⁷ Section 36(4) and section 37 of the STA regulates the South African position. Section 2(5) of the STSMA will replace section 36(4) of the STA, and section 3 of the STSMA will replace section 37 of the STA.

³⁸ Annexure 8 rules 42 and 46(1); Chen & Van der Merwe (2009) *TSAR* 22.

³⁹ By passing a resolution to appoint a managing agent at a trustee's meeting.

⁴⁰ Annexure 8 rule 46(1).

⁴¹ By passing a normal resolution taken at a special meeting.

⁴² Holding more than 25% of the bonds over the units in the scheme can instruct the trustees to appoint a managing agent.

⁴³ Annexure 8 rule 5(a).

Trustees of larger⁴⁴ mixed-use⁴⁵ schemes and holiday resort schemes that require specialized financial training⁴⁶ will usually need the assistance of a managing agent. There will be a focus on providing suggestions through comparative analysis on how South Africa can effectively regulate managing agent policies and practices in legislation. Most importantly I will propose suggestions for improvements in the sectional title legislation regulating the appointment of managing agents. The reasons for this proposal will become clear after the roles of the trustees and the managing agent are critically and comparatively examined.

I will start the discussion by explaining the need for the appointment of a managing agent to a sectional title scheme. During this discussion the reasons for the appointment of the agent; the advantages and disadvantages of appointing an agent and outlining the type of scheme that will most benefit from the appointment of a managing agent will be set out. Difficulties with regard to collecting arrear levies and the challenges in organising annual general meetings will be discussed in detail to show how complex and cumbersome the task of administering and managing a scheme can be, and how the appointment of a managing agent is the best option available to the trustees. The next discussion will focus on the appointment procedure itself. I will discuss the appointment of a managing agent before the inaugural general meeting. There will be a focus on the persons who can be appointed as managing agents; the parties who can appoint the managing agent; the circumstances under which a managing agent is appointed and the requirements for the process of appointment of the managing agent. The contract of appointment will be dealt with separately as it is such a fundamental requirement in the appointment of a managing agent. An important issue relates to the qualities and qualifications necessary to become a managing agent, as one of the most problematic aspects relating to the managing agent is the lack of any legislative requirement that the managing agent have any form of qualification to act as a managing agent. There will

⁴⁴ It has been suggested to the sectional titles regulation board that it should be obligatory for sectional title schemes consisting of more than fifty units to employ a professional managing agent; Proposals to Sectional Titles Regulation Board (March 2003) 3.2. 2; Chen & Van der Merwe (2009) *TSAR* 23.

⁴⁵ A mixed-use scheme is a scheme containing both residential and commercial units.

⁴⁶ Annexure 8 rule 42 provides that managing agents may be appointed to operate current and savings accounts of the body corporate; Chen & Van der Merwe (2009) *TSAR* 23.

be a discussion on how best to select a managing agent. The next discussion will focus on the liability of the managing agent. One of the most important issues here is the legal status of the managing agent. The question whether the managing agent is merely an employee will be answered, and this answer will go toward clarifying the fiduciary duty of the managing agent. The possible indemnification of the managing agent will be discussed. I will also set out the principles of the remuneration and payment of expenses to the managing agent. The consequences of the appointment of a managing agent will be set out. These consequences include the powers, duties, rights and functions of the managing agent. The final discussion will focus on the term of appointment of a managing agent including topics such as the period of the appointment of the managing agent and the termination of appointment of the managing agent. Finally the question as to whether the managing agent can retain the books and records of the body corporate after his or her services have been terminated will be addressed.

The final phase of the thesis will consist of concluding remarks on the material discussed in the previous phases. I shall attempt to summarize and suggest potential solutions to the shortcomings that have been highlighted in each of the stages. This discussion will hopefully also bring the thesis to a dramatic climax in which answers to the questions regarding the major role players in the management of a sectional title schemes posed in the introduction will be given. This stage brings the thesis together in a dynamic connection between introduction and conclusion.

In order to comprehensively discuss and suggest possible solutions to shortcomings related to the issues in each stage of the thesis, comparative references to the manner in which other jurisdictions handle these issues will be made, where appropriate. Sectional ownership is widely recognized in many countries. Many sectional title statutes endeavour to solve similar practical problems experienced by apartment ownership schemes.⁴⁷ Where foreign systems offer different and potentially better solutions, these solutions will be discussed. In this way a comparative study will assist

⁴⁷ Van der Merwe *Sectional Titles* 1-8.

in finding answers for rendering the governance of sectional title schemes in South Africa more effective. The position in New South Wales is of the most significant as South Africa, Singapore and Malaysia have all modeled their sectional titles legislation on the New South Wales' Conveyancing (Strata Titles) Act 17 of 1961.⁴⁸

I will also make reference to the Chinese position. The predominant form of housing in China is the condominium. The reason for this is that there is a scarcity of urban land and a high population density.⁴⁹ Management of the condominium schemes tends to be chaotic due to the lack of a proper legal framework with regard to the appointment and functions of the managing agents.⁵⁰ The condominium concept was recently recognized in the newly enacted Chinese Property Code, but there is no detailed and uniform nationwide condominium statute. The condominium stakeholders were provided with the Property Management Regulation.⁵¹ The fragmented provisions on condominium management need to be consolidated and incorporated into a future statute. Since China and South Africa require the condominium regime to house the majority of its citizens, it seems obvious that the proper management of the scheme is fundamental. The most relevant similarity though is in the manner in which both countries have left the managing agent industry largely unregulated and dependent on the industry regulating itself by an internal code of conduct.⁵²

There will also be references to the Uniform Common Interest Ownership Act of 1994 (most recently amended in 2014) (the "UCIOA") of the United States of America. I will finally look at the *Wohnungseigentumsgesetz* (the "WEG") of Germany. This is an interesting comparison as the *WEG* was one of the foreign statutes that influenced the

⁴⁸ This Act was repealed and replaced by the Strata Titles Act 68 of 1973. The latter Act was renamed the Strata Schemes (Freehold Development) Act 68 of 1973 which, together with the Strata Schemes (Leasehold Development) Act 219 of 1986, deals with development related matters pertaining to schemes in New South Wales. Management and resolution of dispute aspects of schemes are dealt with in the Strata Schemes Management Act 138 of 1996; T Keang Sood *Strata Title in Singapore and Malaysia* 3 ed (2009) 3; F Andreone "50 Years of Australian Strata Titles" (July 2011) 6-7 *Paddocks Press Newsletter* 3.

⁴⁹ Chen *Chinese Condominium Law* 1.

⁵⁰ Chen & Van der Merwe (2009) *TSAR* 23.

⁵¹ Property Management Regulation of 2003 (as amended in 2007).

⁵² Chen & Van der Merwe (2009) *TSAR* 24.

South African Sectional Titles Act.⁵³ Furthermore, both jurisdictions are governed by the Roman law maxim *superficies solo cedit*,⁵⁴ which means:

“what is built on the land, accedes to the land.”

This created the need for a statutory exception in order to establish apartment ownership. These foreign jurisdictions differ from the South African legislation, and can therefore offer suggestions for the improvement and refinement of the South African legislation in the different areas of management discussed in this thesis.

A crucial development in South African sectional title legislation occurred in 2011 with the promulgation of the Sectional Titles Schemes Management Act 8 of 2011 (the “STSMA”) and the Community Schemes Ombud Service Act 9 of 2011 (the “CSOSA”). The management provisions in the Sectional Titles Act 95 of 1986 (the “STA”) were deleted and re-assembled in the STSMA, while leaving the technical registration and survey provisions in the STA. The separation of the management and registration matters was achieved by the repeal of the management provisions in the STA in the Schedule to the STSMA, and their simultaneous re-enactment in the STSMA. The STA is left containing only registration and land survey provisions, and is to be administered by the Department of Rural Development and Land Reform, the successor of the Department of Land Affairs. The STSMA (together with the CSOSA) will be administered by the Department of Human Settlements, formerly the Department of Housing. The STSMA will only come into operation at a date fixed by the President by proclamation in the *Gazette* which will necessarily be after Regulations under these Acts have been enacted. The provisions in the CSOSA requiring consideration and determination by the ombud service will obviously only come into operation at the date at which the ombud service is in full operation.⁵⁵ The STSMA, while re-enacting most of the management provisions of the repealed provisions of the STA, has introduced

⁵³ Van der Merwe *Sectional Title* 1-8;

⁵⁴ CG Van der Merwe “The Sectional Titles Act and the Wohnungseigentumsgesetz” (1974) *CILSA* 165; Z Van der Merwe *Constitutionality of the rules governing sectional titles* LLM thesis (2010) 33.

⁵⁵ STSMA s 22.

several innovations in order to streamline and modernise these provisions. The rules prescribed under the STA must continue to apply to new and existing schemes until the Minister has made regulations prescribing management and conduct rules referred to in section 10(2) of the STSMA.⁵⁶ At present in South Africa Annexures 8 and 9 of the Regulations made under the STA provide so-called prescribed management and conduct rules respectively, which set out a basic framework for the management of the scheme and the behaviour of owners in the scheme. This thesis will refer to the provisions of both the STA and the STSMA dealing with the trustees and managing agents as key role players in the governance of sectional title schemes.

It is hoped that this thesis will contribute to a better understanding and give more clarity of the roles that are played and should be played by the major management actors of a sectional title scheme. The success and sustainability of a sectional title scheme depends not only on suitable statutory management provisions, but also on the manner in which these role players of the scheme apply these rules in practice. Without effective and efficient management the scheme will degenerate into an ungovernable slum. The aim of the thesis is therefore not only to find theoretical solutions for the burning governance issues in sectional titles, but also to consider the practical impact of these solutions.

⁵⁶ STSMA s 21.

Chapter 2: Legal status of and need for trustees

2 1 Introduction

The focus in the following seven chapters will be on the trustees. In this chapter, I will endeavour to place the role that trustees play in the management of the sectional title scheme into perspective. Following this I shall compare the legal status of South African trustees with that of the corresponding executive committees, councils or boards in other jurisdictions. I will show that in Germany the management of a scheme is entrusted to a professional manager instead of to a group of persons consisting mainly of members of the body corporate. I shall then explore the need for the appointment of trustees to perform the day-to-day management functions of the body corporate, instead of following the laborious process of referring all decisions to the general meeting of owners. My conclusion will summarize the salient points on the topic and suggest possible improvements or solutions to shortcomings in the legislation.

2 2 Management role of the trustees in perspective

The South African sectional titles legislation⁵⁷ sets out a management structure for sectional title schemes. As soon as any person other than the developer becomes the registered owner of a unit, a body corporate is formed.⁵⁸ Each sectional owner automatically becomes a member of this central management body when the unit is registered in his or her name.⁵⁹ In *Reddy v Body Corporate of Croftdene Mall*⁶⁰ the court remarked that:

⁵⁷ Previously management issues were dealt with in the STA, but will be dealt with in the STSMA once in operation.

⁵⁸ STA s 36(1) [STSMA s 2(1)]. This must be read with sections 36(1), (2) and (3) of the STA, which requires that the registrar must issue a certificate after a unit is registered in a name other than the developer. This has the effect of the establishment of the body corporate in terms of the STSMA. The registrar must lodge the certificate with the chief ombud. The registration issue is therefore dealt with in the STA, while the management issues will be dealt with in the STSMA.

⁵⁹ STA s 36(1) [STSMA s 2(1)].

⁶⁰ 2002 5 SA 640 (D&CLD) 644C.

“No sectional title scheme can exist without a body corporate. It is as it were an essential limb of a scheme – indeed, perhaps its right arm.”⁶¹

The body corporate must act in accordance with the legislation and the rules in making and enforcing decisions relating to the management of the sectional title scheme. This juristic body is tasked with the enforcement of the rules and the control, management and administration of the common property for the benefit of all owners.⁶² The South African legislation sets out a non-exhaustive list of functions and powers of the body corporate⁶³ that includes administrative, accounting and secretarial duties. However, the body corporate is a juristic body, and therefore performs such functions through the members in the general meeting and the board of trustees.⁶⁴

The trustees are appointed at the annual general meeting by the body corporate to act as its representatives. Whereas the function of the general meeting is mainly legislative, the trustees have an executive and administrative function.⁶⁵ The general meeting sets the standards and policies for the management and administration of the scheme. The trustees handle the day-to-day administration and management of the scheme, with the possible assistance of a managing agent.⁶⁶ The trustees perform the functions and exercise the powers prescribed by the management rules of the scheme by giving effect to resolutions of the general meeting of the body corporate and by exercising its statutory functions and duties in terms of the Act.⁶⁷

⁶¹ Van der Merwe *Sectional Titles* 14-6.

⁶² STA s 36(4) [STSMa s 2(5)].

⁶³ STA s 37 and 38 [STSMa s 3, 4 and 5].

⁶⁴ Van der Merwe *Sectional Titles* 14-6.

⁶⁵ 14-112.

⁶⁶ *Body Corporate of Albany Court and 17 Others v Nedbank and Others* [2008] JOL 21739 (W) para 12; Van der Merwe *Sectional Titles* 14-112.

⁶⁷ STA s 39(1) [STSMa s 7(1)].

2 3 Legal status of trustees

2 3 1 Introduction

In what follows I will discuss the legal status of the trustees. This topic is also closely related to the fiduciary duty of the trustees that will be comprehensively discussed later in chapter four. I will also compare the legal status of South African trustees with their counterparts, namely executive committees, councils and boards in foreign jurisdictions.

2 3 2 South African position

In South African law of trusts, the trustees stand in the position of trust towards the beneficiaries of a trust. In *Estate Kemp v MacDonald's Trustee*⁶⁸ the Appeal Court stated that:

“Trustees means persons entrusted (as owners or otherwise) with the control of property with which they are bound to deal for the benefit of others.”

In *Zinn No v Westminster NO*⁶⁹ the trustee was defined as:

“One who is entrusted with the affairs of another.”

These definitions correspond to a certain extent with the provisions concerning trustees in the STA and STSMA.⁷⁰ The trustees, who are mainly elected from amongst the sectional owners, are the physical functionaries who perform the statutory executive and administrative powers⁷¹ and duties⁷² of the body corporate for the benefit of the unit owners.⁷³ The trustees also perform the functions and exercise the powers prescribed

⁶⁸ 1915 AD 491 499.

⁶⁹ 1936 AD 89 96.

⁷⁰ STA s 36(4) read with s 39(1) [STSMA s 2(5) read with s 7(1)]; *Body Corporate of La Roche Resort Administration Services* [2003] JOL 11655 (N) 3; Van der Merwe *Sectional Titles* 14-112.

⁷¹ STA s 37 [STSMA s 3].

⁷² STA s 38 [STSMA ss 4 and 5].

⁷³ STS s 40 [STSMA s 8].

by the management rules⁷⁴ and by resolutions passed in the general meeting. Therefore, the trustees are the executive and administrative organ of the body corporate.

The trustees are not in a contractual relationship with the body corporate, but rather in a relationship of trust with the body corporate. If a trustee enters into a contractual relationship with the body corporate, for example a contract of lease for a common property parking bay, then this contractual relationship does not influence the nature of his or her office as trustee.

The prescribed management rules clearly state that the trustees “hold office.”⁷⁵ The office of trustees is analogous to directors of a company, while the owners are similar to the shareholders of the company. The trustees, like the directors of a company, act as the executive council, and like directors they are in a fiduciary relationship with the body corporate. They must act honestly and in good faith, and must only act in the best interests of the body corporate.⁷⁶ There must not be any conflicts of material interest, and they cannot derive any economic benefit from their position.⁷⁷ Trustees can be sued, but must be indemnified by the body corporate for all costs, losses, expenses and claims incurred in the performance of their functions, except in cases of dishonesty or gross negligence.⁷⁸

The South African legislation provides that the body corporate has perpetual succession and is capable of suing and of being sued in its corporate name in respect of any contract entered into by the body corporate; any damage to the common property; any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable; any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under the Act or any

⁷⁴ Annexure 8 rules 28 – 44.

⁷⁵ Annexure 8 rule 4(2) and 6. It should be noted that prescribed management rule 47 also refers to the managing agent holding office. This creates confusion as to the exact legal status of the trustees and managing agent.

⁷⁶ STA s 40(2)(a) [STSMA s 8(2)(a)].

⁷⁷ STA s 40(2)(b) [STSMA s 8(2)(b)].

⁷⁸ Annexure 8 rule 12.

rule and any claim against the developer in respect of the scheme if so determined by special resolution.⁷⁹ Therefore, the body corporate has the legal standing to sue on matters concerning the sectional title scheme.⁸⁰ Unlike the body corporate that has perpetual succession, the trustees are not a separate legal entity. For this reason, the trustees cannot collectively commence legal proceedings or be proceeded against as defendants collectively. Unless the trustee is personally liable, any proceedings initiated against the trustees must be done against the body corporate.

Trustees should be specifically authorized by the general meeting, who have passed a direction to bring the legal action⁸¹ as granting the trustees the power to sue in court without reservation could lead to large financial legal fees for the body corporate. This is especially the case in situations where unit owners refuse to pay their contributions. Court proceedings are expensive, time-consuming and tedious. The cost of court proceedings can be more expensive than the money claimed. If the trustees have unfettered power to bring a monetary claim in court, they could choose to resolve the money dispute in court rather than to employ more amicable persuasion, mediation or arbitration. Furthermore, litigation may not be in the best interests of maintaining a harmonious community. The trustees do not always have the necessary legal knowledge and experience when it comes to litigation. Commencing litigation proceedings in court should always be a measure of last resort. When a legal matter arises which involves a large sum of money or fundamental interests of the unit owners, the power to commence legal proceedings should be placed in the hands of the general meeting, while legal matters involving small expenditure and daily issues would be left to the trustees to deal with. The general meeting can pass a resolution to define what matters constitute a fundamental matter or large expenditure.

⁷⁹ STA s 36(6) [STSMA s 2(7)].

⁸⁰ STA s 36(6).

⁸¹ STA s 39(1) [STSMA s 7(1)].

2 3 3 Comparative survey

Foreign jurisdictions such as New South Wales, Singapore and Malaysia also elect a group of persons consisting mainly of owners to act as the executive committee of the body corporate in order to handle the routine administration and management of the scheme. The terminology used, namely “executive committee” or “council” instead of “trustees” might differ, but the basic structure and function of these executive committees are substantially similar to the South African trustees.

The New South Wales Strata Schemes Management Act 138 of 1996 (the “NSW Strata Schemes Management Act”) defines the executive committee as the elected group of owners or owner’s nominees responsible for assisting the owners corporation (body corporate) in the day-to-day management of the strata scheme, subject to the restrictions in the Act and Regulations.⁸² The executive committee is therefore the executive arm of the owners corporation. It has a similar function to a board of directors controlling a company. Unlike the owners corporation, the executive committee is not a separate legal entity in itself and cannot commence legal proceedings in its own name. All proceedings for and against, whether legal or otherwise, must be brought in the name of the owners corporation. The legal status of the executive committee of the owners corporation is aptly defined in the decision of the New South Wales Appeal Court in the case *Owners of Johnston Court – Strata Plan no 5493 v Dumancic*.⁸³

“The council has no corporate status... there is no legal entity, nor any entity entitled ‘council of Owners of Johnston Court’ ... the defendant named has no relevant legal identity for the purpose of being sued ... the council, a collegiate group of persons, has no function other than to perform the functions of a corporate body.”⁸⁴

⁸² NSW Strata Schemes Management Act, sch 3, cl 2(4) and s 21(3).

⁸³ (1990) NSW Titles Cases 80-0001.

⁸⁴ (1990) NSW Titles Cases 80-0001 at 60,053 and 60,054; Keang Sood *Strata Title* 310.

The NSW Strata Schemes Management Act confers many of the powers of the owners corporation on the executive committee.⁸⁵ The owners corporation may limit the matters that the executive committee may decide, and the Act stipulates various matters that must be decided by the owners corporation in general meeting.⁸⁶ The general meeting may continue to exercise all or any of the functions conferred on it by the Act or the by-laws even though an executive committee holds office.⁸⁷ In the event of a disagreement between the owners corporation and the executive committee the decision of the owners corporation prevails, despite any other provision of the Act.⁸⁸

In Singapore in terms of the Building Maintenance and Strata Management Act 47 of 2004 (2008 Revised Edition) (the “BMSMA”) the members of the management corporation (body corporate) elect a council consisting of a small group of proprietors (owners) whose principal function is the day-to-day management of the scheme. Without the election of such a council⁸⁹ it would be necessary to convene a general meeting for every management decision that needs to be made.⁹⁰ Despite the existence of the council, the BMSMA empowers the management corporation in general meeting to exercise or perform all or any of its powers, duties and functions conferred or imposed on it by the Act or the by-laws.⁹¹ The management corporation may also remove from the council the power to make decisions on specific matters so that only the management corporation may decide on those matters in general meeting.⁹²

The Strata Titles Act 318 of 1985 (the “Strata Titles Act”) of Malaysia contains substantially similar provisions. The council, subject to restrictions imposed or directions given by the management corporation (body corporate) at the general meeting, must

⁸⁵ NSW Strata Schemes Management Act s 21.

⁸⁶ NSW Strata Schemes Management Act s 21(2) (a) and (b).

⁸⁷ NSW Strata Schemes Management Act s 21(3).

⁸⁸ NSW Strata Schemes Management Act s 21(4).

⁸⁹ This situation could arise where the proprietors decline to be nominated for the council; refuse to nominate candidates or resign from office if elected.

⁹⁰ BMSMA s 53(10); Keang Sood *Strata Title* 309.

⁹¹ BMSMA s 58(2); This is similar to the NSW Wales Strata Schemes Management Act s 21(3).

⁹² BMSMA s 59; This is similar to the NSW Strata Schemes Management Act s 21(2).

exercise the powers and perform the duties of the management corporation.⁹³ Unlike the management corporation, the council is not a separate legal entity. Any proceedings instituted by or against it must be in the name of the management corporation. It is for this reason that the management corporation has control of the scheme. This is different to the position of directors of a company who have control of the day-to-day management of the company with which the general meeting cannot interfere.⁹⁴

Under the Uniform Common Interest Ownership Act of 2008 (the “UCIOA”) of the United States of America the executive board is a group of persons that represents the unit owners similar to the trustees in South Africa. The executive board has an executive and administrative function, and is elected to execute owners’ resolutions of the general meeting, and to administer the day-to-day affairs of the scheme.⁹⁵ The executive board must perform its duties subject to the restrictions imposed by a declaration, the by-laws and in other provisions of the UCIOA.⁹⁶ The executive board is expressly restricted from dealing with the winding down of a scheme; amending a declaration; having anything to do with either the election of the executive board members or determining the board members’ qualifications, powers, duties and terms of office.⁹⁷ The courts will consider whether the executive board has an exclusive standing to bring legal action on behalf of the management association, and will usually hold that the association has exclusive standing to assert, for example, claims concerning the handling of association funds and matters affecting the common property.

In China the executive council also has an executive and administrative function. Its status is the same as in South Africa and the United States.⁹⁸ Internally the executive council is regarded as the standing committee of the condominium association (body corporate), but when it comes to external transactions with third parties the executive

⁹³ Strata Titles Act s 39(4); Sarawak Strata Titles Ordinance 1995 s 23(3); and Sabah Land (Subsidiary Title) Enactment 9 of 1972 s 14(3).

⁹⁴ Keang Sood *Strata Title* 310.

⁹⁵ UCIOA § 3-103.

⁹⁶ UCIOA § 3-103(a).

⁹⁷ UCIOA § 3-103(b).

⁹⁸ Chinese Property Management Regulation of 2003 art 15; Chen *Chinese Condominium Law* 141.

council acts as an agent of the association.⁹⁹ The executive council must perform its duties subject to the restrictions imposed by the Act, the by-laws and the general meeting's resolutions. The executive council is in principle entitled to exercise all the executive powers and duties of the condominium association subject to certain restrictions. In this way the executive council is seen as subordinate to the general meeting.¹⁰⁰

In contrast to the position in South Africa, New South Wales, Singapore, Malaysia the United States and China, the executive organ of the German body corporate (*Gemeinschaft der Wohnungseigentümer*) is not an elected group of owners, but an appointed single professional manager (*Verwalter*), who may be assisted by an advisory council consisting of unit owners (*Verwaltungsbeirat*).¹⁰¹ The professional manager is in fact the executive organ of the body corporate, and is not merely an agent of the body corporate as is the case of the managing agent of South Africa, New South Wales, Singapore and China.¹⁰² The general meeting of owners has to appoint a professional manager by majority vote.¹⁰³ The owners can also, by majority vote, appoint a council consisting of unit owners in addition to the *Verwalter*.¹⁰⁴ It consists of three sectional owners, one of them being the chairperson of the *Verwaltungsbeirat*.¹⁰⁵ This provision is non-mandatory, and therefore the owners can agree on a different number of members or can appoint non-owners as members of the council in terms of the the general set of rules for the scheme (*Gemeinschaftsordnung*).¹⁰⁶ This German advisory council is an administrative advisory council and is an optional institution to assist the manager with his tasks.¹⁰⁷ The manager cannot be a member of the council. The membership in the council is an honorary office just like the position of a South African trustee. Apart from these general statements the *Wohnungseigentumsgesetz* (the "WEG") does not contain

⁹⁹ Chen *Chinese Condominium Law* 142.

¹⁰⁰ 143.

¹⁰¹ WEG § 29; Pienaar *Sectional Titles* (2010) 173.

¹⁰² D Reinlein *A comparison of the legislative and executive management organs of the South African Sectional Titles Act and the German Wohnungseigentumsgesetz* LLM dissertation University of Stellenbosch (2012) 31.

¹⁰³ WEG § 26.

¹⁰⁴ WEG § 29(1).

¹⁰⁵ WEG § 29(1).

¹⁰⁶ Reinlein *Comparison of legislative and executive management organs* 32.

¹⁰⁷ WEG § 29(2).

any further specific provisions concerning the advisory council. The Act is silent on the duration of membership of the advisory council. The term of office of a member of the council is therefore unlimited and only ends when the member is removed from office or when the member resigns. The council is an important communication link between the owners and the manager, and can influence the decisions of the manager. It also serves as a first discussion centre for the owners and is regarded as a body that can be trusted with the affairs of the scheme.¹⁰⁸ This would be useful in larger or mixed-use schemes where a single professional manager cannot execute and perform all the executive functions and duties alone.¹⁰⁹ The council has no executive powers as such, but rather acts as an advisory body that could to a certain degree control the activities of the professional manager.¹¹⁰ The council monitors and comments on the financial reports of the manager before the reports are presented to the general meeting.¹¹¹ The chairman convenes meetings of the council as and when it is required.¹¹² Therefore, both jurisdictions provide for optional management staff to supplement the executive management organs.¹¹³

The professional manager is appointed contractually, and may be dismissed if he or she does not exercise his or her executive function in a professional manner. This keeps him or her accountable. He or she or a professional management firm can be appointed for a maximum period of five years in general, but the first appointment after the establishment of a scheme can only be for a maximum period of three years.¹¹⁴ The manager receives remuneration for the proper execution of his or her duties. Furthermore, the powers and duties of the professional manager are determined largely by the provisions of the *WEG*,¹¹⁵ and not only by the terms of his or her contract of appointment and the resolutions of the body corporate, as is the case with the South

¹⁰⁸ Reinlein *A comparison of the legislative and executive management organs* 33.

¹⁰⁹ 33.

¹¹⁰ 32.

¹¹¹ *WEG* § 29(3).

¹¹² *WEG* § 29(4).

¹¹³ Reinlein *A comparison of the legislative and executive management organs* 31.

¹¹⁴ *WEG* § 26(1).

¹¹⁵ *WEG* § 27; Pienaar *Sectional Titles* 174; Reinlein *Comparison of legislative and executive management organs* 31.

African managing agent. The manager has wide general powers to manage the scheme, which includes all measures that are necessary for the maintenance of the common property and the financial management of the scheme. After the reform of the *WEG* in 2007 the *Verwalter* can also take all measures that are necessary for instituting legal proceedings on behalf of the owners and the community of owners if he or she is authorised to do so by a majority resolution of the owners.¹¹⁶ These tasks and powers of the professional manager are mandatory and cannot be taken away.¹¹⁷

In practice the professional manager's powers are often overestimated either by its members, the other owners or the manager himself. The manager often relies on the approval of the advisory council in matters for which it has no competence at all. Some members assume incorrectly that they have the power to give instructions to the manager or even to the owners. Some owners consider the members of the advisory council to be their representatives in their relationships with the manager or third parties. However, the functions and powers of the *Verwaltungsbeirat* are limited functions and powers accorded to it in terms of the *WEG* or by a unanimous resolution.¹¹⁸

The two main functions of the *Verwaltungsbeirat* in terms of the *WEG* are to support¹¹⁹ and to audit the financial documentation of the professional manager.¹²⁰ Therefore, there is a supportive function on the one hand and a supervising function on the other hand.¹²¹ The auditing function means that the council should check the budget (*Wirtschaftsplan*), payments (*Abrechnung*), accounting (*Rechnungslegung*) and estimation of costs (*Kostenanschläge*), and comment on these matters before the general meeting decides on them. The manager has the duty to grant access to all financial documentation that must be audited by the council. If the manager impedes the council, for example, by not providing the books of accounts or other financial

¹¹⁶ *WEG* § 27(2) and (3).

¹¹⁷ *WEG* § 27(4); Reinlein *A comparison of the legislative and executive management organs* 31.

¹¹⁸ Reinlein *A comparison of the legislative and executive management organs* 33-34.

¹¹⁹ *WEG* § 29(2).

¹²⁰ *WEG* § 29(3).

¹²¹ Reinlein *A comparison of the legislative and executive management organs* 35.

documents for auditing, the manager may be removed from office.¹²² The auditing function of the council as provided for in the *WEG* is formulated as a mandatory provision. Therefore, it is more of a duty than a right as it goes further than a simple right of auditing the financial affairs of the manager. However, if the council does not audit the financial documentation of the manager, the general meeting can still adopt a valid resolution to approve the financial documentation presented by the manager at the general meeting.

The members of the council are entitled to transfer their auditing task to one or more of their members. The auditing has to be carried out in a neutral and appropriate manner in accordance with general auditing principles consisting of both a calculation and a substantive inspection. The calculation part involves an inspection of whether the revenue and expenditure are balanced in the current account. The substantive check investigates whether the account of revenue and expenditure rendered are assigned to the community of owners and whether the expenditure was objectively necessary. It is important that all accountancy files and documents are presented to the council in a complete form so that the council can render a statement on the accounts of the scheme.¹²³ This can be done in writing or orally at the general meeting. The statement should also include a comment on the manner in which the manager complied with his function to render proper accounts. This statement can be very valuable to owners who must approve the annual budget and other financial documentation presented by the manager at a general meeting, and for the extension of the appointment of the manager.¹²⁴

The council is not only an audit institution. Supporting the *Verwalter* is an even more important function than the audit function.¹²⁵ This right of supervision does not include the authority to give directives to the *Verwalter*, except if the owners granted such a power to the *Verwaltungsbeirat* by a resolution. Such supporting function does not

¹²² Reinlein *A comparison of the legislative and executive management organs* 36.

¹²³ *WEG* § 29(3).

¹²⁴ Reinlein *A comparison of the legislative and executive management organs* 37.

¹²⁵ 34.

include a power to take over the functions of the *Verwalter* as the responsibility for the executive management of the scheme stays with the *Verwalter*. The *Verwalter* cannot be exempted from liability in acting on a matter which had been approved by the *Verwaltungsbeirat*.¹²⁶ The supporting function of the *Verwaltungsbeirat* is not further defined or explained in the *WEG*. The members of the *Verwaltungsbeirat* do not have the power to represent the community of owners in terms of section 29 *WEG* in transactions with either the *Verwalter* or third persons. Nevertheless, there are a range of matters where the *Verwaltungsbeirat* can offer support to the *Verwalter*. These include preparation of the general meeting and the agenda for the meeting, assistance in the implementation of resolutions, the enforcement of the conduct rules (*Hausordnung*), the completion of repairs and maintenance work, the collection of quotations from maintenance contractors and the selection of the most suitable contractor to do the work, the management of the common funds and making information available to owners. However, the support cannot be forced upon the *Verwalter*. The non-acceptance of support offered, does not represent a violation of his obligations.

The council cannot be described as a council of experts as it consists of owners, who are not necessarily experts. It would be desirable to have expert support for the manager, but this has not been laid down as one of the criteria for the appointment of members of a council.¹²⁷ The council can influence the decisions of the manager, and can also not be considered an advisory organ without responsibility. As mentioned above it has an audit and advisory function, and the members can to some extent be held liable for neglect in the performance of these functions. The council cannot be overburdened with too many functions and powers and an extension of its liability in the performance of these functions and the exercise of these powers.¹²⁸ The provisions concerning the council in the *WEG*¹²⁹ are non-mandatory and can therefore be excluded, expanded or accepted as they stand. Consequently, it is up to the owners to

¹²⁶ 36.

¹²⁷ 34.

¹²⁸ 33.

¹²⁹ *WEG* § 29.

design the rights, functions and powers of a council, if appointed, by agreement or resolution.¹³⁰

2 4 The need for trustees

2 4 1 Introduction

Although the general meeting is the most important organ of the body corporate, the trustees play a very important role in the day-to-day management of a sectional title scheme. The general meeting acts as the brain, while the trustees act as the brawn of the body corporate. This is illustrated by the fact that the functions and powers of the body corporate must, subject to the provisions of the Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees holding office in terms of the rules.¹³¹

2 4 2 South African position

Whereas the function of the general meeting is mainly legislative, the trustees have an executive and administrative function.¹³² The general meeting sets the standards and policies for the management of the scheme. The trustees handle the day-to-day management of the scheme by giving effect to resolutions of the general meeting, and by exercising their statutory functions and duties. In very small schemes it is possible that the owners manage the scheme by unanimous agreement or by decisions adopted in general meeting.¹³³ In larger schemes the owners need to elect a small representative group as trustees to perform the task of management of the scheme on their behalf and for their benefit.

Without the trustees acting as the executive organ of the body corporate the general meeting would have to be convened every time it needs to make any decision relating

¹³⁰ Reinlein *A comparison of the legislative and executive management organs* 35.

¹³¹ STA s 39(1) [STSMA s 7(1)].

¹³² Van der Merwe *Sectional Titles* 14-68.

¹³³ Chen *Chinese Condominium Law* 141-142.

to the management of the scheme.¹³⁴ The body corporate would then have to comply with all the strict formalities for such meetings.¹³⁵ This would be a tedious, time consuming, cumbersome and a costly process as fourteen days' notice must be given to convene a general meeting.¹³⁶ Once trustees are elected it is quick and easy to convene a meeting of trustees to decide on any matter within their power as only seven days' notice must be given to convene a meeting for the trustees.¹³⁷ Consequently, the main reason for the election of trustees is to avoid the situation where every action on behalf of the community of owners needs to be authorized by the general meeting.

2 4 3 Comparative survey

Without provision for an executive committee, a New South Wales strata scheme would have to rely on the community of owners in general meeting to perform these duties, and undertake the numerous obligations imposed by the Act, regulations and by-laws for the benefit of the owners,¹³⁸ and would have to comply with the strict formalities for holding such meetings.¹³⁹ Without a secretary, for instance, the general meeting will have to issue the relevant notices to convene the meetings.¹⁴⁰ More importantly, without an executive committee the general meeting would not be in a position to delegate the day-to-day administration of the scheme to select persons, and the central administration of the scheme would be in disarray.

Even if provision is made for an executive committee, difficulties to fill vacancies in the executive committee may leave the management in a shambles. The NSW Strata Schemes Management Act mentions two alternatives to overcome this impasse. The first alternative allows an owner, mortgagee or covenant chargee¹⁴¹ to apply to an Adjudicator for an order that a nominated person (who has consented to that nomination) be empowered to call and hold a general meeting within such time as is

¹³⁴ A Ilkin *New South Wales Strata and Community Schemes Management and the Law* 4 ed (2007) 92.

¹³⁵ Van der Merwe *Sectional Titles* 14-112; NSW Strata Schemes Management Act s 16(4); Ilkin *NSW Strata* 92.

¹³⁶ Annexure 8 rule 54(1).

¹³⁷ Annexure 8 rule 15(2).

¹³⁸ Ilkin *NSW Strata* 92, 98.

¹³⁹ NSW Strata Schemes Management Act s 16(4).

¹⁴⁰ NSW Strata Schemes Management Act s 22(b); Ilkin *NSW Strata* 98.

¹⁴¹ NSW Strata Schemes Management s 17(6).

specified in the order specifically to try and elect an executive committee.¹⁴² The owners might feel more obliged to consent to nomination for the executive committee if the meeting has been called specifically on an Adjudicator's order. A meeting held under this section is, for the purpose of the election of an executive committee, taken to be the first general meeting of the owners corporation.¹⁴³ The Adjudicator may then order that the meeting considers various motions from owners and other persons entitled to vote.¹⁴⁴ The second alternative is that an owner or other eligible person may apply to an Adjudicator seeking an order for the appointment of an administrator.¹⁴⁵ If owners decline to be nominated as members of the executive committee, fail to nominate candidates or resign then the only other options are for the owners corporation to appoint a managing agent¹⁴⁶ or an administrator¹⁴⁷ to manage the scheme.¹⁴⁸

It is possible that a strata scheme in Singapore is left without a council due to the fact that none of the proprietors want to be members of the council; elected members resign during their term of office or the number of resignations leave the council without a quorum. As in New South Wales the management corporation administers the scheme by appointing a managing agent¹⁴⁹ or a Strata Titles Board makes an order for an administrator to administer the scheme where there is no executive council.¹⁵⁰ In the event that the scheme is not properly maintained the Commissioner of Buildings could issue a notice to compel the proprietors (owners) to take the necessary corrective actions.¹⁵¹ The proprietors can also apply to the Strata Titles Board to compel the election and appointment of new office bearers.¹⁵² Where this problem persists and

¹⁴² NSW Strata Schemes Management s 17(1) and s 17(2); Ilkin *NSW Strata* 99.

¹⁴³ NSW Strata Schemes Management s 17(3).

¹⁴⁴ NSW Strata Schemes Management s 17(4).

¹⁴⁵ NSW Strata Schemes Management Act s 162; Ilkin *NSW Strata* 99, 111.

¹⁴⁶ Appointed in terms of NSW Strata Schemes Management Act s 28.

¹⁴⁷ Appointed in terms of NSW Strata Schemes Management Act s 162 or s 183B.

¹⁴⁸ Ilkin *NSW Strata* 92.

¹⁴⁹ BMSMA s 66; Keang Sood *Strata Title* 324.

¹⁵⁰ BMSMA s 112.

¹⁵¹ BMSMA s 6.

¹⁵² BMSMA s 102.

there is no council, the administration and management of the scheme will be left to the entire body of proprietors.¹⁵³

In Malaysia the Commissioner of Buildings may authorize in writing any proprietor to convene an extraordinary general meeting.¹⁵⁴ Alternatively, the management corporation may apply to court for the appointment of an administrator to manage the scheme.¹⁵⁵ If the management corporation is not functioning satisfactorily a proprietor or any other person or body with a registered interest in a parcel (unit) may lodge a complaint with the Commissioner. The Commissioner may then, if satisfied that it is in the interests of the parcel proprietors (unit owners) in the subdivided building or land concerned, appoint a managing agent to exercise the powers and discharge the duties and functions of the management corporation or that of its council.¹⁵⁶

2 5 Conclusion

The need for an executive organ of the body corporate is of the utmost importance for the effective and efficient day-to-day management and administration of the sectional title scheme. This is illustrated by the above overview of the situation in South Africa, New South Wales, Singapore and Malaysia. Without the election of trustees the general meeting of owners would have to convene a general meeting any time a decision needs to be taken regarding the management of the scheme. This is a time consuming and expensive task that can be avoided by electing an efficient board of trustees, executive committee, council or board.

Furthermore, sectional titles legislation imposes numerous duties on those appointed by the trustees, especially to the positions of chairperson, secretary and treasurer. Without trustees to make these appointments the positions would not be filled and the numerous functions imposed by the Act and rules for the benefit of the owners would have to be

¹⁵³ BMSMA s 53(10).

¹⁵⁴ Strata Titles Act, Second Schedule, para 9(3). There is no provision such as this in the Sarawak Ordinance or the Sabah Enactment.

¹⁵⁵ Strata Titles Act s 51; Sarawak Ordinance s 27; Sabah Enactment s 17A.

¹⁵⁶ Strata Titles Act ss 50(1) and (2)(a).

performed by the owners in general meeting. In South Africa the rules provide that the trustees elected at the first general meeting must appoint a chairperson from among themselves at the commencement of the first meeting of trustees.¹⁵⁷ As it is not mandatory to appoint a managing agent in South Africa, the lack of a provision in the rules of a provision obligating the trustees to appoint a secretary and treasurer is a shortcoming. In larger mixed-use and self-managed schemes the election of not only a chairperson, but also a secretary and treasurer should not only be strongly encouraged, but should be made obligatory in the rules. Once appointed, they can divide the numerous tasks imposed by the Act, rules and resolutions of the body corporate amongst themselves. Naturally this task will be facilitated more efficiently by the appointment of a chairperson, secretary and treasurer. I will discuss these office bearers in more detail in chapter 7.

South African legislation should, similar to other jurisdictions, specifically legislate for the situation where no trustees have been elected or the requisite number of trustees cannot be filled. In New South Wales an owner, mortgagee or covenant chargee¹⁵⁸ can apply to an Adjudicator for an order that a nominated person be empowered to call a general meeting specifically to try and elect an executive committee.¹⁵⁹ In Singapore the owners can apply to the Strata Titles Board to compel the election and appointment of new office bearers.¹⁶⁰ However this might not solve the problem if the situation is due to the apathy of owners to serve on the council. In Malaysia the Commissioner of Buildings may authorize in writing any proprietor to convene an extraordinary general meeting that may provide for the duties and powers of the council to be exercisable by the proprietors in general meeting.¹⁶¹ This is a cumbersome way to exercise the functions. The position in Singapore where the Commissioner of Buildings could issue a notice to compel the subsidiary proprietors to take the necessary corrective actions in the event that the scheme is not being properly maintained is also a useful provision in the case of

¹⁵⁷ Annexure 8 rule 18.

¹⁵⁸ NSW Strata Schemes Management Act s 17(6).

¹⁵⁹ NSW Strata Schemes Management Act s 17(1); Ilkin *NSW Strata* 99.

¹⁶⁰ BMSMA s 102.

¹⁶¹ Strata Titles Act, Second Schedule, para 9(3). There is no provision such as this in the Sarawak Ordinance or the Sabah Enactment.

emergencies.¹⁶² In instances where management of the scheme is left to the owners in general meeting or by unanimous consent, the provision that makes individual unit owners jointly and severally liable for the payment of all the debts of the body corporate would be essential to provide for sufficient money to undertake the require maintenance and management matters.¹⁶³

It is for these reasons that I submit that it should be mandatory that a professional manager be appointed to manage sectional title schemes. This would be preferable to a situation where there are no willing or able persons to act as trustees, thereby requiring the general meeting to be convened every time the body corporate needs to make any decision relating to the governance of the scheme. There is an obvious need for an executive and administrative organ of the body corporate. The South African legislation has provided for this. The trustees are elected annually, and a majority of the trustees must be owners who often do not have any knowledge or experience of the administration and management issues relating to sectional titles. In my opinion the German system of appointing an experienced and knowledgeable professional manager as an executive organ of the body corporate, who may be assisted by an advisory council, is preferable to the position in South Africa where the trustees are elected as the executive arm of the scheme, who may supplement their expertise by appointing a managing agent to assist them in the day-to-day management of the scheme. The professional manager would then be an organ of the body corporate, and not merely an agent that is appointed contractually as is currently the case of the managing agent in South Africa, Australia and China. This equates the professional manager with the trustees, except that he or she is appointed contractually, and may be dismissed if he or she does not exercise his or her executive function in a professional manner that keeps him or her accountable. A shortcoming to this type of executive organ is that while an owner can be appointed as manager, a non-owner or indeed a professional managing firm is in practice appointed as manager of a scheme. However, this lack of personal

¹⁶² BMSMA s 6.

¹⁶³ S 55(6).

interest is counteracted by the fact that an advisory council consisting of unit owners may assist the professional manager.

Chapter 3: Number, nomination and election of eligible trustees

3 1 Introduction

This chapter will focus on the nomination and election of trustees. I will first consider the question whether legislation does or should provide for the existence of a board of trustees or members of the executive committee, council or board in the initial period before the first general meeting is held. Following on this I shall explore the important question as to who is eligible to be elected as a trustee at the first and subsequent annual general meetings of the body corporate. I will then examine the number of trustees that should be elected. Once this is established I will discuss the nomination of trustees and their subsequent election.

A significant shortcoming of the South African legislation is that it does not require the trustees to possess certain qualities or qualifications to be elected to the office of trustee. I will explore the consequences of the lack of any such requirement in the STSMA, STA and the prescribed management rules. Each topic will contain comparative material on how other jurisdictions deal with that particular matter. My concluding remarks will summarize the salient points on each topic and suggest possible improvements or solutions to perceived shortcomings in the South African sectional title law.

3 2 Provision for trustees in the initial period before first general meeting

3 2 1 South African position

The Sectional Titles Act 66 of 1971 (the “1971 Act”) together with its rules contained in Schedule 1 and 2 did not deal satisfactorily with the position of trustees during the initial period before the first general meeting (also referred to as the “inaugural general

meeting”). The only relevant provision was that the trustees had to be elected at the first general meeting.¹⁶⁴ The 1971 Act did not:

“Saddle someone with the responsibility to convene the first general meeting and to designate someone to act on behalf of the body corporate pending the election of the first trustees at the first general meeting.”¹⁶⁵

There was no provision made for the calling of the first general meeting within a specified amount of time. The fact that the developer usually managed the scheme during this period opened the door for abuse of power by the developer.

The second generation Sectional Titles Act 95 of 1986 (the “STA”) solved this shortcoming by not only providing that the first general meeting must be held within 60 days after the establishment of the body corporate, but also by engaging the owners as trustees to help in the management of the scheme during this period. The rules provide that all owners are trustees from the date of establishment of the body corporate until the first general meeting. At the start of the first general meeting they must retire, but are still eligible for election as trustees at that meeting.¹⁶⁶ The developer or his nominee must act as chairperson from the date of establishment of the body corporate. At the meeting he has to retire as trustee and chairperson, but is still eligible for re-election to these posts.¹⁶⁷ At the commencement of the first meeting of trustees, after their election, the trustees must elect a chairman from among their number who must hold office as such until the end of the next annual general meeting of the members of the body corporate.¹⁶⁸ Although all owners automatically act as trustees from the moment of establishment of the body corporate, the body corporate only becomes a viable management structure with the election of trustees at the first general meeting.

¹⁶⁴ Sectional Titles Act 66 of 1971 Schedule 1 rule 1.

¹⁶⁵ *Body Corporate of La Roche v Resort Administration Services CC* [2003] JOL 11655 (N) para 8.

¹⁶⁶ Annexure 8 rule 4(2).

¹⁶⁷ Annexure 8 rule 4(3).

¹⁶⁸ Annexure 8 rule 18.

The rationale for the owners automatically being trustees from the date of establishment of the body corporate was explained in *Body Corporate of La Roche v Resort Administration Services*¹⁶⁹ where the High Court stated:

“Unless owners were automatically trustees, the sectional title scheme would flounder in chaos until the proper appointment of trustees.”¹⁷⁰

Therefore, the STA and the prescribed management rules eliminated the shortcoming in the 1971 Act. It saddled the developer with the duty to hold the first general meeting within 60 days, and opted for making all the owners trustees during the initial period,¹⁷¹ instead of designating someone to act on behalf of the body corporate pending the election of the trustees at the first annual general meeting.¹⁷² The practical problem that might arise is that in the case of sales from building plans there may be a large number of transfers to sectional owners before the first general meeting, resulting in numerous trustees. This should not, however, cause too much concern because the developer is obliged to hold the first general meeting within 60 days after the establishment of the body corporate. All the owners will hold their position as trustees until new trustees are elected at the first annual general meeting. The developer, who generally owns most of the units in the scheme, initially dominates the management of a new scheme. Developers frequently use their initial superior voting powers to influence decision-making and to impose their will upon the owners. It often happens that early trustees would support the developer’s position.¹⁷³

Once the first trustees have been elected the operational control is gradually transferred from the developer to the trustees.¹⁷⁴ Although the developer is treated in the same way

¹⁶⁹ [2003] JOL 11655 (N).

¹⁷⁰ Paras 8-9.

¹⁷¹ Annexure 8 rule 50(1); STA s 36(7)(a) [STSM s 2(8)(a)].

¹⁷² [2003] JOL 11655 (N) para 8; Pienaar *Sectional Titles* 172.

¹⁷³ T Maree “Freezing the developer’s voting powers” (June 2006) 20 *MCS Courier* 7.

¹⁷⁴ The developer must account to the body corporate for the period from the establishment of the body corporate until the first trustees are elected in order for him or her to recover his or her expenditure for this period. At such 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 up to the date of the establishment of the body corporate have been paid; and

as the other owners, he or she will be able to control the election of the trustees as long as he or she owns the majority of the units.¹⁷⁵ Nevertheless, the dominance of the developer is desirable in the initial stage due to his or her intimate involvement with the project; the relative ignorance of new owners; their lack of cohesion and their inability to function as a group.¹⁷⁶ This, however, needs to be balanced against the possible abuse of his or her initial voting powers to influence decision-making.

3 2 2 Comparative survey

The New South Wales legislation contains more comprehensive (and also more complicated) provisions on members of the executive committee during the initial period.¹⁷⁷ The legislation distinguishes between two types of strata title schemes, namely small strata schemes consisting only of two lots (units) and those with more than two lots. In the case of a two-lot strata scheme where only one owner owns each lot, the executive committee (consisting of both sole owners) is formed on the same day as the owners corporation is formed, which is the date on which the strata plan is registered. If one lot is owned by a corporation or by co-owners then the executive committee (consisting of a nominee or the co-owner appointed by the other co-owners) will be formed when the company nominee is determined, or when the section 118 notice which identifies the lot owners is entered in the strata roll.¹⁷⁸

Where a strata scheme has more than two lots, there is no provision for the establishment of an executive committee consisting of all the owners in the scheme at the initial stage as in South Africa. There is no obligation on the developer or owners corporation to establish an executive committee in the initial stage before the first

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; STA s 36(7)(a)(i)-(iii) [STSMa s 2(8)(c)(i)-(iii)].

¹⁷⁵ Maree (June 2006) *MCS Courier* 7.

¹⁷⁶ Van der Merwe *Sectional Titles* 14-8.

¹⁷⁷ The executive committee can be constituted at three different points in time. An executive committee can be constituted either at the constitution of executive committee in the initial period before first general meeting; at the first annual general meeting; or at subsequent annual and extraordinary general meetings; Ilkin *NSW Strata* 93.

¹⁷⁸ NSW Strata Schemes Management Act, sch 3, cls 1(2)(a) and 1(2)(c).

general meeting, which may be postponed for a long time.¹⁷⁹ An executive committee might only be brought into being after having been elected at the first general meeting convened by the developer. The agenda of this meeting must include the election of an executive committee.¹⁸⁰

In the initial phase the scheme will be administered by the owners corporation in general meeting by complying with the Act's strict formalities for the convening of such meetings. Alternatively, a managing agent will be appointed against payment of a fee, or on occasion the original owner (developer) or his agent will manage the day-to-day operation of the scheme.¹⁸¹ At this early stage in the scheme's existence the current owners might wish to elect an executive committee to administer the scheme in order to avoid the the payment of the managing agent's charges; the onerous and strict formalities in convening general meetings to take decisions and to avoid leaving the management of the scheme in the hands of the original owner who is unfamiliar with the Act's complicated management provisions. The owners corporation is therefore empowered to elect an executive committee in the interim period before the first general meeting.¹⁸² This executive committee may not necessarily include the original owner.¹⁸³ The reduction of a developer's unit entitlement (participation quota), if it is more than one-half of the aggregate unit entitlement in the scheme to one-third of the aggregate total of the scheme,¹⁸⁴ prevents abuses by the developer in the initial phase.

The election of an executive committee in the interim period has the following advantages: it ensures that the details of owners, mortgagees and covenant chargee's are recorded in the strata roll (deeds registry); that levies and any other moneys and any interest owed by lot holders are paid to the owners corporation; that motions are drafted outlining the specific matters to be considered; that motion can be served on the secretary (who will normally be the original owner or his agent duly authorized in

¹⁷⁹ This occurs where some original owners do not anticipate early sales of their units or if they do not want to sell their units immediately after registration of the strata plan; Ilkin *NSW Strata* 94.

¹⁸⁰ NSW Strata Schemes Management Act, sch 2 cl 3(c); and sch 3, cl 2(7).

¹⁸¹ NSW Strata Schemes Management Act, sch 2, cl 24.

¹⁸² NSW Strata Schemes Management Act s 16(2).

¹⁸³ NSW Strata Schemes Management s 16; and sch 3, cl 2(7); Ilkin *NSW Strata* 94.

¹⁸⁴ NSW Strata Schemes Management Act, sch 2, cl 18(3).

writing)¹⁸⁵ and that an extraordinary general meeting will be convened under a chairperson (who will again normally be the original owner or an appointed agent)¹⁸⁶ to proceed through steps prescribed by regulations 17 and 18.¹⁸⁷ Once the executive committee is elected it must appoint a chairperson, secretary and treasurer at the first executive committee meeting held thereafter.¹⁸⁸ The office bearers shall then hold the same respective positions in the owners corporation.¹⁸⁹ The chairperson (who is the original owner or an appointed agent)¹⁹⁰ is responsible for the conduct of the election. If the procedure is breached an eligible applicant may lodge an application with an Adjudicator for an order against the chairperson.¹⁹¹

In Singapore the council of the management corporation for the initial period consists of each proprietor (owner) who is a natural person or the proprietor's nominee, together with the nominee of each proprietor that is a company.¹⁹² If there is only one subsidiary proprietor, then he or she may take any decision, and such decision is deemed to be the decision of the council of the management corporation.¹⁹³ Therefore, in Singapore where there is no council of the management corporation, the management corporation itself must manage the scheme during the initial period.¹⁹⁴

In Malaysia where there are no more than three proprietors (owners), during the initial period before the first general meeting has been held then the council (trustees) consists of all the proprietors.¹⁹⁵ This may be construed as making provision for a council consisting of the first three proprietors during the period between the time of registration of the strata title application or the opening of a book of the strata register,

¹⁸⁵ NSW Strata Schemes Management Act, sch 2, cl 24.

¹⁸⁶ NSW Strata Schemes Management Act, sch 2, cl 24.

¹⁸⁷ I will comprehensively discuss regulations 17 and 18 later in this chapter.

¹⁸⁸ NSW Strata Schemes Management Act s 18(1).

¹⁸⁹ NSW Strata Schemes Management Act s 18(2).

¹⁹⁰ NSW Strata Schemes Management Act, sch 2, cl 24.

¹⁹¹ In terms of the NSW Strata Schemes Management Act s 138 or s 153 (whichever is more appropriate); Ilkin *NSW Strata* 94.

¹⁹² BMSMA s 53(2).

¹⁹³ BMSMA s 53(3).

¹⁹⁴ BMSMA s 53(10).

¹⁹⁵ Strata Titles Act; Sarawak Ordinance; Sabah Enactment, Second Schedule, para 2(2).

as the case may be, and the first general meeting of the management corporation.¹⁹⁶ This ensures proper management of the strata scheme from the time of the management corporation's inception.

In terms of the United States UCIOA all the owners are not automatically members of the executive council from the time of establishment of the owners' association as is the position during the initial period in South Africa. The UCIOA allows the developer to appoint transitional council members who will be removed at the first general meeting. New council members will be elected or transitional council members can be re-elected.¹⁹⁷ The developer must then hand over control of the association to the owner elected council members within a specified time. The UCIOA sets out specific provisions for the gradual turnover of control.¹⁹⁸

Instead of allowing developers to appoint a provisional executive council on the model of the American UCIOA, the important Chinese Management Property Regulation of 2003 makes provision for the developer to appoint a professional managing agent during the initial period.¹⁹⁹

3 3 Eligibility to be elected as a trustee

3 3 1 Introduction

All jurisdictions make provision for the election of trustees or an executive committee, council or board at the first general meeting of the scheme. The next crucial question to consider is who will qualify to be elected as trustees. The primary focus of this subsection will be on the persons eligible to be nominated and elected as trustees. As part of this discussion I shall consider the mixture of owners and outsiders required to make up a group of trustees. It is important to note that the "eligibility" of persons to be

¹⁹⁶ Keang Sood *Strata Titles* 312.

¹⁹⁷ UCIOA § 3-103(d).

¹⁹⁸ UCIOA s §-103(e). Sixty days after the developer transfers title to purchasers of 25% of the units, at least one member and not less than 25% of the members of the executive board must be elected by the unit owners. Sixty days after the title transfer of 50% of the units to purchasers not less than 33% of the members of the executive board must be elected by unit owners.

¹⁹⁹ Property Management Regulation of 2003 arts 21-26; Chen *Chinese Condominium Law*148.

elected as trustees should not be confused with the “qualifications” required to be elected as a trustees, which I will examine later in this chapter.

3 3 2 South African position

Prescribed management rule 5 indicates which persons are eligible for nomination and election as trustees. The rule stipulates that a person shall not be required to be an owner or the nominee of a juristic person, in order to be eligible for the office of a trustee.²⁰⁰ This rule is subject to two provisos namely that the majority of trustees must be owners or spouses of owners, and that the managing agent or any of his or her employees or an employee of the body corporate may not be a trustee, unless he or she is also an owner.²⁰¹

The fact that non-owners, and not only owners or nominees of juristic persons, may be elected as trustees was confirmed in *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and another*,²⁰² where it was stated that a trustee does not necessarily cease to be a trustee on the sale of his unit to a third person. Although one would logically expect only owners of units or nominees of juristic persons to be trustees, prescribed management rule 5 permits a non-owner to be a trustee.

The first proviso is that the majority of trustees must be owners or spouses of owners.²⁰³ Although this proviso could prove to be too restrictive, its aim is to ensure that the majority of the trustees, as owners, have a personal interest in the efficient management of the scheme, while leaving it open for a small number of suitably qualified outsiders to be elected as trustees to bring the required experience and skill to the mix of trustees. It furthermore caters for instances where an insufficient number of owners or their spouses are prepared to serve as trustees.²⁰⁴ It might also be easier in

²⁰⁰ Annexure 8 rule 5.

²⁰¹ Annexure 8 rules 5(a) and (b).

²⁰² 2006 3 SA 369 (W) para 11.

²⁰³ Annexure 8 rule 5(a).

²⁰⁴ Van der Merwe (1999) *Singapore Journal of International & Comparative Law* 180-181.

practice to remove outsider trustees than owner trustees from trusteeship in cases where they are not pulling their weight.

A husband and wife, who own a unit jointly, can both be trustees. This follows from the definition of “owner” in section 1 of the STA in terms of which both husband and wife will qualify either as an owner or the spouse of an owner. It can be argued that this could cause problems due to the fact that too much control exists under one roof.²⁰⁵ However, there is no restriction disallowing two residents of the same section from acting as trustees of the body corporate, provided that the majority of trustees are owners or spouses of owners.²⁰⁶

The second proviso is that the managing agent or any of his or her employees or an employee of the body corporate may not be a trustee unless he or she is an owner.²⁰⁷ The relaxation of the rule that managing agents and employees of the body corporate can be trustees if they are owners of a section was introduced in 2000.²⁰⁸ A possible reason for this relaxation may be the difficulty in practice to obtain professional trustees and to fulfill the requirement that at least half of the trustees must be owners.²⁰⁹ Although the provision is intended to ensure that at least half the trustees must be owners, there is a concern of ethical conflict that managing agents or employees (even if owners) may not always serve the best interests of the body corporate.²¹⁰ A situation could arise where a managing agent wields enough power in the board of trustees to ensure that the services of the firm he or she works for are constantly retained regardless of the low standard of service. Another area of conflict is that the board of trustees, of which he or she is a member, sets the managing agent’s remuneration.

²⁰⁵ Constas & Bleijs *Demystifying Sectional Title* 37.

²⁰⁶ J Paddock “Q & A with Jennifer Paddock: Two too many trustees” (September 2009) 3-9 *Paddocks Press* 5.

²⁰⁷ Annexure 8 rule 5(b).

²⁰⁸ This amendment was introduced by section 8 of GN R 830 in GG 21483 of 25-08-2000.

²⁰⁹ Van der Merwe *Sectional Titles* 14-121.

²¹⁰ Constas & Bleijs *Demystifying Sectional Title* 36.

Furthermore the possibility that owner-trustees may abuse their power to become the managing agent is also not excluded by this amendment.²¹¹

The reason why the managing agent or employee of the body corporate is not allowed to be a trustee (unless they are owners) is therefore to avoid the possible conflict of interests between the trustees and the managing agent and the trustees and the employees of the body corporate. The function of the trustees is to make executive resolutions, and to then execute them or delegate the execution thereof to the managing agent or other employees. The managing agent and employees must implement the governance and executive functions of the trustees and if employers and managing agents can also act as trustees, these functions could become clouded. This needs to be balanced against prejudicing an employee of the body corporate who has nothing to do with the management, but who has an investment in the scheme.²¹²

The majority of trustees must be either natural persons who own a unit or his or her spouse. An owner who is a juristic person, like a limited company or close corporation, may not as such be elected as a trustee. Only the representative of the juristic person can be elected as a trustee.²¹³ The trustee must therefore be a natural person with contractual capacity.²¹⁴ However, the juristic person may nominate, in accordance with its internal governance documents, one or more persons to serve as trustees, just as any natural person can. Therefore, a director of a company may sign a nomination form either as the sole director or if duly authorised by a resolution of the executive board of directors. At the annual general meeting the body corporate can elect one or more trustees nominated by a juristic person or owner for the purpose of satisfying the requirement that the majority of trustees must be owners or spouses of owners. If a director of a limited company and his spouse are both elected as trustees, one of them

²¹¹ The managing agent and their employees and the employees of the body corporate are also disqualified from being appointed by owners as proxies to attend general meetings of the body corporate on their behalf; van der Merwe *Sectional Titles* 14-121.

²¹² T Woudberg *Basic Sectional Title Book One* 2 ed (1999) 71.

²¹³ T Maree *Kits Deeltitel Oplossings* (2001) 4.4.

²¹⁴ Woudberg *Basic Sectional Title Book One* 2 ed (1999) 71.

should not be an owner and should not be considered a spouse of the owner for purposes of rule 5(a).²¹⁵

Many of the members of the body corporate buy their units for investment purposes. They do not reside in their sections, and in some cases rarely visit the building. Rule 5 does not require that the owner must also be an occupier or resident of a unit in the sectional title scheme.²¹⁶ These non-resident owners may not be personally involved or interested in the day-to-day management and maintenance of the scheme, and are therefore not ideal persons to be elected as trustees. In terms of the management rules the duties and powers of the body corporate must be exercised and performed by the trustees,²¹⁷ and the trustees must do all things reasonably necessary for the control, management and administration of the common property and the enforcement of the rules of the scheme.²¹⁸ The trustees therefore need to be in open, regular, and speedy communication with each other and the members of the body corporate. They must hold regular trustee meetings; constantly inform themselves of the affairs of the body corporate and have a clear understanding of the day-to-day needs of the body corporate. For these reasons trustees must be easily accessible and approachable, and consequently non-resident owners are not always the best candidates to be elected as trustees.

Due to the fact that the eligibility for the position of trustee is regulated by the prescribed management rules, the owners will be able to amend the management rules by way of a unanimous resolution of the body corporate²¹⁹ to require that the trustees must be both owner and resident of a section in the scheme. Although such an amendment would mean that there would be more personal involvement in the administration of the scheme, it must be noted that much more than a “resident trustee” is needed for the

²¹⁵ G Paddock “Q & A with the Professor: How many trustees can represent an owner who is an artificial person?” (June 2008) 3-6 *Paddocks Press Newsletter* 7.

²¹⁶ L De Lange “What to do about non-resident trustees” (July 2007) 25 *MCS Courier* 5.

²¹⁷ Annexure 8 rule 25.

²¹⁸ Annexure 8 rule 28(3).

²¹⁹ STA s 35(2)(a) [STSMA s 10(2)(a)].

efficient administration of the scheme, such as experience, skill, knowledge and participation.²²⁰

Until recently there have been no restrictions on levy defaulters being nominated or elected as trustees. It has happened in practice that levy defaulters, who have been nominated and elected as trustees, gained control of the trustees, manipulated decision-making and blocked resolutions to institute levy recovery actions against themselves.²²¹ For this reason prescribed management rule 7 was amended by the Amendment Regulations of 2013²²² to provide the following:

“Nominations by owners for the election of trustees at any annual general meeting shall be given in writing, accompanied by the written consent of the person nominated, so as to be received at the *domicilium* of the body corporate not later than 48 hours before the meeting: Provided that the trustees are also capable of being elected by way of nominations with the consent of the nominee given at the meeting itself should be insufficient written nominations be received to comply with rule 4(1): *Provided further that no nomination or appointment as trustee, of a person in breach of rule 64(1) or rule 64(2), may be made or accepted.*” (My emphasis added)

Since there is no rule 64(1) or 64(2), the correct reference should have been to rule 64(a) or 64(b).²²³ Prescribed management rule 64 deals with voting embargoes. Rule 64(a) deals with owners in arrears with levy payments;²²⁴ while rule 64(b) deals with owners who consistently breach conduct rules.²²⁵ These two classes of defaulters will now be debarred from being elected as trustees.

²²⁰ De Lange (July 2007) *MCS Courier* 5.

²²¹ T Maree “Latest rule amendments” (April 2013) 44 *MSC Courier* 1.

²²² Published in GN R 196 in *GG* 36421 of 14-03-2013.-2

²²³ Maree (April 2013) 44 *MSC Courier* 1.

²²⁴ Annexure 8 rule 64(a).

²²⁵ Annexure 8 rule 64(b).

Prescribed management rule 7 has been amended again by the Amendment Regulations of 2015,²²⁶ and which has provided the addition of the following proviso:

“Provided further that an owner in breach of rule 64 may not nominate any person as a trustee.”

Therefore an owner who is in arrears with payment of his levies, or remaining in breach of the conduct rules, despite written warning to comply, may also not nominate a person for election as a trustee.²²⁷ This amendment also corrected the abovementioned error by the removal of the reference previously made to the non-existent sub-clauses (1) and (2) to prescribed management rule 64. Consequently a person in breach of rule 64 may neither be nominated nor elected as trustee or nominate another as trustee.

Concomitant with prescribed management rule 7, rule 13 was amended by the Amendment Regulation of 2013.²²⁸ Prescribed management rule 13(g) has been substituted to read as follows:

“A trustee shall now cease to hold office as such if he is in arrears for more than 60 days with any levies and contributions payable by him in respect of his unit or exclusive use area (if any) and he fails to bring such arrears up to date within seven days of being notified in writing to do so.”²²⁹

The appointment of a duly appointed trustee will automatically lapse if he or she defaults in his or her levy payments and fails to comply with the notice. This complements and tightens up the embargo contained in the new prescribed management rule 7, on the nomination of trustees by owners who are in arrears as well as the nomination and election of trustees who are in arrears.²³⁰

²²⁶ Amended in GN R1422 in *GG* 18387 of 30-06-2015, and took effect from 30 July 2015.

²²⁷ T Maree “Latest rule amendments – Trustees take note!” (July 2015) 50 *MCS Courier* 2.

²²⁸ Published in GN R 196 in *GG* 36421 of 14-03-2013.

²²⁹ Annexure 8 rule 13(g).

²³⁰ Maree (April 2013) 44 *MSC Courier* 2; Maree (July 2015) 50 *MCS Courier* 2.

The prescribed management rules do not set out the minimum qualifications required for a person to be elected as a trustee. However, rule 13 sets out the circumstances in which trustees cease to hold the office of trustee, with the implication that only certain types of persons can qualify as trustees. The relevant circumstances for our purposes, mentioned in rule 13, are where a person nominated as trustee becomes of unsound mind;²³¹ his or her estate is sequestrated or surrendered as insolvent;²³² he or she is convicted of an offence which involves dishonesty²³³ or he or she becomes disqualified from being appointed or acting as a director of a company in terms of sections 218 or 219²³⁴ of the 1973 Companies Act.²³⁵ Since trustees will in these circumstances automatically cease to be trustees, it is suggested that owners who are nominated as trustees should be forced to disclose whether they would be disqualified to stay on as trustees due to the fact that any of the circumstances mentioned above applies to them. A person nominated to the office as trustee should be compelled to declare these facts to the existing trustees.

3 3 3 Comparative survey

In a New South Wales strata scheme consisting of three or more lots (units), an election needs to be held to elect the members of the executive committee.²³⁶ The NSW Strata Schemes Management Act enumerates three categories of persons who are eligible for election to the executive committee.²³⁷ They are an individual who is an owner as

²³¹ Annexure 8 rule 13(b).

²³² Annexure 8 rule 13(c).

²³³ Annexure 8 rule 13(d).

²³⁴ Companies Act 71 of 2008 s 69. Briefly these provisions are general principles to disqualify a person being a director of a company such as minority, un-rehabilitated insolvent, and being removed from office of trust on account of misconduct.

²³⁵ Annexures 8 rule 13(f).

²³⁶ In smaller strata schemes consisting of only two lots (units) there is no need to elect members of the executive committee (board of trustees) because the owner of each lot by law automatically becomes the member of the executive committee. If the lot is owned by one owner then that owner will be the member. If the lot is owned by a corporation then the nominee of the corporation will be the member. If the lot is owned by two or more persons then the co-owner agreed upon by the other co-owner will be the member of the executive committee, or if there is no agreement the co-owner first named on the strata roll will be the executive committee member; NSW Strata Schemes Management Act, sch 3, cls 1(2) and 1(3).

²³⁷ NSW Strata Schemes Management, sch 3, cl 2(4).

specifically defined in the Dictionary attached to the Act;²³⁸ a company nominee of a corporation that owns a unit and an individual who is not an owner but who is nominated by an owner. The last category is subject to the proviso that the owner is not also a candidate for election. In practice the owner's nominee is often a spouse or a relative renting the unit from an owner.²³⁹

The eligibility of co-owners such as spouses for nomination for election to the executive committee is regulated.²⁴⁰ A person who is co-owner of a lot may not be a candidate for election as a member of the executive committee, unless the person is nominated for office by an owner who is not a co-owner of the lot,²⁴¹ or by a co-owner of the lot who is not a candidate for election as a member.²⁴²

The nomination and election of sole owners and co-owners to the executive committee are regulated in a very complicated manner. It is sufficient to state that persons that are sole owners and co-owners may nominate members for the executive committee, and their own nomination and election are limited, amongst other things, by whether they owe any money (including interest) to the owners corporation as at the date of the notice of the general meeting. However, there are no provisions in the Act that preclude the eligibility to the executive committee of an owner who is in arrears with levy payments. All nominations are ineffective unless supported by the nominee's consent. The nominee's written consent can be presented at the meeting to elect the executive committee or the nominee can give oral consent at such a meeting.²⁴³

Therefore, in New South Wales the members of the council are either owners,²⁴⁴ representatives of juristic persons who are owners,²⁴⁵ or non-owners who are

²³⁸ Owner of a lot in a freehold strata scheme means: (a) except as provided by paragraph (b), a person for the time being recorded in the Register as entitled to an estate in fee simple in that lot, or (b) a person whose name has been entered on a strata roll as the owner in accordance with section 98.

²³⁹ Ilkin *NSW Strata* 100.

²⁴⁰ NSW Strata Schemes Management Act, sch 3, cl 2(5).

²⁴¹ NSW Strata Schemes Management Act, sch 3, cl 2(5)(a).

²⁴² NSW Strata Schemes Management Act, sch 3, cl 2(5)(b).

²⁴³ NSW Strata Schemes Management Act, reg 17(2).

²⁴⁴ NSW Strata Schemes Management Act, sch 3, cl 2(4)(a).

²⁴⁵ NSW Strata Schemes Management Act, sch 3, cl 2(4)(b).

nominated by owners who are not nominated themselves.²⁴⁶ Although the procedure for appointment is comparable to the South African procedure, there is not the same restriction that more than half of the trustees must be owners or spouses of owners. This enables the members of the owners corporation to nominate and elect any number of skilful and experienced people as members of the council.²⁴⁷

In Singapore only individuals that are at least 21 years of age are eligible for election as a member of the council.²⁴⁸ Apart from that, a person is eligible if he or she is a proprietor (owner) of a lot (unit);²⁴⁹ is nominated for election by a proprietor of a lot which is a company²⁵⁰ or is a member of the immediate family of a proprietor of a lot and is nominated for election by that proprietor.²⁵¹

The latter instance is illustrated by *Si-Hoe Kok Chun 7 Anor v Ramesh Ramchandani*.²⁵² The husband of a proprietor was elected as a member of the council. The proprietors contended that the husband (the respondent) had no business in the management corporation as he was not a proprietor. The High Court confirmed that under the then section 60(5)(c) of the LTSA (the equivalent of section 53(6)(c) of the BMSMA) a council member was not required to be a proprietor. The respondent had been nominated by his wife, who was a proprietor, and was therefore eligible for election as a council member.

Similar to the recent South African position, an embargo is placed in Singapore on the election to the executive council of proprietors who are in arrears with the payment of their contributions or any other moneys owed to the management corporation in respect of their lots. If they are still in arrears on the third day before the election they are not eligible as members of the council.²⁵³ However, the BMSMA does not go so far as to

²⁴⁶ NSW Strata Schemes Management Act, sch 3, cl 2(4)(c).

²⁴⁷ Pienaar *Sectional Titles* 174.

²⁴⁸ BMSMA s 53(6).

²⁴⁹ BMSMA s 53(6)(a).

²⁵⁰ BMSMA s 53(6)(b).

²⁵¹ BMSMA s 53(6)(c).

²⁵² [2006] 2 SLR 59; Keang Sood *Strata Title* 313.

²⁵³ BMSMA s 53(7)(a)-(c).

place an embargo on the person in arrears to nominate a person for the executive council.

The BMSMA contains several complicated provisions designed to prevent cronyism in the election of a council that would result in a council consisting of a group of intimate friends. An individual who is a joint proprietor (co-owner) of a lot (unit) is not eligible for election as a member of the council if the other proprietor is also a candidate or has nominated another person for election.²⁵⁴ Consequently, where a lot is jointly owned by two or more proprietors, only one of them are eligible for election as a council member.²⁵⁵ This is illustrated in *Si-Hoe Kok Chun 7 Anor v Ramesh Ramchandani*.²⁵⁶ The appellants were co-proprietors (co-owners) of certain units in a strata scheme. The High Court observed that the appointment of both appellants as council members for the same year was a breach of the then section 60(6) of the LTSA (the equivalent of section 53(8)(a) of the BMSMA) which is one of the sections designed to prevent cronyism in the election of members for the executive board.

To prevent absolute control and abuse of position by any one proprietor in the council there is a 49% cap on the council seats for any one proprietor.²⁵⁷ The proprietors with substantial interests in a development are given a greater say in the management of their assets or investments by allowing owners of multiple lots to have proportional representation in the council according to share value subject to the 49% cap. This would mean that in a fourteen-member council a proprietor could have up to six seats or one seat short of half of the total seats. This also prevents cronyism and ensures that the interests of the minority proprietors are protected and that the council is not dominated by one group of proprietors.²⁵⁸

²⁵⁴ BMSMA s 53(8)(a); Keang Sood *Strata Title* 313.

²⁵⁵ BMSMA s 53(6)(c).

²⁵⁶ [2006] 2 SLR 59 6; Keang Sood *Strata Title* 314.

²⁵⁷ BMSMA s 53(8)(b) read with s 53(12)(a) and (b).

²⁵⁸ Keang Sood *Strata Title* 314; van der Merwe (1999) *Singapore Journal of International & Comparative Law* 181.

An owner may not nominate a member of his or her family if he himself is nominated;²⁵⁹ the co-owner of a unit may not be nominated as a member if the other co-owner is nominated or if he himself has nominated another person;²⁶⁰ and an individual who is nominated for election by an owner who owns two or more lots is not eligible for election as a member of the council if that owner together with his or her nominees nominated at the same election or elected or appointed to the council at the same or other election, or such of his nominees, exceed the threshold number for that owner determined in that manner.²⁶¹ Finally an undischarged bankrupt is eligible for election as a member of a council if he or she or another person has disclosed his or her status as such in writing at the time of his nomination.²⁶²

The Malaysian provisions are not so elaborate. In terms of the Strata Titles Act it is unclear as to whether all or only one of the co-proprietors (co-owners) of a parcel is eligible as member of a council. It is recommended that only one of them should be eligible to stand for election by virtue of the co-ownership of that parcel as the interests of co-proprietors of a parcel are most likely to be similar.²⁶³

The UCIOA implies that a council member need not necessarily be a unit owner, but this is subject to the proviso that the majority of the executive board members must be unit owners.²⁶⁴ This is the same as the position in South Africa, and therefore any person who is not an owner can be a council member if nominated by an owner not standing for election as a council member.²⁶⁵ However, the South African Act contains an important exception in that the managing agent or any of his or her employees or an employee of the body corporate may not be a trustee, unless he or she is an owner.²⁶⁶

²⁵⁹ BMSMA s 53(6)(c) and s 53(8)(a).

²⁶⁰ BMSMA s 53(8)(a); Keang Sood *Strata Title* 313.

²⁶¹ BMSMA s 53(8)(b).

²⁶² BMSMA s 53(9).

²⁶³ Keang Sood *Strata Title* 314. This argument is supported by the Singapore provision (BMSMA s 53(8)(a)) that an individual who is a joint subsidiary proprietor of a lot with another subsidiary proprietor is not eligible for election as a member of the council if that other subsidiary proprietor is also a candidate for the election concerned.

²⁶⁴ UCIOA § 3-103(f).

²⁶⁵ Chen *Chinese Condominium Law* 148 suggests that the future uniform condominium legislation should follow the South African position in this regard.

²⁶⁶ Annexure 8 rules 5(a) and (b).

In China the executive council member must be a unit owner or a representative of a unit owned by a corporation.²⁶⁷ Only unit owners can be council members. This is a shortcoming as it excludes outside candidates who might introduce some professionalism in management by an executive council. There might also not be a sufficient number of unit owners who are willing to serve as council members. It is noteworthy that in China it is difficult to have experienced council members with the required skills since the management of sectional title schemes by unit owners is a novelty.²⁶⁸

3 4 Number, nomination and election of trustees

3 4 1 Introduction

Having identified the persons who are eligible to be elected as trustees, this discussion will first focus on the manner in which the number of trustees for a particular scheme is determined. Thereafter the nomination of persons to be elected as trustees will be examined. Since the election is a compulsory item on the agenda of the first general meeting and all annual general meetings thereafter, the manner in which trustees are elected at general meetings will then be dealt with.

3 4 2 South African position

At the first general meeting and at every annual general meeting held thereafter the members of the body corporate must determine the *number* of trustees that must be elected for the upcoming year, and must conduct an election for the purpose of filling these positions.²⁶⁹ The number determined may never be less than two trustees.²⁷⁰ The original management rules in Schedule 1 of the 1971 Act specified a maximum number of seven trustees,²⁷¹ but this was not repeated in the prescribed management rules in

²⁶⁷ Property Management Regulation of 2003 art 16(2); Property Management Regulation of Shenzhen Special Economic Zone of 2007 art 23.

²⁶⁸ Chen *Chinese Condominium Law* 148.

²⁶⁹ Annexure 8 rules 50(2)(vi) and 56(d) and (e).

²⁷⁰ Annexure 8 rule 4(1).

²⁷¹ Schedule 1 s 1 provides that there shall not be less than three and more than seven trustees

Annexure 8 of the Regulations of 1988 made under the STA. There is thus currently no limit on the maximum number of trustees.

The number of trustees required will depend on the size of the scheme and the nature of the duties and functions that must be performed. The number must be decided upon at every general meeting and can be amended from time to time in the annual general meeting.²⁷² The number need not be the same as for previous years. In principle the appointment of too many trustees should be avoided as it could make management complicated and cumbersome.²⁷³

Only owners²⁷⁴ who are not in arrears with their levy contributions or in persistent breach of the scheme rules can *nominate* trustees.²⁷⁵ The owners must lodge written nominations for the election of trustees at the *domicilium* of the body corporate at least 48 hours before the annual general meeting. The nominations must be accompanied by the written consent of the nominees.²⁷⁶ In the event of an insufficient number of written nominations being received, nominations may also be tendered at the general meeting with the consent of the nominees.²⁷⁷ Only persons who are familiar with the responsibilities that go with the office of trustee should accept such a nomination.

In the event that the nomination for a trustee is not signed then one of two things could happen at the annual general meeting.²⁷⁸ If sufficient signed nomination forms have been received at least 48 hours before the meeting to fill the number of positions of trustees decided upon by the meeting, then the persons who were properly nominated will fill the positions and the nominees whose nomination forms were not signed will unfortunately have to try again the next year. If an insufficient number of properly signed nomination forms was received prior to the meeting the persons whose nomination

²⁷² Annexure 8 rule 4(1).

²⁷³ Woudberg *Basic Sectional Title Book One* 71; Constat & Bleijs *Demystifying Sectional Title* 36.

²⁷⁴ G Paddock *Sectional Survival Manual* (2013) 100.

²⁷⁵ Annexure 8 rule 7.

²⁷⁶ Annexure 8 rule 7.

²⁷⁷ Annexure 8 rule 7 read with rule 4(1).

²⁷⁸ J Paddock "Q & A with Jennifer Paddock: If a trustee nomination is not signed then one of two things could happen at the AGM" (July 2010) 5-7 *Paddocks Press Newsletter* 6.

forms were not correctly completed can be nominated at the meeting. If such nomination is consented to, then he or she can stand for election.

Due to the fact that the number of trustees required for a particular scheme for the ensuing year will not be public knowledge before determined at the general meeting, it will not be clear whether or not the nominations received before the meeting will be sufficient to fill the number of trustee positions until this decision has been made. If the number of nominations received before the meeting equals the number of trustees decided upon at the meeting, then there will be no need for a vote at the meeting, as the duly nominated persons will automatically fill these positions. This will be subject to the requirement of rule 5 that more than half of the trustees must be owners or spouses of owners. If the requirement is not met, more persons will have to be nominated at the meeting, until the right mix has been achieved.²⁷⁹

Once all the nominations have been announced, the meeting must vote. After the votes have been counted, the chairperson must check how many of the trustees *elected* are owners or spouses of owners and how many are non-owners. If the number of non-owners outnumbers the number of owners or spouses of owners, then the non-owner trustee with the lowest votes in number and value of votes must be eliminated. The value is determined by the participation quota set out in the schedule at the back of the sectional plan of the scheme in terms of section 5(3)(g) of the STA.²⁸⁰ This process must be repeated until the correct mix of trustees is achieved with the majority being owners or their spouses.²⁸¹

²⁷⁹ Van der Merwe *Sectional Titles* 14-120.

²⁸⁰ STA s 1 defines “participation quota” to mean, in relation to a section or an owner of a section, the percentage expressed to four decimal places determined in accordance with the provisions of section 32(1) or (2) in respect of that section for the purpose of calculating the value of the vote for that owner of the section where it is to be reckoned in value; the undivided share in the common property of the owner of the section and the proportion in which the owner must make contributions to the administrative fund or be liable for the payment of a judgement debt of the body corporate. The participation quota is determined by dividing the floor area, correct to the nearest square meter, of the section by the floor area, correct to the nearest square meter, of all the sections in the building comprising the scheme. Two effects of the participation quota, namely the value of the vote and responsibility to make contributions or liability to pay judgement debts, of the participation quota can be amended by the making of a management or conduct rule in terms of section 32(4) of the STA.

²⁸¹ J Paddock “Trustee Nominations and Elections” (August 2010) 5-8 *Paddocks Press Newsletter* 4.

The previous prescribed management rule 6 created uncertainty as to whether existing trustees should be considered automatically re-elected if there were insufficient or no nominations due to the fact that it did not contain the phrase “if so nominated.” Currently management rule 6 sets out that trustees are eligible for re-election, but only if they are nominated in the same way as any other nominee trustee. These trustees hold office only until the next annual general meeting.

3 4 3 Comparative survey

The election of the executive committee is extensively regulated in New South Wales. The election is a compulsory item on the agenda of the first general meeting and all annual general meetings thereafter.²⁸² The chairperson is responsible for the conduct of the election and must follow the prescribed steps.²⁸³ The process starts with the chairperson’s announcement that as part of the agenda at the first annual general meeting nominations for candidates for the executive committee must be taken; the number of members must be decided upon and then the required number of trustees must be elected. During the process of election, the eligibility of persons nominated for election must be considered.

The regulations set out the procedure for nomination and election of an executive committee for a strata scheme comprising more than 2 lots.²⁸⁴ The procedure is prescribed by regulations 17 and 18.²⁸⁵ At a meeting of an owners corporation at which its executive committee is to be elected, the chairperson must announce the names of the candidates already nominated in writing for election to the executive committee,²⁸⁶ and call for any oral nominations of candidates eligible for election to the executive committee.²⁸⁷ Nominations can only be made by persons entitled to vote.²⁸⁸ A written or

²⁸² NSW Strata Schemes Management, sch 2, cl 3(c).

²⁸³ NSW Strata Schemes Management Act, sch 2, cl 3(c); NSW Strata Schemes Management Regulations 2010, regs 17 and 18.

²⁸⁴ NSW Strata Schemes Management Regulations 2010, reg 16.

²⁸⁵ NSW Strata Schemes Management Regulations 2010 made under the Strata Schemes Management Act 138 of 1996.

²⁸⁶ NSW Strata Schemes Management Regulations 2010, reg 17(1)(a).

²⁸⁷ Reg17(1)(b).

²⁸⁸ NSW Strata Schemes Management Act, sch 2, cl 9(1).

oral nomination is ineffective if it is made by a person other than the nominee unless it is supported by the consent of the nominee given in writing, if the nominee is not present at the meeting,²⁸⁹ or orally, if the nominee is present at the meeting.²⁹⁰ In the event that no candidates are nominated or stand for election, there shall be no executive committee. The scheme will then have to be administered by the owners corporation in general meeting or by a managing agent.²⁹¹

Where no further nominations are forthcoming the chairperson must declare that nominations are closed. After such declaration, the owners corporation is to decide²⁹² the number of members of the executive committee.²⁹³ No minimum number is prescribed, but a maximum number of nine is prescribed.²⁹⁴ The previous New South Wales Strata Titles Act stipulated one as the minimum number and nine as the maximum number of members of the executive committee.²⁹⁵ Certain guidelines are used to determine the number of executive committee members required which I will discuss in the evaluation below. Once the number is determined, it cannot be changed unless altered by a later resolution of the owners corporation.

The chairperson must then proceed with whichever of the following three steps is applicable. If the number of candidates nominated *equals* the number of members of the executive committee decided upon, then the chairperson must declare that these candidates have been elected to the executive committee.²⁹⁶ There is then no need to proceed further with regulation 17. If the number of candidates nominated is *less than* the number of members of the executive committee decided upon, the chairperson must declare that those candidates have been elected to the executive committee despite the fact that there will be fewer members than required by the resolution.²⁹⁷ The shortfall will

²⁸⁹ NSW Strata Schemes Management Regulations 2010, reg 17(2)(a).

²⁹⁰ NSW Strata Schemes Management Regulations 2010, reg 17(2)(b).

²⁹¹ Appointed in terms of s 16(4) of the NSW Strata Schemes Management Act 138 of 1996.

²⁹² In accordance with NSW Strata Schemes Management Act 138 of 1996, sch 3, cl 2(2).

²⁹³ NSW Strata Schemes Management Regulations 2010, reg 17(3)

²⁹⁴ NSW Strata Schemes Management Act, sch 3, cl 2(2).

²⁹⁵ NSW Strata Titles Act 68 of 1973 s 71(2).

²⁹⁶ NSW Strata Schemes Management Regulations 2010, reg 17(4)(a).

²⁹⁷ NSW Strata Schemes Management Regulations 2010, reg 17(4)(a).

be accounted for by automatically reducing the number of members required to form the executive committee. This step is unlikely to occur in practice because the owners corporation is unlikely to decide upon a number of members that exceeds the number of candidates nominated. Where no candidates are nominated or stand for election, then there shall be no executive committee and the scheme will have to be administered by the owners corporation in the general meeting or by a strata managing agent. If the number of candidates is *more than* the number of members of the executive committee decided upon the chairperson must arrange for a ballot to be taken.²⁹⁸

Regulation 18 deals with the ballot for the executive committee.²⁹⁹ Prior to the ballot the chairperson must announce the name of each candidate and the nominator of the candidate concerned.³⁰⁰ The name of the nominator is important as the nominator is allowed to terminate the election of the member to the executive committee at a later date.³⁰¹ The chairperson must provide each person present and entitled to vote with a blank ballot paper for each lot (unit) in respect of which the person is entitled to vote.³⁰² It is best to mark the ballot papers with the relevant lot number.

For a vote to be valid, a ballot-paper must be signed by the voter and completed by the voter's writing on it the names of the candidates (without repeating a name) for whom the voter desires to vote, the number of names written being no more than the number determined by the owners' corporation as the number of members of the executive committee.³⁰³ While no name may be repeated, the number of names written does not have to equal the number of executive committee members decided upon. The voters must specify the capacity in which the voter is exercising a right to vote, whether: as owner, first mortgagee or covenant chargee of a lot (identifying the lot),³⁰⁴ or as a company nominee,³⁰⁵ or by proxy,³⁰⁶ and if the vote is being cast by proxy, the name

²⁹⁸ NSW Strata Schemes Management Regulations 2010, reg 17(4)(b).

²⁹⁹ NSW Strata Schemes Management Regulations 2010, reg 18.

³⁰⁰ NSW Strata Schemes Management Regulations 2010, reg 18(1)(a).

³⁰¹ NSW Strata Management Act, sch 3, cl 4(1)(b),

³⁰² NSW Strata Schemes Management Regulations 2010, reg 18(1)(b).

³⁰³ NSW Strata Schemes Management Regulations 2010, reg 18(2)(a).

³⁰⁴ NSW Strata Schemes Management Regulations 2010, reg 18(2)(b)(i).

³⁰⁵ NSW Strata Schemes Management Regulations 2010, reg 18(2)(b)(ii).

and capacity of the person who gave the proxy.³⁰⁷ The voters must sign the ballot papers and the completed ballot-paper must be returned to the chairperson.³⁰⁸

The chairperson or a person appointed by the chairperson must examine whether the ballot papers were validly completed which involves rejecting invalid ballot papers, and indicating to the meeting the reason for the rejection such as outstanding financial contributions due in respect of a lot (section). The chairperson must then announce how many votes each candidate has received.³⁰⁹ Each lot has one vote for each of the candidates on the voting paper. Until all places for membership of the executive committee have been filled, the chairperson must successively declare elected each candidate who has a greater number of votes than all other candidates who have not been elected.³¹⁰ Therefore the candidates who receive the highest number of votes are then declared by the chairperson to be the members of the executive committee. However, if the original owner (developer) owns one half or more of all the lots in the scheme, his or her vote is reduced to one vote for three lots in respect of which he or she is entitled to vote. This means that the original owner's vote is ignored for two out of every three lots that he owns.

If a poll is demanded by a person who is present and entitled to vote, then each lot has a vote for each of the candidates on the lot's voting paper, according to the unit entitlement (participation quota) of that lot. Thus the candidates who receive the highest number of unit entitlements in their favour, being equal to the number of members of the executive committee decided upon, are each declared by the chairperson to be members of the executive committee. However, if the original owner is the owner of lots the sum of whose unit entitlement is equal to one half or more of all the lots in the strata scheme then the original owner's vote for each candidate on a ballot paper is reduced to one third of the unit entitlements for that lot. If only one place remains to be filled (in respect of the last candidate to be elected) but there are 2 or more eligible candidates

³⁰⁶ NSW Strata Schemes Management Regulations 2010, reg 18(2)(b)(iii).

³⁰⁷ NSW Strata Schemes Management Regulations 2010, reg 18(2)(c).

³⁰⁸ NSW Strata Schemes Management Regulations 2010, reg 18(3).

³⁰⁹ NSW Strata Management Act, sch 2, cl 17.

³¹⁰ NSW Strata Schemes Management Regulations 2010, reg 18(4).

with an equal number of votes, the candidate to fill the place is to be decided by a show of hands of those present and entitled to vote.³¹¹

The Singaporean BMSMA provides, as in the South African legislation, that every management corporation must have a council that must consist of such *number* of persons as the management corporation may determine in a general meeting.³¹² It allows a maximum number of 14 council members who are natural persons.³¹³ There is no minimum number prescribed. Where there is only one natural proprietor (owner), he or she may make any decision that a duly convened council may make, and any such decision is deemed to be a decision of the council of the management corporation.³¹⁴ In Malaysia the Strata Titles Act provides that the council must consist of not less than three and not more than fourteen proprietors.³¹⁵ Under the Sarawak Ordinance and Sabah Enactment the council must consist of not more than seven proprietors or less than three proprietors.³¹⁶ It is not expressly provided that the members of the council must be only natural persons, but this must obviously be the case. In Singapore and Malaysia it is unclear whether joint proprietors of a lot are deemed to be one proprietor for the purposes of determining the number of proprietors. As the interests of joint proprietors are likely to be similar they should be deemed to be one proprietor. This argument is supported by the Singapore provision that an individual who is a joint proprietor of a lot with another proprietor is not eligible for election as a member of the council if that other subsidiary proprietor is also a candidate for the election concerned.

In Singapore and Malaysia the members of the council are *elected* at each annual general meeting.³¹⁷ The BMSMA expressly provides that every management corporation shall have a council after the first annual general meeting.³¹⁸ The legislation

³¹¹ Strata Schemes Management Regulations 2010, reg 18(5).

³¹² BMSMA s 53(1).

³¹³ BMSMA ss 53(1) and 80(4).

³¹⁴ BMSMA 53(3).

³¹⁵ Strata Titles Act, Second Schedule, para 2(1).

³¹⁶ Sarawak Ordinance; Sabah Enactment, Second Schedule, para 2(1).

³¹⁷ BMSMA s 53(4); Strata Titles Act, Second Schedule, paras 2(1) and 8(1); Sabah Enactment, Second Schedule, paras 2(1) and 9(1).

³¹⁸ BMSMA s 53(1).

does not prescribe the details or procedures on how the council members are to be elected at each annual general meeting. This is illustrated by *Si-Hoe Kok Chun 7 Anor v Ramesh Ramchandani*³¹⁹ where a husband had been nominated and elected to the executive council by his wife who was a proprietor. The court found that there was no particular formality prescribed for such a nomination.

Under the United States UCIOA owners must elect at least three members to the executive board (trustees) of the owners' association (body corporate).³²⁰ The exact number of members is stated in the by-laws of the owners' association.³²¹ The UCIOA contains no special provisions regarding the election or re-election of members of the executive board, but specifies that the election is subject to the by-laws of the association.³²² The by-laws may for example require that ballots listing all nominees' names for each unit must be prepared in advance of the election.

Under the Chinese law the number of council members remains largely unregulated at national and provincial level.³²³ The Property Management Regulation of Shenzhen Special Economic Zone of 2007 stipulates that the number of executive council members in an executive council should be an odd number from five to seventeen.³²⁴

3 5 Challenge of the validity of election of trustees in court

3 5 1 Introduction

In what follows I will consider whether there is any procedure or avenue for parties who are displeased with the results of the election to invalidate or amend the result of the election of one or more persons to the office of trustee. As I have done before, I shall give a comparable account of how these matters are dealt with in foreign jurisdictions.

³¹⁹ [2006] 2 SLR 59.

³²⁰ UCIOA § 3-103(f).

³²¹ UCIOA § 3-106(a)(1).

³²² UCIOA § 3-106(a).

³²³ Neither the Property Management Regulation of 2003, nor the Shanghai Property Management Regulation of 2004 contains a provision regarding the number of council members.

³²⁴ Property Management Regulation of Shenzhen Special Economic Zone of 2007 art 24.

3 5 2 South African position

The STA does not contain a provision that allows owners to challenge the election of trustees in a court on the ground that the election process was not followed. This is confirmed in *Dempa Investments CC v Body Coporate of Los Angeles*³²⁵ where the court pointed out that:

“There was nothing in the STA or the regulations which requires or even authorizes the court to declare that the trustees have been duly elected.”³²⁶

However, the facts of the case and the relief sought do not bear this out. In this case the applicant sought rescission of an *ex parte* order in which certain persons were declared to be trustees of the body corporate. The judge stated that the order should have been set aside in terms of High Court Rule 42(1)(a) as the order was erroneously sought and erroneously granted because the interested parties (body corporate) who were expected to dispute the election of the trustees should have been cited as respondents. Since it was an *ex parte* order these interested parties had no notice of the order. If there were no persons disputing the election of the trustees and their right to hold office, as proceeding *ex parte* would tend to convey, the question arises whether there was any real purpose to the declaratory order or whether the question was merely abstract, hypothetical or academic. The court therefore set aside the order on the ground that the applicant failed to divulge several material facts to the court. However, the court agreed from the evidence before it that the trustees were not managing the affairs of the body corporate in a proper manner and therefore appointed an administrator as requested by the applicant. The existence of the *ex parte* order was an obstacle to the appointment of the administrator, as the two orders would be in conflict and therefore the order for rescission had to succeed before the appointment of an administrator could be considered.

³²⁵ [2008] JOL 21735 (W).

³²⁶ Para 4.

This judgment concerns the invalidation of an *ex parte* order that ratified the election of certain trustees. The court rightly gave reasons why the *ex parte* order should be invalidated. Contrary to the initial statement by the court, courts are thus the proper forum to validate or invalidate the election of trustees.

This was confirmed in the unreported case *Burger and Others v Friedman and Others*³²⁷ which provides an illustration of the role the High Court can play in validating the election of trustees. The applicants were owners of units in a sectional title scheme known as *Mount Curtis* in Cape Town. Disputes between various groups made the orderly management of the affairs of the body corporate impossible. One group (including the applicants) claimed that they were duly elected trustees of the body corporate and that they appointed Urbanpace (Pty) Ltd as the managing agent. However, another group (including the respondents) contended that they were the duly elected trustees and that they appointed the fifth respondent as the managing agent. The two managing agents appointed by the different groups sent out conflicting levy statements to the owners.³²⁸ In support of their claim that they were the validly elected trustees, the applicants contended that a number of residential owners entitled to 25% of the total quotas of all sections in the scheme requested the existing trustees (respondents) on 27 January 2011 to convene an extraordinary general meeting. The existing trustees did not accede to this request. The applicants therefore decided to call such a meeting to be held on 28 February. At this meeting the applicants were elected as trustees. On an application to the High Court, Griesel J granted an order that the applicants were duly elected as trustees of the body corporate of the *Mount Curtis Sectional Title Scheme SS 85/1989* at the extraordinary general meeting of its members held on 28 February 2011.³²⁹ The respondents refused to accept the order and requested the court to hand down reasons for granting the order.³³⁰

³²⁷ WCC 12-12-2009 case no 20156/2011.

³²⁸ Para 2.

³²⁹ Para 1.

³³⁰ Para 3

The respondents opposed the order on the grounds that the matter was not urgent and that any urgency that existed was self-created; that the court lacked the necessary jurisdiction to hear the application because of an arbitration clause in the rules; and that the 28 February meeting was not validly convened, with the result that the appointment of the applicants as trustees was likewise invalid.³³¹ Griesel J reasoned that the argument based on lack of urgency did not withstand scrutiny because the first respondent conceded in so many words in his answering affidavit that “the current situation is not sustainable.” The applicants pointed out that efforts made by the parties to reach a negotiated settlement were unsuccessful. Therefore the delay in bringing an application while efforts are being made to avoid litigation could not be advanced as a reason to non-suit an applicant. The respondents had furthermore not alleged any prejudice to them by the set down of the matter on a truncated timetable. Griesel J refused to strike the matter from the roll where full affidavits had been filed and full argument had been addressed on behalf of both sides as it would amount to a wasteful exercise in futility and it would simply mean that the same costs and efforts would have to be duplicated on a subsequent occasion, after the matter had been set down in the ordinary course.³³²

The argument of the alleged lack of jurisdiction was based on an arbitration clause in prescribed management rule 71. The managing agent appointed by the respondents was not an owner and therefore was not amenable to the jurisdiction of an arbitrator. Furthermore, the alternative relief sought for the appointment of an administrator could only be granted by a court and accordingly could not have been sought by the applicants other than by way of an application to the court.³³³

The respondents relied on the provisions of prescribed management rule 53³³⁴ in support of the alleged invalidity of the meeting held on 28 February.³³⁵ However, Griesel

³³¹ Para 5.

³³² Para 6.

³³³ Para 7.

³³⁴ Rule 53 states that: “the trustees may whenever they think fit and must upon a request in writing made [either] by owners entitled to 25% of the total of the quotas of all sections . . . convene a special general meeting. If the trustees fail to call a meeting so requested within fourteen days if the request, the owners . . . concerned shall be entitled themselves to call the meeting.”

J pointed out that on 27 January the owners entitled to 25% of the total quotas of all sections in the scheme (including the applicants) requested that an extraordinary general meeting be convened. However, the existing trustees (including the respondents) did not convene the extraordinary meeting, but instead gave notice of an annual general meeting of the body corporate to be held on 16 March. The notice stated that it incorporated the response to the *undated request* for a special general meeting received by the managing agent on 28 January 2011 and presented by a representative of the firm of managing agents.³³⁶ This notice was not accompanied by the documents prescribed by management rule 39(1) (as is required by rule 54(4)) and the group which included the applicants advised the respondents that it was not a valid notice of an annual general meeting. Consequently, the group of owners including the applicants called such an extraordinary general meeting to be held on 28 February due to the fact that the trustees had not complied with their request to convene such a meeting.³³⁷ The fifth respondent (managing agent) was requested on 11 February to send the notice of the meeting to all owners, as part of the duties that it was contracted to perform as managing agent. It failed to do so, apparently on the instructions of the first respondent. On the same date an email communication was sent to 25 of the owners whose e-mail addresses were on record. This was followed by a notice of the meeting to all owners on 16 February. The meeting was duly held and the applicants duly elected on 28 February.³³⁸

The respondents argued that it was not stated by the applicants that the request made by the owners on 27 January had been made to the trustees, or that it was in writing. Griesel J responded that the argument was unsustainable as the managing agent, in the notice sent to owners of the proposed annual general meeting, referred to the “undated request” for a meeting received from the owners. Since oral requests need not be dated and the notice of the annual general meeting was sent out by the managing agent “on behalf of the trustees”, Griesel J found that the trustees did in fact receive

³³⁵ WCC 12-12-2009 case no 20156/2011 para 8.

³³⁶ Para 9.

³³⁷ Para 10.

³³⁸ Para 11.

notice of the request for a special meeting, especially in the absence of any denial by them of notice.³³⁹

The respondents then argued that rule 54 provides for at least fourteen days' notice of every general meeting to be given to all owners and to the managing agent and that the notice in question was only given on 16 February, which was less than fourteen days before the meeting. Furthermore the applicants did not allege that the notice of 28 February meeting was sent to the managing agent.³⁴⁰ Griesel J pointed out that it was abundantly clear that the managing agent was well aware of the special meeting and did not deny that it had knowledge of the special meeting scheduled for 28 February.³⁴¹ As for the alleged short notice the judge stated that notice had been given to owners on 11 February already, which was more than fourteen days before the meeting. Furthermore, notwithstanding the peremptory tone of rule 54, Griesel J was of the view that the court must adopt a benevolent approach to those requirements. Adopting such an approach, he decided that there had been substantial compliance with the provisions of the rule. He continued that a court will not take notice of an irregularity in the notice, particularly if it is not shown that there is actual prejudice to the rights of the person alleged to have been aggrieved by the irregularity. The alleged short notice relied on by the respondents was caused by their own *mala fide* conduct in refusing to accede to the legitimate request by the group of owners for a special meeting. The respondents could not rely on their own conduct in delaying notice to owners in order to argue that the meeting was not validly convened.³⁴²

This case shows that an owner or the body corporate could approach court if the validity of the election of trustees is disputed. It also shows that despite the peremptory nature of the notice requirement for the election of trustees, the court will deviate from the provisions in cases of substantial compliance and declare the election valid.

³³⁹ Para 12.

³⁴⁰ Para 13.

³⁴¹ Para 14.

³⁴² Para 15.

3 5 3 Comparative survey

In New South Wales, if the procedure is breached, an eligible applicant may lodge an application with an Adjudicator for an order against the chairperson, who was responsible for the conduct of the election.³⁴³ The Adjudicator has a general power to make orders to settle disputes or rectify complaints³⁴⁴ on application by an interested person.³⁴⁵ This may be used where a chairperson fails to follow the regulation 17 format for electing an executive committee.³⁴⁶ An Adjudicator may make an order to settle a dispute or complaint about an exercise of, or a failure to exercise, a function conferred or imposed by or under this Act or the by-laws in relation to a strata scheme, or the operation, administration or management of a strata scheme under this Act.³⁴⁷ An owners corporation is taken to have failed to exercise a function if it decides not to exercise the function, or application is made to it to exercise the function and it fails for two months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.³⁴⁸

An Adjudicator can furthermore make an order invalidating resolutions of an owners corporation.³⁴⁹ It allows for a resolution or executive committee election to be declared invalid for any other breach of the Act in relation to the meeting.³⁵⁰ An Adjudicator may make an order invalidating any resolution of, or election held by, the persons present at a meeting of an owners corporation if the Adjudicator considers that the provisions of the Act have not been complied with in relation to the meeting.³⁵¹ An Adjudicator may refuse to make an order under this section, but only if he or she considers that the failure to comply with the provisions of this Act did not adversely affect any person, and that compliance with the provisions of the Act would not have resulted in a failure to

³⁴³ In terms of section 138 or section 153 (whichever is more appropriate) of the Strata Schemes Management Act 138 of 1996; Ilkin *NSW Strata* 94.

³⁴⁴ NSW Strata Schemes Management Act s 138.

³⁴⁵ NSW Strata Schemes Management Act s 138(5).

³⁴⁶ Ilkin *NSW Strata* 440.

³⁴⁷ NSW Strata Schemes Management Act s 138(1).

³⁴⁸ NSW Strata Schemes Management Act s 138(2).

³⁴⁹ NSW Strata Schemes Management Act s 153.

³⁵⁰ Ilkin *NSW Strata* 453.

³⁵¹ NSW Strata Schemes Management Act s 153(1).

pass the resolution or have affected the result of the election.³⁵² An application for an order under this section may be made only by an owner or first mortgagee of a lot.³⁵³

3 6 Can trustees be elected at a special (extraordinary) general meeting?

3 6 1 Introduction

In what follows the possibility of electing a trustee at a special or extraordinary general meeting will be discussed. I shall give a comparable account of how this matter is dealt with in foreign jurisdictions.

3 6 2 South African position

In *Burger and Others v Friedman and Others*³⁵⁴ Griesel J handed down reasons for his judgement (on request by the respondents) in which he granted the order:

“That it be declared that the Applicants were duly elected as trustees of the body corporate of the *Mount Curtis Sectional Title Scheme SS 85/1989* at an *extraordinary general meeting* of its members held on 28 February 2011.”³⁵⁵ (My italics.)

It is controversial whether trustees can only be elected at an annual general meeting and not also at a special general meeting. The problem is that the prescribed management rule 6 stipulates that trustees elected at an annual general meeting remain in office until the next general meeting. The question that arises when trustees are appointed at a special general meeting is what happens to the trustees who were elected at the previous annual general meeting? In essence can new trustees be elected between two annual general meetings without the office of the existing trustees first being terminated?

³⁵² NSW Strata Schemes Management Act s 153(2).

³⁵³ NSW Strata Schemes Management Act s 153(3).

³⁵⁴ Unreported Case No. 20156/2011.

³⁵⁵ Para 1.

Prescribed management rule 13 allows for the removal of a trustee from office by a majority resolution of the body corporate, provided that the intention to vote upon the removal from office has been specified in the notice convening the meeting.³⁵⁶ The removal of all the trustees at a special meeting can thus be achieved, but not the election of new trustees because of the wording of rule 6 states that trustees must be elected at an annual general meeting. Prescribed management rule 14 offers a solution in that it allows the body corporate at a general meeting (which could include a special general meeting) to appoint another trustee in the place of any trustee who has ceased to hold office in terms of rule 13, for the unexpired part of the term of office of the trustee so replaced.

3 6 3 Comparative survey

In New South Wales an executive committee is elected at either an annual or an extraordinary general meeting. As already mentioned two of the compulsory items on the agenda of any annual general meeting are the decision as to the number of members of the executive committee for the ensuing year and the election of those members.³⁵⁷ Until the annual general meeting is held, the members elected at the first or a previous annual general meeting would normally continue to hold office and administer the scheme. The previous members automatically cease to hold office upon election of the new members at the annual general meeting.³⁵⁸ If a new executive committee is not elected, the previous members will still remain in office. The remaining members have the option of resigning and can do so by serving written notice of resignation on the owners' corporation.³⁵⁹ The members of the executive committee normally hold office for about twelve months as this is the period between annual general meetings, and any variation in the length of their appointment can be accounted for by the fact that the annual general meetings do not have to be held on the same date each year.³⁶⁰ The chairperson must follow the same procedure as that for electing

³⁵⁶ Annexure 8 rule 13(e).

³⁵⁷ NSW Strata Schemes Management Act, sch 2, cl 34(e) and (f).

³⁵⁸ NSW Strata Schemes Management Act, sch 3, cl 4(1)(d).

³⁵⁹ NSW Strata Schemes Management, sch 3, cl 4(1)(c).

³⁶⁰ NSW Strata Schemes Management Act, sch 3, cl 31(1).

the executive committee at the first general meeting during the initial stage when conducting the election of the executive committee at annual or special general meetings.

Sometimes owners wish to appoint a new executive committee prior to the next annual general meeting. They can do so by following the procedure wherein a special resolution can be passed to terminate the office of all executive committee members. An elected member of the executive committee must vacate his or her office if a special resolution to this effect is adopted.³⁶¹ All or any of the existing committee members can be removed from office by a special resolution.³⁶² Only the general meeting of the owners corporation has the power to pass such a resolution because it is a so-called restricted matter reserved for the owners in general meeting.³⁶³ Therefore, neither the executive committee nor a strata managing agent has the power to remove an elected member of the executive committee. An extraordinary general meeting can then be held to elect a new executive committee. New motions must be listed on the agenda of the meeting.³⁶⁴

In Singapore members of council may be elected at any properly convened general meeting of the management corporation. In *MCST Plan No 460 v Goldhill Properties (Pty) Ltd & Others*³⁶⁵ certain proprietors wanted to elect council members at an extraordinary general meeting to be specially convened for this purpose. The chairperson ruled that this was out of order. The High Court held that the chairperson was not entitled to do so, and made it clear that an extraordinary general meeting in any organization enjoys the same status as an annual general meeting, but for the fact that it is convened for some special business of the organization. Therefore the election of members of a council need not necessarily take place at an annual general meeting, and can be held at any properly convened general meeting of the management corporation provided that the election of trustees is especially made part of the agenda.

³⁶¹ NSW Strata Schemes Management Act, sch 3, cl 4(1)(e).

³⁶² NSW Strata Schemes Management Act, sch 3, cl 4(3).

³⁶³ NSW Strata Schemes Management Act s 21(2) and s 29(3)(b).

³⁶⁴ Motions 5 and 6 in Form 12.3; Ilkin *NSW Strata* 98.

³⁶⁵ [1991] 3 MLJ 247; Keang Sood *Strata Title* 311 – 312.

Council members can therefore be elected at extraordinary general meetings.³⁶⁶ There is some difficulty here with the provisions that the term of office of the members of the council lasts until the next annual general meeting unless they are re-elected for the next term.³⁶⁷

3 7 Qualifications required to be elected as a trustee

The heading in prescribed management rule 5 is “qualifications” of trustees.³⁶⁸ This is misleading due to the fact that the provisions concerned deal with the *eligibility* rather than the *qualifications* of a person to become a trustee. In my opinion it is a major shortcoming of the South African STA that no qualifications or experience are stipulated for persons to be eligible for the office of trustee. It is for this reason that I submit that a qualified and experienced professional manager that is supervised by a regulatory body should be elected as the executive organ of a body corporate.

After their election, the new trustees will hold an organizational meeting to allocate portfolios and establish committees such as a budget, maintenance and a rules committee. During the first few months the board of trustees must deal with a number of issues. The agenda for the first annual general meeting for instance requires at least the consideration, confirmation or variation of the insurance policies effected by the developer of the body corporate; the consideration, confirmation or variation of the budget of the body corporate for the ensuing financial year; the consideration and approval, with or without amendment, of the financial statements relating to the management, control and administration of the building from date of establishment of the body corporate to date of notice of the meeting; the taking of cession of such contracts relating to the management, control and administration of the building³⁶⁹ as may have been entered into by the developer for the continual management, control and administration of the building and the common property; the appointment of an

³⁶⁶ [1991] 3 MLJ 250.

³⁶⁷ BMSMA s 53(5); Strata Titles Act, Second Schedule, paras 2(1) and (6); Sabah Enactment, Second Schedule, paras 2(1) and (7).

³⁶⁸ Annexure 8 rule 5.

³⁶⁹ Subject to STA s 47(2).

auditor or an accounting officer; the election of trustees; any restrictions imposed or directions given; and the determination of the *domicilium citandi et executandi* of the body corporate.³⁷⁰ The trustees will have to deal with all these matters and will in addition have to implement a variety of rules and regulations affecting the common property and exercise proper control over the financial affairs of the scheme.

It is important for sectional owners to be able to obtain reliable information from the trustees or managing agent concerning their rights and duties as sectional owners. This information could for example concern insurance needs, the enforcement of house rules, the procedure for letting a unit, or the installation of air-conditioning in a section. This wide range of functions have prompted academic observers to enquire how lay trustees can be expected to discharge effectively their management and administration functions and whether the office should not be reserved for qualified, trained and remunerated trustees. Such an enquiry should also take into account the related issue of the (very often) misconceived perception amongst owners with regard to the roles and duties of the body corporate and trustees, which can (and do) lead to errors in the performance of their functions.³⁷¹

In effect trustees must have leadership skills; the ability to deal with different types of people; financial and accounting expertise and experience; legal knowledge; as well as administrative, organisational and management skills. The trustees will have to work closely together and will have to attend various meetings together and so they will have to complement one another in making decisions. Only persons who understand the responsibility of the office of trustee should accept a nomination. The trustees must also know and understand the STA and the prescribed management rules.³⁷² The ideal position would be to have an accountant and lawyer on the board of trustees which, if impossible could be overcome by the employment of an experienced managing agent who could represent the professional element in executive management.

³⁷⁰ Annexure 8 rule 50(2).

³⁷¹ M Botha "Is consent by the trustees of the body corporate on the sectional title scheme to conduct business in a residential scheme sufficient?" (March 2008) 12.1 *Property Law Digest* 8.

³⁷² Annexure 8 and 9.

3 8 Conclusion

Regarding the *election of trustees in the initial period* the South African position that all owners automatically become trustees from the date of establishment of the body corporate until the first general meeting is the best option. The only concern is that in the case of sales of sections from building plans, a very large number of purchasers will be registered as sectional owners on the opening of the sectional title register, which might make management by all the owners difficult in the initial period. However, in practice this should not be too much of a problem, as the first general meeting must be held within 60 days.³⁷³

The dominance of the developer in the initial stage needs to be balanced against the possible abuse of his or her initial voting powers to influence decision-making. This can be done by reducing the developer's voting rights, as is done in New South Wales. Another suggestion is the gradual release of control by the developer to the owner elected executive members within a specified time as is stipulated in the UCIOA of the United States of America.

The Chinese solution to appoint a professional managing agent to supervise the developer (who might possibly abuse his power) and assist inexperienced owners during the initial stage, will bring a professional element to the scheme at a time when the developer and first owners might not have the requisite know-how and experience to make sure that the initial management and maintenance decisions are in the best interests and for the future well-being of the scheme, and for the benefit of all the owners. The fact that the first general meeting must be held within 60 days makes such a solution impractical for South Africa.

The requirement, in Singapore, that a person is not *eligible* for election as a trustee unless he or she is an individual of at least 21 years of age is a sensible requirement that should be adopted by the South African legislature. I therefore recommend that the

³⁷³ Annexure 8 rule 50(1); STA s 36(7)(a) [STSMA s 2 (8)(a)].

management rules should be amended to reflect this requirement, even though the age of majority in South Africa is eighteen years.³⁷⁴

The South African requirement that the majority of trustees must be owners or spouses of owners is also commendable.³⁷⁵ The rationale is that this will ensure that the majority of trustees will have a genuine financial and personal interest in the efficient and effective management of the scheme, while a restricted number of outsiders will bring expertise and experience to the table. The fact that there is not a strict embargo on the number of eligible non-owners means that the chances are better that a sufficient number of persons may be willing to serve as trustees. In addition the disqualification of managing agents and employees who are not owners is a sensible provision as it prevents any possible conflict of interest. The lifting of such a restriction in the event that they are owners, gives them the opportunity to play a role in the management of the scheme in which they have a financial investment.

In South Africa, unlike in Singapore, there is no restriction with regard to two residents of the same section from acting as trustees of the body corporate. Therefore, a husband and wife who co-own a unit can both be elected as trustees. It can be argued that this might cause problems on the ground that the couple will dominate the decision making which smacks of the kind of cronyism that the Singapore legislation tries to avoid. Although the Singapore BSMSA contains several complicated provisions designed to prevent cronyism in the election of a council resulting in a council consisting of a group of intimate friends,³⁷⁶ these provisions are so detailed and intricate that I do not recommend their transplantation into the South African legislation. On the contrary, in view of the general apathy of owners to serve as trustees in South Africa, I am of the opinion that there should not be a restriction on persons who are willing to act as trustees. If a husband who is an accountant, and his wife who is a lawyer, are both willing to serve as trustees, they should not be restricted from being elected as such a

³⁷⁴ This came in effect on 1 July 2007 in terms of the Children's Act 38 of 2005.

³⁷⁵ Chen *Chinese Condominium Law* 148 suggests that the future uniform condominium legislation should follow the South African position in this regard.

³⁷⁶ Van der Merwe (1999) *Singapore Journal of International & Comparative Law* 181.

restriction would exclude a willing, useful and skilled trustee from being elected. It is still the democratic right of the owners not to elect both spouses to the office of trustees.

Prescribed management rule 7 was amended in 2013 to prevent owners who are in arrears with their levy payments, or who are in persistent breach of conduct rules from being elected as trustees.³⁷⁷ This was a sound development as trustees, who are themselves in arrears or persist in breaching the rules of the scheme, should not be in a position to take effective action against other defaulters. The trustees should set the example to the other owners in honouring their financial and social commitments to the body corporate.

There are two inherent defects in rule 64.³⁷⁸ In the first instance, the embargo in respect of levies does not include arrear levies in respect of exclusive use areas. Secondly the embargo in respect of non-compliance with the rules only refers to conduct rules and not to breach of the even more important duties provided for in section 44 of the STA,³⁷⁹ or prescribed management rule 68 which sets out further important obligations on sectional owners.

The Sectional Titles Amendment Regulations of 2015 further amended prescribed management rule 7 by the addition another proviso to the effect that an owner who is in breach of rule 64 may not nominate any person as trustee.³⁸⁰ Therefore, an owner who is in arrears with payment of his levies, or remaining in breach of the conduct rules, despite written warning to comply, may also not nominate a person for election as a trustee.³⁸¹ As persons nominated and elected to the board of trustees are always natural persons, it may be presumed that the wording of the new rule is wide enough to disqualify a person who is the representative of a company or other juristic entity which

³⁷⁷ Amended in GN R196 in *GG* 36241 of 14-03-2013, and took effect from 14 April 2013.

³⁷⁸ Rule 64 deals with voting embargoes. Rule 64 deals with voting embargoes. Sub-rule (a) deals with owners in arrears with levy payments. Sub-rule (b) deals with owners who remain in breach of Conduct Rules; Maree (April 2013) 44 *MSC Courier* 1.

³⁷⁹ Which has now been repealed and replaced by section 13 of the STSMA.

³⁸⁰ Recently amended in GN R1422 in *GG* 18387 of 30-06-2015, and took effect from 30 July 2015.

³⁸¹ This amendment also corrected an error by the removal of the reference previously made to the non-existent sub-clauses (1) and (2) to prescribed management rule 64; Maree (July 2015) 50 *MCS Courier* 2.

owns a unit, from being nominated or elected as trustee if the company or other entity is in arrears with the payment of levies.³⁸²

It is important to note that where an owner, who is a juristic person, nominates a natural person to serve as a trustee as that owner's representative, such actions must be authorised in accordance with the juristic person's internal governance documents. The chairperson of the general meeting considering the appointment of trustees should be satisfied as to the authority of the person who signs the written nomination form.

The amendment of prescribed management rule 13 has the effect that the appointment of a duly elected trustee who defaults in his or her levy payments will automatically lapse if he or she fails to comply, within seven days of being notified in writing, to settle his debts. This complements and tightens up the embargo on the nomination and election of trustees in the prescribed management rule 7. However, the same does not apply in the event of the breach of conduct rules. Therefore a trustee, once appointed, will not automatically cease to hold office if he or she breaches a conduct rule. This is an oversight. Maree draws attention to a technical inaccuracy³⁸³ namely that the provision is introduced as a "substitution" of rule 13(g) while there is no rule 13(g). The provision should therefore have been termed an "addition" rather than a "substitution". The ultimate beneficial result of this amendment is that trustees would be accountable and responsible and capable of leading by example.

The fact that the South African prescribed management rules require that every annual general meeting must decide anew on the *number* of trustees for the upcoming year may create practical problems. It will not be clear whether or not the written nominations received before the annual general meeting will be sufficient to fill the number of trustee positions until the annual general meeting, where the number of trustees for the ensuing year is decided, is held. Owners would be unable to estimate how many persons should be nominated as trustees and would have to keep in mind that the number of trustees

³⁸² Maree (April 2013) 44 *MSC Courier* 2.

³⁸³ Maree (April 2013) 44 *MSC Courier* 2.

eventually elected must represent the correct mix of owners or spouses of owners and outsiders. In principle this matter must be sorted out at the general meeting. I suggest that the number of trustees required should be decided upon before the first annual general meeting, perhaps by the developer at the opening of the sectional title register and embodied in a special conduct rule. At that point the size and nature of the scheme would already be established and the number of trustees required could be decided. This would help avoid the difficulties in establishing whether the number of nominations received before the meeting is less than, equals, or is more than the number of trustees decided at the meeting. Where there is a change in circumstances requiring either less or more trustees the management rule can be changed by unanimous resolution to reflect the needs of the particular scheme.³⁸⁴

The South African Act limits the minimum number of trustees to two. Most of the jurisdictions discussed above follow this position. The South African stance of not setting a cap on the maximum number of trustees, and requiring the general meeting to determine the number of trustees in accordance with the size of the particular scheme, is also the most satisfactory position. The number of trustees required will depend on the size of the scheme and the nature of the duties and functions that must be performed. This is also in accordance with the position in most other jurisdictions. The appointment of too many trustees should be avoided as it could make management complicated and cumbersome.³⁸⁵ An interesting proposal advanced for a Uniform Chinese Condominium statute is that the number of trustees elected should be an odd number. This is acceptable since an odd number requirement makes reaching decisions easier and disposes of the need for the chairman's casting vote.³⁸⁶

Taking from the position in New South Wales, guidelines used to determine the number of trustees should include the fact that there must be at least one member for each of the posts of chairperson, secretary and treasurer bearing in mind that one person may be appointed to one or more of those offices. More trustees should be elected for larger

³⁸⁴ Annexure 8 rule 4(1).

³⁸⁵ Woudberg *Basic Sectional Title Book One* 71; Constat & Bleijs *Demystifying Sectional Title* 36.

³⁸⁶ Chen *Chinese Condominium Law* 149.

schemes. Subject to the maximum number of members being elected, it is likely that the number of candidates nominated will be the same as the number of members decided upon by the first general meeting.

With regard to *nomination* process the South Africa provision that the nominees must consent to their nomination either in writing, or in person at the meeting and that existing trustees are eligible for re-election, provided that they are nominated again are sound. This helps to ensure that there are sufficient persons that are willing and able to fill the position in the executive committee.

A solution to the problem in South Africa of how to decide who is *elected* from the candidates who have been nominated can be found in New South Wales. After the number of members has been decided and the chairperson has declared that the nominations are closed, he or she shall then proceed with whichever of the following three steps is applicable. If the number of candidates nominated *equals* the number of members decided upon then the chairperson must declare that these candidates have been elected to the executive committee.³⁸⁷ If the number of candidates nominated is *less than* the number of members decided upon, the chairperson must declare that those candidates have been elected despite the fact that there will be fewer members than required by the resolution.³⁸⁸ The shortfall will be accounted for by automatically reducing the number of members required to form the board of trustees. If the number of candidates is *more than* the number of members of the executive committee decided upon the chairperson must arrange for a ballot to be taken.³⁸⁹ The detailed New South Wales provisions on the election can be regulated in South Africa by the principles covering general meetings in general.

It often occurs that owners are not particularly interested in serving as trustees. This apathy can be attributed to a general satisfaction with the way the scheme is being

³⁸⁷ Strata Schemes Management Regulations 2010, reg 17(4)(a).

³⁸⁸ Strata Schemes Management Regulations 2010, reg 17(4)(a).

³⁸⁹ Strata Schemes Management Regulations 2010, reg 17(4)(b).

managed.³⁹⁰ Since it is not compulsory for the trustees to appoint a managing agent in South African schemes, the trustees are indispensable. Owners can be motivated to stand as trustees by offering them remuneration for their service, subject to compliance with the provisions of prescribed management rule 10, which requires a special resolution to authorize payment of an owner trustee for his or her services.³⁹¹ As the position of a trustee is normally a volunteer position many people are not interested in giving up their leisure time for free.³⁹² Remuneration of trustees has the advantage that the body corporate may hold trustees to detailed performance standards.³⁹³ If the situation arises where there are insufficient or no owners who are prepared to stand for election as trustees then it has been suggested that the scheme would have to be managed by the general meeting, which can appoint a managing agent to exercise the powers and perform the duties delegated to him or her by the general meeting. An alternative is to make sure that the number of trustees decided upon for the ensuing year corresponds with the number of trustees nominated and with the requirement that the majority of trustees should be owners or spouses of owners.³⁹⁴

In *Dempa Investments CC v Body Corporate of Los Angeles*,³⁹⁵ the court pointed out that there was nothing in the STA or the regulations which requires or even authorizes the court to declare that the trustees have been duly elected. This statement is incorrect. To the contrary, the courts are currently the only forum available to validate or invalidate the election of trustees. This was confirmed in the unreported cases *Burger and Others v Friedman and Others*,³⁹⁶ which provides an illustration of the role the High Court can play in validating the election of trustees. The costly and time-consuming process of *going to court to dispute the proper election of trustees* would be avoided by providing a similar mechanism as in New South Wales where an eligible applicant may

³⁹⁰ J Paddock "Q & A with Jennifer Paddock: No one wants to be a trustee" (July 2010) 5-7 *Paddocks Press Newsletter* 6.

³⁹¹ Annexure 8 rule 10.

³⁹² Paddock (July 2010) *Paddocks Press Newsletter* 6.

³⁹³ G Paddock "Q & A with the Professor: Owners not willing to stand for election as trustees" (July 2009) 4-7 *Paddocks Press Newsletter* 10.

³⁹⁴ Van der Merwe *Sectional Titles* 14-122.

³⁹⁵ [2008] JOL 21735 (W) para 4.

³⁹⁶ WCC 12-12-2009 case no 20156/2011.

lodge an application with an Adjudicator. When the CSOS comes into operation it will be the best forum to validate the election of trustees. One of the prayers for relief includes an order declaring that a resolution, purportedly passed at a meeting of the executive committee, or at a general meeting of the association was void or invalid.³⁹⁷ Any person who is affected materially can request that the adjudicator declare the election of the trustee was either void or is void.

It is a useful provision allow for *removal of and the election of new trustees at a special general meeting*. Prescribed management rule 13(e) allows for the removal of a trustee from office by a majority resolution of the body corporate, provided that the intention to vote upon the removal from office has been specified in the notice convening the meeting.³⁹⁸ The replacement of trustees between annual general meetings is provided for in terms of prescribed management rule 14. The body corporate may at a general meeting appoint another trustee in the place of any trustee who has ceased to hold office for the unexpired part of the term of office of the trustee so replaced.³⁹⁹ These two rules, read together, provide the opportunity to remove trustees from office before the next annual general meeting by a majority resolution of the general meeting. Once the resolution is passed the new trustees can be elected at a special general meeting, who shall remain in office for the unexpired part of the term of office of the trustee so replaced.

What has become clear at this point is that being a trustee takes much time and effort. This is especially the case in large schemes that consist of many sections, or where the scheme is scattered over a large area of land.⁴⁰⁰ It involves hard work, dealing with varied and strong personalities including apathetic and ignorant owners, and complicated financial issues. However, trustees do have a certain degree of control and do contribute constructively to the scheme and the value of the property. Trustees can therefore play a vital role in the success of the scheme. In the absence of a legislative

³⁹⁷ CSOSA s 39(4)(c).

³⁹⁸ Annexure 8 rule 13(e).

³⁹⁹ Annexure 8 rule 14.

⁴⁰⁰ Woudberg *Basic Sectional Title Book One* 45.

provision that makes the appointment of a professional managing agent mandatory, trustees should be properly elected, educated, and experienced in all matters relating to sectional titles. The management and financial functions of the trustees have social and financial consequences for the unit owners and affect the value of the scheme property. The problem is that most of the persons who are elected as trustees do not have the requisite expertise and experience to manage a sectional title scheme and do not understand the nature and extent of an ideal involvement in the running of the office of trustees.⁴⁰¹ This indicates the dilemma facing sectional title scheme management. It is for this reason that providing sectional title as an option for providing access to housing would not be a viable option, unless the scheme is managed by qualified and professional management organ.

Consequently a professional manager, rather than a group of owners and outsiders, should be given the task of administering larger sectional title schemes. It is common practice in South Africa for the trustees to appoint a managing agent as the trustees have limited time, experience and qualifications at their disposal to properly manage the scheme themselves. Trustees of larger mixed-use schemes that require specialized financial training⁴⁰² will usually need the assistance of a managing agent. However, in my opinion the German system of appointing an experienced and knowledgeable professional manager as an executive organ of the body corporate (who may be assisted by an advisory council) is preferable to the position in South Africa where the trustees are elected as the executive arm of the scheme, who may supplement their expertise by appointing a managing agent to assist them in the day-to-day management of the scheme.

⁴⁰¹ Strydom *Regsapspekte van die Bestuur van 'n Deeltitelskema* (LLD thesis University of Stellenbosch 1996) 288.

⁴⁰² Annexure 8 rule 42 provides that managing agents may be appointed to operate current and savings accounts of the body corporate; Chen and Van der Merwe 2009 *TSAR* 22-23.

Chapter 4: Fiduciary duty of trustees, their indemnity and transactions with third parties

4 1 Introduction

This chapter will be devoted to the fiduciary duty of trustees. I will discuss the distinction between the role that trustees play in internal relationships with the body corporate, and the role that trustees play in transactions with third parties. This will be followed by a discussion on the indemnification of trustees for costs, losses, expenses and claims incurred in the performance of their duties. I will then examine the validity of acts by trustees, and the consequences of their transactions with third parties. Once again each topic will contain comparative material on how other jurisdictions deal with the particular matter in question.

4 2 The role of trustees in internal as opposed to external transactions

As I have already explained the trustees are elected annually from amongst the sectional owners to act as the executive organ of the body corporate.⁴⁰³ The prescribed management rules clearly state that the trustees must “hold office.”⁴⁰⁴ When the trustees act internally there is no need for an agency agreement as they are not appointed by contract, but are democratically elected to an office by the owners in the general meeting.

It is important to note that when the trustees enter into contracts with third parties on behalf of the body corporate they act as agents of the body corporate. The trustees need to be authorized to represent the body corporate when entering into transactions with third parties. This point will be discussed in more detail later in this chapter.

⁴⁰³ STA s 36(4) read with s 39(1) [STSMA s 2(5) read with s 7(1)]; Van der Merwe *Sectional Titles* 14-68.

⁴⁰⁴ Annexure 8 rule 4(2) and 6.

When the trustees act in internal and external relations they do so as organ of the body corporate. The concepts of trustees as both organ and agent of the body corporate are therefore not mutually exclusive. The construction of the trustees as agents when transacting with third parties is important to show that the trustees must be authorized to represent the body corporate when binding the body corporate and third parties in juristic acts. Whether the trustees are dealing with the body corporate directly, or binding the body corporate in contracts with third parties, they owe the body corporate a fiduciary duty and must act honestly and in good faith, and must only act in the best interests of the body corporate. Therefore, trustees are not in a contractual relationship, but rather in a relationship of trust with the body corporate.

4 3 The fiduciary duty of trustees

4 3 1 South African position

In what follows I will discuss the fiduciary relationship trustees have with the body corporate, and the fiduciary duties of the trustees that flow from this relationship. In South Africa each trustee of a body corporate stands in a fiduciary relationship to the body corporate.⁴⁰⁵ The duty of care of trustees is fiduciary in nature. This statutory provision is in accordance with, and is basically a codification of the common law principle, that a person who controls the assets of another, or who holds the power to act on behalf of another owes a fiduciary duty towards that person.⁴⁰⁶ Therefore, a person in a fiduciary relationship must exercise his or her powers *bona fide* and for the benefit of the person or body on whose behalf the powers are exercised.

This fiduciary relationship implies firstly that the trustee must act honestly and in good faith towards the body corporate.⁴⁰⁷ The trustee must not act without authority or exceed his or her powers of management and representation,⁴⁰⁸ and must positively exercise them in terms of the Act and in the interest of and for the benefit of the body

⁴⁰⁵ STA s 40(1) [STSMA s 8(1)]; *Kleynhans NO v Smith* [2006] JOL 18048 (T) paras 5 and 8.

⁴⁰⁶ Van der Merwe *Sectional Titles* 14-117; Botha (2008) *Property Law Digest* 6.

⁴⁰⁷ STA s 40(2)(a) [STSMA s 8(2)(a)].

⁴⁰⁸ STA s 40(2)(a)(ii) [STSMA s 8(2)(a)(ii)]; *Body Corporate of Albany Court and 17 Others v Nedbank and Others* [2008] JOL 21739 (W) para 13.

corporate.⁴⁰⁹ Secondly, a trustee must avoid any material conflict between his or her own interests and the interests of the body corporate.⁴¹⁰ The trustee must not receive⁴¹¹ any personal economic benefit, direct or indirect,⁴¹² from the body corporate or from any other person.⁴¹³ The trustees are further obliged to notify all the other trustees of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the body corporate as soon as he or she becomes aware of such interest.⁴¹⁴ An example of such a breach of statutory duty is where a trustee enriches him or herself at the expense of the body corporate by awarding a maintenance contract of the sectional title building to a firm in which he holds a share without disclosing that fact.⁴¹⁵

The above codification of the common law is expressly made without derogating from the generality of the expression “fiduciary relationship.”⁴¹⁶ The impact of this reservation is that the illustrations enumerated in section 40(2) of the STA and section 8(2) of the STSMA are not exhaustive, and the fiduciary relationship between the body corporate and the trustees could have wider implications.⁴¹⁷ The general principle is that the trustee must exercise the utmost good faith in the exercise of his or her powers. Examples of clear situations of breach of the fiduciary duty includes conflict of interests, exceeding the limitations on powers, failure to exercise an unfettered discretion, failure to exercise powers for the purpose for which they were granted and a failure to exercise powers honestly.⁴¹⁸

⁴⁰⁹ STA s 40(2)(a)(i) [STSMA s 8(2)(a)(i)].

⁴¹⁰ STA s 40(2)(b) [STSMA s 8(2)(b)].

⁴¹¹ STA s 40(2)(b)(i) refers to an economic benefit “derived” and not “received.”

⁴¹² This “direct or indirect” provision was added to STSMA s 8(2)(b)(i), and was not provided for in STA s 40(2)(b)(i).

⁴¹³ STSMA s 8(2)(b)(i). The provision in STA s 40(2)(b)(i) states that: “The trustee shall not *derive* any personal economic benefit *to which he is not entitled by reason of his office as trustee of the body corporate* from the body corporate or any other person *in circumstances in which the benefit is obtained in conflict with the interests of the body corporate.*”

⁴¹⁴ STSMA s 8(2)(b)(ii). STA s 40(2)(b)(ii) states: “The trustee is further obliged to notify all the other trustees *at the earliest opportunity practicable* of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the body corporate.”

⁴¹⁵ Van der Merwe *Sectional Titles* 14-118.

⁴¹⁶ STSMA s 8(2). STA s 40(2) states: “*without prejudice* to the generality of the expression ‘fiduciary relationship.’”

⁴¹⁷ Botha (2008) *Property Law Digest* 6.

⁴¹⁸ Van der Merwe *Sectional Titles* 14-118.

According to common law a person in a fiduciary relationship has two duties, namely a duty of trust and a duty of care and skill.⁴¹⁹ The duty of trust entails that a fiduciary must exercise his or her capacities and powers *bona fide*,⁴²⁰ in the interest of the body corporate; and must not exercise them in his or her own interest or in that of another. The duty of care and skill entails that a fiduciary must display reasonable care and skill in exercising the functions and duties of his or her office. Although both these duties arise from the fiduciary relationship, they are usually considered fairly distinct duties with their own sphere of application and legal consequences. Whereas the fiduciary duty of trust regulates the powers that a fiduciary wields, the duty of care and skill pertains to the manner in which the trustee exercises the function and duties of a fiduciary. Furthermore, the basis of liability differs as the fiduciary duty of trust is considered to be *sui generis*, while the duty of care and skill is considered to be of a delictual nature.⁴²¹

Van der Merwe states further that section 40(3)(a) of the STA,⁴²² if interpreted in an innovative manner, also draws a distinction between the consequences of a breach of one or the other of these duties.⁴²³ If a trustee breaches his or her duty of care and skill in the exercise of his or her functions and duties, he or she will be held delictually liable for the losses suffered by the body corporate as a result of such a breach. The duty required by the STA is not the care and skill which can be reasonably expected of a person of his or her knowledge and experience as under company law.⁴²⁴ On the contrary the STA expressly states that a trustee can only be delictually liable for losses suffered on account of the grossly negligent performance of his or her functions and duties under the STA.⁴²⁵ On the other hand if the trustee breaches his or her fiduciary duty of trust by a *mala fide* act or omission, he or she shall be liable to the body

⁴¹⁹ 14-118.

⁴²⁰ This means with good intentions and no hidden agenda.

⁴²¹ Van der Merwe *Sectional Titles* 14-118; Botha (2008) *Property Law Digest* 7.

⁴²² STSMA s 8(3).

⁴²³ Van der Merwe *Sectional Titles* 14-118.

⁴²⁴ Botha (2008) *Property Law Digest* 7.

⁴²⁵ STA s 40(3)(a)(i). STSMA s 8(3)(a)(i) provides that that: "A trustee of a body corporate *who acts in breach of his or her fiduciary relationship*, is liable to the body corporate for any loss suffered as a result thereof by the body corporate."

corporate for any economic benefit derived thereof.⁴²⁶ Section 8(3) of the STSMA has omitted the words:

“...whose *mala fide or grossly negligent act or omission has breached any duty arising from his fiduciary relationship*, shall be liable to the body corporate...”⁴²⁷

and merely states:

“...who acts in *breach of his or her fiduciary duty* is liable to the body corporate...”⁴²⁸

The consequence remains the same in terms of both the STA and STSMA. The trustee who breaches his or her fiduciary duty is liable to the body corporate

“for any loss suffered as a result thereof by the body corporate; or any economic benefit derived by the trustees by reason thereof.”⁴²⁹

The STA provides that, in cases where the body corporate discovers that the trustee has not disclosed the nature and extent of any direct or indirect interest in a contract concluded by the trustees on behalf of the body corporate, that contract is voidable at the option of the body corporate.⁴³⁰ If the contract is voided by the body corporate then there needs to be restitution to restore the *status quo*. The STA expressly provides that where the body corporate chooses to void the contract, the court may on application of an interested person order that such contract should nevertheless be binding if it considers such order fair in the circumstances. This order may be supplemented with

⁴²⁶ STA s 40(3)(a)(ii). STSMA s 8(3)(b) provides that: “A trustee of a body corporate *who acts in breach of his or her fiduciary relationship*, is liable to the body corporate for any economic benefit *received* by the trustee by reason thereof.

⁴²⁷ STA ss 40(3)(a)(i) and (ii). My emphasis added.

⁴²⁸ STSMA ss 8(3)(a) and (b). My emphasis added.

⁴²⁹ STA ss 40(3)(a)(i) and (ii) [STSMA s 8(3)(a) and (b)].

⁴³⁰ STA s 40(3)(b). CM Durham “Q & A with Carryn: Can transactions by the trustees be reversed?” (April 2004) 9-4 *Paddocks Press Newsletter* 4.

further orders in respect of the contract which it deems fit.⁴³¹ This is different from the general principle applied in contract law when a contract is deemed void where the contract is *ab initio* non-existent, but restitution must be applied to restore the status quo.⁴³² This provision that any contract in breach of the trustee's fiduciary duty is voidable at the option of the body corporate has been omitted from the STSMA.

Furthermore, except for the duty of a trustee to act honestly and in good faith and exercise his or her powers in terms of the Act and in the interest and for the benefit of the body corporate in managing and representing the body corporate, any other conduct of a trustee does not constitute a breach of a duty arising from his or her fiduciary relationship to the body corporate if such conduct were preceded or followed by the written approval of all the members of the body corporate where such members were or are cognizant of all the material facts.⁴³³

An interesting question is whether there is a duty on the trustees to warrant the safety and security of the owners and residents of the scheme. The effect of this would be that the trustees would be held personally liable for the safety and security of the unit owners.⁴³⁴ This could place an unnecessary and onerous duty on trustees to such an extent that no one would be willing to serve as trustee. There is nothing in the Act or rules that specifically suggests that trustees could be held liable in such a case. The trustees do have the duty to maintain the common property in good repair and therefore safe for use. However, it is the body corporate and not the trustees that would be liable, unless the trustee knew of some danger and did not take steps to warn the owners or residents or to remedy such danger.

The responsibility of the trustees to ensure the safety and security of the owners and residents of the scheme was dealt with in a recent case. In *Du Plooy v The Cascades*

⁴³¹ STA s 40 (3)(b).

⁴³² Chen *Chinese Condominium Law* 146.

⁴³³ STA s 40(4) [STSMA s 8(4)].

⁴³⁴ G Paddock "Q & A with the Professor: Are the trustees liable for the owners' safety and security?" (April 2013) 8-4 *Paddocks Press Newsletter* 4.

*Body Corporate and Another*⁴³⁵ the plaintiff was an owner of one of the units in the scheme, and was responsible for the cleaning and gardening in the scheme. Mr Du Plooy claimed damages from the body corporate for an injury sustained as a consequence of slipping and falling on slime and moss that had accumulated on the floor of the washing line area (common property) at the Cascades Sectional Title Scheme. He alleged that the fall was caused by the negligent breach of a legal duty owed to him by the body corporate to take steps to prevent him from slipping and falling in this area. The Judge said that one couldn't quarrel with the following submission made by the plaintiff:

“The body corporate is in virtually the same position as landlord, hotel owner or shopkeeper, who by virtue of his or her control over property, has a legal duty to take reasonable steps in respect of maintenance and supervision to ensure that the property is in a safe condition with reference to the type of person who may normally and reasonable make use of it.”⁴³⁶

The trustees are in a fiduciary relationship with the body corporate and the STA expands on this relationship of being entrusted with this duty of care. The prescribed management rules are more specific to some of these powers, functions and duties. The trustees must keep the common property properly maintained, clean, and in serviceable repair.⁴³⁷ This could be interpreted to include the requirement that the common property must be kept safe for use. If an owner or occupier were to fall and injure him or herself as a result of a trustee or the trustees failing in this duty of care, the trustees could find themselves defending themselves and the body corporate in court.⁴³⁸ In order to discharge its legal duty to take care that the common property at the development is safe, the body corporate is obliged to take no more than reasonable steps to guard against foreseeable harm to owners and other users of the common

⁴³⁵ Case No. 275/10 [2013] ZAWCHC 62 (12 March 2013).

⁴³⁶ Para 7.

⁴³⁷ STA s 37(1)(j).

⁴³⁸ M Addisson “Slip and fall injuries – trustees beware!” (December 2013) 8-12 *Paddocks Press Newsletter* 2.

property. In determining whether reasonable steps were taken by the body corporate the judge recited the following *dictum*:

“Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgment.”⁴³⁹

The Judge found that plaintiff had failed to establish, on a balance of probabilities, that first defendant at any stage ought to have been aware of any slippery and unsafe condition of the washing line area.⁴⁴⁰

It can also be argued that owners must take responsibility for their own safety by installing security systems or taking out insurance. In normal circumstances if an owner or resident is attacked in the common property or his or her car is vandalized neither the body corporate, nor the trustees could be held liable for such loss, harm or damage suffered. However, the trustees must, at the first meeting of the trustees or as soon thereafter as is possible, take all reasonable steps to insure the owners and the trustees and to keep them insured against liability in respect of death, bodily injury or illness;⁴⁴¹ or loss of or damage to property, occurring in connection with the common property, for a sum of liability of not less than one hundred thousand rand, which sum may be increased from time to time as directed by the owners in general meeting.⁴⁴² In this way the trustees would protect themselves and the body corporate against any possible liability.

⁴³⁹ *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) 55I.

⁴⁴⁰ (275/10) [2013] ZAWCHC 62 (12 March 2013) para 29.

⁴⁴¹ Annexure 8 rule 29(2)(a)(i).

⁴⁴² Annexure 8 rule 29(2)(a)(ii).

4 3 3 Comparative survey

In New South Wales the duty of council members is also fiduciary in nature. In *Re Steel & Others and the Conveyancing (Strata Title) Act 1961*⁴⁴³ the nature of the duty was explained by Else-Mitchell J as follows:

“It is plain that the respondents [the members of the council] have failed to recognize that it is their duty to manage the affairs of the body corporate for the benefit of all the lot holders, and that the exercise of any of their powers in circumstances which might suggest a conflict of interest and duty requires them to justify their conduct, and that the onus lies on them to prove affirmatively that they have not acted in their own interests or for their own benefit.”⁴⁴⁴

To illustrate this fiduciary duty the secretary will be held personally liable to a third party if his or her acts are beyond the authority conferred on him or her. The secretary can limit this risk. In relation to non-routine matters the owners corporation or executive committee should pass a specific resolution to confer authority on the secretary to undertake an act. It is unlikely that the owners corporation will be able to pass a resolution to use the owners corporations' funds to exempt or indemnify the secretary against any liability for a previous breach of duty, neglect or other tort. It has therefore been strongly recommended that the owners corporation purchase office bearers' liability insurance to protect the executive committee's office bearers from adverse effects of personal liability. When signing documents on behalf of the owners corporation the secretary should clearly signify the representative capacity of the signature.⁴⁴⁵ The secretary risks being held personally liable for the debt if it is not paid by the executive committee and the owners corporation's name does not appear on any of the relevant documents.

⁴⁴³ (1968) 88 WN (Pt 1) (NSW) 467.

⁴⁴⁴ 470.

⁴⁴⁵ Ilkin *NSW Strata* 107.

Numerous provisions in the NSW Strata Schemes Management Act impose monetary penalties on the owners corporation if it is in default of the Act's provisions. None of these provisions impose monetary penalties on an office bearer. However, an office bearer who continues to breach the Act's provisions may become subject to an Adjudicator's order. If the office bearer does not comply with the Adjudicator's order, proceedings against the offending office bearer may be commenced at the Consumer, Trader and Tenancy Tribunal where, on the breach being proven, a Tribunal member may impose a monetary penalty on the office bearer for which he or she will be personally liable and cannot seek indemnity from the owners corporation.⁴⁴⁶

In New South Wales candidates for executive committee elections and acting members must make disclosure of certain interests.⁴⁴⁷ A person who is connected with the original owner (developer) or caretaker of a strata scheme is not eligible to be elected as a member of an executive committee for the strata scheme unless the person discloses the connection that the person has with the original owner or caretaker, and the disclosure is made at the meeting of the owners corporation at which the executive committee is to be elected and before the election is conducted.⁴⁴⁸ A disclosure made is to be included in the minutes of the meeting at which the disclosure is made.⁴⁴⁹ The same principle applies to the eligibility of such a person for appointment to act in the place of a member of the executive committee.⁴⁵⁰ A person who becomes connected with the original owner or caretaker of a strata scheme after being appointed as, or to act in the place of, a member of the executive committee must disclose any connection that the person has with the original owner or caretaker to the secretary or, if the person is the secretary, to the chairperson. The disclosure must be made as soon as possible after the person becomes aware of the connection.⁴⁵¹ The secretary or chairperson to

⁴⁴⁶ 108.

⁴⁴⁷ NSW Strata Schemes Management Act, sch 3, cl 3A.

⁴⁴⁸ NSW Strata Schemes Management Act, sch 3, cl 3A(1)(a) and (b).

⁴⁴⁹ NSW Strata Schemes Management Act, sch 3, cl 3A(2).

⁴⁵⁰ NSW Strata Schemes Management Act, sch 3, cl 3A(3)(a) and (b).

⁴⁵¹ NSW Strata Schemes Management Act, sch 3, cl 3A(4).

whom a disclosure is made must ensure that the disclosure is included on the agenda for the next general meeting of the owners corporation.⁴⁵²

In Singapore a member of a council is under a duty at all times to act honestly and to use reasonable diligence in the discharge of the duties of his office.⁴⁵³ A member of a council or any officer⁴⁵⁴ or agent⁴⁵⁵ or a managing agent of the management corporation is not allowed to use his or her position as such to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.⁴⁵⁶ A person who contravenes any of these provisions is liable to the management corporation for any profit made by him or for any damage suffered by the corporation as a result of the breach of any such provision.⁴⁵⁷ Furthermore, a person who breaches any of these provisions is also guilty of an offence for which the penalty on conviction is a maximum fine of Singaporean \$5,000 or imprisonment for a maximum term not exceeding one year or both.⁴⁵⁸ This is in addition to, and not in derogation of, any other written law or rule of law relating to the duty or liability of council members.⁴⁵⁹

In Singapore a council member with a direct or indirect pecuniary interest in any contract, proposed contract or other matter⁴⁶⁰ must before any meeting of the council or management corporation declare the nature of his or her interest and not take part in the consideration or discussion thereof or vote on any question with respect to that contract or matter.⁴⁶¹ The purpose of this provision is to avoid abuses by the council. The interested member could further be asked by the chairperson or the person presiding over the meeting to vacate the meeting, unless asked by the council to be

⁴⁵² NSW Strata Schemes Management Act, sch 3, cl 3A(5).

⁴⁵³ BMSMA s 61(1).

⁴⁵⁴ An officer includes a person who at any time has been an officer of a management corporation in terms of BMSMA s 61(5).

⁴⁵⁵ Any agent includes a banker, solicitor or auditor of the management corporation and any person who at any time has been a banker, solicitor or auditor of the corporation in terms of BMSMA s 61(5).

⁴⁵⁶ BMSMA s 61(2).

⁴⁵⁷ BMSMA s 61(3)(a).

⁴⁵⁸ BMSMA s 61(3)(b).

⁴⁵⁹ BMSMA s 61(4).

⁴⁶⁰ Any matter would include any litigation which may result in a conflict of interest situation.

⁴⁶¹ BMSMA s 60(1)(a) and (b).

present to provide information.⁴⁶² These requirements do not apply where the interest of the member of a council consists only of being a member or creditor of a company that is interested in a contract or proposed contract if the member's interest may properly be regarded as not being a material interest.⁴⁶³ A material interest is presumably where the member is a majority shareholder in the company concerned. An interest of an immediate family member⁴⁶⁴ of a member of the council is to be treated as an interest of the member.⁴⁶⁵

The previous statutory requirement pertaining to disclosure of interests by council members, which was not as elaborate as the BMSMA provision, was considered in *Sum Lye Heng (also known as Lim Jessie) v MCSTP No 2285 and Others*.⁴⁶⁶ The defendants, comprising the management corporation and council, had issued a private summons against the plaintiff for allegedly breaching the then sections 66(1) and 67(2)⁴⁶⁷ of the LTSA. Section 66(1) reads:

“Every member of a council who is in any way, directly or indirectly, interested in a contract or proposed contract with the management corporation shall, as soon as practicable after the relevant facts have come to his knowledge, declare the nature of his interest at a meeting of the council.”

The plaintiff was the former chairperson of the council and was at the same time the director and shareholder of SCMS, a property management company which had submitted a tender for the provision of managing agency services to the management corporation. The plaintiff had duly declared her interest as director at a council meeting that was subsequently held, and this was followed by another declaration two weeks later. Prior to that she offered to resign from the council at the next meeting, but the offer was not accepted. The plaintiff applied to the High Court to restrain the

⁴⁶² BMSMA s 60(1)(c).

⁴⁶³ BMSMA s 60(2).

⁴⁶⁴ This includes a spouse, a child, adopted child, step-child, sibling or parent; BMSMA s 2(1).

⁴⁶⁵ BMSMA s 60(8).

⁴⁶⁶ [2003] 4 SLR 553; Keang Sood *Strata Title* 335.

⁴⁶⁷ Section 67(2) was replaced by section 61(2) of the BMSMA.

management corporation from proceeding with the private summons for alleged breach of the relevant provisions on the ground that it was an abuse of the process of the court. The judge allowed the plaintiff's application and ordered a permanent stay of private summons. The judge reasoned that it was not open to the council to subsequently complain of the plaintiff's conduct in respect of SCMS and the tender exercise. This was so especially when SCMS had been encouraged to continue with its tender. Moreover, all the parties had acted on the basis that the plaintiff had complied with the relevant provisions of the LTSA. Accordingly the council was estopped from making the complaint as it had acted on the basis that the plaintiff had duly made her declaration at a council meeting that was validly held. The judge pointed out that the real reason for the complaint was because the plaintiff's relationship with the then members of the council had become acrimonious in light of further developments. Due to the fact that the new members were bound by the decisions and actions of the previous council, they were not entitled to take action against the plaintiff except in those instances where it was not too late to reverse its decision. This is because otherwise none could act with certainty on a decision of a previous council. The recourse was for the new council to look to the previous council for an explanation.

This decision was affirmed by the Court of Appeal in *Management Corporation Strata Title Plan No 2285 and Others v Sum Lye Heng (alias Lim Jessie)*.⁴⁶⁸ It was held that the High Court had rightly pointed out that it was not open to the management corporation to make the complaint mentioned above as all parties concerned had acted on the basis that the plaintiff had complied with the requirements of the LTSA, and the company had even been encouraged to tender for the management contract in question. There was evidence that the plaintiff declared her interest in the company on innumerable occasions. Apart from her declaring her interests in the company at a meeting of the council, which was duly noted and recorded in the minutes of the meeting, she did so in various emails to her fellow council members. The plaintiff also took it upon herself to inform the Commissioner of Buildings that she was a director and shareholder of the company which was tendering for the contract to provide managing

⁴⁶⁸ [2004] 2 SLR 408.

agency services for the scheme and that she had declared her interest therein at the council meeting concerned.⁴⁶⁹

A general notice given to the members of a council by a member that he or she has an interest in any contract with a company or firm of which the council member is an officer or member is deemed to be a sufficient declaration of interest in relation to that contract.⁴⁷⁰ The notice must specify the nature and extent of his or her interest in that company or firm, and the interest must not be different in nature or greater in extent than the nature and extent specified in the general notice at the time any contract is entered into.⁴⁷¹ The notice will have no effect unless it is given at a meeting of the council,⁴⁷² or the member concerned takes reasonable steps to ensure that it is brought up and read at the next meeting of the council.⁴⁷³

Every member of a council who holds any office or possesses any property whereby, directly or indirectly, duties or interests might be created in conflict with his or her duties or interest as a member of the council is required to declare the nature, character and extent of the conflict at a council meeting.⁴⁷⁴ The declaration must be made at the first meeting of the council held after he or she becomes a member of the council⁴⁷⁵ or, if already a member of the council, after he or she commenced to hold the office or to possess the property concerned.⁴⁷⁶ The secretary of the council is required to record every declaration in the minutes of the meeting at which the declaration was made.⁴⁷⁷ This statutory requirement of disclosure of interests is in addition to, and not in derogation of, the operation of any rule of law restricting a member of a council from having any interest in contracts with the management corporation, or from holding offices or possessing properties involving duties or interests in conflict with his duties or

⁴⁶⁹ Keang Sood *Strata Title* 336.

⁴⁷⁰ BMSMA s 60(3).

⁴⁷¹ BMSMA s 60(3).

⁴⁷² BMSMA s 60(4)(a).

⁴⁷³ BMSMA s 60(4)(b).

⁴⁷⁴ BMSMA s 60(5).

⁴⁷⁵ BMSMA s 60(6)(a).

⁴⁷⁶ BMSMA s 60(6)(b).

⁴⁷⁷ BMSMA s 60(7).

interests as a council member.⁴⁷⁸ Any council member who fails to comply with the statutory provisions relating to disclosures of interests is guilty of an offence and is liable on conviction to or to imprisonment.⁴⁷⁹ This consequence serves to prevent corruption, malpractice and abuse by council members.

The UCIOA of the United States makes it clear that the executive board appointed by the developer hold their office as fiduciaries. It stipulates that officers and members of the executive board appointed by the developer must exercise the degree of care and loyalty required of a trustee in the performance of their duties.⁴⁸⁰ Therefore, any executive board member appointed by the developer is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.⁴⁸¹ The rationale for this is to avert potential conflicts of interest between the developer and the unit owners.⁴⁸² In contrast, the executive board members elected by unit owners do not have to comply with the higher standard of a fiduciary duty but are only required to take ordinary and reasonable care in the performance of their functions. This only requires that executive board members must discharge their duties in good faith, and with that diligence and care which an ordinary prudent person would exercise under similar circumstances in the performance of their duties.⁴⁸³ It seems that the UCIOA only relies on a business judgment rule as the basis to evaluate an executive board's actions.⁴⁸⁴ This means that as long as directors of a corporation decide matters rationally, honestly and without a conflict of interest, the decision will not be reviewed by the courts.⁴⁸⁵

⁴⁷⁸ BMSMA s 60(9).

⁴⁷⁹ BMSMA s 60(10).

⁴⁸⁰ UCIOA § 3-103(a).

⁴⁸¹ UCIOA § 3-103, Comment 3.

⁴⁸² UCIOA § 3-103, Comment 1.

⁴⁸³ North Carolina General Statute § 47C-3-103(a).

⁴⁸⁴ UCIOA § 3-103, Comment.

⁴⁸⁵ *Atkins v. Hibernia Corp* 182F3d 320, 324 (5th cir 1999).

4 4 Indemnity of trustees

4 4 1 The South African position

After establishing the fiduciary duties of trustees I will now discuss how the trustees are indemnified by the body corporate against all costs, losses, expenses and claims which he or she may incur or become liable to by reason of any act in the performance of his or her duties, except if the costs, expenses or claims were caused by his or her *mala fide* or grossly negligent act or omission.⁴⁸⁶

In South Africa trustees carry the potential risk of personal liability in the performance of their duties. A trustee could be held personally liable for a wrongful action, even if such action was done on behalf of the body corporate. Trustees can also be held liable for mismanagement of the sectional title scheme. The prescribed management rules stipulate that every trustee, agent, other officer or servant of the body corporate shall be indemnified by the body corporate against all costs, losses, expenses and claims which he or she may incur or become liable to by reason of any act in the performance of his or her duties. Such indemnification must be paid out of the funds of the body corporate.⁴⁸⁷ However, trustees will not be entitled to such indemnification if the costs, expenses or claims were caused by his or her *mala fide* or grossly negligent act or omission.⁴⁸⁸ The fact that the question as to whether an act or omission is grossly negligent is open to interpretation by the courts makes it difficult to start court proceedings on this ground. It is generally accepted that gross negligence is hard to prove and that a favourable decision by the court is more the exception than a rule.⁴⁸⁹ This indemnification does not extend to the managing agent appointed in terms of prescribed management rule 46.⁴⁹⁰ I will discuss this more fully in chapter 12.

⁴⁸⁶ Annexure 8 rule 12(1)(a).

⁴⁸⁷ Annexure 8 rule 12(1)(b).

⁴⁸⁸ Annexure 8 rule 12(1)(a).

⁴⁸⁹ Constat & Bleijs *Demystifying Sectional Title* 35.

⁴⁹⁰ Annexure 8 rule 12(2).

The rule qualifies the strict fiduciary duty imposed on a trustee by virtue of the fact that he or she is entrusted with the management of the affairs of another.⁴⁹¹ Van der Merwe suggests that the rationale behind the indemnity is that if it were possible to sue trustees personally on the ground of negligent omissions then no one would be prepared to stand as trustees. In this way a balance is struck between encouraging those to stand for office as trustee and ensuring the proper management of the scheme.⁴⁹²

Furthermore if owner trustees or outside professional trustees are paid for their services then they should not be entitled to indemnification for negligent omissions in the performance of their duties.⁴⁹³ Note, however, that the indemnity is not only for claims which he or she may incur or become liable to by reason of any act in the performance of his or her duties, but also for all costs, losses, expenses incurred in the performance of his or her duties. Trustees who are compensated should be held liable if they do not exercise ordinary care and skill the day-to-day management of the scheme.⁴⁹⁴

4 4 3 Comparative survey

The New South Wales, Singapore and Malaysian legislation do not make provision for the indemnification of the executive members who are negligent in the performance of their duties. A professional indemnity insurance policy could be taken out by the corporation to protect office bearers from personal liability.⁴⁹⁵

The UCIOA stipulates that the owners association (body corporate) can provide for the indemnification of the executive board members (trustees) and officers and maintain professional liability insurance for its directors and officers.⁴⁹⁶ Such expenses are borne by all the unit owners by means of their contributions to the management fund.

⁴⁹¹ J Paddock "Q & A with Jennifer Paddock: Trustee indemnity" (March 2010) 5-3 *Paddocks Press Newsletter* 6.

⁴⁹² Van der Merwe *Sectional Titles* 14-120.

⁴⁹³ Constat & Bleijs *Demystifying Sectional Title* 35.

⁴⁹⁴ Van der Merwe *Sectional Title* 14-120.

⁴⁹⁵ Keang Sood *NSW Strata* 319.

⁴⁹⁶ UCIOA § 3-102(a)(13).

It has been suggested that a future uniform Chinese condominium statute should include such an indemnification clause for executive council members (trustees). The indemnities can serve to comfort the executive members and to encourage unit owners to take office on the board.⁴⁹⁷

4 5 Transactions with third parties

4 5 1 The South African position

The body corporate is a juristic or legal person. It exercises its functions and performs its powers through its two main organs. The general meeting fulfills the legislative functions of the body corporate, while the trustees fulfill the executive and administrative functions of the body corporate. As I will show in this discussion it is important to draw a clear distinction between the role of the trustees in internal relationships with the body corporate, and the role of the trustees when transacting with third parties.⁴⁹⁸ When the trustees transact with the body corporate, and in particular the general meeting, the trustees act as an executive organ of the body corporate. This means that their acts as against the general meeting and the individual members are regarded as the acts of the body corporate itself. In contrast, when the trustees transact with third parties the trustees act in their capacity as executive and administrative organ as well as agents of the body corporate.⁴⁹⁹ This has the result that the body corporate is bound by all the acts performed by the trustees within the scope of their actual or ostensible authority.⁵⁰⁰

Pienaar does not agree that the trustees act as an organ of the body corporate in internal matters, and as an agent of the body corporate in external matters, and is of the opinion that it is not clear why the distinction is made.⁵⁰¹ He reasons that, according to common law principles, the executive and management organ of a juristic person acts as an organ in both internal and external matters. He points out that the assumption that trustees must act as agents in external matters stems from Von Savigny's fiction theory

⁴⁹⁷ Chen *Chinese Condominium Law* 158.

⁴⁹⁸ Van der Merwe *Sectional Titles* 14-113.

⁴⁹⁹ PJ Badenhorst, JM Pienaar & H Mostert *Siberberg and Schoeman's law of property* 5ed (2006) 468.

⁵⁰⁰ 469.

⁵⁰¹ Pienaar *Sectional Titles* 178.

that a juristic person cannot perform external juridical acts or form intent, and thus must act through agents and representatives. Von Savigny's fiction theory therefore defines a juristic person as a legal fiction. However, Von Savigny does not explain how the authority to act as representative, which is also a juridical act, is bestowed on the agent. He goes on to explain that in company law it is an established principle that the directors act as agents in external contractual matters, but as a management organ in the case of delictual or criminal liability of the company as well as in internal affairs, due to the fact that the directing will and mind of the directors is regarded as the will and mind of the company.⁵⁰² However, he indicates that the distinction is made because the directors are not automatically authorized to act as representatives of the company, but receive their authority from the Companies Act, the articles of association and the statutes of the company. This authority arrived from the founding documents and constitution of the company is, in his opinion, not the same as in the case of agency by representation that is derived from Von Savigny's fiction theory.

Pienaar then points out that the provisions of the Companies Act are not applicable to the body corporate of a sectional title scheme.⁵⁰³ The body corporate is not established or based on contract, and the trustees are regarded as the executive organ of the body corporate due to the fact that they were elected and hold office in terms of the management rules. The STA contains no provision that the trustees can bind the body corporate only in external matters through agency. One equivalent provision with company law is that the trustees cannot act in contravention of the STA, the rules of the scheme and the resolutions of the general meeting⁵⁰⁴ and stand in a fiduciary (and not contractual) relationship to the body corporate.⁵⁰⁵ He then points out that these measures do not mean that the trustees represent the body corporate as agents. On the contrary, they must be seen as corporate directives determining to what extent the trustees, as the executive and management organ, can bind the body corporate. Pienaar therefore concludes that it is unnecessary and artificial to designate the actions

⁵⁰² 179.

⁵⁰³ STA s 36(5) [STSMA s 2(6)].

⁵⁰⁴ STA s 39(1).

⁵⁰⁵ STA s 40(1); Pienaar *Sectional Titles* 180.

of the trustees in internal matters as management functions of a management organ and the external contractual transactions of trustees as measures based on agency. In support of this conclusion he quotes *Body Corporate of La Roche v Resort Administration Services CC*⁵⁰⁶ where the court clearly distinguishes between the legal position of the trustees as organ of the body corporate and the managing agent appointed by the trustees as agent of the body corporate.⁵⁰⁷

Although Pienaar's argument follows a logical sequence of conclusions, I do not agree with his submission that the distinction is unnecessary. The distinction is important as it shows that trustees cannot contract with third parties and bind the body corporate purely on the authority of being defined as one of the two organs of the body corporate, but do so based on authority granted by the body corporate to represent the latter. Apart from pointing out that the distinction in *Body Corporate of La Roche v Resort Administration Services CC*⁵⁰⁸ concerned the managing agent and not the trustees, it seems to be generally accepted by the courts that trustees act as the representative of the body corporate in transactions with third parties.⁵⁰⁹ As I will show later in the thesis the managing agent also acts as agent when it, by representation, binds the body corporate in contracts with third parties.

Agency has been used in a wide variety of meanings.⁵¹⁰ In the context of trustees "agency" is the performance of a juristic act on behalf of or in the name of the principal (the body corporate) by the agent (the trustees), who is authorized by the body corporate to act, that creates, alters or discharges legal relations between the body corporate and a third party.⁵¹¹ It is the trustee's position as the body corporate's authorized representative in affecting the body corporate's legal relations with third parties that is the essence of agency.⁵¹² The transactions with third parties are

⁵⁰⁶ [2003] JOL 11655 (N) para 5.

⁵⁰⁷ Pienaar *Sectional Titles* 180.

⁵⁰⁸ [2003] JOL 11655 (N).

⁵⁰⁹ *Body Corporate of Albany court and 17 others v Nedbank and others* [2008] JOL 21739 (W) para 12.

⁵¹⁰ M Dendy & JC De Wet "Agency and Representation" in LTC Harms & JA Faris *LAWSA LAWSA I* 3 ed (2014) para 125.

⁵¹¹ *Totalisator Agency Board OFS v Livanos* 1987 (3) SA 283 (W) at 291; Willes Bradfield G "Agency" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2009) 984.

⁵¹² 984.

transactions of the body corporate, as principal, and are for the body corporate's benefit. These transactions render the body corporate liable, without benefit or liability attaching to the trustees.

Representation or agency is the act of one person performing a juristic act on behalf of another.⁵¹³ A person who does not have capacity to conclude a juristic act cannot be an agent.⁵¹⁴ The agent's ability to bind the principal is derived from and determined by the agent's authority to do so. An agent without authority cannot bind the principal. This authorization is a distinct unilateral act. It can arise out of an agreement or by operation of law. Where a person acts for another person without authority, that lack of authority may in appropriate circumstances be ratified. The principal may also be estopped⁵¹⁵ from denying that the agent had authority to conclude the juristic act on his or her behalf.

The trustees's actual authority can be conferred in three ways. In the first place the trustee can be authorized by way of express authority. A unilateral juristic act by the body corporate in terms of a directive or restriction in the general meeting⁵¹⁶ will constitute an express authority to the trustees to enter into a contract with a third party on behalf of the body corporate. The minutes of the general meeting will indicate the body corporate's intention to be bound by that contract. Secondly, the trustee's actual authority can be by way of tacit authority. This type of authority can be inferred from the body corporate's words and conduct and from other admissible evidence of surrounding circumstances. The body corporate elects the trustees to do all things reasonably necessary for the control, management and administration of the common property,⁵¹⁷ and therefore intends to confer authority to enter into all such transactions as are reasonably incidental to the management of the scheme, even if it is not expressly stated. Finally the trustee's actual authority can be by way of authority by operation of law. Where there is no express or implied act of authority by the body corporate, the

⁵¹³ Dendy & De Wet "Agency and Representation" *LAWSA I* para 126.

⁵¹⁴ 129.

⁵¹⁵ Estoppel is also called apparent or ostensible authority.

⁵¹⁶ STA s 39(1) [STSMA s 7(1)].

⁵¹⁷ Annexure 8 rule 28(2).

trustee may have authority by operation of law. In this way the trustees derive their power to represent the body corporate from their election into office and by executing their statutory functions and powers.⁵¹⁸

It is important to construe the trustees as agents when transacting with third parties on behalf of the body corporate. The reason for my submission is that the trustees are then subject to the legal effects of agency. Certain relations are created between the body corporate as principal and the trustees as agent. The effect is that trustees have the obligation to transact on behalf of the body corporate personally in accordance with instructions with reasonable care, skill and diligence in good faith and must render an account to the body corporate and deliver any proceeds from the transaction. The body corporate must refund all expenses reasonably and properly incurred by the trustees in carrying out their functions. The body corporate must also indemnify the trustees for all loss or liability duly incurred in the execution of the transaction.

The relations between the body corporate and third party vary according to whether the trustees acted within the scope of authority; exceeded authority; concealed their capacity or acted corruptly. The relations between the trustees and and third party vary according to whether the trustees acted within the scope of authority or exceeded authority. If the trustee merely acted as organ of the body corporate in transactions with third parties there would not be any legal basis, boundaries or effects that would attach to the transactions, other than those set out in the Act and rules. The provisions in the STA and rules that deal with trustees in transacting with third parties fit perfectly within the legal framework of agency.

The trustees, in terms of their actual authority, are empowered to exercise all the powers and to perform all the duties of the body corporate subject to the Act, the rules and any restrictions imposed or directions given by the owners the general meeting.⁵¹⁹ Any act outside such powers would be *ultra vires*. The trustees may for example in

⁵¹⁸ STA s 39(1) [STSMA s 7(1)].

⁵¹⁹ STA s 39(1) [STSMA s 7(1)].

terms of the rules not make loans on behalf of the body corporate to sectional owners or to themselves.⁵²⁰

All contracts entered into by the trustees on behalf of the body corporate are valid and binding on the body corporate where the contract concerns a matter falling within the functions and powers of the body corporate and the requirements imposed by the Act, the rules and the directions given or restrictions imposed by the general meeting have been complied with. Section 39 of the STA; section 7 of the STSMA⁵²¹ and rule 25 in Annexure 8 contained in the Regulations made under the STA are similarly worded:

“The functions and powers of the body corporate shall, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules.”

When a third party seeks to have a contract against the body corporate enforced which he or she contends was entered into by the trustees on its behalf, the third party must first establish that the body corporate had the capacity to enter into the contract because any act performed by the trustees in excess of the capacity of the body corporate is *ultra vires* and void.⁵²² The contracts entered into by trustees which have nothing to do with the functions or powers of the body corporate or a specific duty imposed on the trustees by the Act or the rules cannot bind the body corporate, unless the trustees were specifically authorized by the general meeting to conclude the contract, or if the body corporate can be estopped from relying on the lack of authority. An example is where the trustees purportedly enter into a contract on behalf of the body corporate with a third party to arrange for holiday accommodation for themselves.⁵²³ The third party would not be able to hold the body corporate liable on the contract as this does not fall within the functions and powers of the body corporate stated in the Act,

⁵²⁰ Annexure 8 rule 26(2).

⁵²¹ STA s 39 [STSMA s 7(1)].

⁵²² Van der Merwe *Sectional Titles* 13-113.

⁵²³ H Delpont “Contracting with the body corporate of a sectional title scheme” (2006) *Obiter* 577.

and therefore the trustees are not empowered by section 39 of the STA or any prescribed rule to enter into such a contract on behalf of the body corporate.

Where the trustees enter into a contract with a third party on a matter within the functions and powers of the body corporate, but the relevant restrictions or prerequisites imposed by the Act, rules or general meeting have not been observed, then the question whether the contract is binding depends on whether the disregarded prerequisites or requirements are statutorily imposed or otherwise. For example section 26(1) of the STA allows the body corporate to purchase land to extend the common property if authorized to do so by all the members. In terms of section 39(1) of the STA the trustees may exercise the body corporate's powers, but the trustees are only entitled to purchase land to extend the common property in terms of section 26(1), provided the written authority of all the body corporate's members has been obtained.

Trustees are also not empowered to let the common property in terms of a long lease in terms of section 17(1) of the STA, unless the owners have by unanimous resolution directed the body corporate to do so. The trustees act outside their powers if they enter into contracts with a third party where the required consents are not given. Whether such a contract is valid or void depends on the legislature's intention. The decisive issue is not whether obtaining the consent can be classified as an act of internal management, but whether or not the legislature intended to invalidate the contract entered into by the trustees where the statutorily imposed prerequisites have not been met. A third party dealing with the trustees on any such matter should make enquiries and ensure that the required prerequisites have been complied with.

The third party must secondly establish that the act was not one reserved by the Act or the rules for the owners in the general meeting. If the management rules reserve a power or duty for the general meeting, then the third party will most likely be taken to have constructive notice of that fact because the rules, which fulfill the function of a constitution establishing how the body corporate functions and operates,⁵²⁴ must be

⁵²⁴ *Wiljay Investments (Pty) Ltd v Body Corporate Bryanston Crescent* 1984 2 SA 722 (T) 272D.

lodged in the deeds registries office, where they can be inspected by the general public, to be effective.⁵²⁵ The prescribed management rules in Annexure 8 contained in the Regulations made under the STA are published in the Government Gazette and are in fact Regulations promulgated in terms of the Act. The doctrine of constructive notice applies as the rules are open for public inspection. The doctrine of constructive notice therefore operates to protect the body corporate.⁵²⁶

In terms of prescribed management rule 33 the trustees may effect luxurious improvements on the common property only with the unanimous consent of the members of the body corporate. Therefore, the trustees have no authority to effect such improvements without the unanimous consent of the members. Whether such a contract, where prerequisites or restrictions imposed by the management rules have not been met, is valid or void depends on the legislature's intention. In terms of prescribed management rule 27 the legislature's intention is clearer in that a contract signed on behalf of the body corporate must be signed by two trustees or by a trustee and the managing agent in order to be valid and binding on the body corporate. Where a rule is less clear, the third party should make enquiries to ensure that all the prescribed formalities have been met.

There are also situations where prerequisites or restrictions imposed by "own rules" have not been met. Section 35(5)(a) of the STA⁵²⁷ empowers the body corporate to replace or amend the prescribed rules and then notify the Registrar of Deeds on the prescribed form.⁵²⁸ Changes to the rules take effect only from the date of filing of such notification by the Registrar.⁵²⁹ These rules are not published in the Government

⁵²⁵ STA ss 11(3)(e) and 35(5). STA s 11(3)(e) has been amended by the substitution of the following paragraph: "a certificate by the Chief Ombud stating that the rules contemplated in section 10 of the Sectional Titles Schemes Management Act have been approved." STA s 35(5) is now dealt with in STSMA s 10(5).

⁵²⁶ Van der Merwe *Sectional Titles* 14-114.

⁵²⁷ STSMA s 10(5)(a) states that: "If the management or conduct rules contemplated in subsection (2) are substituted, added to, amended or repealed, the developer or the body corporate must lodge with the chief ombud a notification in the prescribed form of such substitution, addition, amendment or repeal."

⁵²⁸ Form V.

⁵²⁹ STSMA s 10(5)(c) states that: "If the chief ombud approves the substitution, addition, amendment or repeal of the rules for filing, he or she must issue a certificate to that effect. Section 10(5)(d) states that "A substitution, addition, amendment or repeal of rules contemplated in paragraph (a) comes into operation on the date of the

Gazette, but are public documents as they are filed with the registrar. An “own rule” can for example stipulate that a contract above a certain monetary limit does not bind the body corporate, unless it is signed by the managing agent and at least three trustees. The third party should not simply accept that the relevant scheme is governed by the prescribed management rules, and is expected to be aware of these own rule restrictions. The third party should be aware of this possibility and should insist on obtaining a copy of the relevant management rules of the scheme. The third party would therefore not be able to hold the body corporate liable if only two trustees signed the document.⁵³⁰

If the rules provide that an act can be performed by the trustees with the authority of a resolution⁵³¹ of the general meeting and the other party assumes in good faith that the trustees have the necessary authority to perform that act, he or she will be able to enforce the contract against the body corporate by using the so called *Turquand* rule,⁵³² otherwise known as the indoor management rule, if it should subsequently transpire that the necessary resolution was never passed and that the general meeting is not prepared to ratify the trustees’ action. The ratio for this rule, which applies to corporations generally, and is not restricted to commercial companies,⁵³³ is that the other party cannot be expected to look beyond a corporation’s public documents and to investigate its internal management. In *Body Corporate of Albany Court and 17 others v Nedbank and others*⁵³⁴ the court found that there was nothing to indicate that the body corporate was precluded from contending by the Act or the rules to delegate the function of instructing attorneys in litigation to the trustees. Gautschi AJ stated:

issuing of a certificate contemplated in paragraph (c) or the opening of a sectional title register for the scheme, whichever is the latest.”

⁵³⁰ Van der Merwe *Sectional Titles* 14-114.

⁵³¹ The type of resolution required is usually immaterial as the *Turquand* rule will apply unless the resolution is required to be registered in the deeds registry and qualifies as a public document for purposes of the doctrine of constructive notice; Van der Merwe *Sectional Titles* 14-114.

⁵³² This rule acquired its name from the decision in *Royal British Bank v Turquand* 1856 119 ER 886.

⁵³³ *The Mine Worker’s Union v Prinsloo* 1948 3 SA 831 (A) 847.

⁵³⁴ [2008] JOL 21739 (W) para 12.

“In transactions with third parties, the trustees act as representatives of the body corporate and the body corporate is bound by all actions for which the trustees have actual or ostensible authority. In the present case, there is no question of actual authority, whether express or implied, and the enquiry is limited to ostensible authority. The body corporate is protected by the doctrine of constructive notice. If any document to which the public has access would show that the trustees would not have the authority to conclude a particular transaction, then the third party cannot rely on the ostensible authority of the trustees. The third party must ascertain whether the contract or transaction was not reserved by the Act or the rules for the owners in general meeting. If, however, the transaction is one which the trustees may properly be authorised to conclude, and third party assumes in good faith that the trustees were properly authorised in general meeting to conclude such transaction, then, by operation of the *Turquand* rule, the body corporate would be precluded from contending that the trustees were not authorised. There is nothing before me to indicate that the body corporate was precluded by the Act or the rules to delegate the function of instructing attorneys in litigation to the trustees. The instructions given by the general meeting are not in the public domain and the doctrine of constructive notice will not apply. The body corporate is therefore bound by the instructions given by the trustees to the attorneys, albeit that the trustees were in fact unauthorised to do so.”⁵³⁵

If the general meeting imposes restrictions on the powers of the trustees without amending the rules,⁵³⁶ then a person who is unaware of those restrictions will still be able to enforce a contract which the trustees entered into while disregarding those restrictions by relying on either the *Turquand* rule or estoppel (ostensible authority), depending on the particular circumstances.⁵³⁷ Where a third party contracts with the trustees of a body corporate in respect of a matter that clearly falls within the functions and powers of the body corporate and in respect of which there are no specific

⁵³⁵ [2008] JOL 21739 (W) para 12.

⁵³⁶ STA s 39(1) [STSMAs 7(1)].

⁵³⁷ Van der Merwe *Sectional Titles* 14-115.

requirements or prerequisites prescribed by the Act or in the rules, the third party is entitled to assume that the trustees are authorised to enter into the contract and that all internal requirements have been imposed by the general meeting in respect of the contract have been complied with.

This is an application of the Turquand rule. For example if a contractor enters into a contract with the trustees to maintain the lifts of the sectional title scheme, the contractor may enforce the contract despite a resolution in a general meeting that the agreement must first be approved by the body corporate's managing agent. A third party contracting with a body corporate is not expected to investigate whether any internal requirements were imposed by the general meeting and if these requirements were met. The protection afforded by this rule would fall away if the third party knew that internal formalities had not been complied with, or the circumstances surrounding the negotiations are of such a nature that any reasonable person would be placed on guard and enquire whether the prerequisites had been complied with, but the third party failed to make such enquiries.⁵³⁸

Section 39(1) of the STA empowers the body of trustees, and not individual trustees, to perform the powers and duties of the body corporate. In terms of prescribed management rule 27 a contract signed on behalf of the body corporate must be signed by a trustee and a managing agent, or by two trustees. This does not mean that a trustee who signs the contract is authorized to do so as the Act empowers the body of trustees, and not individual trustees to perform the functions and powers of the body corporate.⁵³⁹ Prescribed management rule 26 empowers the trustees to delegate their powers to one or more of the trustees. A third party cannot assume that such a trustee has delegated authority to conclude the contract. This is true for the chairperson as neither the Act nor the rules give the chairperson any special contracting authority and it cannot be assumed there is an implied authority similar to that of a managing director of a company. Therefore, the third party dealing with an individual trustee and not the body

⁵³⁸ Delpont (2006) *Obiter* 580; Van der Merwe *Sectional Titles* 14-115.

⁵³⁹ STA s 39(1) [STSMA s 7(1)].

of trustees should make sure the trustee is acting in terms of a delegated authority or that the body of trustees have approved the contract and empowered the individual trustee to sign.⁵⁴⁰

The body corporate or body of trustees may in appropriate circumstances ratify contracts entered into with a third party by trustees who did not have the necessary authority.⁵⁴¹ If the contract is not ratified then the third party may still succeed in holding the body corporate to the contract if all the requirements of estoppel are met. A party contracting with the trustees of a body corporate should consider adding a clause whereby the trustees in question assume personal liability for due performance of the body corporate's obligations in terms of the contract if the body corporate is not bound by the contract because the trustees had not been empowered to enter into the contract on the body corporate's behalf.⁵⁴²

These common law doctrines govern the situations where the trustees act in excess of their functions or powers and those of the body corporate. Furthermore, the rules make specific provision for the situation where one or more trustees have acted and it is discovered afterward that the appointment of the trustee or his continuance in office was defective. The prescribed management rules provide that any act performed by the trustees shall be valid notwithstanding that it is subsequently discovered that there was some defect in the appointment or continuance in office of any trustee.⁵⁴³ Third parties can therefore accept that trustees are duly appointed. However, a third party seeking to rely on the rule to enforce a contract against the body corporate must have acted in good faith when entering into the contract because the rule only applies if the defect is discovered subsequently, and not if it is already known.⁵⁴⁴ The third party must not have known that the trustee who entered into the contract was not actually a trustee at the time.⁵⁴⁵

⁵⁴⁰ Delport (2006) *Obiter* 580-581; Van der Merwe *Sectional Titles* 14-115.

⁵⁴¹ Delport (2006) *Obiter* 581.

⁵⁴² 581.

⁵⁴³ Annexure 8 rule 11.

⁵⁴⁴ Van der Merwe *Sectional Titles* 14-116.

⁵⁴⁵ Constat & Bleijs *Demystifying Sectional Title* 37.

Where the body corporate is prejudiced as a result of the other party being able to enforce a contract against the body corporate that the trustees have concluded in excess of their actual authority, the body corporate may, in principle, recover damages from the trustees. The claim will be based on breach of the trustees' fiduciary duty owed to the body corporate. Every trustee is entitled to be indemnified out of the funds of the body corporate against all costs, losses, expenses and claims which he may incur or become liable to by reason of any act done by him in the discharge of his duties unless they are caused by his *mala fide* or grossly negligent act or omission.⁵⁴⁶ If the general meeting wishes to exercise its statutory power in terms of the STA to impose restrictions on the powers of the trustees to enter into certain contracts on the behalf of the body corporate, it must do so before the trustees enter into the contract.

*Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh*⁵⁴⁷ offers a practical example of the effects of trustees transacting with third parties to bind the body corporate of a sectional title scheme. The applicant (a property developer) and first respondent (two trustees of a sectional title body corporate) had concluded an agreement in terms of which the first respondent sold and ceded to the applicant its right to extend the sectional title scheme. This brought section 25 of the STA into play. Section 25(1) empowers a developer of a sectional title scheme to reserve the right to extend the scheme from time to time. Section 25(6) stipulates that if no reservation is made or a reservation has lapsed for any reason, the right to extend the scheme vests in the body corporate with the proviso that the body corporate may only exercise, alienate or transfer such right with the written consent of all the members of the body corporate as well as the written consent of the mortgagee of each unit in the scheme.

When the applicant sought an order to enforce the agreement, the first respondent resisted the application on the ground, inter alia, of the agreement's alleged invalidity. The first respondent contended that the written consent of the members of the body corporate and mortgagees of units had not been secured prior to the conclusion of the

⁵⁴⁶ Annexure 8 rule 12(1)(a).

⁵⁴⁷ 2006 3 SA 369 (W).

sale agreement, as was required in terms of the first proviso to section 25(6), and that the agreement was consequently void *ab initio*. The applicant, in turn, relied on the second proviso to section 25(6) in contending that lack of consent did not render the agreement invalid as consent was required only prior to registration of transfer and not prior to conclusion of the agreement of cession giving rise to the transfer. In the context of section 25 “alienate” and “transfer” meant the same thing in that both constituted the same act of registration in the deeds office. A mere sale agreement cannot constitute a transfer of ownership and was merely the underlying contract which gave the purchaser the personal right to claim transfer of ownership. Therefore, the written consent need only be obtained before transfer, and not before entering into any agreement to transfer. The argument was fortified by the submission that the cession between the applicant and the body corporate comprised two parts. The first part created the binding obligation and did not require consent of all the members to be binding, while the second part was the transfer in the deeds office that did require such consent.

The first respondent’s defence was that the requirement of section 25(6) had not been met in that consent had not been obtained prior to conclusion of the sale agreement. At a meeting the applicant’s proposed purchase of the right of extension was discussed and the body corporate took the decision that the trustees were to appoint a committee to negotiate the contract with the applicant. The minutes of a meeting of the body corporate showed that the applicant’s offer to purchase was unanimously accepted, but the members did not specifically give their written consent.

The court decided that the case raises two issues: firstly the authorization or otherwise of those who purported to enter into the agreement on behalf of the body corporate; and secondly the applicability of section 25(6) to the agreement and the impact, if any, thereon.⁵⁴⁸ In respect of the first issue the court decided that the applicant had been entitled to believe that the trustees who signed the agreement had been authorized to do so on behalf of the body corporate. The body corporate was therefore liable on the contract even if the signatories had not actually been authorized by the body corporate

⁵⁴⁸ 2006 3 SA 369 (W) para 3.

to sign the contract since they were ostensibly authorized to do so. The court reasoned that the trustees had not been empowered by the body corporate to do more than to negotiate, and the conclusion of any resulting agreement was not within its powers. The trustees of the body corporate have the power to extend the scheme on behalf of the body corporate in terms of section 39(1) of the STA read with prescribed management rules 25 and 26, subject to the provisions in section 25(6). The agreement was signed by two trustees in compliance with prescribed management rule 27. There was no evidence that the powers of the trustees were restricted by any direction given at a general meeting of the body corporate. Therefore, the applicant could assume in good faith that the trustees had the necessary authority to enter into an agreement on behalf of the body corporate for the sale and session of the right of the body corporate to extend the sectional title scheme. The Turquand rule was of “equal application” in this instance. Third parties who deal with the body corporate cannot be expected to know of irregularities that take place in the internal management of the body corporate. There is no duty to investigate whether the preliminaries have been observed. Therefore, it could be assumed the acts of internal management have actually been performed. The applicant was entitled to believe that the trustees who signed the agreement were authorized on behalf of the body corporate. The result was that the body corporate was bound by all acts of the trustees within the scope of their actual or ostensible authority.

With regard to the second issue the court held that the written consents required by section 25(6) must be obtained prior to the agreement constituting an act of alienation such as cession. As this was not done in this case the agreement was void and the application was dismissed. The court reasoned that the purpose of the proviso to section 25(6) of the STA is to protect owners from discovering that the value of their undivided share in the common property has been diminished or disappeared by cession of the right vested in the body corporate to extend the scheme. Furthermore, the proviso aims to protect unit owners from discovering that the number of units increased while the expanse of the common property decreased by reason of the developer exercising of the right of extension that formerly vested in the body corporate. The proviso is for the sole benefit of the owners and mortgagees. The owners of units

must be protected against a diminution in the value of their units, whether this value was in monetary terms or by way of enjoyment of their units. The mortgagees must be protected from the diminution of the value of the security upon which they relied when making finance available to the owners of units.

It was held that there was a distinction between the words “alienate” and “transfer” as they appeared in the first proviso to section 25(6).⁵⁴⁹ To “alienate” included the dispossession of the right to extend the scheme through a sale and cession, whilst “transfer” referred to the formal act required by statute that publicly enacted and completed the disposition.⁵⁵⁰ Neither could be done without the written consent of the owners and mortgagees. Section 25(6) permits a body corporate to alienate its right of extension only with the necessary consent. It was held that the consents had to be provided contemporaneously with the alienation and with the transfer.⁵⁵¹ They could not be given later.⁵⁵² Generally speaking consent may be given *ex post facto* by subsequent ratification, but in the context of section 25(6) it is difficult to envisage that consent would be given by all the members of the body corporate at some stage after the agreement to alienate has been concluded. The court accordingly found that it appeared from the wording and objects of the Act and other indications that an agreement made contrary to the proviso to section 25(6) was a nullity.⁵⁵³ On the facts, that the first respondent had been required to secure the consents prior to conclusion of the agreement of cession, which was the act of alienation.⁵⁵⁴ For these reasons the court dismissed the application.⁵⁵⁵

4 5 3 Comparative survey

The NSW Strata Schemes Management Act also contains a number of so-called “restricted matters” on which the executive committee cannot act or transact without

⁵⁴⁹ 2006 3 SA 369 (W) para 84.

⁵⁵⁰ Para 89.

⁵⁵¹ Para 92.

⁵⁵² Para 104.

⁵⁵³ Para 101 – 102.

⁵⁵⁴ Para 107.

⁵⁵⁵ Para 112.

convening a formal general meeting. These matters are reserved for the general meeting and cannot be acted upon by the executive committee (trustees).⁵⁵⁶ These matters definitely fall outside the actual authority of the trustees and would be *ultra vires* if performed by them. The NSW Strata Schemes Management Act also provides that a proposed executive committee decision may be vetoed by a written notice to the secretary of the executive committee by one or more owners, the sum of whose unit entitlements exceeds one-third of the aggregate unit entitlement, that they oppose a particular decision of the executive committee.⁵⁵⁷ The provision is apparently intended to enable owners to take control out of the hands of the executive committee if they are opposed to the executive committee handling certain matters. In view of certain practical difficulties, the provision is unlikely to be used much in practice.

Similar to the South African provision that validates an act by a trustee where there is some defect in the trustees appointment,⁵⁵⁸ an act or proceeding of an executive committee in New South Wales done in good faith is regarded as valid if taken at a properly constituted executive committee meeting even though there was a vacancy in the executive committee, or a defect in the appointment, or disqualification of a member of the executive committee when the act or proceeding was done, taken or commenced.⁵⁵⁹

In New South Wales the secretary is the chief administrative officer, but unlike the secretary of a company he or she has no inherent power to contractually bind the owners corporation. The secretary's signature will only contractually bind the owners corporation if a resolution conferring such power on him or her has been passed by the owners corporation or its executive committee. Third parties dealing with the secretary must be aware whether he or she has actual or apparent authority to enter into contracts on the owners corporation's behalf. The owners corporation may not be bound by the contract if it is entered into by a secretary who lacks this necessary authority. Any

⁵⁵⁶ NSW Strata Schemes Management Act s 21(2)(a) and 21(2)(b).

⁵⁵⁷ NSW Strata Schemes Management Act, sch 3, cl 11(2).

⁵⁵⁸ Annexure 8 rule 11.

⁵⁵⁹ NSW Strata Schemes Management Act, sch 3, cl 17.

act done by a secretary without authority may be saved from invalidity by subsequent ratification by the general meeting or the executive committee.⁵⁶⁰

In Singapore the secretary has no inherent power to contractually bind the management corporation, unless a resolution has been passed by the corporation or its council conferring this power on the secretary. Any unauthorized act by the secretary is likely to be validated by subsequent ratification by the corporation or its council. Keang Sood recommends that the resolution be passed by the corporation or its council to confer the ability on the secretary to act to avoid the secretary's personal liability to third parties in non-routine matters.⁵⁶¹

4 6 Conclusion

From the above discussion I have shown that trustees are democratically elected to the position by the owners in the general meeting, and hold office as the executive functionaries and owe the body corporate a fiduciary duty. Although the trustees owe a fiduciary duty of care to the body corporate, the trustees will only incur liability if they commit *mala fide* or grossly negligent acts in the exercise of their powers or the performance of their functions and duties.⁵⁶² This is far from the trustees being obliged to exercise the utmost good faith and a high degree of care and skill. In the United States the council members (trustees) who are appointed by the developer hold their office as fiduciaries of the owners, whereas only ordinary and reasonable care is required from board members elected by the owners.⁵⁶³ In Singapore a council member is under a duty at all times to use reasonable diligence in the discharge of the duties of his office.⁵⁶⁴ Therefore the STA, BMSMA and the UCIOA impose a lower standard of duty of care on the trustees, executive council and executive board. In holding the trustees liable only for gross negligence, South African law also purports to encourage unit owners to serve as trustees. In this way the legislator tried to strike a balance

⁵⁶⁰ Ilkin *NSW Strata* 106.

⁵⁶¹ Keang Sood *Strata Title* 319.

⁵⁶² Annexure 8 rule 12.

⁵⁶³ UCIOA § 3-103(a).

⁵⁶⁴ BMSMA s 61(1).

between making the office of the trustee more attractive and ensuring the efficient functioning and management of the scheme by ensuring some form of liability for underperformance of the task.

There should be a difference in the standard of care required between owner trustees and outsider trustees. For owner trustees a lower standard of care is suitable because they are probably not remunerated for the duties and powers they perform. For outside experienced professionals who serve as trustees an ordinary duty of care should apply since they are normally remunerated for their service.⁵⁶⁵ Van der Merwe agrees that such a lenient responsibility is appropriate for trustees of a sectional title scheme who perform their tasks without remuneration.⁵⁶⁶ That being said he qualifies the submission by stating that trustees, whether owners or outsiders, who receive remuneration for managing the scheme should be held liable if they do not exercise ordinary care and skill in conducting the affairs of the body corporate. This is also presumably the rationale behind the rule that determines that the indemnification does not apply to the managing agent that is appointed by the body corporate.⁵⁶⁷ I do not therefore advocate the insertion of a Singapore provision that a committee member who breaches any obligations is also guilty of an offence with a monetary penalty on conviction or imprisonment or both. This places too high a burden and would deter persons from standing for election. A better option would be to follow the New South Wales provisions that do not impose monetary penalties on an office bearer. However, an office bearer who continues to breach the Act's provisions may become subject to an Adjudicator's order. Failure to comply with the Adjudicator's order could lead to proceedings being commenced at the Tribunal where the defaulting office member could be personally liable for a monetary penalty for which he or she cannot seek indemnity from the owners corporation.⁵⁶⁸ I suggest that in South Africa, if a trustee continues to breach his or her obligations under the STA or the STSMA, an ombudsman under the CSOS should order that he or she should be personally liable for a monetary penalty.

⁵⁶⁵ Chen *Chinese Condominium Law* 147.

⁵⁶⁶ Van der Merwe *Sectional Titles* 14-120.

⁵⁶⁷ Annexure 8 rule 12(2); Botha (2008) *Property Law Digest* 7.

⁵⁶⁸ Ilkin *NSW Strata* 108.

This fiduciary relationship does require that the trustee must act honestly and in good faith towards the body corporate; must act positively in the interest and for the benefit of the body corporate and must not act without or exceed his or her powers of management and representation.⁵⁶⁹ Furthermore, a trustee must avoid any material conflict between his or her own interests and the interests of the body corporate. The trustee must not receive any personal economic benefit, direct or indirect, from the body corporate or from any other person. Trustees are further obliged to notify all the other trustees of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the body corporate as soon as such trustee becomes aware of such interest. This is supplemented by the rule that a trustee is disqualified from voting in respect of any contract, or any litigation or proposed litigation with the body corporate, by virtue of any interest he may have therein.⁵⁷⁰ Where the trustee breaches the fiduciary duty he or she will then be liable to the body corporate for any loss suffered or economic benefit received.

When the trustees transact with third parties the trustees act in their capacity as executive organ of the body corporate and as agents of the body corporate. This has the result that the body corporate is bound by all the acts performed by the trustees within the scope of their actual or ostensible authority. When a third party seeks to have a contract against the body corporate enforced which he or she contends was entered into by the trustees on its behalf, the third party must first establish that the body corporate had the capacity to enter into the contract because any act performed by the trustees in excess of the capacity of the body corporate is *ultra vires* and void. The third party must secondly establish that the act was not one reserved by the Act or the rules for the owners in the general meeting. The body corporate may, by means of a resolution passed at a general meeting, confer the power to sign any contract or document on behalf of the body corporate. I recommend that the body corporate pass a resolution to give the trustee contractual power to enter into contracts with third parties as is done in New South Wales and Singapore. The resolution can set out the names of

⁵⁶⁹ G Paddock “Q & A with the Professor: Liability of trustees” (January 2011) 6-1 *Paddocks Press Newsletter* 6.

⁵⁷⁰ Annexure 8 rule 23.

trustees who may contractually bind the body corporate; how many trustees are required to sign the contract; whether the managing agent is also required to sign the contract; what preliminaries are required; any monetary restrictions and the types of contracts that the trustee may not enter into. In this way the third party is protected from entering into contracts with unauthorized trustees simply by checking the resolution. The trustees will also be protected from being held personally liable on the contract with the third party as their authorization will be based on the resolution passed by the body corporate. The third party will be taken to have constructive notice of that fact as the resolution will be open for public inspection. The doctrine of constructive notice therefore operates to protect the body corporate. This will avoid the necessity for third parties to inspect the management rules or the scheme's own rules. The actual authority of the trustee will be held in one place, namely the resolution adopted by the body corporate. The third party will then not need to rely on the *Turquand* rule to enforce the contract as the resolution granting the trustee actual authority to bind the body corporate will serve as proof of authorization. The third party will then not have to look beyond a corporation's public documents and to investigate its internal management. The third party will then know which trustee has authority to bind the body corporate.

The body corporate or body of trustees may still in appropriate circumstances ratify contracts entered into with a third party by trustees who did not have the necessary authority, or the third party may succeed in holding the body corporate to the contract if all the requirements of estoppel are met. A party contracting with the trustees of a body corporate should consider adding a clause whereby the trustees in question assume personal liability for due performance of the body corporate's obligations in terms of the contract if the body corporate is not bound by the contract because the trustees had not been empowered to enter into the contract on the body corporate's behalf.⁵⁷¹ Furthermore, the prescribed management rules in Annexure 8 provide that any act performed by the trustees shall be valid notwithstanding that it is subsequently discovered that there was some defect in the appointment or continuance in office of

⁵⁷¹ Delpont (2006) *Obiter* 581.

any trustee.⁵⁷² Third parties can therefore accept that trustees are duly appointed. The third party must not have known that the trustee who entered into the contract was not actually a trustee at the time.⁵⁷³ Where the body corporate is prejudiced as a result of the other party being able to enforce a contract against the body corporate that the trustees have concluded in excess of their actual authority, the body corporate may, in principle, recover damages from the trustees based on the breach of the trustees' fiduciary duty. However, this is negated by the fact that every trustee is entitled to be indemnified out of the funds of the body corporate against all costs, losses, expenses and claims which he may incur or become liable to by reason of any act done by him in the discharge of his duties, unless they are caused by his *mala fide* or grossly negligent act or omission.⁵⁷⁴

*Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh*⁵⁷⁵ concerned the situation where the STA and the rules empowered the trustees to bind the body corporate of a sectional title scheme, provided that certain preliminaries were complied with. The court decided that in such a case, the third party dealing with the trustees is not obliged to investigate if the preliminaries have actually been observed, and can assume that they have in fact been complied with. The third party may hold the body corporate to the contract even though the preliminaries were not met.⁵⁷⁶ However, a third party who entered into a contract with the trustees to purchase the body corporate's right to extend the sectional title scheme could not assume that all the written consents required for the sale in terms of section 25 of the STA had in fact been obtained. If these written consents had not been obtained the sale agreement entered into by the trustees is void. This created confusion and the question was raised as to why the third parties could not assume that the preliminaries referred to in section 25 had been observed.

This confusion could be avoided if an ordinary resolution, by majority vote of the body corporate, is passed at the annual general meeting where the trustees are elected. This

⁵⁷² Annexure 8 rule 11.

⁵⁷³ Constat & Bleijs *Demystifying Sectional Title* 37.

⁵⁷⁴ Annexure 8 rule 12(1)(a).

⁵⁷⁵ 2006 3 SA 369 (W).

⁵⁷⁶ Delport (2006) *Obiter* 571.

ordinary resolution should set out which trustee will have actual authorization to bind the body corporate, and that the trustee who has such authorization will observe the required preliminaries in entering the contract. The preliminaries include the requirement that two trustees or one trustee and the managing agent must sign the contract;⁵⁷⁷ and that the trustees will not bind the body corporate in a contract with a financial responsibility that will exceed the amount approved by the body corporate; and that the trustees have not exceeded their powers by entering into a contract that is in conflict with a direction or restriction of the body corporate⁵⁷⁸ and that the trustees have not entered into a contract that is prohibited in terms of the legislation or rules, such as making a loan on behalf of the body corporate to owners or to themselves⁵⁷⁹ and that the trustee has declared the nature and extent of any direct or indirect material interest in the contract to the trustees.⁵⁸⁰ It is important that trustees understand that they make decisions as a board, and that no single trustee will bind the body corporate in a contract with a third party until such time that the board of trustees have discussed it and decided to enter into the contract by majority vote.⁵⁸¹ A trustee is disqualified from voting in respect of any contract or proposed contract with the body corporate by virtue of any interest he may have therein. The trustee with a direct or indirect interest should excuse himself from the room while the trustees vote on the contract. The trustees must keep minutes of their proceedings and of all meetings of the body corporate,⁵⁸² and must include all resolutions in this minute book.⁵⁸³ Any third party contracting with the body corporate can then request the ordinary resolution of the body corporate as well as the trustee resolution as evidence of the trustees' authority to bind the body corporate.

⁵⁷⁷ Annexure 8 rule 27.

⁵⁷⁸ STA s 39(1).

⁵⁷⁹ Annexure 8 rule 26(2).

⁵⁸⁰ STA s 40(2)(b)(ii) and Annexure 8 rule 23.

⁵⁸¹ Annexure 8 rule 22.

⁵⁸² Annexure 8 rules 34(1)(a) and (b).

⁵⁸³ Annexure 8 rules 34(1)(c).

Chapter 5: Powers and duties of the trustees

5 1 Introduction

In this chapter I will focus on the division of powers between the trustees and the general meeting. I will then outline the specific powers and duties granted to trustees in terms of the Act and the prescribed management rules. Once again each topic will contain comparative material on how other jurisdictions deal with the particular matter concerned.

5 2 Division of powers between the trustees and the general meeting

5 2 1 The South African position

In the attempt to define the division of powers between the trustees and the body corporate acting through its main organ, the general meeting, I will examine the effect of section 39 of the STA. This provision confers the powers and duties of the body corporate on the trustees subject to the provisions of the Act, the rules and any restriction imposed or direction given at a general meeting of the owners.⁵⁸⁴ In what follows I will consider each of these restrictions in turn.

In the first place the Act confers the powers and duties of the body corporate on the trustees subject, in the first place, to the provisions of the Act. The STA reserves certain matters that fundamentally affect the scheme for the general meeting. Examples include the alienation and letting of common property,⁵⁸⁵ the extension of sections and the scheme⁵⁸⁶ and changes to owners' voting rights or to the basis on which they contribute to expenditure.⁵⁸⁷ Decisions regarding the termination of the scheme must be taken either by the general meeting or by the court.⁵⁸⁸ Finally, only the general meeting can

⁵⁸⁴ STA s 39(1) [STSMA s 7(1)]; also expressly incorporated in Annexure 8 rule 25.

⁵⁸⁵ STA s 17.

⁵⁸⁶ STA ss 24-26.

⁵⁸⁷ STA s 32(4) [STSMA s 11(2)].

⁵⁸⁸ STA ss 48 and 49 [STSMA s 17].

substitute, add to, amend, repeal or supplement the prescribed management and conduct rules of Annexure 8 or 9 respectively.⁵⁸⁹ It is for this reason that the general meeting is seen as the legislative organ of the body corporate.

Secondly, the prescribed management rules in Annexure 8 contained in the Regulations made under the STA give certain powers to the general meeting, and also place restrictions on the powers of the trustees.⁵⁹⁰ For example the general meeting has the power to elect trustees, to remove them from office and to replace trustees who cease to hold office.⁵⁹¹ The general meeting may also impose restrictions on the ability of the trustees to delegate their powers and functions to one or more of their number.⁵⁹² The trustees are expressly forbidden from making loans on behalf of the body corporate to themselves or to sectional owners.⁵⁹³ The trustees must also account for their administration of the scheme to the general meeting of the body corporate.⁵⁹⁴

Finally, the powers of the trustees are also subject to any restriction imposed or direction given at a general meeting. The members of the body corporate, by majority vote, at the general meeting can therefore place restrictions on or direct the actions of the trustees. These decisions must be minuted and kept on permanent record.⁵⁹⁵ The imposing of restrictions or giving of directions is a compulsory item of business that must be dealt with at each annual general meeting.⁵⁹⁶ The restrictions and directions can be given or imposed at any general meeting, but must be considered at each annual general meeting.

An example of a restriction is where the owners in the general meeting resolve that the trustees may not borrow or spend more than a specified amount of money without first consulting with and obtaining the approval of the body corporate. An example of a

⁵⁸⁹ STA s 35(2)(a) and (b) [STSMA s 10(2)(a) and (b)].

⁵⁹⁰ Van der Merwe *Sectional Titles* 14-68.

⁵⁹¹ Annexure 8 rules 6, 13(e) and 14.

⁵⁹² Annexure 8 rule 26(1)(b).

⁵⁹³ Annexure 8 rule 26(2).

⁵⁹⁴ Annexure 8 rule 36-38.

⁵⁹⁵ Annexure 8 rule 34.

⁵⁹⁶ Annexure 8 rule 56(g).

direction is where the owners in the general meeting instruct the trustees to display copies of draft minutes of their meetings on the scheme's notice board as soon as they are prepared.⁵⁹⁷

*North Global Properties (Pty) Ltd v Body Corporate of the Sunrise Beach Scheme*⁵⁹⁸ provides an example of a scheme rule that prohibited the trustees from spending more than R50 000 without first obtaining the prior consent of the body corporate. The scheme's developer disputed the competence of the trustees to bring an appeal against a previous order for the appointment of an administrator, as the trustees needed a resolution to spend more than R50 000. The developer invoked High Court rule 7(1)⁵⁹⁹ to dispute the authority of the attorneys acting for the trustees, and requested the trustees deliver a power of attorney supported by a resolution of the body corporate. The trustees filed a power of attorney of the body corporate, but it was only supported by a resolution of the trustees. The court found that the court costs would definitely exceed the trustees' spending limit of R50 000, and therefore decided that the trustees did not have authority to bind the members of the body corporate without their express mandate to incur expenses.⁶⁰⁰ To do so would have meant that the trustees would have acted *ultra vires*.⁶⁰¹

The body corporate may therefore decide that certain matters or classes of matters can only be decided by the general meeting.⁶⁰² An important question is whether a simple majority at a general meeting of owners can or cannot give binding directives to the trustees as to how they must exercise powers vested in them by the Act or the rules. The management of the scheme is vested in the trustees, and they cannot perform that task effectively if they must submit to the directives by a simple majority at a general meeting. However, there is clear wording in both these sections that the trustees are

⁵⁹⁷ J Paddock "Section 39(1) – The imposition of owner directions and restrictions on trustees" (January 2010) 5-1 *Paddocks Press Newsletter* 3.

⁵⁹⁸ Case no.12465/2011 KZD.

⁵⁹⁹ The aim of this rule is to prevent a litigant from repudiating the outcome of legal proceedings by denying its authority to initiate the legal proceedings; Van der Merwe *Sectional Titles* 17-70.

⁶⁰⁰ Case no.12465/2011 KZD para 14.

⁶⁰¹ Paras 11-13.

⁶⁰² J Van der Walt "The powers of trustees" (January 2008) 3-1 *Paddocks Press Newsletter* 5.

subject to directives at the general meeting. Van der Merwe explains that a resolution adopted by a simple majority at a general meeting binds the trustees due to the fact that the body corporate's task is to manage the scheme on behalf of the owners. Therefore, the majority of those owners should be entitled to give binding directives as to how the scheme should be managed. Furthermore, although not expressly stated in section 39(1), it is evident that the majority of the owners cannot give binding directives to the trustees that are contrary to the Act or the rules of the scheme.⁶⁰³

In terms of section 39(1) of the STA⁶⁰⁴ the trustees have all the powers not allocated to the general meeting. The general meeting also has certain inherent or residual powers. If the trustees refuse or are unable to exercise powers conferred on them then the general meeting may exercise those powers.⁶⁰⁵ As I have already discussed in chapter 4 the general meeting can ratify an action by trustees who exceed their powers in performing any act, provided that such an act is within the competence of the body corporate itself.⁶⁰⁶

The general meeting retains control over the trustees because it alone can perform certain functions reserved by the Act and rules; it retains residual functions; it can elect and remove the trustees from office and give them binding directives and restrictions as to how they must exercise their powers. The general meeting sets the policy and the trustees carry out the policy. Only the owners in the general meeting can make or amend the rules for the scheme. The management rules can be amended by a unanimous resolution of the body corporate, while the conduct rules can be amended by a special resolution of the body corporate.⁶⁰⁷ Since the owners in the general meeting have the final say in any disagreement with the trustees, the owners are the "masters" of the body corporate while the trustees are the "servants" of the body corporate in this context.⁶⁰⁸

⁶⁰³ Van der Merwe *Sectional Titles* 14-71.

⁶⁰⁴ STSMA s 7(1).

⁶⁰⁵ Van der Merwe *Sectional Titles* 14-72.

⁶⁰⁶ 14-72.

⁶⁰⁷ STA s 35(2).

⁶⁰⁸ G Paddock "Meetings in sectional title schemes" (March 2009) 4-3 *Paddocks Press Newsletter* 2.

The trustees, on the other hand, have the executive function and, subject to all the restrictions listed already, have wide powers to perform the daily management tasks necessary to keep the scheme going during the period between annual general meetings. The trustees may also delegate some of their powers, subject to restrictions imposed by the rules and the general meeting.⁶⁰⁹

5 3 2 Comparative survey

In New South Wales an owners corporation has the principal responsibility for the management of the scheme.⁶¹⁰ The general meeting may continue to exercise all or any of its powers, authorities, duties and functions as conferred or imposed by the Act or by-laws, despite the existence of the executive committee, and presumably despite any decision made by the executive committee.⁶¹¹

The executive committee can exercise all the powers of the owners corporation not reserved to the owners corporation in general meeting. In *Jacklin v The Proprietors – Strata Plan No 2795*⁶¹² the Supreme Court stated:

“Subject to certain restrictions, the duties and powers of the owners corporation in relation to the administration, maintenance and repair of the common property may, under both Acts, be exercised by the Council of the owners corporation.”⁶¹³

The restrictions on the wide powers of the executive committee pertain to matters that fall into three restricted classes. The classes are restricted matters;⁶¹⁴ removal of executive power by resolution of the owners corporation⁶¹⁵ and veto of a proposed executive committee decision.⁶¹⁶

⁶⁰⁹ Van der Merwe *Sectional Titles* 14-72.

⁶¹⁰ NSW Strata Schemes Management Act s 8(2).

⁶¹¹ NSW Strata Schemes Management Act s 21(3).

⁶¹² [1975] 1 NSWLR 15; (1975) NSW Titles Cases 30-014 at 50,172.

⁶¹³ Ilkin *NSW Strata* 118.

⁶¹⁴ NSW Strata Schemes Management Act s 21(2)(a).

⁶¹⁵ NSW Strata Schemes Management Act s 21(2)(b).

⁶¹⁶ NSW Strata Schemes Management Act, sch 3, cl 11(2).

Executive committee decisions made in respect of matters not within these three restricted classes have the same status as decisions of the owners corporation.⁶¹⁷ Decisions on any matter within any of these three restricted classes, are unenforceable or *ultra vires*, by or against the owners corporation. If the executive committee attempts to execute a decision on a matter within any of the above three restricted classes, it may be restrained by an order issued by an Adjudicator⁶¹⁸ or by the Supreme Court.

The term “restricted matter” commonly refers to any matter that requires either a unanimous, special or ordinary resolution under the Act or by-laws to be effective and matters that are taken out of the competence of the executive committee by a resolution reserving those matters for decision by the general meeting. To prevent an executive committee from making a decision on a restricted matter, the veto procedure could be followed or an injunctive type of relief could be sought.

The second restricted class relates to the removal of the executive committee’s power to make certain decisions. Section 21(2)(b) allows the owners corporation to pass an ordinary resolution to remove the executive committee’s power to make decisions on specific matters or classes of matters. Once such a resolution has been passed, it remains effective until rescinded or altered by the owners corporation passing an ordinary resolution to that effect. The difficulty in locating such resolutions undermines the usefulness and application of this restriction. Minute books may be lost or destroyed, and if they exist, a meticulous and lengthy search may be required to find the resolution in question. Furthermore, minute books are required to be kept for only five years. Regrettably the relevant provision⁶¹⁹ does not require the strata roll to record such resolutions as in the case of by-laws. A further complication is that whereas by-laws are adopted by special resolution, these section 21(2)(b) resolutions are scattered amongst the numerous resolutions adopted by mere majority vote. Be that as it may, the same veto procedure and injunctive type of relief are available to prevent an executive committee from making a decision on a matter removed in terms of a section

⁶¹⁷ NSW Strata Schemes Management Act s 21(1).

⁶¹⁸ NSW Strata Schemes Management Act ss 138, 153 or 170.

⁶¹⁹ NSW Strata Schemes Management Act s 96.

21(2)(b) resolution. Although this restricted class is a mechanism to limit the powers of the executive committee, it has been warned that an over-reliance thereon would risk defeating the function of the executive committee in assisting the owners corporation in the management of the scheme.⁶²⁰

The third restricted class relates to the owners' power to veto a proposed decision of the executive committee on a particular matter. Clause 11(2) of schedule 3 enables the owners to take a proposed decision out of the executive committee's hands and render it of no force and effect. In terms of the schedule to the Act owners whose unit entitlements exceed one-third of the aggregate unit entitlement of the scheme may, without any justification for their action,⁶²¹ personally hand over a written notice registering their opposition to the proposed decision to the secretary prior to an executive committee meeting.⁶²² The owners do not need to justify their use of this veto. Once received, details of the veto notice, including the time and date of delivery, must be recorded by the secretary.⁶²³ The handing over of a valid notice does not mean that the matter must automatically be referred to a general meeting or that the secretary must convene one. If the executive committee, despite the opposing veto notice, still goes ahead with taking the decision, an eligible applicant can seek an interim order from an Adjudicator to quash the decision, or an owner may requisition an extraordinary general meeting to pass a resolution to rescind the committee resolution. Some owners misuse these veto notices to prohibit all future executive committee decisions, even where specific matters are yet to arise for consideration. However, veto notices should be only be used after meeting notices have been affixed to noticeboards or given to owners and executive committee members.⁶²⁴

In addition to the three classes of restrictions on the powers of the executive committee, the owners corporation's prevailing management powers entitles it in general meeting to overrule any decision of the executive committee by rescinding, varying or adopting a

⁶²⁰ Ilkin *NSW Strata* 113.

⁶²¹ 114.

⁶²² NSW Strata Management Act, sch 3, cl 11(2).

⁶²³ NSW Strata Schemes Management Act s 101(a).

⁶²⁴ Ilkin *NSW Strata* 114.

resolution inconsistent with the executive committee's decision.⁶²⁵ The only exception is when work has been undertaken, an article has been purchased or another person to whom the decision has been communicated has acted on the basis of the executive committee's decision. That decision cannot be revoked by the owners corporation in general meeting. If the executive committee has already implemented the decision when the owners corporation passes the rescinding resolution an Adjudicator possesses some overriding power to make an order,⁶²⁶ which is deemed to be a resolution of the owners corporation.⁶²⁷

On the analogy of company law cases it is likely that the owners corporation in a general meeting can validate an executive committee's procedural irregularities⁶²⁸ such as a lack of quorum or an improperly appointed committee member, provided the validation is not beyond the owner corporation's power.⁶²⁹ It can further retrospectively ratify decisions of the executive committee if the decisions are beyond the executive committee's power, but within the owners corporation's competence.⁶³⁰ If a section of the Act expressly confers a power specifically on the executive committee, then the owners corporation in the general meeting cannot exercise that power.⁶³¹ If the executive committee fails to exercise the power expressly conferred on it then the owners corporation in the general meeting could pass an ordinary resolution requiring the executive committee to exercise the power, or it could seek an order from an Adjudicator directing the executive committee to exercise the power.⁶³²

In Singapore the management corporation may, in a general meeting, continue to exercise or perform all or any of the powers, duties and functions conferred or imposed on the management corporation by the Act or the by-laws, even though a council holds

⁶²⁵ NSW Strata Schemes Management Act s 21(4).

⁶²⁶ NSW Strata Schemes Management Act s 142 and s 143.

⁶²⁷ NSW Wales Strata Schemes Management Act s 207.

⁶²⁸ *Bamford v Bamford* [1970] 1 Ch 212.

⁶²⁹ NSW Strata Schemes Management Act, sch 3, cl 17.

⁶³⁰ *Grant v United Kingdom Switchback Railways Co* (1889) 40 Ch D 135; *Irvine v Union Bank of Australia* (1877) 2 App Cas 366.

⁶³¹ NSW Strata Schemes Management Act ss 32(2) and 105.

⁶³² NSW Strata Schemes Management Act s 138.

office.⁶³³ In principle all decisions of the council are regarded as the decision of the management corporation, except for decisions on so-called “restricted matters.”⁶³⁴ A restricted matter is any matter on which a decision, in terms of the BMSMA or the by-laws, may only be made by the management corporation in general meeting by a unanimous, special, 90% or comprehensive resolution, or by consensus or in a general meeting, and any matter which falls within the sole competence of the management corporation to determine in a general meeting and which is so specified in a resolution of the corporation passed for such purpose.⁶³⁵ The only exception is that the council is competent to make a decision on a restricted matter if the general meeting has determined that a particular restricted matter must be decided at a council meeting.⁶³⁶

In addition to the limitation placed on the council to make decisions on restricted matters, the management corporation may in general meeting remove from their council the power to make decisions on other specific matters or class of matters by reserving these matters to the corporation in a general meeting.⁶³⁷ The BMSMA furthermore contains the same veto procedure that we encountered in the New South Wales legislation. Thus if the secretary, prior to a decision being taken by the council, receives a written notice from proprietors (owners) representing a one third majority of the share values in the scheme, opposing a particular proposed decision, any decision on this matter made by the council has no force and effect, and cannot be enforced against the management corporation.⁶³⁸

The effect of such a notice was considered in *Lark Lounge & Nite Club Pte Ltd v MCST Plan No 1420 (Balestier Point)*.⁶³⁹ The relevant provision in this case was section 63(3) of the LTSA, which is materially similar to section 58(3) of the BMSMA. The plaintiff had purchased four lots in the strata development from the management corporation (defendant) to be used as a showroom and amusement centre. The plaintiff sought the

⁶³³ BMSMA s 58(2).

⁶³⁴ BMSMA s 58(1).

⁶³⁵ BMSMA ss 58(4)(a) and (b) and 59.

⁶³⁶ BMSMA s 58(4)(a).

⁶³⁷ BMSMA s 59.

⁶³⁸ BMSMA s 58(3).

⁶³⁹ [1998] 2 SLR 222.

defendant's approval to use the lots instead as a karaoke and music lounge before submitting an application to the Urban and Redevelopment Authority for the proposed change of use. In view of the history of violence, gang clashes and vandalism prevalent in existing karaoke lounges in the same scheme, well over one third of the proprietors of the lots served the defendant's council with a written notice opposing the plaintiff's application for a change of use. The plaintiff commenced proceedings for a declaration that the said notice amounted to obstructive and oppressive conduct on the part of the proprietors concerned towards another proprietor and was an abuse of the law and accordingly null and void. In deciding against the plaintiff, the judge observed that section 63(3) of the LTSA was clear on the effect of such a notice. He reasoned that since the notice has been served on the council, the council was not competent to make any decision on the plaintiff's application. The notice had the effect of taking the matter out of the hands of the council. The judge also remarked that the opposition of the proprietors concerned to another karaoke lounge being set up was not without good reason.⁶⁴⁰ Implicit in the court's decision is that service of such notice must be for a good reason having regard to the particular circumstances of the development in question. This is especially the case where the interest of another subsidiary proprietor would be affected. It is likely that a notice served *mala fide* or in bad faith will be ruled null and void and of no effect by the court.

In Malaysia the council is also not entitled to make a decision that may only be made by the management corporation pursuant to a unanimous, special or ordinary resolution passed at a general meeting of proprietors. The council is also subject to any restriction imposed or direction given by the management corporation at a general meeting.⁶⁴¹ Although the management corporation in a general meeting can overrule a properly made decision of the council by rescinding or varying it, it would appear that such a council decision may not be revoked after it has been put into effect, such as where an item has been purchased or the work has been undertaken.

⁶⁴⁰ [1998] 2 SLR 222 230.

⁶⁴¹ Strata Titles Act s 39(4); Sarawak Ordinance s 23(3); Sabah Enactment s 14(3).

Under the UCIOA of the United States the executive board is entitled in principle to exercise all the powers and functions of the condominium association subject to various restrictions. The executive board may always act on behalf of the association except when prevented from doing so in the declaration, the by-laws or in other provisions of the Act.⁶⁴² An executive board is expressly restricted from amending a declaration or determining the board members' qualifications, powers, duties and terms of office and from dealing with the winding down of a condominium.⁶⁴³

5 3 Specific powers and duties (functions) of trustees

5 3 1 Introduction

As I have already explained, the trustees make the day-to-day decisions on behalf of all owners, and do not have to meet with the owners for every decision that has to be taken. They do not need to consult with the owners before raising a special levy to fund unbudgeted repairs of the common property.⁶⁴⁴ The trustees are also entitled to enter into short-term rental agreements with owners to rent out a part of the common property for up to ten years.⁶⁴⁵ Trustees can furthermore appoint employees, for example a gardener, caretaker⁶⁴⁶ or managing agent.⁶⁴⁷ The trustees may also initiate a process to obtain approval of non-luxurious improvements to the common property, such as the installation of security fences, but if any owner asks for a meeting to discuss the issues then the trustees can only proceed if the meeting approves the proposals by special resolution.⁶⁴⁸ In what follows I will examine some of the most important powers and duties of the trustees.

⁶⁴² UCIOA § 3-103(a).

⁶⁴³ UCIOA § 3-103(b).

⁶⁴⁴ Annexure 8 rule 31.

⁶⁴⁵ STA s 38.

⁶⁴⁶ Annexure 8 rule 26.

⁶⁴⁷ Annexure 8 rule 46.

⁶⁴⁸ Annexure 8 rule 33; Van der Walt (January 2008) *Paddocks Press Newsletter* 5.

5 3 2 The South African position

5 3 2 1 Specific powers conferred on trustees

Subject to any restriction imposed or direction given by the general meeting of the body corporate, the prescribed management rules confer four powers specifically on the trustees. The first is the power to appoint for and on behalf of the body corporate such agents and employees as they deem fit in connection with the control, management and administration of the common property,⁶⁴⁹ and the exercise and performance of any or all of the powers and duties of the body corporate.⁶⁵⁰ The second is the power to delegate to one or more of the trustees such of their powers and duties as they deem fit, including the power to revoke that delegation at any time.⁶⁵¹ The third is the power to sign instruments on behalf of the body corporate.⁶⁵² The final power is to give written consent for certain activities concerning sections or the common property.⁶⁵³ In what follows I shall discuss each of these powers in turn.

The trustees' *power to appoint agents and employees* includes the appointment of all kinds of agents and employees including cleaning staff and maintenance firms and even managing agents. The last part of the rule empowers the trustees to appoint an employee or managing agent in connection with the exercise and performance of any or all powers and duties of the body corporate.⁶⁵⁴

Applied to a managing agent, this seems to imply that all duties, functions and powers of the body corporate may be *delegated* to a managing agent. This interpretation is obviously too wide and must be interpreted and applied restrictively.⁶⁵⁵ The legislation makes it clear that the power to appoint a managing agent, determine the levies of the scheme or to take a unanimous resolution may not be delegated to the managing agent.

⁶⁴⁹ Annexure 8 rule 26(1)(a)(i).

⁶⁵⁰ Annexure 8 rule 26(1)(a)(ii).

⁶⁵¹ Annexure 8 rule 26(1)(b).

⁶⁵² Annexure 8 rule 27.

⁶⁵³ Pienaar *Sectional Titles* 181.

⁶⁵⁴ Annexure 8 rule 26(1)(a)(ii).

⁶⁵⁵ Van der Merwe *Sectional Titles* 14-138; T Maree "Managing agents: some do's and don'ts" (December 2010) 38 *MCS Courier* 3.

The trustees can further not delegate powers that they do not possess themselves. The managing agent can be delegated the power to sign the levy clearance certificate.⁶⁵⁶ All of the functions and powers should be assessed according to their own nature before it can be determined whether they are capable of being delegated or not.

The trustees' *power to delegate* includes the power to appoint one of their members as treasurer or secretary or some similar position in the internal management of the board of trustees. It may also involve designating one of their members to represent the body corporate in instituting or defending a court action; settling an insurance claim; negotiating with the local authority; negotiating and signing a contract or in some other role involving dealings with outsiders.⁶⁵⁷

The body corporate is a legal entity and not a natural person capable of *signing instruments and documents* and must rely on a duly authorized representative in this regard. Prescribed management rule 27 sets out who is authorized to sign instruments on the body corporate's behalf. The rule provides that no instrument signed on behalf of the body corporate, shall be valid and binding unless it is signed by a trustee and the managing agent or by two trustees or, in the case of a certificate issued in terms of section 15B(3)(a)(i)(aa) of the STA, by two trustees or the managing agent.⁶⁵⁸ In *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and Another*⁶⁵⁹ it was shown that a cheque must be signed by a trustee and the managing agent or by two trustees. The legislative rationale for making it compulsory for two natural persons to sign body corporate instruments or documents is referred to as the four eyes principle by Van der Merwe.⁶⁶⁰ The introduction of the four-eyes principle avoids abuse by a single trustee signing a document to the detriment of the body corporate. It imposes a check on each trustees' motivation for signing a particular instrument or document.⁶⁶¹

⁶⁵⁶ STA s 15B(3)(i)(aa).

⁶⁵⁷ Van der Merwe 14-138.

⁶⁵⁸ Annexure 8 rule 27.

⁶⁵⁹ 2006 3 SA 369 (W) paras 64 and 65.

⁶⁶⁰ Van der Merwe *Sectional Titles* 14-139.

⁶⁶¹ 14-139.

A certificate that all money due to the body corporate by the transferor in respect of a unit which is to be transferred has been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof, must be signed by two trustees or the managing agent.⁶⁶² The purpose of this provision is to prevent a trustee who wants to sell his unit from acting in bad faith and signing the certificate even though levies on his or her unit are still outstanding. The reason why managing agents are allowed to sign levy clearance certificates on their own is probably because they are generally independent professionals with no personal interest in the scheme.⁶⁶³ However, the amended prescribed management rule 5 has made it possible for a managing agent to own a unit in a scheme and to act as trustee for that scheme. This creates the possibility for such a managing agent to act in bad faith and to sign his own levy clearance certificate despite outstanding levies on his or her own unit. When prescribed management rule 5 was amended the legislature should have amended prescribed management rule 27 to disallow a managing agent from signing a clearance certificate for his or her own unit.

The heading of prescribed management rule 27 refers to the signing of “instruments.” The rule is interpreted widely to include negotiable instruments, legal instruments and other less formal documents. The word “instrument” presumably includes negotiable instruments such as bills of exchange, promissory notes, insurance claims,⁶⁶⁴ cheques, as well as powers of attorney, contracts of employment and other legal documents. This interpretation is supported by the fact that although the headnote of prescribed management rule 27 refers to the signing of instruments, the wording of the actual rule refers to the signing of documents.

A commentator has stated that fact that the managing agent is not authorized to sign a cheque drawn on the banking account of the body corporate without being co-signed by a trustee is incomplete in view of the provision of prescribed management rule 42 which stipulates that the trustees may authorize the managing agent to administer and operate

⁶⁶² Annexure 8 rule 27 read with STA s 15B(3)(a)(i)(aa).

⁶⁶³ J Paddock “Signing body corporate documents” (December 2010) 5-12 *Paddocks Press Newsletter* 5.

⁶⁶⁴ M Adisson “Dealing with insurance claims” (January 2011) 6-1 *Paddocks Press Newsletter* 2.

the bank account of the body corporate.⁶⁶⁵ The administration and operating of the bank account of the body corporate should include the signing of cheques. However, it does not mean that the managing agent is automatically authorized to sign cheques on the basis of this provision only. A managing agent will thus be allowed to sign such a cheque if the trustees specifically delegate such power to the managing agent.

An interpretation that all documents and not only formal (legal) documents usually designated by the word “instruments,” must be signed by the trustees is obviously too wide. In actual fact only documents that bind the body corporate, or are required to be signed by the trustees under the Act or the rules, need to be signed in the above manner.⁶⁶⁶ The prescribed management rules contain specific provisions about the signing of documents by trustees.⁶⁶⁷ Prescribed management rule 15 allows one trustee to give notice of a meeting of trustees in writing. Prescribed management rule 38 stipulates that the annual report by trustees must be signed by the chairperson. Prescribed management rules 53 and 54 require a decision by trustees and written notice to owners for the calling of a special and annual general meeting. Although such a notice has all the features of a document, it is not normally signed by the trustees or by the managing agent in practice. It is an open question whether the non-compliance with the signature requirement of prescribed management rule 27 would invalidate the proceedings and the resolutions taken at the meeting. The crucial question is how such a procedural defect impacts on the due process that must be followed by the trustees in deciding to call the meetings and setting the agenda, as well as on any owner who was materially prejudiced by the defect.⁶⁶⁸

Finally the Act and the rules confer powers on the trustees by requiring their *written consent for certain legal acts or activities involving sections and the common property*. Examples are that the consent of the trustees is required for the subdivision of a section

⁶⁶⁵ Maree (December 2010) *MCS Courier* 2.

⁶⁶⁶ 2.

⁶⁶⁷ Paddock (December 2010) *Paddocks Press Newsletter* 5.

⁶⁶⁸ Van der Merwe 14-139.

and the consolidation of two or more sections;⁶⁶⁹ the attendance by the managing agent of trustee meetings;⁶⁷⁰ the construction or placement of any structure or building improvement on an exclusive use area;⁶⁷¹ the keeping of pets within a section or on the common property;⁶⁷² the maintenance of a receptacle for refuse in a section, exclusive use area or the common property;⁶⁷³ the parking of any vehicle on the common property;⁶⁷⁴ the marking, painting, driving nails or screws into or otherwise damaging or altering any part of the common property;⁶⁷⁵ the approval of the nature and design and the manner of installation of any safety devices and screens to prevent the entry of animals or insects;⁶⁷⁶ the placement of any sign, notice, billboard or advertisement on any part of the common property or section in a residential scheme;⁶⁷⁷ and the erection of a washing line or the hanging of washing or laundry on any part of the building or the common property.⁶⁷⁸ The body corporate can confer the power on the trustees to effect or remove luxurious improvements on the common property,⁶⁷⁹ and to effect or remove non-luxurious improvements on the common property.⁶⁸⁰

Van der Merwe submits that the body corporate can confer the power on the trustees to make house rules dealing with the finer details concerning the health, safety, control, use and cleanliness of the common property.⁶⁸¹ Schedule 1 rules made under the 1971 Act often contained a provision entitling the trustees to make house rules.⁶⁸² An important issue is whether these house rules⁶⁸³ made by trustees (also referred to as

⁶⁶⁹ STA s 21(1) [STSMA s 7(2)].

⁶⁷⁰ Annexure 8 rule 49(1).

⁶⁷¹ Annexure 8 rule 68(1)(vi).

⁶⁷² Annexure 9 rule 1(1).

⁶⁷³ Annexure 9 rule 2(1)(a).

⁶⁷⁴ Annexure 9 rule 3(1).

⁶⁷⁵ Annexure 9 rule 4(1).

⁶⁷⁶ Annexure 9 rule 4(2).

⁶⁷⁷ Annexure 9 rule 6.

⁶⁷⁸ Annexure 9 rule 8.

⁶⁷⁹ Annexure 8 rule 33(1).

⁶⁸⁰ Annexure 8 rule 33(2).

⁶⁸¹ Van der Merwe *Sectional Titles* 14-140.

⁶⁸² J Van de Walt "Management, Conduct and House Rules" (August 2008) 3-8 *Paddocks Press* 7.

⁶⁸³ I must note that people often refer to house rules when they actually mean the conduct rules that are filed at the Deeds Office in terms of section 35(2)(b) of the Act, and which are enforceable. This mistake in terminology could be due to the fact that section 5(8) of the Rental Housing Act 50 of 1999 requires that the landlord must ensure that a copy of any House Rules applicable to a dwelling must be attached as an annexure to the lease. Section 1 of the Rental Housing Act defines "House Rules" to mean the rules in relation to the control, management, administration,

“trustee directives”), and not filed at the Deeds Office, are valid and enforceable in sectional title schemes.⁶⁸⁴

Van der Merwe is of view is that these rules did not become part of a scheme's management rules when the Regulations under the Sectional Titles Act 95 of 1986 came into operation on 1 June 1988.⁶⁸⁵ He gives various arguments against trustee-made house rules being enforceable. Section 35 of the STA and Regulation 30 sets out a strict procedures for when management and conduct rules may be substituted, added to, amended or repealed.⁶⁸⁶ These provisions governing management and conduct rules have created a system of checks and balances that precludes the circumvention of these rules by allowing the trustees to make rules for the control and management of the scheme.⁶⁸⁷ Furthermore, the body corporate exists and the trustees hold office under the Act, and their powers are derived either expressly or by necessary implication from the provisions of the Act, Regulations and the rules. Since there is no provision in the Act, Regulations or rules that gives the body corporate or the trustees the power to make house rules, they do not have such power.⁶⁸⁸ Thirdly the fact that the rules prescribed under the 1971 Act only remain in force to the extent that they are not incompatible with those prescribed under the 1986 Act suggests that the legislature wanted to create a template for scheme rules which could not be deviated from easily.⁶⁸⁹

There are two final considerations that Van der Merwe points out with regard to enforcement of the rules. Sections 35(4) and 38(j) of the STA both state that the body corporate are responsible for the enforcement of the management and conduct rules and for the control, administration and management of the common property for the

use and enjoyment of the rental housing property. In the context of sectional titles this will include the management and conduct rules in terms of section 35(2) of the Act; CM Durham “Are tenants subject to the sectional title scheme’s rules?” (November 2014) 9-11 *Paddocks Press Newsletter* 5.

⁶⁸⁴ Van der Merwe *Sectional Titles* 13-33.

⁶⁸⁵ 13-34.

⁶⁸⁶ STA s 35(2) and Regulations 30(1) – 30(7).

⁶⁸⁷ Van der Merwe *Sectional Titles* 13-34; Pienaar *Sectional Titles* 203-204.

⁶⁸⁸ Van der Merwe *Sectional Titles* 13-34.

⁶⁸⁹ 13-34.

benefit of all owners. The trustees cannot make and enforce rules regulating the use of a section. Furthermore, the body corporate is expressly empowered to enforce the management and conduct rules, and is allowed reasonable access to the sections and exclusive use areas to ensure that the rules are being observed.⁶⁹⁰ This cannot be construed to confer similar powers in respect of house rules.⁶⁹¹ Van der Merwe is also of the opinion that a management or conduct rule empowering trustee-made rules will not validate them. He is of the view that such a rule could be in conflict with the maxim *delegatus non potest delegare*.⁶⁹²

Wood-Bodley⁶⁹³ has suggested that there are two instances where house rules may be valid. The first instance is where it is proper to construe the house rule as an exercise by the trustees of their power to control the common property.⁶⁹⁴ For example a rule that provides that no person under a certain age may swim in a pool unless supervised by an adult. The second instance is where the trustee rule seeks to grant consent in terms of the rules. Since certain prescribed rules prohibit certain actions by owners except with the written consent of the trustees, this type of house rule will merely function to grant such written consent of the trustees. For example prescribed conduct rule 4(2) sets out that an owner may not install any locking device, safety gate, burglar bars or other safety device for the protection of his section or any screen or other device to prevent the entry of animals or insects, provided that the trustees have first approved in writing the nature and design of the device and the manner of its installation. If the trustees made a rule that set out what type of safety gate would be approved would serve as granting of consent in terms of the relevant prescribed conduct rule, and would be enforceable.

Although I am aware that it may be more expedient that trustees make such rules, I have concerns that by doing so they will be failing to apply their mind to each individual request for consent, and will not be taking the circumstances of the case into

⁶⁹⁰ STA s 44(1)(a).

⁶⁹¹ Van der Merwe *Sectional Titles* 13-34 – 13-35.

⁶⁹² 13-35.

⁶⁹³ MC Wood-Bodley “House rules’ in sectional title schemes - are they ultra vires?” (2003) 120 *SALJ* 605-606.

⁶⁹⁴ 606.

consideration. In *Body Corporate of the Laguna Ridge Scheme No 152/1987 v Dorse*⁶⁹⁵ the court stated that the trustees must consider each request for permission to keep a pet and to base their permission on the fact and circumstances of the particular case. The trustees were not allowed to refuse permission on the basis of creating a precedent. The judge decided that the trustees had failed to apply their minds when they refused permission for an elderly lady to keep her small dog. Furthermore, trustees do not remain in office indefinitely, and the mood, feeling and tastes of the board of trustees will change from one set of trustees to another.⁶⁹⁶

It is often argued that these house rules shall only provide directions as to the practical application of a conduct rule. It is my view that trustee directives or house rules will often be regulatory or restrictive in their nature, and should be therefore only be dealt with in the management or conduct rules passed by the body corporate. The process of adopting rules by unanimous or special resolution means that the owners are included in the decisions as to how the scheme is governed.⁶⁹⁷ The obligation to file management and conduct rules means that they are publically available. If trustees make rules that are not filed there will be a lack of transparency, which could lead to confusion as to what rules are applicable to the scheme. All rules must be reasonable and must not be in conflict with the Act and must apply equally to all owners of units put to substantially the same purpose.⁶⁹⁸ It is for these reasons that I am of the opinion that house rules made by trustees are not enforceable.

The trustees are therefore invested with certain powers. These powers are circumscribed and the trustees have no authority or power to act outside the ambit of the powers as conferred in terms of the Act or the rules.⁶⁹⁹

⁶⁹⁵ 1999 (2) SA512 (D).

⁶⁹⁶ CM Durham "House rules in sectional title schemes" (21-05-2015) *Paddocks Blog* <http://paddocksblog.com/2015/05/21/house-rules-in-sectional-title-schemes/> (accessed 21-09-2015).

⁶⁹⁷ Van de Walt (August 2008) 3-8 *Paddocks Press* 7.

⁶⁹⁸ STA s 35(3) [STSMA s 10(3)].

⁶⁹⁹ Van der Merwe *Sectional Titles* 14-140.

5 3 2 2 Specific duties conferred on trustees

With regard to the specific duties (functions) of the trustees, the rules require the trustees to perform the functions entrusted to them by sections 37⁷⁰⁰ and 39⁷⁰¹ of the STA.⁷⁰² The other general duties imposed on the trustees are to do all things reasonably necessary for the control, management, and administration of the common property in terms of the powers conferred upon the body corporate by section 38⁷⁰³ of the STA⁷⁰⁴ and to do all things reasonably necessary for the enforcement of the rules in force from time to time.⁷⁰⁵

In *Body Corporate Montpark Drakens and Others v Smuts*⁷⁰⁶ the court stated that the STA not only imposes duties upon trustees, but also by necessary implication confers upon trustees the clear right in law to perform those functions without unnecessary or improper interference from meddlesome owners. In this sense the trustees have the duty to maintain the sections of owners who do not comply with their duty to maintain their sections in a state of good repair.⁷⁰⁷ Owners are required to repair and maintain their sections in a good state of repair and, in respect of exclusive use area, keep it in a clean and neat condition.⁷⁰⁸ In the event that owners fail to comply with their duties in this regard, and if such failure persists for a period of 30 days, trustees may affect the necessary repairs and maintenance on the owner's behalf and at his expense.⁷⁰⁹

Besides these general duties certain specific duties are imposed on the trustees in the management rules in Annexure 8 of the Regulations. The trustees must keep minutes of their own proceedings⁷¹⁰ and must also cause minutes to be kept of all general

⁷⁰⁰ STA s 37 [STSMA s 3].

⁷⁰¹ STA s 39 [STSMA ss 7(1) and (3)].

⁷⁰² Annexure 8 rule 28(1).

⁷⁰³ STA s 38 [STSMA s 4].

⁷⁰⁴ Annexure 8 rule 28(2).

⁷⁰⁵ Annexure 8 rule 28(3).

⁷⁰⁶ [2207] JOL 19484 (W) para 7.

⁷⁰⁷ T Maree "Do trustees have the duty to maintain sections?" (June 2007) 24 *MCS Courier* 1.

⁷⁰⁸ STA s 44(1)(c) [STSMA s 13(1)(c)].

⁷⁰⁹ Annexure 8 rule 70.

⁷¹⁰ Annexure 8 rule 34(1)(a).

meetings of the body corporate⁷¹¹ in a special minute book.⁷¹² Any unanimous, special and other resolution of the body corporate must be recorded in the minute book.⁷¹³ Although minutes of meetings of the trustees are not expressly required to be kept in a minute book, this ought to be done in practice. The minute books for general meetings and meetings of the trustees should be bound in a way that will prevent falsification.⁷¹⁴ The trustees must keep all minute books in perpetuity.⁷¹⁵ The trustees are also obliged to make all minutes of the body corporate available for inspection on the written application of any owner or sectional mortgagee.⁷¹⁶

The trustees must cause proper books of account and financial records to be kept⁷¹⁷ so as fairly to explain the transactions and financial position of the body corporate.⁷¹⁸ Paying attention to accurate accounting and financial recording is important for the financial well-being of the sectional title scheme.⁷¹⁹ Records must be kept of the assets and liabilities of the body corporate⁷²⁰ and of all sums of money received and expended by the body corporate and the matters in respect of which such receipt and expenditure occur.⁷²¹

Furthermore, a register of the sectional owners, of sectional mortgagees and of all other persons with real rights in units must also be kept.⁷²² These persons are obliged to inform the trustees in writing of their interests. Individual ledger accounts must be kept for each owner.⁷²³ The books could either be kept by one of the trustees, for example the treasurer, or by the bookkeeper appointed for that purpose. On application, the trustees must make the books of account and the records available for inspection by an

⁷¹¹ Annexure 8 rule 34(1)(b).

⁷¹² Annexure 8 rule 34(1)(b).

⁷¹³ Annexure 8 rule 34(1)(c).

⁷¹⁴ Van der Merwe *Sectional Titles* 14-142.

⁷¹⁵ Annexure 8 rule 34(2).

⁷¹⁶ Annexure 8 rule 34(3).

⁷¹⁷ Annexure 8 rule 35(1).

⁷¹⁸ Annexure 8 rule 35(1).

⁷¹⁹ C Ridder "Financial planning in tough times" (December 2008) 3-12 *Paddocks Press Newsletter* 5.

⁷²⁰ Annexure 8 rule 35(1)(a).

⁷²¹ Annexure 8 rule 35(1)(b).

⁷²² Annexure 8 rule 35(1)(c).

⁷²³ Annexure 8 rule 35(1)(d).

owner, a registered mortgagee or the managing agent.⁷²⁴ This means that an owner can obtain information on levies that have not been paid by his fellow sectional owners. The trustees, on behalf of the body corporate, must supply the information.⁷²⁵ The substitution of this rule would probably conflict with the provisions of the Promotion of Access of Information Act 2 of 2000.⁷²⁶ These books of account and records must be retained by the trustees for a period of six years after completion of the transactions, acts or operations to which they relate. However, the minute books must be retained for as long as the scheme remains registered.⁷²⁷

The trustees must cause certain documents to be prepared and submitted to every annual general meeting for consideration.⁷²⁸ The trustees must firstly prepare, prior to the commencement of every financial year, an itemized estimate of the anticipated income and expenses of the body corporate, including reasonable provision for contingencies and maintenance of the common property⁷²⁹ for the ensuing year.⁷³⁰ The budget must be made for the financial year and not from one annual general meeting to the next.⁷³¹ The budgets must be prepared in the format that would be submitted to the annual general meeting for consideration prior to the start of the financial year. For example where the financial year of a scheme runs until the end of February 2015, the budget must be prepared prior to March 2014.⁷³² This suggests that trustees are given the instruments to ensure that the scheme has the financial resources to operate effectively.

⁷²⁴ Annexure 8 rule 35(2).

⁷²⁵ Van der Merwe *Sectional Titles* 14-142; J Maree “Access to information held by the managing agent” (March 2007) 22 *MCS Courier* 9.

⁷²⁶ T Maree “Bestuursagente se pligte ten opsigte van trustees se optrede” (December 2010) 38 *MCS Courier* 8.

⁷²⁷ Annexure 8 rule 35(3).

⁷²⁸ Annexure 8 rule 36-38 read with rule 56.

⁷²⁹ Annexure 8 rule 36(2).

⁷³⁰ Annexure 8 rule 36(1); T Maree “Meer oor begrootings” (March 2007) 22 *MCS Courier* 7-8. The incorrect reference to rule 56(b) in rule 37(1) was corrected in 6(e) of GN R1264 in GG 31626 of 28-11-2008.

⁷³¹ Van der Merwe *Sectional Titles* 14-143.

⁷³² C Ridden “Revised rules for levies and budgets” (December 2011) 6- 12 *Paddocks Press Newsletter* 2.

A recent amendment to the Regulations included the insertion of prescribed management rule 31(4Aa)⁷³³ which states that:

“After the expiry of a financial year and until they become liable for contributions in respect of the ensuing financial year, owners are liable for contributions in the same amounts and payable in the same instalments as were due and payable by them during the expired financial year: Provided that the trustees may, if they consider it necessary and by written notice to the owners, increase the contributions due by owners by a maximum of 10 per cent excluding capital expenditure to take account of the anticipated increased liabilities of the body corporate. Such increase shall be ratified or changed after the Annual General Meeting by the trustees once the body corporate has approved or amended the schedule of income and expenditure.”

Prescribed management rule 31(4Aa) has been criticized by commentators, as being badly phrased.⁷³⁴ The last sentence gives the impression that the trustees have a discretion to ratify or change the increase after the budget had been approved, and on an interim basis. Trustees have no such discretion and must only determine and allocate levies according to the amount of the approved budget. This could lead to confusion and disputes. This provision should be interpreted to mean that the trustees must adjust the interim levy amounts in accordance with the budgets approved by owners at the annual general meeting, as is required by section 37 of the STA.

Where the financial year-end and the annual meeting do not coincide, the budget must coincide with the financial year of the scheme.⁷³⁵ It has been long recognised in

⁷³³ Sub-rule 31(4A) was inserted by rule 6 (b) of GN R1264 in GG 31626 of 28-11-2008 and was deleted by mistake by GN R196 in GG 36421 of 14-03-2013. Annexure 8 rule 31(4A) stated that: “After the expiry of a financial year and until they become liable for contributions in respect of the ensuing financial year, owners are liable for contributions in the same amounts and payable in the same instalments as were due and payable by them during the expired financial year: provided that the trustees may, if they consider it necessary and by written notice to the owners, increase the contributions due by the owners by a maximum of 10 per cent to take account of the anticipated increased liabilities of the body corporate.” This error was rectified by the insertion of rule 31(4Aa) by GN R548 in GG 38923 of 30-06-2015 which took effect on 30 July 2015.

⁷³⁴ Maree “Latest rule amendments – Trustees take note!” (July 2015) 50 *MCS Courier* 3.

⁷³⁵ Annexure 8 rule 31(2A).

sectional title financial practice that levies set at the level necessary to meet the operating and financial needs of the body corporate should be the same for the budget and the financial year and that the levies should be in place from day one.⁷³⁶ The insertion of rule 31(2A)⁷³⁷ gives effect to this idea, unless the levy is more than 10% higher than the previous year. Recently an Amendment Regulation inserted into rule 31 after sub-rule (4A) a new sub-rule (4B)⁷³⁸ which states that:

“The trustees may from time to time, when necessary, make special levies upon the owners or call upon them to make special contributions in respect of all such expenses as are mentioned in rule 31(1) above (which are not included in any estimates made in rule 31(2) above), and such levies and contributions may be made payable in one sum or by such instalments and at such time or times as the trustees shall think fit.”

In view of the fact that the trustees are elected to run the scheme and have the power of raising special levies, they should have the power to set the levy from day one, irrespective of the required increase. The item on the agenda of annual meetings can still remain to give the owners a form of supervision where necessary. This will provide the trustees with an important tool to operate the scheme effectively.⁷³⁹

The trustees must secondly prepare an audited financial statement in conformity with generally accepted accounting practice, which fairly presents the state of affairs of the body corporate and its finances and transactions at the end of the financial year concerned.⁷⁴⁰ This must include information and notes pertaining to the proper management by the body corporate and must contain analyses of the periods of debts and amounts due in respect of levies, special levies and other contributions;⁷⁴¹ the

⁷³⁶ Ridden (December 2011) *Paddocks Press Newsletter* 2.

⁷³⁷ Annexure 8 rule 31(2A) states: “Where the financial year-end and the annual general meeting of a body corporate do not coincide, the budget shall coincide with the financial year of the scheme.”

⁷³⁸ Published in GN R 196 in *GG 36421* of 14-03-2013.

⁷³⁹ Van der Merwe *Sectional Titles* 14-143.

⁷⁴⁰ Annexure 8 rule 37(1); C Ridden “Will it still balance?” (August 2009) 4-8 *Paddocks Press Newsletter* 1; C Ridden “Fringe benefits tax of supervisor’s accommodation” (June 2010) 5-6 *Paddocks Press Newsletter* 1.

⁷⁴¹ Annexure 8 rule 37(2)(a).

periods of debts and amounts due in respect of amounts owing by the body corporate to the creditors and in particular to any public or local authority in respect of rates, taxes and charges for consumption of services, including, but not limited to, water, electricity, gas, sewerage and refuse removal⁷⁴² as well as the expiry dates of all insurance policies.⁷⁴³

Apart from the generally accepted principles associated with drafting financial statements the auditors who draft financial statements under International Financial Reporting Standards often fail to see that the financial statement must comply with prescribed management rule 37(2)(a)-(c). A few other specific aspects that need to be checked, complied with or reported are that the auditor firm's appointment is reflected in the minutes of the annual general meeting and that a suitable engagement letter is in place; that the amended management or conduct rule to reflect his or her appointment has been filed with the registrar to enable the auditor to give confirmation required by prescribed management rule 56(i); that any restrictions imposed or directions given to trustees at a general meeting have been complied with; that all contracts have been properly signed by at least two trustees or a trustee and a managing agent and supported by a resolution formally and correctly minuted; that levies have been determined correctly; that all the required minutes have been kept and that they record the transactions that form the basis for example the budget at the annual general meeting and the raising of levies by the trustees and that the accounting complies with the Act and the rules of the scheme.⁷⁴⁴

All of the above considerations must be kept in mind when professionals are appointed to prepare the annual financial statements on behalf of the trustees. Ultimately this responsibility rests with the trustees and it is therefore vital that the trustees work closely with the professional firms who specialise in sectional title matters. Higher

⁷⁴² Annexure 8 rule 37(2)(b).

⁷⁴³ Annexure 8 rule 37(2)(c).

⁷⁴⁴ C Ridden "The trustees' responsibilities relative to the audited financial statements" (March 2011) 6-3 *Paddocks Press Newsletter* 3.

accounting and auditing fees may have to be expended.⁷⁴⁵ The trustees must lay the audited financial statements before every annual general meeting for consideration in terms of prescribed management rule 56(a).⁷⁴⁶ The rule refers to the trustees and not to the body corporate or managing agent. Therefore, the trustees must take full responsibility for these statements and cannot shift the final responsibility to the managing agent or even the accounting officer or auditor for any failure or defect in these statements.⁷⁴⁷

The trustees must finally prepare a report signed by a chairperson reviewing the affairs of the body corporate during the past year and must lay it before every annual general meeting for consideration in terms of prescribed management rule 56(a).⁷⁴⁸

Owners and mortgagees who have notified the body corporate of their interests must be furnished with copies of the estimate of income and expenditure,⁷⁴⁹ audited⁷⁵⁰ financial statement,⁷⁵¹ signed report of the chairperson;⁷⁵² as well as schedules reflecting the replacement value of the buildings and all improvements to the common property comprised in the scheme and the replacement value of every individual unit,⁷⁵³ at least fourteen days before the annual general meeting at which they are to be considered.⁷⁵⁴ These documents must be sent by prepaid post addressed to the owner at his *domicilium* and to the mortgagee at his address as reflected in the records of the body corporate.⁷⁵⁵ Delivery is also deemed to be effected on the owner if the documents are

⁷⁴⁵ 3.

⁷⁴⁶ Annexure 8 rule 37(1).

⁷⁴⁷ Ridden (March 2011) *Paddocks Press Newsletter* 3.

⁷⁴⁸ Annexure 8 rule 38. The incorrect reference to rule 56(b) in rule 38 was corrected rule 56(a) in section 6(f) of GN R 1264 in GG 31626 of 28-11-2008. Annexure 8 rule 56(a) states: "The following business shall be transacted at an annual general meeting: The consideration of the financial statement and report referred to in rules 37 and 38."

⁷⁴⁹ Annexure 8 rule 36.

⁷⁵⁰ Under Annexure 8 rule 40 the body corporate is obliged to appoint an auditor or an accounting officer for schemes consisting of fewer than ten units at every general meeting for the ensuing year to audit and sign the financial statement prepared by the trustees. Auditors should check on the debts of the body corporate and advise the owners to introduce special levies to pay off the debt. This is part of an auditor's function in signing the financial statements of the body corporate.

⁷⁵¹ Annexure 8 rule 37.

⁷⁵² Annexure 8 rule 38.

⁷⁵³ Annexure 8 rule 29(1)(c).

⁷⁵⁴ Annexure 8 rule 39(1).

⁷⁵⁵ Annexure 8 rule 39(2) read with rule 3(2).

transmitted by facsimile or electronic mail to the number or address specified by such owner in writing for the purpose of receiving such documentation. This specification is only effective once the body corporate receives it at its *domicilium*.⁷⁵⁶ This makes the receipt of this documentation cheaper, more effective and more convenient. Inadvertent failure to deliver the documentation to the persons concerned or the non-receipt of the documentation by such persons does not invalidate the proceedings at such meeting.⁷⁵⁷ This applies except in the case of holders of sectional mortgage bonds who have advised the body corporate of their interest.

Section 32 of the Bill of Rights incorporated into the Constitution of the Republic of South Africa, 1996 and supplemented by the Promotion of Access of Information Act 2 of 2000 guarantees the making available of information. The principle is that a person is entitled to be furnished with all available information that affects his interest whether from the state, private persons or organizations, and so-called “sensitive information” may not be excluded. An interesting question is whether the owners are entitled to the scheme’s debtors age analysis reports that sets out which owners are in arrears with their levies and for what period of time they have been in arrears. Prescribed management rule 35 requires that the trustees keep books and records that fairly explain the financial position of the body corporate, and owners are entitled to inspect these records. Furthermore prescribed management rule 48 requires that the managing agent keep full records of his or her administration and report to the body corporate and to all holders of registered sectional mortgage bonds who have notified the body corporate of their interest of all matters which in his or her opinion detrimentally affect the value or amenity of the common property and any of the sections. It is for these reasons that I am of the opinion that all the members of the body corporate are entitled to information regarding any owner who is in arrears with their levies.

Not only owners, but also prospective owners need bona fide information regarding all aspects of the scheme in which they live or in which they want to purchase. Examples

⁷⁵⁶ Annexure 8 rule 39(2).

⁷⁵⁷ Annexure 1 rule 54(5).

of information that should be made available to owners, prospective owners, banks and estate agents include the names of trustees and the managing agent; the yearly income and expenditure of the body corporate; the number of owners who are in arrears with their levies and the total amount of arrears; the financial state of the reserve fund; the frequency of and the reason for raising special levies in the past; whether the body corporate is engaged in litigation or arbitration proceedings; the minutes of trustee and annual general meetings; what percentage of the sections are occupied by tenants; whether there are illegal extensions and how the trustees propose to deal with these; whether the insurance cover of the building is adequate and whether the budget is sufficient for the maintenance and administration of the scheme.⁷⁵⁸

The Protection of Personal Information Act 4 of 2013 (the “POPI Act”) could have an affect on the access to information in sectional title schemes.⁷⁵⁹ The POPI Act gives effect to the constitutional right to privacy while protecting the free-flow of information and advancing the right of access to information.⁷⁶⁰ It regulates the manner in which personal information is processed by public and private bodies by establishing conditions; provides Codes of Conduct; provides rights and remedies for non-compliance and creates measures, including the establishment of an Information Regulator, to promote and enforce the protection of personal information. Personal information has a wide definition in section 1 and includes, among other information, any identifying number, email address, physical address, telephone number, location, and confidential correspondence.

Trustees have the responsibility in terms of various provisions in the STA to process owner’s personal information, thus making them the “responsible party” and the owners, to whom the personal information will relate, will be the “data subject.”⁷⁶¹ The POPI Act that the trustees must process the personal information of the members of the body

⁷⁵⁸ T Maree “Deeltitelskemas vereis oop kaarte” (August 2008) 32 *MCS Courier* 7.

⁷⁵⁹ The President will determine commencement of POPI by proclamation in a Gazette. The provisions relating to definitions, establishment of the office of the Information Regulator and the making of the regulations came into force on 11 April 2014. The processing of personal information taking place on the date on which POPI Act comes into force must be brought into compliance within one year.

⁷⁶⁰ Protection of Personal Information Act 4 of 2013 s 2.

⁷⁶¹ POPI Act s 1.

corporate in a way that does not intrude on the privacy of the owner to an unreasonable extent. All the information must be collected for a specific, defined and legitimate purpose and it cannot be further processed for a different purpose. The body corporate must maintain the quality of information in that it must be accurate and complete and not misleading and must be updated where necessary. Furthermore the body corporate must have appropriate technical and organizational security safeguards for the information. The owner must have access to the personal information and must be able to correct it. Therefore once the POPI Act comes into force trustees, on behalf of bodies corporate, will have to consider what data they keep, how it is stored, secured, used and made available to others.

A practical example of the application of POPI to sectional title schemes is the body corporate's access to the contact details of owners.⁷⁶² Section 37(1)(l) of the STA requires that the body corporate comply with any reasonable request for the names and addresses of the persons who are the trustees or the members of the body corporate. Prescribed management rule 35(2) provides that on the application of any owner, registered mortgagee or of the managing agent the trustees must make all or any of the books of account and records available for inspection by such owner, mortgagee or managing agent. Prescribed management rule 3(2) provides that the *domicilium citandi et executandi* of each owner shall be the address of the section registered in his name. The owner is entitled at any time to change the domicilium on condition that any new domicilium selected must be situated in South Africa. The change shall only be effective on receipt of written notice thereof by the body corporate at its domicilium. This rule implies an obligation on the body corporate to keep a list of owners and their addresses, while section 37(1)(l) of the STA requires that the body corporate must comply with any reasonable request for the names and addresses of its members. Whether or not the trustees must make the names or addresses available will depend on the reasonableness of the request.

⁷⁶² CM Durham "Wake up and smell the POPI" (23-02-2015) *Paddocks Blog* <http://paddocksblog.com/2015/02/23/wake-up-and-smell-the-pop/> (accessed 15-08-2014).

The very nature of communal living requires that the inhabitants have reasonable access to each other's contact details. The POPI Act cannot be used as an excuse not to give this personal information, as the STA provides legitimation to the fact that owners are entitled to this information. On the other hand it also does not mean that the trustees must give all the contact information, but merely the name and *domicilium* as is required in terms of rule 3(2).

Once the CSOS comes into operation it will provide a mechanism to ensure compliance with the right to access to information. The CSOSA provides, as one of the prayers for relief, an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association (body corporate) to make such information or documents available within a specified time.⁷⁶³

An important function conferred on trustees concerns insurance policies to be entered into against risks encountered in sectional title schemes. At the first meeting of trustees, or as soon thereafter as possible, and annually thereafter, the trustees must insure the building and all improvements to the common property to the full replacement value thereof against fire and other risks.⁷⁶⁴ The trustees are mandated to negotiate the most beneficial excess, premiums and insurance rate.⁷⁶⁵ The trustees must further take out public liability cover, procure a fidelity guarantee against dishonesty on the part of the trustees or employees or agents of the body corporate and insure against other risks as directed by a special resolution of the general meeting.⁷⁶⁶ The trustees should ensure that the professionals they deal with like insurance brokers, property valuers, auditors,

⁷⁶³ CSOSA s 39(7)(a).

⁷⁶⁴ Annexure 8 rule 29(1)(a).

⁷⁶⁵ Annexure 8 rule 29(1)(a)(i)-(x); Addison (January 2011) *Paddocks Press Newsletter 2*; M Addison "Sectional title insurance – a look at trustee responsibility" (October 2009) 4-10 *Paddocks Press Newsletter 2*.

⁷⁶⁶ Annexure 8 Rule 29(2)(b) which states: "At the first meeting of the trustees or as soon thereafter as is possible, the trustees shall take all reasonable steps to procure to the extent, if any, as determined by the members of the body corporate in a general meeting, a fidelity guarantee in terms of which shall be refunded any loss of moneys belonging to the body corporate or for which it is responsible, sustained as a result of any act of fraud or dishonesty committed by any insured person being any person in the service of the body corporate and all trustees and persons acting in the capacity of managing agents of the body corporate." M Addison "Trustees need to take a closer look at fidelity cover" (August 2008) 3-8 *Paddocks Press Newsletter 1*.

attorneys, and managing agents have appropriate professional indemnity cover.⁷⁶⁷ One of the duties of the trustees under the old prescribed management rule 29 was to procure a cash policy for loss of money in the course of business up to an amount equivalent to the total levies due and payable in one month, or such lesser amount as the trustees may determine as well as for loss and damage to any receptacle for which the body corporate is responsible resulting from the theft or attempted theft of money. This rule refers to cash immediately required for day-to-day disbursement, for example the purchase of cleaning materials or the salary of employees of the body corporate. By deleting the reference to this type of insurance in the old rule 29(2)(c), the legislator shortened the list of compulsory insurance that has to be taken out by the trustees. In comparison with the German *Wohnungseigentumsgesetz* which obliges the manager to take out liability insurance and to insure the building against fire,⁷⁶⁸ the South African list of compulsory insurance is unnecessarily detailed and complicated. If the sectional owners nevertheless want to be insured against loss not mentioned above, the owners may in terms of prescribed management rule 29(3) by special resolution direct the trustees to insure against such risk.

A commentator has listed the trustees' functions with regard to insurance.⁷⁶⁹ In summary the trustees must insure the building(s) to their replacement value against fire and other risks as may be prescribed and keep the building(s) insured to their replacement value. They must insure the buildings against any other risk as determined by special resolution. They must use any insurance policy payments received as a result of damage to the building to rebuild or repair it. The trustees must pay the premium on any insurance policy taken out by the trustees. Trustees must determine the replacement value of the building and update the replacement schedule; deal with the difference between body corporate and traditional commercial policies; check on the credentials of the insurance broker and insurance adviser appointed by the body

⁷⁶⁷ M Addison "Sectional title insurance - the role of the trustees" (October 2010) 5-10 *Paddocks Press Newsletter* 2.

⁷⁶⁸ *WEG* § 21 V 3.

⁷⁶⁹ M Addison "Trustees responsibilities regarding sectional title insurance" (April 2009) 4-4 *Paddocks Press* 1; Addison (October 2009) 4-10 *Paddocks Press Newsletter* 2; Addison (October 2010) 5- 10 *Paddocks Press Newsletter* 2.

corporate; check whether the adviser has professional indemnity cover; check on fidelity cover and whether the body corporate is covered by the Fidelity Fund of the Estate Agents Affairs Board; check whether other professionals with whom the body corporate deals have appropriate professional indemnity cover and whether a contractor has appropriate all-risk cover before he starts any work on the common property.⁷⁷⁰

Another important duty conferred on the trustees is to levy and collect contributions as estimated at the annual general meeting from the owners in accordance with their participation quotas⁷⁷¹ in instalments as determined by them. The trustees must determine the amount of the contributions payable by owners,⁷⁷² advise each owner in writing of the amount payable as levy within fourteen days after each annual general meeting⁷⁷³ and collect the contributions in instalments from the owners.⁷⁷⁴ The trustees may from time to time, when necessary, impose special levies upon the owners or call upon them to make special contributions in respect of all such expenses as are mentioned in prescribed management rule 31(1),⁷⁷⁵ which are not included in any estimates made in terms of rule 31(2).⁷⁷⁶ Such levies and contributions may be made payable in one sum or by such instalments and at such time or times as the trustees shall think fit.⁷⁷⁷ The trustees shall be entitled to charge interest on arrear amounts at such rate as they may from time to time determine.⁷⁷⁸

A further duty of trustees is to keep a complete record of all rules and house rules in force from time to time and to ensure that any amendment, substitution, addition or

⁷⁷⁰ 2.

⁷⁷¹ Determination of every owner's participation quota in terms of STA s 32(2) and (4).

⁷⁷² STA s 37(1) [STSMA s 3(1)].

⁷⁷³ Annexure 8 rule 31(3).

⁷⁷⁴ Annexure 8 rules 30 and 31.

⁷⁷⁵ Annexure 8 rule 31(1) states: "The liability of owners to make contributions, and the proportions in which the owners shall make contributions for the purposes of section 37(1) of the Act, or may in terms of section 47 of the Act be held liable for the payment of a judgment debt of the body corporate, shall with effect from the date upon which the body corporate comes into being, be borne by the owners in accordance with a determination made in terms of section 32(4) of the Act, or in the absence of such determination, in accordance with the participation quotas attaching to their respective sections."

⁷⁷⁶ Annexure 8 rule 31(2) states: "At every annual general meeting the body corporate shall approve, with or without amendment, the estimate of income and expenditure referred to in rule 36, and shall determine the amount estimated to be required to be levied upon the owners during the ensuing financial year."

⁷⁷⁷ Annexure 8 rule 31(4B).

⁷⁷⁸ Annexure 8 rule 31(6).

repeal of such rules⁷⁷⁹ is submitted forthwith to the Registrar of Deeds for filing.⁷⁸⁰ In terms of the STSMA any amendment, substitution, addition or repeal of such rules will need to be submitted to the chief ombud.⁷⁸¹ In order to monitor compliance one of the matters to be dealt with at the annual general meeting is a confirmation by the auditor or accounting officer that any amendment, substitution or repeal of the rules⁷⁸² has been submitted to the Registrar of Deeds for filing.⁷⁸³ The trustees are obliged to supply a copy of the rules on application to sectional owners, occupants of sections, prospective purchasers, sectional mortgagees, the managing agent and the auditor or the accounting officer.⁷⁸⁴ The applicant may be required to pay a reasonable charge for the copy.⁷⁸⁵ The trustees must also do all things reasonably necessary for the enforcement of the rules.⁷⁸⁶

If so required in writing by a majority of owners, the trustees must arrange for separate meters to be installed at the body corporate's cost to record the consumption of electricity, water and gas in respect of each individual section and the common property.⁷⁸⁷

The trustees are also responsible for depositing and investing funds received by the body corporate in an account in the name of the body corporate at a commercial bank or building society and use such money, subject to any direction given or restriction imposed at a general meeting, for the expenses of the body corporate or for investment in terms of prescribed management rule 43.⁷⁸⁸ Trustees are expressly prohibited from the making of loans on behalf of the body corporate to sectional owners or to themselves.⁷⁸⁹ Any funds not immediately required for disbursements may be invested

⁷⁷⁹ STA s 35(5) [STSMA s 10(5)].

⁷⁸⁰ Annexure 8 rule 32(1).

⁷⁸¹ STSMA s 10(5).

⁷⁸² As contemplated in STA s 35(5) [STSMA s 10(5)].

⁷⁸³ Annexure 8 rule 56(i).

⁷⁸⁴ Annexure 8 rule 32(2)(a)-(f).

⁷⁸⁵ Annexure 8 rule 32(2).

⁷⁸⁶ Annexure 8 rule 28(3).

⁷⁸⁷ Annexure 8 rule 33(3).

⁷⁸⁸ Annexure 8 rule 41.

⁷⁸⁹ Annexure 8 rule 26(2).

in a savings or similar account with any registered building society or bank approved by the trustees from time to time.⁷⁹⁰ The possibility to invest the money with any other registered deposit-receiving institution was deleted by amendment of rule 43 in 1997. Since most building societies have been converted into banks, the investment-receiving institution will mostly be a registered bank.⁷⁹¹ The trustees can either invest in a savings or similar account (not in a money market or unit trust account in one of the institutions mentioned above); or it should be kept deposited in a commercial bank in accordance with rule 41. Interest on money invested must be used by the body corporate for any lawful purpose.⁷⁹²

One of the functions (duties) of the body corporate to be performed by the trustees in terms of the STA is to comply with a reasonable request for the names and addresses of the persons who are trustees of the body corporate or who are members of the body corporate.⁷⁹³

The trustees will usually divide their duties among themselves. The financial duties could be delegated to the trustee who is appointed as treasurer. The administrative duties could be delegated to the trustee who is appointed as the secretary. Another trustee could be delegated the task of being responsible for supervising the maintenance of the buildings and garden. The importance of these office bearers in exercising the duties in the management of the sectional title scheme is clear. I will discuss these office bearers in more detail in chapter 7.

5 3 3 Comparative survey

The provisions relating to powers and duties of the executive committee or council in Singapore and Malaysia are similar to the provisions in South Africa. In Singapore and Malaysia the council is empowered to employ for and on behalf of the management corporation such agents or employees as it thinks necessary in connection with or to

⁷⁹⁰ Annexure 8 rule 43.

⁷⁹¹ Van der Merwe *Sectional Titles* 14-148.

⁷⁹² Annexure 8 rule 44.

⁷⁹³ STA s 37(1)(l) [STSMA s 3(1)(n)].

facilitate the exercise of powers and the performance of the duties and functions of the corporation.⁷⁹⁴ In Malaysia the council is empowered to delegate to one or more of its members such of its powers and duties and revoke the delegation at any time, subject to any restrictions imposed or directions given by the management corporation at a general meeting.⁷⁹⁵ Therefore the council could appoint one of its members as a secretary or a treasurer or as both and delegate certain powers to him or her.

The South African management and conduct rules make the exercise of certain activities on the common property subject to the written consent of the trustees. Likewise a Singapore by-law validly made by the management corporation may confer authority on the executive council to decide on certain matters. Thus an application to the competent authorities to change the use of lots (units) in a strata development must be accompanied by the council's prior written approval. The council has the discretion to withhold its approval albeit only for good reason notwithstanding that the application for change of use has been approved by the competent authorities.⁷⁹⁶

The council also has the power to convene an extraordinary general meeting.⁷⁹⁷ The council is required to immediately proceed to convene an extraordinary general meeting of the management corporation to be held as soon as practicable, but not later than six weeks after the receipt by the secretary of the corporation of a requisition for such a meeting signed by one or more persons entitled to vote in respect of one or more lots, the share value or the total share value of which is at least 20 percent of the aggregate share value of all the lots whose subsidiary proprietors comprise the management corporation; or not less than 25% of the total number of subsidiary proprietors of the lots whose subsidiary proprietors comprise the management corporation.⁷⁹⁸ Any reasonable expenses incurred by reason of the failure of the council to convene a meeting shall be

⁷⁹⁴ Building Maintenance (Strata Management) Regulations 2005 (S 192/2005), reg 12; Strata Titles Act and Sarawak Ordinance, Second Schedule, para 6; Sabah Enactment, Second Schedule, para 7.

⁷⁹⁵ Strata Titles Act, Second Schedule, para 5(a) and (b); Sarawak Ordinance and Sabah Enactment, Second Schedule, para 5.

⁷⁹⁶ Keang Sood *Strata Title* 325.

⁷⁹⁷ BMSMA s 27(2).

⁷⁹⁸ BMSMA, First Schedule, para 14(1)(a) and (b).

paid to the former by the management corporation.⁷⁹⁹ The Singapore case of *MCST Plan No 460 v Goldhill Properties (Pty) Ltd & Others*⁸⁰⁰ made it clear that an extraordinary general meeting in any organization enjoys the same status as an annual general meeting. Accordingly it is permissible for council members also to be elected at an extraordinary general meeting.⁸⁰¹

In Malaysia the council may convene an extraordinary general meeting whenever it thinks fit.⁸⁰² It shall do so either upon the requisition in writing made by proprietors who are together entitled to at least one-quarter of the aggregate share units, or upon receiving a direction in writing from the Commissioner of Buildings for the transaction of such business as the Commissioner may direct.⁸⁰³

The Singapore and Malaysian legislation impose similar duties and functions on the executive council as their South African counterpart. The council must keep minutes of its proceedings and of general meetings.⁸⁰⁴ In addition in Singapore the council must keep a record of its decisions, any notices given to its secretary⁸⁰⁵ and full and accurate minutes of its meetings.⁸⁰⁶ If a management corporation is required in its by-laws to maintain a notice board, the council is required to display on the notice board a copy of the minutes of a council meeting within seven days after the meeting.⁸⁰⁷ A copy of a minute of any resolution of its meeting or of the management corporation passed in accordance with the BMSMA must be displayed on the notice board⁸⁰⁸ for at least 14 days.⁸⁰⁹ These provisions pertaining to the display of all minutes of council and

⁷⁹⁹ Para 14(4).

⁸⁰⁰ [1991] 3 MLJ 247; Keang Sood *Strata Title* 330.

⁸⁰¹ [1991] 3 MLJ 247 250.

⁸⁰² Strata Titles Act and Sarawak Ordinance, Second Schedule, paras 9(2)(c) and 9(2)(b); Sabah Enactment, Second Schedule, para 10(2)(b).

⁸⁰³ Strata Titles Act, Second Schedule, para 9(2)(a) and (b); Sarawak Ordinance, Second Schedule, para 9(2)(a); Sabah Enactment, Second Schedule, para 10(2)(a).

⁸⁰⁴ BMSMA, Second Schedule, para 3(1); Strata Titles Act and Sarawak Ordinance, Second Schedule, para 7(1); Sabah Enactment, Second Schedule, para 8(1).

⁸⁰⁵ BMSMA s 60(3).

⁸⁰⁶ BMSMA, Second Schedule, para 2(4).

⁸⁰⁷ BMSMA, Second Schedule, para 3(2)(a).

⁸⁰⁸ BMSMA, Second Schedule, para 3(2)(b).

⁸⁰⁹ BMSMA, Second Schedule, para 3(3).

executive committee meetings are based on clause 16 in schedule 3 of the NSW Strata Schemes Management Act.

In Singapore the secretary must within 30 days of his or her appointment furnish the Commissioner of Buildings in writing with the particulars of all persons elected or appointed to an office or as a member of the council. These particulars include their names; their NRIC or passport numbers; their residential addresses and the lots in respect of which they are subsidiary proprietors.⁸¹⁰ Failure to comply is an offence and the penalty on conviction is a maximum fine of Singaporean \$3,000.⁸¹¹

Furthermore, in Singapore the relevant member in the council is required to furnish to the Commissioner of Buildings⁸¹² or any person authorized by him, within such reasonable time as is specified in the notice, such information or explanation relating to the management of the management corporation which the Commissioner or any such duly authorized person may reasonably require for the purposes of the carrying out of his functions under the BMSMA. Failure to do so is an offence and the penalty on conviction is a maximum fine of Singaporean \$2,000 or imprisonment for a maximum term of three months or both.⁸¹³

In Singapore and Malaysia the council is required to keep proper books of account in respect of all sums of money received and expended by it, specifying matters in relation to which receipts and expenditure took place.⁸¹⁴ The nature and scope of the duty to keep proper books of account was considered in *Re Steel & Others and the Conveyancing (Strata Titles) Act 1961*.⁸¹⁵ In this case evidence was given of irregularities in the conduct of the affairs of the body corporate and of the refusal of the council to make full disclosure of the records of the body corporate. The judge considered the statutory obligation to keep proper books of account as provided for in

⁸¹⁰ Building Maintenance (Strata Management) Regulations 2005 (S 192/2005), regs 9(1)(a)-(d) and 2(a)-(d).

⁸¹¹ Building Maintenance (Strata Management) Regulations 2005 (S 192/2005), reg 9(3).

⁸¹² Appointed under BMSMA s 3(1).

⁸¹³ BMSMA s 126(6)(b).

⁸¹⁴ BMSMA, Second Schedule, para 3(5)(a); Strata Titles Act and Sarawak Ordinance, Second Schedule, para 7(2)(a); Sabah Enactment, Second Schedule, para 8(2)(a).

⁸¹⁵ (1968) 88 WN (Pt 1) 467.

the bylaw 12(c) of the First Schedule to the previous New South Wales Conveyancing (Strata Titles) Act 1961. He explained his view that the statute required a separate set of books of account to be kept for the affairs of the body corporate as follows:

“There has never been any attempt to maintain a separate set of books of account or a separate bank account for the body corporate’s affairs. The statutory obligation to keep ‘proper books of account’ in the by-laws in my view required a separate set of books to be kept for the affairs of the body corporate... It should be added that the books kept were not in fact ‘proper’ on any basis but were... ‘a simplified method of accountancy easily understood by laymen.’ In fact their simplicity was deceptive, for, as was conceded by the respondents during the hearing, various small sums seem to have been untraceable and the burden of charges has not been thrown with accurate equity on the various lot holders; so too the accounts of the former company, Carrington Pty, Ltd, have been confused with those of the body corporate. These matters may have been confused with those of the body corporate. These matters may not represent vast sums of money but they illustrate the deficiencies in the books of account. Another aspect of the keeping of accounts is that there was no annual audit and no separate bank account was kept for the body corporate’s financial affairs, despite the resolutions passed at an early meeting of the body corporate in 1963 when the respondents were the only members. Not only, therefore, have the respondents failed to comply with the statutory by-laws but they have not complied with the procedure they devised themselves for the conduct of the body corporate’s affairs.⁸¹⁶

Apart from the duty to keep proper books of account,⁸¹⁷ the council is also required to make the books of account available for inspection at all reasonable times on the application of a proprietor or a mortgagee or chargee of a lot or parcel or a proprietor of

⁸¹⁶ (1968) 88 WN (Pt 1) 467 470.

⁸¹⁷ BMSMA, Second Schedule, para 3(5)(a); Strata Titles Act and Sarawak Ordinance, Second Schedule, para 7(2)(a); Sabah Enactment, Second Schedule, para 8(2)(a).

a provisional block (or any person authorized in writing by him).⁸¹⁸ Under the New South Wales Strata Schemes Management Act⁸¹⁹ the owners corporation is required to keep and retain such books of accounts for a period of five years or such other period as may be required by the regulations.⁸²⁰ In Singapore the corporation must retain all its records, books of account and such other documents relating to any of its transactions or operations to which those documents relate are completed.⁸²¹ There is no equivalent provision in Malaysia. The rules of the Malaysian STA should require that the accounting records to be retained by the council for a reasonable number of years or until the winding up of the management corporation. This would enable easy access to the financial situation of the scheme in previous years.⁸²²

In Malaysia the council is required to prepare, for each annual general meeting proper accounts relating to all moneys and the income and expenditure of the corporation.⁸²³ In Singapore such accounts must be audited in respect of each financial year by a public accountant appointed by the council⁸²⁴ within 90 days after the annual general meeting if no auditor was appointed at the meeting.⁸²⁵ In Malaysia such accounts are to be audited annually by auditors appointed by the council.⁸²⁶ The fact that the accounts are audited would help to protect members of the management corporation and the council against any allegations pertaining to the accounts that may be made against them.

In Singapore the council must within 30 days after the annual general meeting serve the Commissioner of Buildings with a written statement signed by a member of the council containing information including the date and agenda of the last annual general meeting; the names and addresses of the persons appointed or elected to the council at

⁸¹⁸ BMSMA, Second Schedule, para 3(5)(b); Strata Titles Act and Sarawak Ordinance, Second Schedule, para 7(2)(b); Sabah Enactment, Second Schedule, para 8(2)(c).

⁸¹⁹ NSW Strata Schemes Management Act ss 103 and 104(a).

⁸²⁰ NSW Schemes Management Regulation 2005, cls 5 and 6.

⁸²¹ BMSMA s 48(2).

⁸²² Keang Sood *Strata Titles* 329.

⁸²³ Strata Titles Act and Sarawak Ordinance, Second Schedule, para 7(3); Sabah Enactment, Second Schedule, para 8(3).

⁸²⁴ BMSMA ss 45(1) and (2).

⁸²⁵ BMSMA s 45(3)(b).

⁸²⁶ Strata Titles Act, Second Schedule, para 7(4) and (b); Sabah Enactment, Second Schedule, para 8(2)(b). There is no such requirement under the Sarawak Ordinance.

the last annual general meeting; the name and address of the auditor appointed by the corporation;⁸²⁷ the name and address of any managing agent appointed⁸²⁸ at the last annual general meeting; the amount of the regular periodic contributions levied in respect of each lot by the corporation;⁸²⁹ and the rate of interest determined by the corporation⁸³⁰ in respect of any unpaid contribution.⁸³¹

Where an auditor is appointed it must submit to the Commissioner the name and address of the auditor within 14 days of the appointment.⁸³² Where this is not served on the Commissioner within the time stipulated all the members of the council will be guilty of an offence and the penalty on conviction is a maximum fine of \$3,000.⁸³³ It is also an offence with the same penalty if the written statement or submission does not comply with the requirements as regards the information to be contained therein.⁸³⁴ A person charged with such an offence may prove that he or she took all reasonable steps and exercised all due diligence to ensure that any requirements as regards to preparation or serving of the written statement or submission have been complied with.⁸³⁵

In Malaysia the council is required to file within 28 days with the Commissioner of Buildings certified true copies of the audited accounts of the corporation which have been presented to the general meeting, the resolutions passed at the general meeting and the minutes of the general meeting.⁸³⁶ The council is required to, within 21 days from holding the annual general meeting, extend copies of the minutes of the meeting to all proprietors or display the minutes of the meeting on the notice board of the corporation.⁸³⁷

⁸²⁷ In accordance with BMSMA s 45(3)(a).

⁸²⁸ BMSMA s 66(1).

⁸²⁹ BMSMA s 39(4).

⁸³⁰ BMSMA s 40(6)(b).

⁸³¹ Building Maintenance (Strata Management) Regulations 2005 (s192/2005), regs 10(1) and (2) made under the BMSMA s 136.

⁸³² Building Maintenance (Strata Management) Regulations 2005 (s192/2005), regs 10(3) and (4).

⁸³³ Building Maintenance (Strata Management) Regulations 2005 (s192/2005), reg 10(5).

⁸³⁴ Building Maintenance (Strata Management) Regulations 2005 (s192/2005), reg 10(6).

⁸³⁵ Building Maintenance (Strata Management) Regulations 2005 (s192/2005), reg 10(7).

⁸³⁶ Strata Titles Act, Second Schedule, para 7(5).

⁸³⁷ Strata Titles Act, Second Schedule, para 7(5A).

In Singapore and Malaysia the council must permit the Commissioner of Buildings or persons authorized by him full and free access to accounting and other records of the corporation and to make copies of, take extracts from any such accounting or other records of the corporation.⁸³⁸ Failure to do so is an offence in both Singapore and Malaysia.⁸³⁹

Under the UCIOA of the United States the executive board is entitled in principle to exercise all the powers and functions of the condominium association subject to various restrictions. The executive board may always act on behalf of the association except when prevented from doing so in the declaration, the by-laws or in other provisions of the Act.⁸⁴⁰ An executive board is expressly restricted from amending a declaration or determining the board members' qualifications, powers, duties and terms of office.⁸⁴¹ The executive board is also prevented from dealing with the winding down of a condominium.

5 4 Conclusion

It is important not to follow the common misconception amongst sectional title owners that the trustees are more important than the ordinary members of the body corporate, with the chairperson being the most important of them all. This could lead to errors in the decision-making process. The trustees are seen to have the power to make certain decisions affecting the entire scheme without consulting or taking the views of the other members of the scheme into account.⁸⁴² The main risk attached to this notion is that sectional owners often feel powerless to act in the face of opposition from the trustees. The trustees are not the body corporate. The body corporate comprises all the owners in the scheme, while the trustees are elected by the body corporate to represent the body corporate as the executive committee. If every decision relating to the

⁸³⁸ BMSMA s 126; Strata Titles Act, Second Schedule, para 7(6).

⁸³⁹ In Singapore the penalty on conviction is a maximum fine of \$2,000 or imprisonment for a maximum term of three months or both (BMSMA, s 126(6)). In Malaysia the penalty on conviction is a maximum fine of RM10,000 (Strata Titles Act s 55(1) read with s 39(5) and the Second Schedule, para 7(6)).

⁸⁴⁰ UCIOA § 3-103(a).

⁸⁴¹ UCIOA § 3-103(b).

⁸⁴² Van der Walt (January 2008) *Paddocks Press Newsletter* 5.

management of the scheme had to be taken in the general meeting then management would be highly inefficient and ineffective. The general meeting makes the policies relating to management and the trustees execute the actual management acts. The trustees are obliged to act on the instructions of the owners, provided that the instructions are legal and do not contravene the provisions of the Act or the rules. The trustees should consult with the members of the body corporate before making decisions on matters that significantly affect the finances of the scheme or the use on the common property. At each annual general meeting the owners should give the trustees financial instructions by approving a particular budget. The two organs complement one another and should function together to ensure the scheme is managed and administered properly. Where the trustees act within the scope of the provisions of the Act, the rules, and any restriction imposed or direction given by the members of the body corporate the management of the scheme is in capable hands.

It has been questioned how long restrictions on the trustees should last and whether they are in effect until the next annual general meeting or indefinitely. In my opinion any monetary restriction involving the spending or borrowing of money given in general terms should last until the next annual general meeting. The rationale for this is that the restriction is made in the context of a specific budget that has been approved by the owners for a particular year. It is therefore given in a particular financial context based on a particular budget that is replaced at the next annual general meeting. There is nothing stopping the owners from restricting the trustees' power to make a majority decision to let the common property to an owner for less than ten years⁸⁴³ by imposing a direction that they shall not do so unless and until there has been a prior decision made by special resolution of owners approving a lease.⁸⁴⁴

From the discussion it is clear that trustees have numerous responsibilities, and therefore the responsibility of being a trustee is an onerous one. The South African legislation makes it possible for trustees to deal with the day-to-day management of the

⁸⁴³ Annexure 8 rule 38(i) read with STA s 39 [STSMA s 7].

⁸⁴⁴ Paddock (January 2010) *Paddocks Press Newsletter* 3.

scheme by giving them certain powers and duties, subject to certain restrictions. This facilitates the trustees in the exercise of their powers and duties, while ensuring that the trustees do not act outside their mandate. In this way provisions are in place for the efficient management of the scheme.

Regarding their powers the trustees can appoint such agents and employees such as managing agents, gardeners, cleaners, and caretakers as they think fit to assist them in the daily management of the scheme. Their power to delegate entitles them to delegate the financial accounting and recording duties to the treasurer. Their power to sign instruments on behalf of the body corporate ensures that these instruments can be used as proof in a court of law and their power to give written consent for certain activities concerning sections or the common property, ensures harmony in the sectional title community. This links up with the general duty of trustees to do all things reasonably necessary for the control, management, and administration of the common property in terms of the powers conferred upon the body corporate and to do all things reasonably necessary for the enforcement of the rules in force from time to time.

Besides these general powers, certain specific duties are imposed on the trustees in the prescribed management rules. This includes duties regarding the keeping of minutes; the preparation of proper books of account and records to be kept so as fairly to explain the transactions and financial position of the body corporate; the keeping of a register of the names and addresses of sectional owners, mortgagees and of all other persons with real rights to the units; the causing of certain documents to be prepared and submitted to every annual general meeting for consideration which includes an itemized estimate of the anticipated income and expenses of the body corporate, an audited financial statement, and a report signed by a chairperson reviewing the affairs of the body corporate during the past year; the duty to furnish these documents to owners and mortgagees; the duty to insure the building, negotiate the most beneficial excess, premiums and insurance rate, and take out public liability cover; the duty to levy and collect contributions; the making, keeping, supplying and enforcing of the rules; arranging for separate meters to be installed at the body corporate's cost to record the

consumption of electricity, water and gas in respect of each individual section and the common property; and the responsibility for depositing and investing funds received by the body corporate in an account in the name of the body corporate at a commercial bank.

Once the trustees have been elected there should be some form of publicity, other than the minutes of the general meeting at which the trustees were elected, that the trustees have been appointed and there should be some duty to account on all the matters relating to the management of the scheme by the trustees as is the case in Singapore. In South Africa once the CSOS is in operation the body corporate could furnish the ombudsman in writing the particulars of all persons elected or appointed to an office within 30 days of their appointment. This information could include the names of the trustees; identification numbers of the trustees; whether they are unit owners or outsiders; and the physical address of the trustees. Furthermore, the trustees should be required to furnish to the ombudsman within such reasonable time as is specified in the notice, such information or explanation relating to the management of the body corporate which the ombudsman may reasonably require.

The exercise and performance of these functions and duties are subject to the provisions of the Act; the provisions of the rules and finally to any restriction imposed or direction given at a general meeting of the owners of sections. The trustees' actions are therefore limited. The body corporate would not, for example, be bound by a resolution adopted at a meeting of trustees that the caretaker of the scheme should be paid a farewell gift of over R50 000 for many years of service.⁸⁴⁵ In this example the managing agent stopped the payment and it was put on the agenda for the annual general meeting. The owners were against the payment and the body corporate did not have the money to make the payment. The body corporate was not bound by the trustee's resolution. The owners approve the budget for anticipated expenses each year, and this expense was not approved. When it was put on the agenda at the annual general meeting the owners were aggressively against it. The body corporate is not a charitable

⁸⁴⁵ G Paddock "Q & A with the Professor" (September 2010) 5-9 *Paddocks Press Newsletter* 7.

institution with money to spend as the trustees deem appropriate. The expenses detailed in the STA and the rules, and the fiduciary obligation of trustees to the owners oblige the trustees to hold the body corporate funds in trust and to spend money in ways that would benefit the whole scheme. The action of the trustees to award the caretaker money will only be valid if approved in the general meeting. In this way the trustees are not the masters, but the servants of the body corporate.⁸⁴⁶ They nevertheless deserve the respect, appreciation and co-operation of the members who elected them to undertake the difficult task of management of the sectional title scheme without remuneration.

⁸⁴⁶ Paddock *The Sectional Title Handbook* 101.

Chapter 6: Meetings of the trustees

6 1 Introduction

An important management and operating function of trustees is to make various management decisions at meetings held by them. The purpose of this chapter is to examine the procedures used to convene trustee meetings and the methods by which trustees make decisions. The trustees can only exercise the powers and perform the duties entrusted to them in the STA, in the rules and by directions given to them by owners in a general meeting by means of resolutions taken at a duly constituted meeting of the board of trustees, unless something else is provided for in the rules.⁸⁴⁷

There are two main methods by which the prescribed management rules authorize a departure from this principle. First a rule that empowers the trustees to delegate their powers and duties to one or more of their number;⁸⁴⁸ and secondly a rule providing that a written resolution signed by all the trustees present in the Republic and at least constituting a quorum, is as valid as a resolution passed at a formal meeting of the board of trustees.⁸⁴⁹

In what follows I shall discuss when, how often and where trustee meetings are held. I will then examine how trustee meetings are convened, dealing specifically with who convenes the meeting and what type of notice is required to convene such a meeting. Following this I shall set out who may attend, speak and vote at trustee meetings. I will then examine the quorum requirements for the meetings. The method by which the trustees make decisions is an important topic. In this regard the voting procedure and the applicable requirements are discussed. I will also set out the procedure for how decisions can be taken by the trustees without holding a formal trustee meeting. The

⁸⁴⁷ Pienaar *Sectional Titles* 175.

⁸⁴⁸ Annexure 8 rule 26(1)(b).

⁸⁴⁹ Annexure 8 rule 24; *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and another* 2006 (3) SA 369 (W) para 11.

discussion is concluded with the requirement that the trustees must keep minutes of their proceedings, and make these minutes available for inspection on request.

6 2 South African position

It is not practical that all the owners should meet everytime any financial and management issues arise in the day-to-day administration of the scheme. It is for this reason that the trustees should arrange their meetings for a fixed place, date and time each month so that they can deal regularly and efficiently with their routine management decisions. The STA and rules do not require that the meetings be held at any specific time or at regular intervals. Trustee meetings will accordingly be convened when trustees think fit.⁸⁵⁰ There will be fewer trustee meetings in smaller schemes, or in schemes that have a managing agent, and more trustee meetings in larger or mixed-use sectional title schemes. With regard to the venue of the meeting the prescribed management rules do not stipulate a place where the meeting should be held. The venue can be determined in the rules of the particular scheme if the trustees so wish. The venue should be a place that is convenient for all the trustees. Trustee meetings are often held at the managing agent's offices.

The convening of and proceedings at meetings of the trustees are regulated by the prescribed management rules.⁸⁵¹ The rules provide that the trustees may give notice convening meetings, meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit.⁸⁵² The trustees can conduct their meetings more informally than general meetings of the body corporate because there are few trustees. The chairperson has the discretion as to what degree of formality is required in trustee meetings.

Any trustee may at any time convene a meeting of the trustees by giving not less than seven days' written notice. This is subject to the proviso that in cases of urgency such

⁸⁵⁰ Annexure 8 rule 15(1).

⁸⁵¹ Annexure 8 rule 15 – 24.

⁸⁵² Annexure 8 rule 15(1).

shorter notice as is reasonable in the circumstances may be given.⁸⁵³ The written notice must specify the reason for calling such a meeting.⁸⁵⁴ This notice must be given to all the trustees, but it is not necessary to give notice of a meeting to a trustee who is absent from the Republic.⁸⁵⁵ This is subject to the proviso that if the trustee had appointed an alternate trustee who is in the Republic then such notice of the meeting shall be given to the alternate trustee.⁸⁵⁶ It is important to note that the rules provide for the appointment of alternate trustees, but do not sanction the appointment of a proxy to vote on behalf of an alternate trustee at a trustee meeting. I agree with this as the alternate trustee is meant to replace or stand in for an absent trustee. To have a proxy stand in for an alternate takes it too far. The notice must also be given to all first mortgagees, who have requested in writing to receive reasonable notice of all meetings of the trustees.⁸⁵⁷ The trustees must give reasonable prior notice of their meetings to any managing agent employed by the body corporate who may, with the consent of the trustees, be present at the meeting.⁸⁵⁸ There is no explicit requirement that the owners be given notice of trustee meetings.⁸⁵⁹

There are certain rules concerning the attendance at trustee meetings. All trustees are entitled to be present, speak and vote at any meeting of the trustees.⁸⁶⁰ While a trustee is absent or unable to act, his alternate may attend, speak and vote at meetings of the trustees in his place. The managing agent may attend and speak at the trustee meeting with the majority consent of the trustees.⁸⁶¹ The managing agent employed by the body corporate handles most of the trustees' administrative duties, and plays a leading role in meetings, drafting and dispatching notices including suitable agendas, drawing their attention to matters requiring their attention, taking minutes and advising them on proper procedures in terms of the Act and the rules.⁸⁶² The nominee of the first

⁸⁵³ Annexure 8 rule 15(2).

⁸⁵⁴ Annexure 8 rule 15(2).

⁸⁵⁵ Annexure 8 rule 15(1).

⁸⁵⁶ Annexure 8 rule 15(1).

⁸⁵⁷ Annexure 8 rule 15(2) read with rule 15(3).

⁸⁵⁸ Annexure 8 rule 49(1).

⁸⁵⁹ Annexure 8 rule 15(5).

⁸⁶⁰ Annexure 8 rule 15(2).

⁸⁶¹ Annexure 8 rule 49(1).

⁸⁶² Paddock G *Sectional Title Survival Manual* 7ed (2013) 106.

mortgagee who has received notice of a trustees' meeting shall be entitled to attend and speak at the meeting of the trustees, but shall not in such capacity be entitled to vote at such meeting.⁸⁶³

Until recently this was also the case for any owner who wanted to attend a trustee meeting.⁸⁶⁴ Prescribed management rule 15(5) was recently amended⁸⁶⁵ to state:

“An owner shall be entitled to attend, on invitation, any meeting of the trustee,⁸⁶⁶ but shall not in his or her capacity as such be entitled to vote thereat.”

The right of owners to attend meetings of the trustees was given recognition in 1997.⁸⁶⁷ This 2015 amendment has removed the right of owners to attend meetings of the trustees, and also their right to speak at such meetings. Therefore, an owner may only attend a meeting if invited to attend by the trustees and, due to the explicit removal of the words “and speak at” may not even speak, if so invited.⁸⁶⁸

In my view this is a serious restriction on the proprietary rights of owners. This rule is not conducive to open and transparent decision making by the trustees. In practice there are owners who are disruptive at trustee meetings, and in this way the attendance and opportunity of owners to speak at trustee meetings can restrict the efficiency and effectiveness of the meeting if owners primarily misuse this opportunity to air their grievances. To place a blanket-ban on the attendance of all owners is an unfair limitation. What is required is a strong chairperson to manage these disruptive owners, and to censure discussion by the owners on topics that are irrelevant and not on the agenda. I will discuss the role of the chairperson in more detail in chapter 7. Van der Merwe suggests that a restriction by which owners are only entitled to speak on topics

⁸⁶³ Annexure 8 rule 15(4).

⁸⁶⁴ Annexure 8 rule 15(5).

⁸⁶⁵ Annexure 8 rule 15(5) was amended by GN R548 in *GG 38923* of 30-06-2015.

⁸⁶⁶ Maree points out that the word “trustee” should be plural “trustees,” and is probably a printing error in the *Government Gazette*; Maree (July 2015) 50 *MCS Courier* 2.

⁸⁶⁷ Inserted by GN R1422 in *GG 18387* of 31-10-1997.

⁸⁶⁸ Maree (July 2015) 50 *MCS Courier* 2.

as determined by the chairperson should possibly be added.⁸⁶⁹ This restriction could be difficult to enforce in practice and would add an unnecessary extra burden on the chairperson.

I am of the opinion that all boards of trustees should extend an invitation to owners to attend their meetings. An owner should be given the opportunity to attend, speak at, and to request information from the trustees to clear up misunderstandings. If sensitive or private matters, such as discussions over owners in arrears with their levies, or the decision to impose a fine on an owner or occupier, need to be discussed at the trustee meeting, the chairperson could leave those matters until the end of the meeting. After all the other agenda items have been discussed and decided upon the chairperson could excuse the owners present so that the trustees have the opportunity to discuss the private issues. Since every owner has a personal and financial interest in the scheme, he or she should be able to speak not only at general meetings, but also at the meetings of trustees where the day-to-day management of the scheme is conducted. The aim of my submission is to create transparency in the acts and decisions of trustees. This would have the effect of preventing autocratic trustees from sidelining an owner with a genuine grievance.

It has been suggested that trustees should notify owners of their meetings,⁸⁷⁰ but the trustees are not obliged in terms of the prescribed management rules to send notice of the date, time and agenda of the meeting or to invite the owners to such meeting. It is important to note that nothing prevents the owners from making enquiries from the secretary as to when the next meeting of the trustees will take place, and to request an invitation. A balance must be struck between the transparency of trustees' actions and the trustees' efficient executive actions and decisions. Furthermore, the trustees can agree by majority vote to have any person present if they are of the opinion that the person could be useful in giving valuable information or be of assistance with the trustees' business. Examples of such persons are contractors who come to the meeting

⁸⁶⁹ Van der Merwe *Sectional Titles* 14-133.

⁸⁷⁰ Proposals to the Sectional Titles Regulation Board (March 2003) 2.4.2.1.

to give a presentation of their product or service. One trustee cannot demand that his or her advocate be present at a trustee meeting.⁸⁷¹ It is important to note that only trustees can vote on resolutions taken at trustee meetings.

There are requirements regarding the quorum for the trustee meeting. A “quorum” is the minimum number of people who must be present at a meeting in order for that meeting’s proceedings to be valid. The rules stipulate that 50% of the number of trustees, but not less than two is a quorum for a meeting of trustees.⁸⁷² A valid trustee meeting cannot be held with only one trustee. Trustees must be present in person and are not allowed to appoint a proxy to represent an absent trustee. An alternate trustee, who does not represent but replaces an absent trustee, is counted for the purposes of establishing a quorum. If a trustee offers an apology for not attending the meeting he or she is not counted for constituting a quorum.

If 50% of the trustees resign or are otherwise disqualified from office the number of trustees will fall below the number necessary for a quorum. In such a situation the remaining trustee or trustees may not continue to do business. The rules allow the remaining trustee or trustees to continue to act, but only for the purpose of appointing or co-opting additional trustees to make up a quorum, or for the purpose of convening a general meeting of owners.⁸⁷³ Owners at a general meeting can replace any trustee who has resigned, been removed or otherwise disqualified from office. The rule allows the remaining trustee to co-opt their spouse or others who will act with them. However, the co-opting of trustees is not regulated in the rules. The fear is that a remaining trustee would co-opt his or her spouse and other persons who supports him or her in order to form a quorum so that the remaining trustees can impose their own ideas and decisions upon the unit owners. However, a trustee may only co-opt these persons for the purpose of forming a quorum, and not for the purpose of taking resolutions.

⁸⁷¹ G Paddock “Q & A with the Professor: Can a trustee demand his advocate be present at a trustees’ meeting?” (July 2011) 6-7 *Paddocks Press Newsletter* 5.

⁸⁷² Annexure 8 rule 16(1).

⁸⁷³ Annexure 8 rule 16(2).

If at any meetings of the trustees a quorum is not present within thirty minutes of the time appointed for the meeting, the meeting shall stand adjourned to the next business day at the same time. The trustees then present, who shall not be less than two, shall form the quorum.⁸⁷⁴ All trustees should, if reasonably possible, receive fresh notice to re-convene the adjourned meeting if the decisions taken at the meeting are to be valid and to complete the business on the agenda.⁸⁷⁵ The justification for this rule is presumably to prevent the trustees from becoming paralyzed, and to avoid any tactical move by the trustees to block important decisions. Trustees favouring the status quo would use this obstructive strategy.⁸⁷⁶ If a significant number of members choose not to be present, the meeting will fail due to a lack of a quorum and the status quo will remain.

All matters at a meeting of trustees are determined by a simple majority of the votes of the trustees present and voting.⁸⁷⁷ A proxy or agent cannot vote for an absent trustee. An alternate trustee votes in his or her own name. Each trustee has one deliberative vote. The trustee can vote for or against any motion. If the votes are evenly divided then the chairperson has a casting vote, except where there are only two trustees.⁸⁷⁸ Any trustee having any interest in any contract or proposed contract, litigation or proposed litigation with the body corporate is disqualified from voting in respect of such contract or litigation.⁸⁷⁹ This is by virtue of the fact that the trustee may have an interest therein.

In situations where the trustees wish to decide on a matter, but find it inconvenient to hold a meeting they may make use of the procedure set out in prescribed management rule 24. This rule provides that a written resolution signed by all the trustees present in the Republic, if sufficient in number to constitute a quorum, shall be valid and effective as if it had been passed at a meeting of trustees duly convened and held.⁸⁸⁰ This procedure allows a meeting to take place without a formal meeting. This type of

⁸⁷⁴ Annexure 8 rule 17.

⁸⁷⁵ G Paddock "Q & A with the Professor: Loss of quorum" (March 2009) 4-3 *Paddocks Press Newsletter* 9.

⁸⁷⁶ Chen *Condominium Law* 155.

⁸⁷⁷ Annexure 8 rule 22.

⁸⁷⁸ Annexure 8 rule 18.

⁸⁷⁹ Annexure 8 rule 23.

⁸⁸⁰ Annexure 8 rule 24.

resolution is called a “round robin” resolution.⁸⁸¹ It is often used where an urgent matter arises, where there are only a limited number of trivial matters to be determined where no discussion or debate is required and it is not considered worthwhile to convene a meeting. The proposed resolution to be circulated must specify the exact terms of the resolution and must be accompanied by a full motivation that gives the background information trustees need to consider the resolution. It must then be signed and returned to the chairperson.

The trustees must keep minutes of their proceedings⁸⁸² and must make the minutes available for inspection on the written application of any owner or registered mortgagee of a unit.⁸⁸³ The trustees must from time to time furnish to the managing agent copies of the minutes of all meetings of the trustees and of the body corporate.⁸⁸⁴

It is important to note that the decisions made by trustees in these meetings must be lawful, reasonable and procedurally fair. Section 33 of the Bill of Rights incorporated into the Constitution of the Republic of South Africa, 1996 affords everyone the right to just administrative action that is lawful, reasonable and procedurally fair.⁸⁸⁵ Anyone whose rights that have been adversely affected by an administrative action has the right to be given written reasons.⁸⁸⁶ The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) was enacted to give effect to these rights, and to provide for the review of administrative action by a court or where appropriate by an independent and impartial tribunal; to impose a duty on the state to give effect to these rights and to promote efficient administration.⁸⁸⁷ In terms of section 1 of PAJA “administrative action” means:

⁸⁸¹ Paddock *Sectional Title Survival Manual* 108.

⁸⁸² Annexure 8 rule 34(1)(a)

⁸⁸³ Annexure 8 rule 34(1)(3).

⁸⁸⁴ Annexure 8 rule 49(2).

⁸⁸⁵ Constitution of the Republic of South Africa, 1996 chapter 2 s 33(1).

⁸⁸⁶ S 33(2).

⁸⁸⁷ S 33(3).

“any decision taken, or any failure to take a decision by a natural person or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision.”⁸⁸⁸

Maree is of the opinion that trustees should bear in mind that an application for review under the PAJA relates not only to decisions of state departments and municipalities, but also to decisions of natural persons such as trustees and the general meeting, and could affect the rights of members of the scheme negatively.⁸⁸⁹ Hoexter asserts that there is room for argument made in the English case *R v Panel on Take-overs and Mergers, ex parte Datafin plc*⁸⁹⁰ that some private juristic bodies are exercising public functions. In my view whether or not PAJA will apply to trustees’ administrative actions on behalf of bodies corporate depends on whether it is exercising a public power or performing a public function. I am of the view that private powers and functions come into play in the administration and management of sectional title schemes. Therefore, the actions or decisions by trustees are not subject to review under PAJA.

The next important consideration is how administrative actions taken by trustees on behalf of bodies corporate can be reviewed. Hoexter⁸⁹¹ argues that the reviewability of a private power in administrative law lies in section 8(2) of the Constitution of the Republic of South Africa, 1996 that contemplates the direct application of constitutional rights and states that:

“[a] provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

Hoexter is of the opinion that reviewing administrative action in terms of section 33 of the Bill of Rights is, by virtue of its nature and the nature of the duties they impose, tied

⁸⁸⁸ Promotion of Administrative Justice Act 3 of 2000 s 1.

⁸⁸⁹ T Maree “How does our national Constitution affect sectional title administration?” (December 2010) 38 *MCS Courier* 10-11.

⁸⁹⁰ [1987] 1 All ER 564 CA; C Hoexter *Administrative Law in South Africa* (2007) 193.

⁸⁹¹ C Hoexter *Administrative Law in South Africa* 2 ed (2012) 128.

to the use of public rather than private powers.⁸⁹² It is further argued that it does not rule out the indirect application of section 33 by virtue of section 39(2) of the Bill of Rights which requires that, when interpreting legislation and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Courts have shown a preference for indirect application instead of direct application.⁸⁹³ In this way the trustees acting on behalf of the body corporate will need to ensure that their administrative actions are lawful, reasonable and procedurally fair in order to promote the spirit, purport and objects of the Bill of Rights.⁸⁹⁴

I submit that these actions are still subject to the rules of natural justice and legality in terms of common law. In *Klein v Dainfern College*⁸⁹⁵ Claasen J stated:

“...No rational reason exists to exclude individuals from the protection of judicial review in the case of coercive actions by private tribunals not exercising any public power. To my mind the Constitution makes no pronouncements in respect of this branch of private administrative law. Thus continuing to apply the principles of natural justice to the coercive actions of private tribunals exercising no public powers will in no way be abhorrent to the spirit and purport of the Constitution.”

An illustration of review of a decision of the trustees based on common law principles can be found in *Body Corporate of the Laguna Ridge Scheme No. 152/1987 v Dorse*.⁸⁹⁶ In this case the parties agreed to have the decision, based on an application in terms of Rule 53 of the Uniform Rules of Court, to review and set aside the decision of the trustees not to allow the owner's application to keep her Yorkshire terrier in the scheme. The trustees ignored the most relevant considerations relating to the particular dog including that the dog's presence did not cause any nuisance, and took into account

⁸⁹² 127-128.

⁸⁹³ 128.

⁸⁹⁴ Constitution of the Republic of South Africa, 1996 chapter 2 ss 33(1).

⁸⁹⁵ 2006 (3) SA 73(T) para 54; Hoexter *Administrative Law* 128.

⁸⁹⁶ 1999 (2) SA 512 (D); Hoexter *Administrative Law* 127.

irrelevant considerations such as the creation of precedent. The judge set aside the decision on the basis that it was so grossly unreasonable as to warrant an inference that the trustees had failed to apply their minds to the matter.

If, for example the trustees wanted to incorporate a fining or penalty rule into the rules of the scheme, the validity of the rule and its implementation would depend on whether the rule is both substantively and procedurally reasonable and fair.⁸⁹⁷ The rule needs to be reasonable and apply equally to all owners put to substantially the same purpose and would need to have a legitimate purpose, for example to prevent the transgressions of the rules.⁸⁹⁸ It follows that due process must be followed in collecting the fine. This process must also be reasonably, fairly and equally applied.

It is important to note that once the CSOS is operational it will be the correct forum for reviewing the administrative actions taken by trustees on behalf of bodies corporate. The CSOSA sets out provisions for making applications in section 38. Furthermore, the CSOSA sets out various prayers for relief in section 39 in respect of financial issues;⁸⁹⁹ behavioural issues;⁹⁰⁰ governance issues;⁹⁰¹ meetings;⁹⁰² management services;⁹⁰³ works pertaining to private and common areas⁹⁰⁴ and also in respect of general or other issues.⁹⁰⁵ These orders will ensure that all management and administrative decisions or

⁸⁹⁷ CM Durham “The validity of a penalty rule and the enforceability of the fine implementation” (August 2014) 9-8 *Paddocks Press Newsletter* 5.

⁸⁹⁸ STA s 35(3); Van der Merwe *Z Constitutionality of the rules governing sectional titles* LLM thesis (2010) 129.

⁸⁹⁹ CSOSA s 39(1)(c) provides a prayer for an order declaring that a contribution levied on owners or occupiers, or the way it is paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way.

⁹⁰⁰ CSOSA s 39(2)(c) provides a prayer for an order declaring that an animal is being kept in a community scheme contrary to the scheme governance documentation, and requiring the owner or occupier in charge of the animal to remove it.

⁹⁰¹ CSOSA s 39(3)(c) provides a prayer for an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision.

⁹⁰² CSOSA s 39(4)(e) provides a prayer for an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.

⁹⁰³ CSOSA s 39(5)(b) provides a prayer for an order declaring that the association does or does not have the right to terminate the appointment of a managing agent, and that the appointment is or is not terminated.

⁹⁰⁴ CSOSA s 39(6)(a) provides a prayer for an order requiring the association to have repairs and maintenance carried out.

⁹⁰⁵ CSOSA s 39(7)(a) provides a prayer for an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association to make these available within a specified time.

actions will need to be in conformity with common law and constitutional principles relating to natural justice.

6 3 Comparative survey

The NSW Schemes Management Act does not require executive committee meetings to be held at any specified time or at regular intervals during the year. In larger schemes meetings may be held monthly, while the meetings will be less frequent in smaller schemes, especially if a managing agent has been appointed. The executive committee will usually determine when the next meeting can be held.

There are four different methods by which executive committee meetings may be convened. In the first place an executive committee meeting can be convened by a request of one-third of the executive committee members.⁹⁰⁶ The request need not be in writing, but must be addressed to the secretary, or if he or she is absent, another committee member.⁹⁰⁷ Not less than one-third of all executive members must have requested the meeting. The owners may not request a meeting but can instead persuade the members of the executive committee to issue the secretary with a requisition notice including those motions that the owners want considered.⁹⁰⁸ The request must also propose certain motions for consideration.⁹⁰⁹ In practice it is usually the secretary who advises the other executive committee members that there is outstanding business that requires consideration and that a committee meeting will be convened for a suitable date, time and venue. This is the most common manner used for convening executive committee meetings.

The second method to convene an executive committee meeting is to include a motion that sets a date, time and venue for holding the next executive committee member

⁹⁰⁶ NSW Strata Schemes Management, sch 3, cl 7(1) which states that: “the secretary of an owners corporation or, in the secretary’s absence, any member of the executive committee must convene a meeting of the executive committee if requested to do so by not less than one-third of the members of the executive committee, within the period of time, if any, specified in the request.”

⁹⁰⁷ NSW Strata Schemes Management Act, sch 3, cl 7(2).

⁹⁰⁸ NSW Strata Schemes Management Act, sch 3, cl 31(3).

⁹⁰⁹ NSW Strata Schemes Management Act, sch 3, cls 6(2) and 10(1)(b).

meeting at a previous executive committee meeting. This is usually done when there are matters that require some inquiry or investigation before a formal resolution can be passed at the next meeting.

The third method is where the general meeting passes an ordinary resolution requiring the executive committee to convene and hold a meeting on a specified date to consider particular motions.⁹¹⁰ The resolution should deal with those few matters specified in the Act that can be decided upon only by the executive committee. The other types of motions must be dealt with by the owners corporation in the general meeting.

The final method to convene an executive committee meeting is by order of an Adjudicator. If the executive committee fails or refuses to hold a meeting following a valid request,⁹¹¹ or a direction given by the general meeting, an order may be sought from an Adjudicator⁹¹² requiring the executive committee to hold the meeting within a specified time. There are penalties for failure to comply with such an order. The ultimate sanction for an un-cooperative executive committee is for the owners corporation to pass a special resolution to remove every executive committee member from office.

Having determined the date, time and venue of the meeting,⁹¹³ the secretary must ask the executive committee members to submit any matters proposed for consideration by the meeting including matters referred to them by owners, mortgagees and tenants. The notice of the meeting must then be given to each owner and executive committee member in large schemes, and displayed on the notice board⁹¹⁴ at least 72 hours before the time fixed for the meeting. In smaller schemes it is not necessary to notify the owners and each member of the executive council if the notice can be displayed on the notice board of the scheme at least 72 hours before the meeting.⁹¹⁵ If the by-laws do not require the owners corporation to have a noticeboard the notice must be given to each

⁹¹⁰ The power of the owners corporation to impose this requirement is contained in NSW Strata Schemes Management Act s 21(3).

⁹¹¹ NSW Strata Schemes Management Act, sch 3, cl 7(1).

⁹¹² In terms of NSW Strata Schemes Management Act s 138.

⁹¹³ NSW Strata Schemes Management Act, sch 3, cl 11.

⁹¹⁴ NSW Strata Schemes Management Act, sch 3, cl 6(1).

⁹¹⁵ It is best to do personal service as it is the least contestable method: Ilkin *NSW Strata* 123.

lot owner and each executive committee member at least 72 hours before the time fixed for the meeting. The notice must specify when and where the meeting is to be held and must contain a detailed agenda, but need not specify the exact wording of any motion proposed for resolution.⁹¹⁶ The notice may be sent to a person by electronic means only if the person has given the owners corporation an e-mail address for the service of notices under the Act.⁹¹⁷

Any owner or company nominee of a corporate owner may attend an executive committee meeting, but may not address the meeting unless authorized by ordinary resolution of the executive committee.⁹¹⁸ A tenant occupying a lot in the scheme has no automatic right to attend the meeting, unless he or she also holds the office of a committee member. A specific power of attorney authorizing attendance would be sufficient to secure admittance to the meeting by other persons.⁹¹⁹

In terms of the NSW Schemes Management Act the quorum for considering and voting on a motion submitted at a meeting of an executive committee that has two or more members is at least one-half of the total number of members,⁹²⁰ last elected by the owners corporation.⁹²¹ If the executive committee has only one member that one member will constitute the quorum.⁹²² If the meeting is not quorate, then the members who are present cannot consider any motions or elect any office bearers.⁹²³ The waiting and adjournment procedures for general meetings do not apply to executive committee meetings. The chairperson must fix a time and date for the next meeting and the secretary must give 72 hours' notice of that meeting. A new executive committee meeting must then be held, and the meeting must still be quorate before decisions can be made and business conducted.⁹²⁴

⁹¹⁶ NSW Strata Schemes Management Act, sch 3, cl 6(3).

⁹¹⁷ NSW Strata Schemes Management Act, sch 3, cl 6(4).

⁹¹⁸ NSW Strata Schemes Management Act, sch 3, cl 14.

⁹¹⁹ Ilkin *NSW Strata* 124.

⁹²⁰ NSW Strata Schemes Management Act, sch 3, cl 9(3).

⁹²¹ NSW Strata Schemes Management Act, sch 3, cl 9(5).

⁹²² NSW Strata Schemes Management Act, sch 3, cl 9(2).

⁹²³ NSW Strata Schemes Management Act, sch 3, cl 9(1).

⁹²⁴ Ilkin *NSW Strata* 122.

The chairperson presides over the meeting and must ensure that a quorum is present to consider motions.⁹²⁵ The Act does not contain rules for conducting business and proceedings at the meeting. Therefore, the meeting must be conducted according to procedures prescribed in the by-laws of the scheme registered at the Registrar General's office. If no such by-laws exist it is recommended that the general meetings' procedures be used, with suitable modifications, as it largely follows the common law position. The executive committee is restricted to motions that require the passing of an ordinary resolution. Motions are adopted at executive committee meetings by simple majority vote.⁹²⁶ Subject to the Act, such a decision on any matter is the decision of the executive committee at any meeting at which a quorum is present.⁹²⁷

An executive council member has only one vote, except if a member also holds the position of a substitute committee member⁹²⁸ in which case the member may cast two votes. The chairperson does not have a casting vote,⁹²⁹ but may cast two votes if he also acts as a substitute committee member.⁹³⁰ Calling for a poll or a proxy vote does not feature in executive committee meetings. Motions cannot be amended if they are adopted at a meeting conducted by approval in writing,⁹³¹ but amendments will be valid if approved at a conventional meeting of the executive.⁹³²

The committee may resolve to adjourn the meeting for any reason.⁹³³ An example is where more information is required or more quotes are required for a resolution concerning the appointment of a company. Notice of the time and venue of the adjourned meeting must be given at least one day prior to the meeting by displaying a notice on the noticeboard and by giving notice to each owner where the scheme is not

⁹²⁵ NSW Strata Schemes Management Act, sch 3, cl 8(1).

⁹²⁶ NSW Strata Schemes Management Act, sch 3, cl 11(1). A simple majority is approval by 51% of the executive council members.

⁹²⁷ NSW Strata Schemes Management Act, sch 3, cl 11(1).

⁹²⁸ NSW Strata Schemes Management Act, sch 3, cl 3(1).

⁹²⁹ NSW Strata Schemes Management Act, sch 3, cl 8(2).

⁹³⁰ NSW Strata Schemes Management Act, sch 3, cl 8(2).

⁹³¹ NSW Strata Schemes Management Act, sch 3, cl 10.

⁹³² NSW Strata Schemes Management Act, sch 3, cl 11.

⁹³³ NSW Strata Schemes Management Act, sch 3, cl 13(1).

required to have a noticeboard.⁹³⁴ If there are two meetings held at the same time then both meetings are invalid.⁹³⁵

As in South Africa, executive committee members do not have to meet physically at a specific venue and time, but may instead submit written votes.⁹³⁶ This method is usually employed when notice of a meeting has already been given and the secretary then decides that the matters are so trivial that a physical meeting to debate the motion is not considered necessary. A resolution is then taken to have been validly passed if notice was given of the intended meeting, a copy of the motion for the resolution was served on each member of the executive committee and the resolution was approved in writing by a majority of members of the executive committee.⁹³⁷ Here again a time and date must be set, the matters for consideration must be determined and notice must be given.⁹³⁸ When the secretary has counted the votes and received a majority of voting notices indicating approval of a proposed resolution, the resolution is deemed to be passed. Motions cannot be amended if they are passed at a meeting conducted by approval in writing.⁹³⁹ This procedure produces the same overall result as a conventional meeting, but it should not be characterized as a meeting as it merely gives the appearance of one.⁹⁴⁰ The preparation and display of minutes requirement is the same as when a meeting is held by members physically attending a meeting.⁹⁴¹

After the meeting the secretary must prepare, record and display complete and accurate minutes of the decisions reached at the meeting including notices given to the secretary⁹⁴² and a record of all resolutions adopted at the meeting.⁹⁴³ In large schemes each owner and executive committee member must be given a copy of the minutes and a copy must be displayed on the notice board within seven days of the meeting date for

⁹³⁴ NSW Strata Schemes Management Act, sch 3, cl 13(2).

⁹³⁵ NSW Strata Schemes Management Act, sch 3, cl 9(4).

⁹³⁶ NSW Strata Schemes Management Act, sch 3, cl 10.

⁹³⁷ NSW Strata Schemes Management Act, sch 3, cl 10(1).

⁹³⁸ NSW Strata Schemes Management Act s 36(2)-(4).

⁹³⁹ NSW Strata Schemes Management Act, sch 3, cl 10.

⁹⁴⁰ Ilkin *NSW Strata* 126.

⁹⁴¹ NSW Strata Schemes Management Act, sch 3, cl 16.

⁹⁴² NSW Strata Schemes Management Act, sch 3, cl 12.

⁹⁴³ NSW Strata Schemes Management Act, sch 3, cl 15.

at least fourteen days.⁹⁴⁴ In small schemes the minutes must be displayed on the noticeboard within seven days of the meeting and remain on display on the noticeboard for not less than fourteen days after first being affixed; or if the by-laws do not require a noticeboard the minutes must be given to each lot owner and executive committee member within seven days of the meeting.⁹⁴⁵

In Singapore the council is required to give notice of its intention to hold a meeting at least three days before the meeting by displaying the notice on the notice board of the management corporation,⁹⁴⁶ and by serving the notice on each member of the council.⁹⁴⁷ The notice must specify when and where the meeting is to be held and must contain the detailed agenda for the meeting.⁹⁴⁸

As in South Africa, a proprietor (owner) is entitled to attend a meeting of the management council, but may not address the meeting except with the permission of the council.⁹⁴⁹

A quorum at any meeting of a council consists of only one member if he or she is the only member⁹⁵⁰ or, where there are two or more members of a council, of the majority of the members of the council.⁹⁵¹ For the purpose of determining whether there is a quorum, a council member is to be treated as being present at a meeting notwithstanding the fact that he or she cannot vote or has withdrawn from the meeting due to the fact that he or she has a pecuniary interest in a matter before the council.⁹⁵² This will alleviate any difficulty in forming a quorum in such a situation.

⁹⁴⁴ NSW Strata Schemes Management Act, sch 3, cl 16.

⁹⁴⁵ NSW Strata Schemes Management Act, sch 3, cl 16.

⁹⁴⁶ BMSMA, Second Schedule, para 4(1)(a).

⁹⁴⁷ BMSMA, Second Schedule, para 4(1)(b).

⁹⁴⁸ BMSMA, Second Schedule, Para 4(2).

⁹⁴⁹ BMSMA, Second Schedule, paras 5(1) and 5(2).

⁹⁵⁰ BMSMA, Second Schedule, para 2(1)(a)

⁹⁵¹ BMSMA, Second Schedule, para 2(1)(b).

⁹⁵² BMSMA, Second Schedule, para 2(2); see also BMSMA s 60

The chairperson must preside over the meeting of the council. In his absence, the members of the council who are present shall appoint one of their own to preside over the meeting.⁹⁵³ The decision on any matter, where there is only one member of a council, of that member,⁹⁵⁴ or where there are two or more members of a council, of the majority of the members voting on a specific matter shall be the decision of the council at any meeting at which a quorum is present.⁹⁵⁵

As in New South Wales a council must prepare, keep and display full and accurate minutes of its resolutions and of any notice given to its secretary.⁹⁵⁶ If the management corporation is required by its by-laws to maintain a notice board, a copy of the minutes of a council meeting must be displayed on the notice board within seven days after the meeting⁹⁵⁷ for a period of not less than fourteen days.⁹⁵⁸ If there is no notice board, the council concerned shall give each proprietor a copy of the minutes within that period.⁹⁵⁹

As in South Africa and in New South Wales a council resolution may also be adopted without a meeting where all members are physically present. A resolution of a council shall be taken to have been validly passed even though the meeting at which the motion for the resolution was proposed to be submitted was not held⁹⁶⁰ if notice was given⁹⁶¹ of the intended meeting of the council,⁹⁶² a copy of the motion was served on each member of the council;⁹⁶³ the resolution was approved in writing by a majority of members of the council;⁹⁶⁴ and the motion does not concern any matter that the management corporation determines⁹⁶⁵ may only be decided upon by its council at a

⁹⁵³ BMSMA, Second Schedule, para 1.

⁹⁵⁴ BMSMA, Second Schedule, para 2(3)(a).

⁹⁵⁵ BMSMA, Second Schedule, para 2(3)(b).

⁹⁵⁶ BMSMA, Second Schedule, para 2(4).

⁹⁵⁷ BMSMA, Second Schedule, para BMSMA, Second Schedule, para 3(2)(a).

⁹⁵⁸ Para 3(3).

⁹⁵⁹ BMSMA, Second Schedule, para BMSMA, Second Schedule, para 3(4).

⁹⁶⁰ BMSMA, Second Schedule, para 7.

⁹⁶¹ In accordance with the Second Schedule to the BMSMA.

⁹⁶² BMSMA, Second Schedule, para 7(a).

⁹⁶³ BMSMA, Second Schedule, para 7(b).

⁹⁶⁴ BMSMA, Second Schedule, para 7(c).

⁹⁶⁵ BMSMA s 59.

physical meeting.⁹⁶⁶ The members therefore vote in writing instead of a having a council meeting that facilitates decision-making on cases where it is difficult to meet regularly.

In Malaysia the council shall meet at such times and places and at such intervals as it thinks fit, provided that any member of the council may convene a meeting by appointing a date for the meeting and giving the other members not less than seven days' notice of the date appointed.⁹⁶⁷ At the commencement of each meeting, the council elects a chairperson for the meeting who shall have a casting as well as an original vote.⁹⁶⁸ The council may regulate its own procedure at meetings subject to the Second Schedule to the Strata Titles Act.⁹⁶⁹ Except where there is only one proprietor, the quorum at the meeting of a council is two, where there are more than four members; three where there are five or six members; four where there are seven or eight members; five where there are nine or ten members; six where there are eleven or twelve members and seven where there are thirteen or fourteen members.⁹⁷⁰ All decisions are taken by a simple majority vote.⁹⁷¹

Singapore and Malaysia do not allow for a member of the council to be represented at a council meeting by another proprietor. Members may not be able to attend a meeting and this non-representation may prevent the attainment of a quorum at a meeting, which could be detrimental to the scheme. It could therefore be recommended that there should be a provision allowing for representation. This representative should be able to vote in his or her capacity as a member of the council and also on behalf of the member in whose place he or she has been appointed to act. However, it is my opinion that a representative that is not a duly elected executive member should not be entitled to vote. A better solution is to adopt the New South Wales provision that makes one of the other executive members a substitute executive member holding two votes.

⁹⁶⁶ BMSMA, Second Schedule, para 7(d).

⁹⁶⁷ Strata Titles Act and Sarawak Ordinance, Second Schedule, para 3; Sabah Second Schedule, para 3 requires the council to meet at least once a year.

⁹⁶⁸ Strata Titles Act, Second Schedule, para 4(3).

⁹⁶⁹ Strata Titles Act and Sabah Enactment, Second Schedule, para 4(4).

⁹⁷⁰ Strata Titles Act, Second Schedule, para 4(1).

⁹⁷¹ Strata Titles Act, Second Schedule, para 4(2).

The UCIOA of the United States does not specify how often executive board meetings must be held. These meetings are held from time to time as the need arises. The UCIOA does not make an express provision on how to convene the executive board meeting. Unless the by-laws specify otherwise, a quorum is present for any executive board meeting if board members entitled to cast 50% of the votes are present at the beginning of the meeting.⁹⁷² The UCIOA allows the by-laws to regulate the voting procedure for council meetings.

In China the executive council meetings are held from time to time as the need arises.⁹⁷³ More than one-third of the council members can request the chairperson of the executive council to convene a council meeting.⁹⁷⁴ The chairperson is then responsible for summoning and chairing the council meeting. If the chairperson is away, the sub-district office must designate another council member to summon and chair the meeting. There is no provision concerning notice of council meetings, but there is a presumption that proper notice should be served by the chairperson on each and every council member beforehand. In China a local property management regulation specifies that more than half of the council members should be present at any council meeting for a quorum to be present.⁹⁷⁵ In China the number council members must be an odd number, which makes it unnecessary to give the chairman a casting vote. As in Singapore a member who has a pecuniary interest in a matter before the council, should be disqualified from voting on the matter.

6 4 Conclusion

The trustees make the day-to-day decisions on behalf of all owners, but they do not have to have a meeting with the owners for every decision that has to be taken. The trustees can hold trustee meetings, which is an easier and faster way to make decisions. They should attend all meetings at which their presence is required. The trustees can only exercise the powers and perform the duties entrusted to them in the

⁹⁷² UCIOA § 3-109(b).

⁹⁷³ Regulation of the Owners' General Meetings of 2003 art 25.

⁹⁷⁴ Property Management Regulation of Shenzhen Special Economic Zone of 2007 art 29.

⁹⁷⁵ Property Management Regulation of Shenzhen Special Economic Zone of 2007 art 29(5).

STA and in the prescribed management rules by means of resolutions taken at a duly constituted meeting of the board of trustees. It is therefore important that trustees know and understand the procedures for convening and holding trustee meetings which includes matters such as when, how often and where the meetings should be held; who convenes the meeting; what type of notice is required to convene such a meeting; who may attend, speak and vote at the trustee meetings; the quorum requirements for the meetings; the method by which the trustees make decisions; the voting procedure and requirements and the keeping and making available for inspection the minutes of the meeting. The trustees should also understand the procedure involved when they make a decision without holding a formal trustee meeting.

The trustee meetings should be held when and where the trustees think fit. The venue, date and time of the meeting should be convenient to all those who attend it. The size and nature of the scheme determines how often trustee meetings should be held. In larger schemes meetings may be held monthly, while the meetings will be less frequent in smaller schemes, especially if a managing agent has been appointed.

In South Africa a single trustee can convene a trustee meeting, whereas in New South Wales and China only one-third of the executive committee or council can convene a meeting. It can be argued that if only a single council member could propose a meeting at any time the council's workload would increase significantly and there would be the risk of being overwhelmed by trivial matters.⁹⁷⁶ However, I submit that the South African provision is adequate, as I do not think that the trustees, who often have little time available and are not remunerated, would convene a meeting for trivial matters.

With regard to the time of notice it is sound that shorter notice must be allowed in cases of urgency if it is reasonable to do so. Although it is not expressly provided, the notice must specify the time and place of the meeting and also the reason for calling the meeting. This seems inadequate in the light of the more detailed provisions of the New South Wales and Singapore statutes. In terms of these statutes the members of the

⁹⁷⁶ Chen *Chinese Condominium Law* 153.

committee or council must propose matters for consideration to the secretary including matters proposed by mortgagees and owners and eventually a detailed agenda must be attached to the notice without having to specify the exact wording of any motion proposed for resolution. I submit that the notice in South Africa should contain more than just a reason for calling the meeting, and should contain the agenda for the meeting.

In South Africa prescribed management rule 15 requires that written notice of a meeting must be given to each trustee and to first mortgagees who have requested that he or she be given notice at least seven days in advance. It further stipulates that notice need not be given to trustees that are absent from the country provided that notice be given to his or her alternate if so appointed and in the country. Since the trustees may give (written) notice as they deem fit, it seems best to do personal service of the notice by hand as it is the least contestable method. Notice may also be served by post or in a more practical way by electronic means if the trustee concerned has given the body corporate an email address for the service of notices. Since the notice must be in writing it is improbable that notice by telephone call would suffice.

In addition I suggest that the trustees should also post a notice on the scheme's public notice board seven days before the meeting is held inviting all interested owners to attend as is done in New South Wales and Singapore. Since the first mortgagee who is entitled to attend and speak at the meeting, is entitled to reasonable notice I submit that all owners should have the same entitlement and should receive invitations to attend the meetings with reasonable notice.

Trustee meetings should be open to all owners and nominees of first mortgagees as is the case in New South Wales. This grants owners the right to information regarding the day-to-day management of the scheme, and fosters open and transparent management. Owners who wish to attend the meeting should give the secretary at least three days' notice before the meeting. It has been argued that the owners and nominees of first mortgagees should not be able to speak at the meetings as it causes

disruptions. If all owners attend and speak at trustee meetings then these meetings would start to function much like a general meeting and this would defeat the object and purpose of trustee meetings. Therefore, a balance needs to be struck between the owner's right to information and the efficiency of trustee meetings. In New South Wales and Singapore an owner or may attend an executive committee meeting, but may not address the meeting unless authorized by ordinary resolution of the executive committee. I submit that owners should be entitled to attend trustee meetings as observers with the right to speak, but that the chairperson must be able to censure discussion by the owners on topics that are not on the agenda or irrelevant.

A tenant occupying a unit in the scheme has no automatic right to attend the meeting, unless he or she is also a trustee. In New South Wales the executive members can agree by majority vote to have any person present if they are of the opinion that the person could be useful in giving valuable information or be of assistance with the trustees' business. This opportunity must also be given to South African tenants.

The South African rule that the presence at least 50% of the trustees, but not less than two, is sufficient for a quorum, is sound. The South African rule that a meeting which lacks the required quorum within 30 minutes of the appointed time must stand adjourned to the next business day at the same time and that the trustees then present who must not be less than two, needs consideration. The New South Wales provision does not provide for such an adjournment, but requires that a new meeting should be scheduled and that the new meeting must be quorate to proceed with business. It is debatable whether an inquorate South African adjourned meeting should be allowed to take important decisions. Trustees are appointed to fulfill an important task and should therefore be forced to attend trustee meetings.

Regarding the conduct at the meeting, the chairperson must preside over the meeting and ensure that a quorum is present to consider motions. The STA does not contain rules for conducting business and proceedings at the meeting. If the management rules

of a particular scheme do not have provisions in this regard, it is recommended that the procedures employed at general meetings, with suitable modifications, must be used.

In South Africa all matters at a meeting of trustees are determined by a simple majority of the votes of the trustees present and voting.⁹⁷⁷ If the votes are evenly divided then the chairperson has a casting vote.⁹⁷⁸ The fact that there are an odd number of council members in China means that the chairman's casting vote is not required. In contrast in New South Wales legislation contains the interesting provision that a member of the executive committee or the chairperson may be granted the position of substitute committee member in which case he is allowed to cast two votes. This implies that the chairperson or another member may act as representative for a member who for some reason or other cannot attend the meeting. Therefore, the chairperson does not have a casting vote in executive council meetings, but the chairperson who acts as a substitute committee member can cast two votes. Since the authority is delegated by another elected member this seems a sensible provision to avoid an impasse in the voting procedure.

It flows from the fiduciary status of a trustee that he or she should not take part in decisions on matters in which he or she has a personal pecuniary interest. This is confirmed in prescribed management rule 23, which reads that a trustee shall be disqualified from voting in respect of any contract or proposed contract, or any litigation or proposed litigation with the body corporate by virtue of any interest he may have therein. An important provision that should be included in all statutes is that a member having an interest conflict with the motion should be disqualified from voting.

In South Africa, New South Wales, and Singapore trustees are allowed to take decisions by submitting written votes without having to meet physically. In South Africa a resolution in writing signed by all the trustees for the time being present in the Republic, and being not less than are sufficient to form a quorum, shall be as valid and

⁹⁷⁷ Annexure 8 rule 22.

⁹⁷⁸ Annexure 8 rule 18.

effective as if it had been passed at a meeting of the trustees duly convened and held. In New South Wales and Singapore this appears to be only possible in cases where a meeting has already been convened and it was considered unnecessary to hold the meeting. Then the copies of the motions of the resolutions already sent to the members of the executive committee, must only be approved by a majority of written votes sent to the secretary. This is sensible as it deals with trivial matters or matters that do not require debate for which it is not worthwhile to convene and hold a meeting. It may also prove to be convenient in cases where it is difficult to meet regularly. When such a meeting is carried out in writing a notice should be placed on a public notice board and given to each trustee beforehand in a timely manner. The notice to be circulated should specify the exact terms of the resolution, and when it is signed it must be returned to the chairperson. The trustees can therefore act by unanimous consent as documented in a resolution signed by all its members in lieu of a meeting.

The question arises whether trustees may conclude the resolution by email. The advancement in technology has led to trustees holding meetings by proposing resolutions in an e-mail and then an email conversation pursues resulting in a resolution being passed. Maree is of the opinion that such a round robin meeting by email would not qualify as a proper meeting.⁹⁷⁹ He suggests that having concluded the email discussions the chairperson should send a formal written resolution to all trustees for their signatures. The signed resolutions should then be returned to the body corporate's *domicilium* address to place them on record in compliance with the management rules.⁹⁸⁰ I agree with this submission.

In South Africa the trustees have to keep minutes of their proceedings and make the minutes available for inspection on the written application of any owner or registered mortgagee of a unit. I recommend, taking from the New South Wales provision, that each first mortgagee, owner and trustee must be given a copy of the minutes, or that a copy must be displayed on the notice board within seven days of the meeting date for

⁹⁷⁹ T Maree "May trustees conclude resolutions by e-mail?" (December 2012) 42 *MCS Courier* 4.

⁹⁸⁰ Annexure 8 rule 24.

not less than fourteen days thereafter. Where the board of trustees can act by unanimous consent as documented in a written resolution signed by all their members, the decision should be put in the minutes and be made available for inspection by first mortgagees, owners and trustees, and should also be placed on the central notice board if the scheme has one.

Chapter 7: Office bearers, remuneration and reimbursement of the trustees

7 1 Introduction

Related to the topic of meetings are the various office bearers that are appointed to assist in the management of the sectional title scheme. Although the only office bearer expressly mentioned in the prescribed management rules is the chairperson, I shall show that foreign jurisdictions also cater for the appointment of a secretary and a treasurer. Further important matters such as the remuneration and the reimbursement of expenses to trustees will also be dealt with in this chapter.

7 2 Office bearers

7 2 1 Introduction

We have seen that there is an obvious need for trustees to be elected as the executive and administrative organ of the body corporate. The prescribed management rules provide that, subject to the restrictions imposed or directions given at a general meeting, the trustees may delegate such of their powers and duties as they deem fit to one or more of their number, and may at any time revoke such delegation.⁹⁸¹ Therefore, once appointed, they can divide the numerous tasks of management amongst themselves by the appointment of at least a chairperson, secretary and treasurer. Without a division of tasks between office bearers, the trustees will in practice find it hard to function efficiently as a board, especially in large schemes. The South African prescribed management rules do not expressly provide for the election of officers among the trustees, apart from the election of the chairperson. In what follows I will discuss the position and duties of the chairperson in South Africa and conclude with the arrangement made in foreign jurisdictions for the election of office bearers.

⁹⁸¹ Annexure 8 rule 26(1)(b).

7 2 2 South African position

In terms of the prescribed management rules the developer or his nominee is the chairperson of the trustees from the establishment of the body corporate until the inaugural general meeting.⁹⁸² Thereafter the body corporate is obliged to elect trustees for the ensuing year at each annual general meeting. At their first meeting, the newly elected trustees must elect a chairperson from amongst their number to hold office until the end of the next annual general meeting.⁹⁸³ The chairperson is not elected as such at the annual general meeting, as it is left to the trustees to make decisions regarding their leadership.⁹⁸⁴ The election of the chairperson could take place by a ballot or on a show of hands. The chairperson remains in office until the end of the next annual general meeting, unless the chairperson dies, resigns or is removed from office in the interim.

In the same way as a director of a company need not be a shareholder, the chairperson need not be an owner. In trustee meetings such a non-owner chairperson exercises his or her vote in his or her capacity as a trustee and not as owner. If the non-owner chairperson of the trustees were also the chairperson of the general meeting then he or she would not be able to vote, but could still be appointed as a proxy.⁹⁸⁵

The prescribed management rules provide that the chairperson of the trustees must preside over every general meeting of the body corporate, unless otherwise resolved by the members of the body corporate at such meeting.⁹⁸⁶ The chairperson will usually preside over every annual and special general meeting, but the general meeting can decide by majority vote to pass his or her task to another trustee or a representative of the managing agent. Only in cases where the trustees have not yet elected a chairperson; or where at any annual general meeting the chairperson of the trustees is not present within fifteen minutes from the time appointed for any annual general

⁹⁸² Annexure 8 rule 4(3).

⁹⁸³ Annexure 8 rule 18.

⁹⁸⁴ Woudberg *Basic Sectional title* book 1 72.

⁹⁸⁵ G Paddock "Q & A with the Professor: Non-owner chairperson" (October 2008) 3-10 *Paddocks Press Newsletter* 10.

⁹⁸⁶ Annexure 8 rule 59(1).

meeting or where he or she is unwilling or unable to act as chairperson, are the members present obliged to elect a another chairperson.⁹⁸⁷ An acting chairperson at a general meeting need not be a member, but could be an outsider such as a managing agent or any other suitable person elected by the general meeting.⁹⁸⁸ Graham Paddock is of the view that, although in practice it is not unusual for the owners to allow the managing agent to act as chairperson of a meeting, the managing agent is not a suitable person to chair general meetings because he or she is employed by the body corporate.⁹⁸⁹ A managing agent's proper role is to assist the chairperson with the support and technical details needed to run the meeting and the voting procedures.

The chairperson's primary function is to preside over and chair every general meeting and trustee meeting. A chairperson must maintain order, regulate the orderly expression of opinions and guide the meeting through its agenda to its conclusion.

In the general meeting this involves the chairperson being an impartial referee.⁹⁹⁰ The chairperson should exercise this power in the utmost good faith and for the benefit of the body corporate. Every owner should be given a chance to speak on a matter under consideration, but no one should be allowed to dominate the discussion or delay the decision by repetition of arguments. The chairperson should not express his personal opinion on the matter under discussion or manipulate, influence or persuade the owners into seeing his or her view, except by way of his vote, unless he or she temporarily vacates the chair for that specific purpose. Therefore, if the owners believe that the chairperson of the trustees will not be impartial in dealing with the business of the meeting then they should appoint another chairperson. In contrast the chairperson of the trustees can openly play an active role in the debate in a trustee meeting.

The chairperson normally convenes the general meetings, draws up the agenda for each meeting and conducts the meetings in accordance with the general rules for

⁹⁸⁷ Annexure 8 rule 59(2).

⁹⁸⁸ Proposals to the Sectional Titles Regulation Board (March 2003) 3.2.5; T Maree "Notes on the latest amendments" (September 2005) 18 *MCS Courier* 13.

⁹⁸⁹ Paddock *Sectional Title Survival Manual* 138.

⁹⁹⁰ 138.

meetings and associations. The chairperson should declare the meeting open and welcome those present. He or she is obliged to declare the meeting “properly constituted” if proper notice has been given and “duly constituted” if the required quorum is present. He should give details on the proxies and representatives present. He must ensure that the members present sign the attendance register. The chairperson can then move to the first item on the agenda. He must read and explain, without personal interpretation, each motion and allow discussion to take place without digressing from the issue at hand. He must ensure that consideration is given to each item on the agenda, and then put each motion to the vote. If voting is done by a show of hands, the chairperson has the discretion to change the manner of voting to one by poll.⁹⁹¹ He responsible to control, count and record the vote and declare the result of the vote. Once all the motions have been dealt with he must adjourn the meeting. He or she is obliged to adjourn the meeting at the request of a member backed by a majority of the persons attending the meeting. If the chairperson exceeds his or her powers by attempting to arbitrarily adjourn the meeting, the members present can elect a new chairperson in his place and continue the meeting.

The chairman does not have any additional voting power at a general meeting of the body corporate. At trustee meetings the chairperson has the casting as well as a deliberative vote, provided that there are more than two trustees.⁹⁹² The chairperson uses his or her deliberative vote in his or her capacity as trustee. The casting vote is used only to break a deadlock after all the trustees, including the chairperson, have cast their deliberative vote, and the votes are tied. If, for example, there are four trustees and there are equal votes for and against a particular motion then the chairperson can resolve the voting deadlock by exercising his or her casting vote in the direction that he or she favours. Jennifer Paddock has the view that the chairperson’s casting vote is to maintain the status quo. Her view is that the chairperson has the duty to remain neutral and therefore the casting vote should not be used to alter the existing position. Therefore if there are not sufficient votes to change the existing position, the

⁹⁹¹ Annexure 8 rule 62.

⁹⁹² Annexure 8 rule 18.

chairperson's casting vote should be used to maintain the existing position.⁹⁹³ I do not believe that one person should be given the deciding vote to alter a position, but it is necessary that a decision be taken. The fact that the management rules provide that there should be at least two trustees,⁹⁹⁴ had the result that a casting vote had to be accorded to the chairperson. I am of the opinion that this confusion as to how the casting vote can be exercised could be solved by ensuring that there is always an uneven number of trustees as in China. In this way there will always be a majority vote.

The chairperson can be removed from office by the body corporate by a resolution passed at a special general meeting, and also by the trustees by resolution of removal at a trustee meeting. In both cases this can only be done after due notice of the intended removal from office of the chairperson has been given.⁹⁹⁵ This new power given to the trustees to remove an inefficient or unpopular chairperson can be seen as a logical corollary to their power to elect a chairperson.⁹⁹⁶ It is also a much speedier procedure than having to convene a special general meeting for this purpose, and avoids having to get a majority vote of the body corporate, which could be cumbersome. This prevents the chairperson from abusing his or her position and is conducive to efficient administration of the scheme.⁹⁹⁷ The prior notification keeps the chairperson, trustees and the owner informed of the matter, and allows them to prepare for the meeting. It is also important to note that reasons do not have to be given for the removal of the chairperson.

If the chairperson is removed from office as a trustee, he or she will also cease to be chairperson. However, the removal of a chairperson does not entail his dismissal as a trustee. If someone wishes to remove the chairperson from the office of chairperson and trustee it can be done by the body corporate in the general meeting taking an ordinary

⁹⁹³ J Paddock "Q & A with Jennifer Paddock: Trustees voting deadlock" (September 2009) 4-9 *Paddocks Press Newsletter* 5.

⁹⁹⁴ Annexure 8 rule 4(1).

⁹⁹⁵ Annexure 8 rule 19; J Paddock "Q & A with Jennifer Paddock: Removal of a chairperson" (March 2010) 5-3 *Paddocks Press Newsletter* 6.

⁹⁹⁶ Annexure 8 rule 18.

⁹⁹⁷ Van der Merwe *Sectional Titles* 14-136.

resolution to that effect.⁹⁹⁸ The intention to vote on the removal of the chairperson from both offices would have to be disclosed in the notice convening the meeting. The trustees can call a special general meeting for this purpose, or owners holding 25% of the quotas can request the trustees in writing to call such a meeting. If the trustees fail to do so within fourteen days of the request then the owners are entitled to convene the meeting themselves. If the chairperson is disqualified as a trustee in terms of management rule 13, he or she is automatically disqualified from the office of chairperson.⁹⁹⁹ If the chairperson vacates (resigns) or is removed from his or her office or is disqualified, the rules provide for the replacement of that chairperson. The trustees including the ex-chairperson must elect another chairperson from amongst their number for the remainder of the period of office of his or her predecessor.¹⁰⁰⁰ This chairperson has the same voting rights.¹⁰⁰¹

If a chairperson vacates the chair during the course of a trustee meeting or is not present or is unable, for whatever reason, to preside at any meeting, the trustees present at the meeting must choose a substitute and temporary chairperson for such meeting who shall have the same voting rights as the substituted chairperson.¹⁰⁰²

Although the chairperson may have more responsibility than the rest of the trustees, he or she alone does not have individual executive powers, and may not take decisions relating to the management of the scheme on his or her own. This task falls on the trustees as a collective group.¹⁰⁰³ The chairperson should always consult with the trustees before making decisions to avoid any conflicts.

7 2 3 Comparative survey

In New South Wales the members of an executive committee must, at their first meeting after they assume office, appoint a chairperson, secretary and treasurer of the executive

⁹⁹⁸ Paddock (March 2010) *Paddocks Press Newsletter* 6.

⁹⁹⁹ Van der Merwe *Sectional Titles* 14-136.

¹⁰⁰⁰ Annexure 8 rule 20.

¹⁰⁰¹ Annexure 8 rule 20.

¹⁰⁰² Annexure 8 rule 21.

¹⁰⁰³ Maree (December 2010) 38 *MCS Courier* 7-8.

committee.¹⁰⁰⁴ There is no deadline as to when the executive committee must hold their first meeting after the committee members are appointed. However, the Adjudicator has the power to order a meeting. In practice the first election of the executive committee members is held at the first annual general meeting, but sometimes an extraordinary general meeting is held prior to the first annual general meeting in order to elect an executive committee.¹⁰⁰⁵ It is permissible to appoint one person to more than one of these offices.¹⁰⁰⁶

There is no provision in the NSW Strata Schemes Management Act on the procedure governing the office bearers' appointment and the appointment is usually by a simple vote on a show of hands. Once the chairperson, secretary and treasurer of the executive committee are appointed they also hold the respective offices of chairperson, secretary and treasurer in the owners corporation.¹⁰⁰⁷ The original owner (developer) shall exercise the powers, authorities, duties and functions of the three office bearers until the expiration of the first annual general meeting or until those office bearers are appointed whichever happens first.¹⁰⁰⁸

The only requirement for eligibility for appointment to any of these offices is that a person must be a member of the executive committee. The powers and duties pertaining to these offices may still be delegated to a managing agent by the agency agreement.¹⁰⁰⁹ In this way the owners corporation may delegate all the office bearers' duties to the managing agent. The office bearers are often appointed simply to satisfy the Act's requirements. In practice the office bearers act as communication links between the managing agent and the owners corporation.¹⁰¹⁰

¹⁰⁰⁴ NSW Strata Schemes Management Act s 18(1).

¹⁰⁰⁵ NSW Strata Schemes Management Act, sch 3, cl 3(c) and s 16(2).

¹⁰⁰⁶ NSW Strata Schemes Management Act s 18(3).

¹⁰⁰⁷ NSW Strata Schemes Management Act s 18(2).

¹⁰⁰⁸ NSW Strata Schemes Management Act, sch 2, cl 24.

¹⁰⁰⁹ NSW Strata Schemes Management Act, sch 3, cl 5(1) and s 29.

¹⁰¹⁰ Ilkin *NSW Strata* 104.

The office bearers cease to hold office where they cease to be executive members;¹⁰¹¹ where the owners corporation receives written notice of their resignation from office¹⁰¹² or where another person is appointed by the executive committee to hold that office,¹⁰¹³ whichever happens first. The executive committee may pass a majority resolution appointing another person to a particular office where that office bearer is not fulfilling his or her functions properly.

The chairperson's primary duty is to preside at all meetings of the executive committee and owners corporation.¹⁰¹⁴ This ensures the successful and lawful functioning of those meetings. The chairperson's functions are treated separately when presiding over executive committee meetings and general meetings. At executive committee meetings the chairperson's only duty is to preside.¹⁰¹⁵ If the chairperson is absent from the meeting then the executive committee members present at the meeting must appoint one of their number to preside over the meeting. The chairperson does not have a casting vote in relation to any motion, but may vote in his or her own right as a member of the executive committee.¹⁰¹⁶

Schedule 2 of the NSW Strata Schemes Management Act and regulations 17 and 18 refer to the chairperson's powers, authorities, duties and functions at general meetings of the owners corporation. The chairperson is allowed to declare out of order any motions or amendments that conflict with the Act or by-laws or that would be otherwise unlawful or unenforceable, or motions not mentioned in the meeting's written agenda.¹⁰¹⁷ The chairperson is required to preside if present,¹⁰¹⁸ and if he or she is absent the people present and entitled to vote are required to elect a replacement for the meeting.¹⁰¹⁹ The chairperson does not have a casting vote in relation to any motion,

¹⁰¹¹ NSW Strata Schemes Management Act, sch 3, cl 5(3)(a).

¹⁰¹² NSW Strata Schemes Management Act, sch 3, cl 5(3)(b).

¹⁰¹³ NSW Strata Schemes Management Act, sch 3, cl 5(3)(c).

¹⁰¹⁴ NSW Strata Schemes Management Act, sch 3, cl 18 and sch 2, cl 15.

¹⁰¹⁵ NSW Strata Schemes Management Act, sch 3, cl 8(1).

¹⁰¹⁶ NSW Strata Schemes Management, sch 3, cl 8(2).

¹⁰¹⁷ NSW Strata Schemes Management Act, sch 3, cl 14.

¹⁰¹⁸ NSW Strata Schemes Management Act, sch 3, cl 15(1)

¹⁰¹⁹ NSW Strata Schemes Management Act, sch 3, cl 15(2).

but may vote in his or her own right if otherwise entitled.¹⁰²⁰ The chairperson is required to announce the names of people entitled to vote on a motion, or the election of the executive committee members, before submitting the motion to the meeting, or holding the election only if requested to do so by a person present and entitled to vote.¹⁰²¹ The chairperson's declaration of the result of a vote on any motion is final, unless a poll is requested.¹⁰²² A poll can be requested even after the chairperson has declared the result of the vote.¹⁰²³ A valid general meeting of an owners corporation is held even if the chairperson is the only person present at the meeting, providing that the quorum provisions in clause 12 are satisfied.¹⁰²⁴ For example if sufficient people entitled to vote give their proxy votes to the chairperson, who is the only person who attends, a quorum will still be formed. This is also the case where a general meeting is conducted by a chairperson who is also still the original owner of all the lots. Despite the above provisions the Act, regulations and by-laws are silent on many of the procedures a chairperson should follow.¹⁰²⁵

The secretary is the chief administrative officer and his or her specific powers and duties are primarily of a clerical nature as set out in the Act.¹⁰²⁶ The secretary must prepare and distribute minutes of meetings of the owners corporation,¹⁰²⁷ including a motion for confirmation of the minutes of the last general meeting.¹⁰²⁸ Such a motion is not required in respect of minutes of executive committee meetings, although in practice it is often listed on the agenda notice. The secretary must give on behalf of the owners corporation and executive committee the notices required under the Act.¹⁰²⁹ This includes notices of executive committee meetings, notices to convene general meetings

¹⁰²⁰ NSW Strata Schemes Management Act, sch 3, cl 15(3).

¹⁰²¹ NSW Strata Schemes Management Act, sch 3, cl 16.

¹⁰²² NSW Strata Schemes Management Act, sch 3, cl 20.

¹⁰²³ NSW Strata Schemes Management Act, sch 3, cl 19.

¹⁰²⁴ NSW Strata Schemes Management, Act sch 3, cl 21.

¹⁰²⁵ Ilkin *NSW Strata* 105.

¹⁰²⁶ NSW Strata Schemes Management Act s 22.

¹⁰²⁷ S 22(a). Minutes of general meetings are distributed according to clause 33, schedule 2 while executive committee minute distribution duty is dealt with according to clause 12, schedule 3.

¹⁰²⁸ NSW Strata Schemes Management Act, sch 3, cl 35(1)(a) and s 22(a).

¹⁰²⁹ NSW Strata Schemes Management Act s 22(b).

and levy contribution notices. The secretary must properly maintain the strata roll;¹⁰³⁰ make certain documents available for inspection¹⁰³¹ and answer all communication addressed to the owners corporation.¹⁰³² The secretary should retain copies of all correspondence for five years from the date of the correspondence.¹⁰³³ The secretary must convene meetings of the executive committee and general meetings of the owners corporation¹⁰³⁴ and attend to all administrative and secretarial tasks of the owners corporation and executive committee.¹⁰³⁵ Where a duty has not been performed, the secretary will be bound to implement the task even without a resolution specifically nominating the secretary to do so. Examples of these duties are ensuring that the owners corporation's tax returns are lodged; that all compulsory insurance policies are effected; that quotes are obtained for work to be done and that residents are given copies of the by-laws.

Furthermore, the secretary must normally cause a noticeboard to be affixed to some part of the common property where one has not already been affixed by the developer. The secretary must give at least 72 hours' notice of an executive committee meeting,¹⁰³⁶ and must convene an executive committee meeting if requested to do so by not less than one-third of the executive committee members.¹⁰³⁷ The secretary must ensure that the minutes of the executive committee meeting are complete and accurate and that they contain all the resolutions passed,¹⁰³⁸ and either circulate these minutes or display them on the noticeboard.¹⁰³⁹ The secretary must, with the treasurer, advise the chairperson, and is entitled to move a motion, nominate a person for election as an executive committee member or vote at an owners corporation meeting.¹⁰⁴⁰ He or she

¹⁰³⁰ NSW Strata Schemes Management Act ss 22(c) and 96.

¹⁰³¹ NSW Strata Schemes Management Act s 22(d).

¹⁰³² NSW Strata Schemes Management Act s 22(e).

¹⁰³³ NSW Strata Schemes Management Act s 104.

¹⁰³⁴ NSW Strata Schemes Management Act s 22(f).

¹⁰³⁵ NSW Strata Schemes Management Act s 22(g).

¹⁰³⁶ NSW Strata Schemes Management Act, sch 3, cl 6.

¹⁰³⁷ NSW Strata Schemes Management Act, sch 3, cl 6. 7(1).

¹⁰³⁸ NSW Strata Schemes Management Act, sch 3, cl 6. 12.

¹⁰³⁹ NSW Strata Schemes Management Act, sch 3, cl 6. NSW Strata Schemes Management Act, sch 3, cl 6.16.

¹⁰⁴⁰ NSW Strata Schemes Management Act, sch 3, cl 6.19.

must include on the agenda of owners corporation meetings any motions received¹⁰⁴¹ and bring to all owners corporation meetings the minute book, all necessary correspondence, the strata roll, any other relevant records and files and have the treasurer bring the levy register. The secretary has custody of all the scheme's records apart from the accounting records and financial statements kept by the treasurer. The duties enumerated above are not exhaustive and the secretary may be required to perform numerous other duties. However, nothing in the Act precludes the secretary from seeking assistance from another committee member to help fulfill these duties.

Most of the treasurer's powers and duties are found in the NSW Strata Schemes Management Act.¹⁰⁴² The treasurer must notify the owners of any contributions levied pursuant to the Act¹⁰⁴³ and must acknowledge receipt, bank and account for any moneys paid to the owners corporation¹⁰⁴⁴ and prepare certain certificates requested from him.¹⁰⁴⁵ The treasurer must keep the prescribed accounting records and prepare the prescribed financial statements as required in terms of the Act.¹⁰⁴⁶ The treasurer must check the secretary list on the agenda of proposed executive committee and owners corporation meetings, for instance where the owner's contributions are in arrears, in order to decide whether court recovery proceedings should be instituted and by whom and advise the chairperson at owners corporation meetings of these instances, by checking the levy register. This will enable the chairperson to announce the names of persons who are entitled to vote on a motion or elect executive committee members.¹⁰⁴⁷

Since the nature of maintaining the accounting and financial records is so complicated, and due to the desire to minimize the number of people who handle the owners corporation's money, only six categories of persons may receive, expend, or account for

¹⁰⁴¹ NSW Strata Schemes Management Act, sch 3, cl 6.36.

¹⁰⁴² NSW Strata Schemes Management Act s 23(1).

¹⁰⁴³ NSW Strata Schemes Management Act s 23(1)(a).

¹⁰⁴⁴ NSW Strata Schemes Management Act s 23(1)(b).

¹⁰⁴⁵ NSW Strata Schemes Management Act s 23(1)(c).

¹⁰⁴⁶ NSW Strata Schemes Management Act s 23(1)(d).

¹⁰⁴⁷ NSW Strata Schemes Management Act, sch 2, cl 16.

moneys and keep books of account for the owners corporation.¹⁰⁴⁸ One of these categories is a person who is a member of the owners corporation or the executive committee and is the treasurer of the owners corporation or the executive committee. The treasurer of an owners corporation may delegate the exercise of any of the treasurer's functions (other than this power of delegation) to another member of the executive committee if the delegation is specifically approved by the executive committee of the owners corporation,¹⁰⁴⁹ and the executive committee specifically approves of the function being delegated to that member of the executive committee,¹⁰⁵⁰ and the delegation is subject to such limitations as to time or otherwise as the executive committee requires.¹⁰⁵¹ All or part of the treasurer's duties, powers, authorities and functions can be assigned and may be subject to limitations such as deadlines approved by the executive committee. Whilst a delegate is so acting he or she is deemed to be the treasurer.¹⁰⁵²

The NSW Strata Schemes Management Act Act imposes numerous duties on those appointed by the executive committee to the positions of chairperson, secretary and treasurer. If there is not an executive committee the general meeting would not be in a position to delegate the day-to-day administration of the scheme to select persons, and the central administration of the scheme would be in disarray. The community of owners in general meeting would have to perform these duties, and undertake the numerous obligations imposed by the Act, regulations and by-laws for the benefit of the owners.¹⁰⁵³ For example if there is no office of secretary, the general meeting will have to issue relevant notices to convene the meetings.¹⁰⁵⁴ Section 19 provides a partial solution where a chairperson, secretary and treasurer are not appointed. An Adjudicator may, on application, make an order appointing a person nominated by the applicant (and who has consented to that nomination) to convene a meeting of the executive committee of the owners corporation if there is not a chairperson, secretary or treasurer

¹⁰⁴⁸ NSW Strata Schemes Management Act ss 23 and 24.

¹⁰⁴⁹ NSW Strata Schemes Management Act s 23(2)(a).

¹⁰⁵⁰ NSW Strata Schemes Management Act s 23(2)(b).

¹⁰⁵¹ NSW Strata Schemes Management Act s 23(2)(c).

¹⁰⁵² NSW Strata Schemes Management Act s 23(3).

¹⁰⁵³ NSW Strata Schemes Management Act s 18(1); Ilkin *NSW Strata* 92, 98.

¹⁰⁵⁴ NSW Strata Schemes Management Act s 22(b); Ilkin *NSW Strata* 98.

of the executive committee of the owners corporation after the first meeting of the executive committee has been held.¹⁰⁵⁵ The meeting is to be convened and held within such time as is specified in the order.¹⁰⁵⁶ A meeting held under this section is taken to have been held by the executive committee of the owners corporation.¹⁰⁵⁷ An order made under this section may include such ancillary or consequential provisions as the Adjudicator thinks fit.¹⁰⁵⁸ If an order made under this section so provides, notice of the meeting may be given in the manner specified in the order.¹⁰⁵⁹ An application under this section may be made only by an owner, mortgagee or covenant chargee of a lot in the relevant strata scheme.¹⁰⁶⁰ This section has limited scope as it makes no provision for fulfilling the other duties that must be performed by the office bearers such as the preparation of minutes of meetings; maintaining of the strata roll; provision of section 109 certificates;¹⁰⁶¹ answering of communications addressed to the owners corporation; notifying the owners of contributions due and payable and performing various other accounting and financial duties.

In Singapore there are elaborate provisions regarding the chairperson, secretary and treasurer.¹⁰⁶² The members of the council must at the first meeting of the council after they assume office, appoint the office bearers where they were not appointed by the management corporation at its annual general meeting.¹⁰⁶³ They must be natural persons.¹⁰⁶⁴ An office bearer must be a member of the council,¹⁰⁶⁵ and can be appointed to one or more of the offices.¹⁰⁶⁶ An individual cannot be elected or appointed to hold office as the treasurer of a management corporation or that of a council for more

¹⁰⁵⁵ NSW Strata Schemes Management Act s 19(1).

¹⁰⁵⁶ NSW Strata Schemes Management Act s 19(2).

¹⁰⁵⁷ NSW Strata Schemes Management Act s 19(3).

¹⁰⁵⁸ NSW Strata Schemes Management Act s 19(4).

¹⁰⁵⁹ NSW Strata Schemes Management Act s 19(5).

¹⁰⁶⁰ NSW Strata Schemes Management Act s 19(6).

¹⁰⁶¹ A section 109 certificate is a certificate by the owners corporation as to financial and other matters relating to the lot.

¹⁰⁶² BMSMA s 55(1).

¹⁰⁶³ BMSMA s 55(2).

¹⁰⁶⁴ BMSMA s 53(1).

¹⁰⁶⁵ BMSMA s 55(3)(a)

¹⁰⁶⁶ BMSMA s 55(3)(b).

than two terms,¹⁰⁶⁷ except in respect of a management corporation with ten or fewer lots if, and only if, the management corporation, by a resolution by consensus, concurs with the individual's election or appointment as treasurer for each further executive term.¹⁰⁶⁸

As in New South Wales an office bearer shall hold office until he or she ceases to be a member of the council;¹⁰⁶⁹ the management corporation receives from him a written notice of resignation¹⁰⁷⁰ or another person is appointed by the council or by the general meeting to hold that office, whichever happens first.¹⁰⁷¹ In *MCST Plan No 460 v Goldhill Properties (Pty) Ltd & Others*¹⁰⁷² a resolution proposed by a proprietor (owner) at an extraordinary general meeting of the management corporation to remove the secretary of the council and to replace him with one of his own nominees was ruled out of order by the chairperson. The High Court held that the chairperson was not entitled to do so. The matter could also properly be dealt with at an extraordinary general meeting and not necessarily at an annual general meeting.¹⁰⁷³ In *Jayasooriah v MST Plan No 983*¹⁰⁷⁴ a proprietor challenged his removal from the post of secretary of the council on the ground that his removal and replacement could not be done by the adoption of a motion of an extraordinary general meeting. The Strata Titles Board noted that although office bearers are normally elected at an annual general meeting, there was nothing to indicate that they could not be validly elected at an extraordinary general meeting. Given that office bearers could resign between annual general meetings soon after their election, it would be unworkable for a management corporation to have to wait for at least 12 months before having another election of office bearers. The extraordinary general meeting was convened to resolve all outstanding issues arising from the problems between the parties. The Board ruled that the extraordinary general meeting

¹⁰⁶⁷ BMSMA s 55(7).

¹⁰⁶⁸ Building Maintenance and Strata Management (Exempt Treasurers) Order 2005 (S 197/2005).

¹⁰⁶⁹ BMSMA s 55(4)(a).

¹⁰⁷⁰ BMSMA s 55(4)(b).

¹⁰⁷¹ BMSMA s 55(4)(c).

¹⁰⁷² [1991] 3 MLJ 247; Keang Sood *Strata Title* 311 - 312.

¹⁰⁷³ [1991] 3 MLJ 247 250; Keang Sood *Strata Title* 315 - 316.

¹⁰⁷⁴ STB Nos 9 & 10 of 1989, reported in *Strata Titles Boards Decisions* Singapore: FT Law & Tax 245; Keang Sood *Strata Title* 316.

was properly convened to elect the new office bearers so as to give life and meaning to the management corporation.¹⁰⁷⁵

An office bearer cannot resign until a meeting of the council is first convened for the purpose of appointing another person to fill his vacancy¹⁰⁷⁶ or a general meeting is first convened for the purpose of electing another person to fill his vacancy.¹⁰⁷⁷ Any purported resignation or vacation is deemed to be invalid.¹⁰⁷⁸ In terms of the previous provision office bearers were not permitted to resign unless replacements were found.¹⁰⁷⁹ This was unfair and punished those who were prepared to serve as office bearers and discouraged many subsidiary proprietors from serving as they could be held hostage by the apathy of other subsidiary proprietors. Presently, before the office bearer is allowed to resign a general meeting must first be convened to try to find a replacement. This serves the purpose to give notice to the general body that an office bearer is resigning and there is no one stepping forward to serve. The management corporation will have to bear liability incurred by the management corporation due to their general apathy. A proprietor may apply to the Strata Titles Board to compel the election and appointment of new office bearers. Office bearers are now allowed to resign even if it results in no members being left in the council. Therefore individual proprietors must bear the consequences for this possibility. If a management corporation carries on business without office bearers for more than six months every person who, for the whole or any part of that period, is a proprietor and knows that the management corporation is carrying on business in that manner is jointly and severally liable for the payment of all debts of the management corporation contracted during that period after those six months as the case may be, and may be sued for those debts.¹⁰⁸⁰ This acts as a deterrent for the management corporation to go without office bearers for too long.

¹⁰⁷⁵ STB Nos 9 & 10 of 1989, reported in *Strata Titles Boards Decisions* Singapore: FT Law & Tax 245 at 261.

¹⁰⁷⁶ BMSMA s 55(5)(a)

¹⁰⁷⁷ BMSMA s 55(5)(b).

¹⁰⁷⁸ BMSMA s 55.

¹⁰⁷⁹ LTSA s 62(4).

¹⁰⁸⁰ BMSMA s 55(6)(a) and (b).

In Singapore and Malaysia the chairperson's primary function is to preside at all meetings of the council and at any general meetings of the management corporation.¹⁰⁸¹ In his or her absence at any such meeting the members present will appoint one of their number to preside at that meeting.¹⁰⁸² In Malaysia the chairperson has a casting and original vote.¹⁰⁸³ In Singapore the chairperson is empowered to rule that a motion submitted at a general meeting is out of order if he or she considers that it would conflict with the BMSMA or the by-laws, or would otherwise be unlawful or unenforceable.¹⁰⁸⁴ The chairperson's declaration of the result of the voting on any proposal submitted at a general meeting, otherwise than on a poll, is conclusive without proof of the votes recorded for or against the proposal.¹⁰⁸⁵

In Singapore the powers and duties of the secretary of the council include the preparation and distribution of minutes of meetings of the management corporation and the submission of a motion for the confirmation of the minutes of any meeting of the management corporation at the next meeting;¹⁰⁸⁶ the giving of the required notices on behalf of the corporation and the council;¹⁰⁸⁷ the maintenance of the strata roll;¹⁰⁸⁸ making documents available for inspection;¹⁰⁸⁹ responding to communications addressed to the corporation;¹⁰⁹⁰ the convening of meetings of the council and the management corporation¹⁰⁹¹ and the attending of matters of an administrative or secretarial nature in connection with the exercise of its functions.¹⁰⁹² The secretary must furthermore within 30 days of his or her appointment furnish the Commissioner of Buildings with written particulars of all persons elected or appointed to an office or as a

¹⁰⁸¹ BMSMA s 55(1), First Schedule, para 6 and Second Schedule, para 1; Strata Titles Act and Sarawak Ordinance, Second Schedule, para 4(3); Sabah Enactment, Second Schedule, para 4(3).

¹⁰⁸² BMSMA, First Schedule, para 6 and Second Schedule, para 1; Sabah Enactment, Second Schedule, para 13.

¹⁰⁸³ Strata Titles Act; Sarawak Ordinance and Sabah Enactment, Second Schedule, para 4(3).

¹⁰⁸⁴ BMSMA, First Schedule, para 4.

¹⁰⁸⁵ BMSMA, First Schedule, para 10; Sarawak Ordinance, Second Schedule, para 13(2); and Sabah Enactment, Second Schedule, para 14(2).

¹⁰⁸⁶ BMSMA s 56(a).

¹⁰⁸⁷ BMSMA s 56(b).

¹⁰⁸⁸ BMSMA s 56(c).

¹⁰⁸⁹ BMSMA s 56(d).

¹⁰⁹⁰ BMSMA s 56(e).

¹⁰⁹¹ BMSMA s 56(f).

¹⁰⁹² BMSMA s 56(g).

member of the council.¹⁰⁹³ Failure to comply is an offence and the penalty on conviction is a maximum fine of Singaporean \$3,000.¹⁰⁹⁴ The secretary has no inherent power to contractually bind the management corporation, unless a resolution has been passed by the corporation or its council conferring this power. Any unauthorized act by the secretary is likely to be validated by subsequent ratification by the corporation or its council. Keang Sood recommends that the resolution be passed by the corporation or its council to confer the ability on the secretary to act to avoid the secretary's personal liability to third parties in non-routine matters.¹⁰⁹⁵ Alternatively a professional indemnity insurance policy can be taken out by the corporation to protect office bearers from personal liability.

In Singapore the treasurer has powers and duties corresponding to those of his New South Wales counterpart. These include notifying of proprietors of any contributions levied pursuant to the BMSMA;¹⁰⁹⁶ the receipt, acknowledgement and banking of, and accounting for any money paid to the corporation;¹⁰⁹⁷ the preparation of certain certificates;¹⁰⁹⁸ the keeping of the accounting records and the preparation of the financial statements of the corporation.¹⁰⁹⁹ A person cannot exercise or perform the powers relating to the receipt or expenditure of, or accounting for moneys or the keeping of the books of account of the corporation unless he or she is a proprietor or a member of the council and is the treasurer of the corporation or council;¹¹⁰⁰ a managing agent who is empowered to exercise or perform those powers, duties and functions;¹¹⁰¹ or a person required by an order of the council to exercise or perform jointly with the treasurer of the management corporation those powers, duties or functions and who enables the treasurer to comply with the order.¹¹⁰²

¹⁰⁹³ Building Maintenance (Strata Management) Regulations 2005 (S 192/2005), regs 9(1)(a)-(d) and 2(a)-(d).

¹⁰⁹⁴ Building Maintenance (Strata Management) Regulations 2005 (S 192/2005), reg 9(3).

¹⁰⁹⁵ Keang Sood *Strata Title* 319.

¹⁰⁹⁶ BMSMA s 57(1)(a).

¹⁰⁹⁷ BMSMA s 57(1)(b).

¹⁰⁹⁸ BMSMA s 57(1)(c).

¹⁰⁹⁹ BMSMA s 57(1)(d).

¹¹⁰⁰ BMSMA s 57(2)(a).

¹¹⁰¹ BMSMA s 57(2)(b).

¹¹⁰² BMSMA s 57(2)(c).

In *Re Robin Lane (Strata Titles Plan No 281)*¹¹⁰³ the applicants as co-proprietors had alleged that the respondent was not authorised to sign cheques of the management corporation and sought reimbursement from him in respect of certain cheques that he had signed. As the expenditure was authorized by the management corporation, the Strata Titles Board was of the view that the respondent had not acted wrongly as a council member under the instruction of the council. The fact that there was no evidence to show that the respondent was one of the authorized signatories for the issuance of cheques was found not to be conclusive. The Board reasoned that even if the respondent was not the designated treasurer, he may be required by order of the council to exercise the powers and functions with the treasurer jointly.¹¹⁰⁴ Although such an order was not recorded in confused recording of the minutes of the council and general meetings, the Board concluded that such a decision might have been made as the respondent was also one of the authorized signatories for the management corporation's bank.

The council may by notice in writing served on the treasurer of the corporation order that he shall not exercise or perform any of the powers, duties or functions that are specified in the notice unless he does so jointly with another person who is so specified.¹¹⁰⁵ For example the treasurer may be ordered not to sign any cheques drawn on the management corporation's bank accounts unless signed jointly with the secretary. The treasurer is empowered to delegate any of his powers duties or functions to another member of the council.¹¹⁰⁶

The proprietors can apply to the Strata Titles Board to compel the election and appointment of new office bearers.¹¹⁰⁷ This might not solve the problem though, given the fact that the situation could have arisen due to owner apathy where proprietors did not want to be on the council. The fact that the powers, duties and functions of the office

¹¹⁰³ [2005] SGSTB 2.

¹¹⁰⁴ [2005] SGSTB 2 at 24. Under LTSA s 62(6)(c) which is materially the same as the BMSMA s 57(2)(c).

¹¹⁰⁵ BMSMA s 57(5).

¹¹⁰⁶ BMSMA s 57(3) and (4).

¹¹⁰⁷ BMSMA s 102.

bearers may be exercised or performed by a managing agent on adoption of an ordinary resolution of the management corporation, is a way out of the impasse¹¹⁰⁸

The UCIOA of the United States stipulates that an association's by-laws require the election of the executive board members including a president, a treasurer, a secretary and any other officers.¹¹⁰⁹ The executive committee appoints standing committees to ease the board's workload and to facilitate communication between the board and owners.¹¹¹⁰

7 3 Remuneration and reimbursement of expenses

7 3 1 Introduction

In what follows I will discuss the remuneration of trustees for rendering the services involved in the day-to-day management of the sectional title scheme. Important related topics are the amount of remuneration the trustee would be entitled to, and who would decide on the amount the trustee is entitled to be paid. I will also discuss the benefits and possible advantages of remunerating trustees. Following this I will set out whether trustees are entitled to be reimbursed for disbursements and expenses incurred in carrying out their duties and exercising their powers.

7 3 2 The South African position

The position of trustees is a voluntary one, and they often give their time and effort for free. Prescribed management rule 10 deals with trustee remuneration. It divides trustees into two categories, namely owner and non-owner trustees, and treats remuneration for each category differently.

Trustees who are owners are not entitled to any remuneration for their services, unless otherwise determined by a special resolution of the body corporate.¹¹¹¹ This is probably

¹¹⁰⁸ BMSMA s 67(3).

¹¹⁰⁹ UCIOA § 3-106(a)(2).

¹¹¹⁰ Chen *Chinese Condominium* 144.

¹¹¹¹ Annexure 8 rule 10(1).

based on the assumption that owners are willing to invest their free time and effort in order to ensure that the scheme is properly managed, and to give them a greater say in the decision making of the scheme's management than the average owner.¹¹¹² The rules permit non-owner trustees to remuneration at an amount that is agreed on by the body corporate and the trustee.¹¹¹³ Nominees of owners who are juristic persons may also be remunerated as these nominees are presumably in the same position as owners.¹¹¹⁴ An alternate trustee who is not an owner must claim his remuneration, if any, from the trustee who he or she replaced and not from the body corporate, unless the body corporate has been instructed in writing by such trustee to pay any portion of his remuneration to the alternate trustee.¹¹¹⁵

An employee of the body corporate may be a trustee if he or she is an owner.¹¹¹⁶ If such an owner employee, who is remunerated by the body corporate as such, is elected as a trustee it is still necessary to pass a special resolution to authorize payment to this professional owner trustee. This could cause problems though as such person now has a fiduciary duty to supervise his or her own work. These two positions are now inextricably linked.¹¹¹⁷

The body corporate is responsible for deciding how much a trustee should be paid. The remuneration of owner trustees could potentially be different in each case. This would be an expense that forms part of the body corporate's budget, and would have to be agreed to by owners at an annual general meeting. The remuneration of non-owner trustees will be at a rate as they have agreed upon with the body corporate. Whether the trustees are paid hourly, weekly, or monthly will also be something that is agreed upon between the trustees concerned and the body corporate.¹¹¹⁸

¹¹¹² J Paddock "Trustee remuneration – what's the deal?" (March 2010) 5-3 *Paddocks Press Newsletter* 3.

¹¹¹³ Annexure 8 rule 10(2).

¹¹¹⁴ Van der Merwe *Sectional Titles* 14-130.

¹¹¹⁵ Annexure 8 rule 10(2).

¹¹¹⁶ Annexure 8 rule 5(b).

¹¹¹⁷ G Paddock "Q&A with the Professor: Remuneration of owner, trustee, employee" (December 2011) 6-12 *Paddocks Press Newsletter* 5.

¹¹¹⁸ J Paddock (March 2010) 5-3 *Paddocks Press Newsletter* 3.

Where owner apathy is a problem and owners do not want to stand as trustees, remuneration could be used as an incentive to induce owners to stand for election. This could have the effect of possibly removing any temptation on the part of the trustee to benefit from his or her position at the expense of the body corporate. The owners can pass a special resolution that the trustee must be remunerated. The owners should also specify the level of remuneration for the trustees at each annual general meeting. If no owner is prepared to stand as trustee, the body corporate may have to consider passing a resolution to authorize the payment to a professional and accountable person to act as trustee. In this way a person, other than the managing agent, is elected and the body corporate can hold that person to a detailed performance standard.¹¹¹⁹ If none of the owners are willing to act as trustees, then an owner who is for example a retired person with administrative skills but who is not prepared to work for free, could perhaps be persuaded to act as a trustee for a lower amount of remuneration than would have to be paid to a skilled person in the open market.¹¹²⁰ The nature of the work will often allow such a person to continue to enjoy his or her retirement, in addition to spending a few hours a day or a few days a week giving the body corporate's administration his or her full attention. Furthermore, the body corporate could pay owners to work part-time to help trustees in very busy periods for example when major repairs are being undertaken. This would be of particular application in schemes that do not employ managing agents.

Both owner and non-owner trustees are entitled to be reimbursed for all disbursements and expenses actually and reasonably incurred by them in carrying out their duties and exercising their powers.¹¹²¹ Examples of such expenses include phonecalls, petrol for travelling to meetings and stationery. Reimbursement should be given for attending training courses and professional body meetings. An interesting question is whether the cost of flight tickets for attending trustee meetings is considered reasonable. Different factors would need to be considered to answer this question. These factors include whether the issues dealt with at the meeting were such that the owners generally agree

¹¹¹⁹ G Paddocks (July 2009) 4-7 *Paddocks Press Newsletter* 10.

¹¹²⁰ J Paddock (March 2010) 5-3 *Paddocks Press Newsletter* 3.

¹¹²¹ Annexure 8 rule 10(1) and (2).

could not have been dealt with without incurring the travelling expenses; whether the body corporate paid these expenses in the past; whether the trustees asked the owners in advance if they could spend the money; whether the expenses were budgeted for at the last annual general meeting and whether the trustees also enjoy some holiday time with their friends and family other than the meeting. If there is a genuine need or a clear understanding that the body corporate would cover the costs then the expense is reasonable. However, if the trustees derive personal benefit then the expense is not reasonable and is unrecoverable. If the owners in general meeting, by majority vote resolve to pay, then the body corporate can specifically budget for the expense.¹¹²²

7 3 3 Comparative survey

In New South Wales the owners corporation is allowed to pay the chairperson, secretary, treasurer and any other member of the executive committee a sum of money in recognition of services performed in the period since the last annual general meeting, regardless of whether these persons are owners or non-owners of a lot (section).¹¹²³ The amount is determined at the annual general meeting followed by a resolution authorizing the payment.

The NSW Strata Schemes Management Act and Regulations do not set out the amount of the remuneration. If the services rendered are equivalent to those of the managing agent then the sum paid may be comparable. This would not carry a threat of the executive committee member being charged with a breach of section 20 of the Agents Act, which prohibits a person from acting or carrying on business of a managing agent unless he or she is licensed. There can be no payment in advance or for services performed prior to the last annual general meeting.¹¹²⁴

¹¹²² G Paddock “Q & A with the Professor: Limit on trustee expenses” (January 2009) 4-1 *Paddocks Press Newsletter* 9.

¹¹²³ NSW Strata Schemes Management Act s 25.

¹¹²⁴ Ilkin *NSW Strata* 111.

There is no provision on reimbursing a committee member for expenses incurred while rendering services. It could be that term “services” include both remuneration and reimbursements. This could have been indicated more clearly in the Act.

7 4 Conclusion

The South African prescribed management rules provide for the election of a chairperson at the first trustee meeting after their election as trustees.¹¹²⁵ The rules do not specifically provide for the appointment of any other office bearers such as a secretary or treasurer. However, the rules provide that, subject to the restrictions imposed or directions given at a general meeting, the trustees may delegate such of their powers and duties as they deem fit to one or more of their number and may at any time revoke such delegation.¹¹²⁶ The division of the trustees’ functions between a chairperson, secretary and treasurer will facilitate more efficient management, especially in larger schemes. Secretarial duties could be delegated to a secretary and financial duties to a treasurer from amongst their number.

On the model of the New South Wales and Singapore legislation the powers and duties of the secretary could include among others the preparation and distribution of minutes of meetings; the dispatch of notices on behalf of the body corporate and the trustees; maintaining a list of all the members of the body corporate; the answering of letters addressed to the body corporate; the convening of meetings of the trustees and the body corporate and the attendance to all matters of an administrative and secretarial matters.

The powers and duties of the treasurer could include among others, the notification of owners of any contributions levied under the Act; the receipt, acknowledgement and banking of and the accounting for any money paid to the body corporate; the keeping of the required accounting records and the preparation of the required financial statements.

¹¹²⁵ Annexure 8 rule 18.

¹¹²⁶ Annexure 8 rule 26(1)(b).

It would facilitate better management if each trustee were delegated a specific portfolio. In this way each trustee would be responsible for a particular set of duties. For example a maintenance trustee could oversee any alterations or improvements and could regularly inspect the common property. A liason trustee could be responsible for all communications between owners, trustees and the managing agent. A division of functions, powers and duties along these lines amongst the trustees would facilitate more efficient administration, especially larger sectional title developments.¹¹²⁷

The crucial question is, however, whether the South African industry would like to entrust these functions to the trustees in view of the fact that most of the trustees are unqualified owners or spouses of owners. Furthermore, the sectional title industry regards the role of trustees as essentially supervisory. The actual performance of these functions especially the financial functions are, in practice, dealt with by the managing agent, the auditor and the accounting officer. The lack of a specific rule to cater for the appointment of a secretary and a treasurer in the South African management rules is therefore not necessarily a shortcoming as South African sectional title practice has shown that these functions of the trustees are in actual fact delegated in most instances to more professional managing agents.

Generally the trustees are expected to manage the scheme without any remuneration. This position is less than satisfactory. Trustees do not have an easy job. They must convene, attend, and chair various meetings; deal with and address correspondence from owners and various other persons; handle the finances and accounting records of the scheme and amend and enforce the scheme's rules. In larger sectional title schemes the trustees should be remunerated for their time, effort and possible expertise. Trustees that have a genuine interest in the good management of the scheme deserve remuneration. The payment of remuneration to trustees may change the dynamics in a sectional title community. Trustees, who are paid for their services, would be more enthusiastic and could be held accountable for a more professional

¹¹²⁷ Van der Merwe *Sectional Titles* 14-132.

performance. They would also have to exercise a higher standard of care could and run the risk of being dismissed if they do not live up to the higher standard.

The South African approach in letting owners decide on payment for services by trustees is best. This type of flexibility is a reflection of unit owner autonomy. Furthermore, allowing non-owner trustees to be remunerated is an effective measure to attract skillful and experienced outsider professionals to serve as trustees. Paying owner trustees can be included as a budget item in the agenda for general meetings and be approved at an annual or special general meeting by special resolution.

Finally, it makes sense that the trustees should be reimbursed for all expenses reasonably and properly incurred in the exercise of their duties. Genuine expenses such as telephone calls, stamps, photocopies and the cost of stationery should be paid out of the administrative fund. Reimbursing the member who incurred reasonable expenses in rendering management services should be budgeted for as contributions to the administrative fund.

Chapter 8: Term of office of trustees

8 1 Introduction

In this chapter I shall focus on the term of office of trustees. I will commence with a general discussion on the duration of the office of trustees. Then I will consider the question whether the trustees are competent to fill any vacancy in their number that arises during their period of office. This will be followed by a discussion of the necessity for alternate trustees to be appointed for a trustee who is absent or unable to act. The possibility of introducing a rotation system to rejuvenate the management structure will then be explored. Finally, I will discuss the instances that disqualify trustees from continuing in the office, and the circumstances under which a trustees' office is terminated.

8 2 Duration of office of trustees

8 2 1 South African position

The trustees, once elected, hold office until the next annual general meeting, at which time they are eligible for re-election if properly nominated.¹¹²⁸ The body corporate can adopt rules that provide that in the event of no nominations being received the existing trustees are deemed to have been re-elected. This presupposes that none of the existing trustees have handed in their resignation. This alternative procedure avoids the need for annual elections that are time-consuming and require nominations.¹¹²⁹

8 2 2 Comparative survey

The position in New South Wales, Singapore and Malaysia is similar to the South African position. The executive committee or council (trustees) holds office until the next annual general meeting. In New South Wales a member of executive committee vacates office at the end of the next annual meeting at which time a new executive

¹¹²⁸ Annexure 8 rule 6.

¹¹²⁹ Van der Merwe *Sectional Titles* 14-128.

committee is elected by the owners corporation.¹¹³⁰ In Singapore the members of the council retire from office at the conclusion of the next annual general meeting, but a retiring member of the council is eligible for re-election.¹¹³¹ Furthermore, a member of the council vacates office at the end of the next annual general meeting where a new council is elected by the management corporation or upon the election at a general meeting of another person to that office, if earlier.¹¹³² In Malaysia a member of the council ceases to hold office at the next annual general meeting where he is not re-elected.¹¹³³

Although Chinese national law is silent on the term of office of a council member, a local property management regulation states that the term of office for the executive council is three years to five years,¹¹³⁴ while another regulation states that a council member's term of office is three years.¹¹³⁵

8 3 Filling of vacancies

8 3 1 South African position

In South Africa the trustees may fill any vacancy in their number that arises during their period of office. Any trustee appointed to fill a vacancy holds office until the next annual general meeting when he or she retires, and be eligible for re-election as though he or she had been elected at the previous annual general meeting.¹¹³⁶

In *Williams v Nathan and others*¹¹³⁷ the court stated that “vacancy in number” refers to a vacancy brought about if one of the elected trustees for any reason ceases to act as such. The court further stated that the relevant rule does not entitle existing trustees in

¹¹³⁰ NSW Strata Schemes Management Act, sch 3, cl 4(1)(d).

¹¹³¹ BMSMA s 53(5).

¹¹³² BMSMA s 54(1)(e).

¹¹³³ Strata Titles Act, Second Schedule, para 2(1).

¹¹³⁴ Shanghai Property Management Regulation of 2004 art 14.

¹¹³⁵ Property Management Regulation of Shenzhen Special Economic Zone 2007 art 14.

¹¹³⁶ Annexure 8 rule 8.

¹¹³⁷ Van der Merwe *Sectional Titles* 14-128; [2006] JOL 18414 (W) para 33.

effect to elect additional trustees. Under prescribed management rule 6 the election of additional trustees is the prerogative of the body corporate.¹¹³⁸

8 3 2 Comparative survey

In New South Wales where a vacancy occurs in the office of a member of an executive committee the owners corporation must seek to appoint an eligible person to fill the vacancy.¹¹³⁹ A vacancy can occur when an owner ceases to be an owner in the scheme; where the nominating owner ceases to be an owner in the scheme; where there is loss of support by the nominator; where the executive committee member resigns from office or where the executive committee member vacates office after the owners corporation passed a special resolution requiring such termination. If this vacancy is caused by the fact that all the existing committee members automatically ceased to hold office at the end of the next annual general meeting, when a new executive committee is elected by the owners corporation,¹¹⁴⁰ then the provisions on how a vacancy should be filled are not applicable.

The vacancy can be filled in the following three ways: the owners corporation can by ordinary resolution appoint a replacement;¹¹⁴¹ the executive committee with the required competence can by majority resolution appoint a replacement¹¹⁴² and the managing agent, duly authorized in the agency agreement or resolution of appointment, can record a decision in the owners corporation's minute book that a replacement has been appointed. If the appointment is made by the latter two methods the cumbersome nomination and election procedures in regulations 17 and 18¹¹⁴³ need not be followed, and the procedure can be replaced by any other convenient method on condition that the eligible person must consent to the nomination either verbally or in writing. This person will hold office for the balance of the predecessor's term.¹¹⁴⁴

¹¹³⁸ Para 34.

¹¹³⁹ NSW Strata Schemes Management, sch 3, cl 4(2); Ilkin *NSW Strata* 102.

¹¹⁴⁰ NSW Strata Schemes Management, sch 3, cl 4(1)(d).

¹¹⁴¹ NSW Strata Schemes Management, sch 3, cl 4(2).

¹¹⁴² NSW Strata Schemes Management, sch 3, cl 4(2).

¹¹⁴³ I discuss the procedures of regulations 17 and 18 at chapter 3 4 3.

¹¹⁴⁴ Ilkin *NSW Strata* 102-103.

In Singapore a vacancy in the office of the chairperson, secretary or treasurer or other member of the council may be filled by the remaining members of the council appointing a person eligible for election to fill the vacancy. The remaining council members will constitute a quorum at a meeting of the council for the purpose only of appointing a person to fill a vacancy in the office of the chairperson, secretary, treasurer or other member of council, or for convening a general meeting of the management corporation for that purpose.¹¹⁴⁵ Any person appointed to fill a vacancy, will hold the office for the balance of his predecessor's term of office.¹¹⁴⁶

In Malaysia a member of the council may also resign his or her office at any time by giving the management corporation a notice in writing of his resignation as member.¹¹⁴⁷ For such a vacancy, the remaining members may appoint another proprietor to be a member until the next annual general meeting.¹¹⁴⁸

The UCIOA states that an executive board may fill any board vacancies for the remaining period of any term.¹¹⁴⁹

8 4 Alternate trustees

8 4 1 South African position

In South Africa owners can appoint another person as a proxy to attend general meetings. In contrast trustees cannot appoint a proxy to attend trustee meetings on their behalf. The trustees may, however, appoint an alternate trustee in the place of a trustee who is absent or unable to act as a trustee.¹¹⁵⁰ This alternate can then protect the interests of the trustee, or those of the owners whom the trustee represents. Examples of situations where trustees are absent or unable to act as trustee are where they plan

¹¹⁴⁵ BMSMA s 54(4)(a) and (b).

¹¹⁴⁶ BMSMA s 54(3).

¹¹⁴⁷ Strata Titles Act and Sarawak Ordinance, Second Schedule, para 2(4); Sabah Enactment, Second Schedule, para 2(5).

¹¹⁴⁸ Strata Titles Act and Sarawak Ordinance, Second Schedule, para 2(5); Sabah Enactment, Second Schedule, para 2(6).

¹¹⁴⁹ UCIOA § 3-106(b).

¹¹⁵⁰ Annexure 8 rule 9.

to go overseas or on a holiday or have another commitment. An alternate trustee need not be an owner.¹¹⁵¹ Once appointed, an alternate trustee has the powers and is subject to the duties of a trustee.¹¹⁵² An alternate trustee ceases to hold office if the trustee, whom he or she replaces, ceases to be a trustee or if the trustees revoke the alternate trustee's appointment.¹¹⁵³

8 3 2 Comparative survey

In New South Wales an executive committee member may suggest a substitute (alternate) if he or she anticipates being unable to attend one or more committee meetings.¹¹⁵⁴ The appointment as substitute must then be confirmed by a formal resolution passed by the executive committee. A committee member anticipating an absence and seeking an appointment of a substitute would have to contact the secretary to arrange for an appropriate motion to be added to the agenda of the next executive committee meeting, where a majority vote is needed for the motion to be successful. A substitute can only be an owner, co-owner¹¹⁵⁵ or a company nominee of a corporation that is an owner. Furthermore, a substitute can be an existing committee member, provided that the appointee is also an owner or the company nominee of a corporate owner.¹¹⁵⁶ The substitute committee member will then receive two votes on any motion or agenda item.¹¹⁵⁷ The substitute can vote according to his or her own discretion, unless the absent committee member has directed the substitute on how to vote on certain specific or all matters. When the substitute acts in the place of a member then he or she is deemed to be a committee member.¹¹⁵⁸ The committee member is still a committee member during their absence. That could mean that the total number of committee members could exceed the usual maximum of nine or

¹¹⁵¹ Annexure 8 rule 9(1).

¹¹⁵² Annexure 8 rule 9(2).

¹¹⁵³ Annexure 8 rule 9(3).

¹¹⁵⁴ NSW Strata Schemes Management Act, sch 3, cl 3(1); Ilkin *NSW Strata* 101.

¹¹⁵⁵ NSW Strata Schemes Management Act, sch 3, cl 2(5)(a).

¹¹⁵⁶ NSW Strata Schemes Management Act, sch 3, cl 3(3).

¹¹⁵⁷ NSW Strata Schemes Management Act, sch 3, cl 3(4).

¹¹⁵⁸ NSW Strata Schemes Management Act, sch 3, cl 3(2).

whichever number had been resolved upon at a previous meeting of the owners corporation.¹¹⁵⁹

8 5 Rotation of trustees

The prescribed management rules do not provide for the rotation of trustees. This leads to a tendency to re-elect existing trustees. Van der Merwe suggests that a system of rotation needs to be introduced to ensure continuity and the opportunity for an infusion of new blood.¹¹⁶⁰ A body corporate could, for example, adopt a rule whereby one third of the existing trustees should resign or retire at each annual general meeting. This will rejuvenate the management structure and avoid the risk of incompetent council members being retained in office for too long, and of trustees, who remain in office for too long, abusing their position.

Alternatively, a rule could set out a maximum term which any trustee may serve before becoming ineligible for re-election. Such a rule will prevent trustees from being re-elected indefinitely. In this way the trustees who retire or resign by rotation are those who have served on the board the longest. Such a system of rotation will maintain a majority of experienced trustees in office, while providing for an infusion of new members.

However, the fact that many schemes struggle to find owners willing to act as trustees militates against the introduction of a system of rotation. To limit the number of terms a willing trustee may be re-elected might hinder the effective management of the scheme. These two sides must be considered carefully before introducing a system of rotation of trustees in a sectional title scheme. Providing adequate provisions for the removal of incompetent trustees can mitigate these concerns.

The Memorandum of Incorporation of a company generally provides that a certain number or percentage of directors resigns every year and offer themselves for re-

¹¹⁵⁹ NSW Strata Schemes Management Act, sch 3, cl 2(2).

¹¹⁶⁰ Van der Merwe *Sectional Titles* 14-131.

appointment. The purpose of such a provision is that the shareholders will actively consider whether the director is performing according to their expectations, and refuse to appoint directors whose performance is not up to standard. Any re-appointment is only valid once the director has provided written consent to serve as a director.

8 6 Disqualification of trustees to continue in office

8 6 1 The South African position

The South African management rules stipulate seven instances in which an existing trustee is disqualified from continuing in office. In six of these instances he or she is automatically disqualified from continuing in office. In the seventh instance a resolution of the general meeting is required to remove him or her from office, provided that the intention to vote upon the removal from office has been specified in the notice convening the meeting. The first five instances where the trustee automatically ceases to hold office are where he or she resigns in the form of a written notice to the body corporate;¹¹⁶¹ where he or she becomes of unsound mind;¹¹⁶² where he or she surrenders his or her estate as insolvent or his or her estate is sequestrated;¹¹⁶³ where if he or she is convicted of an offence involving dishonesty¹¹⁶⁴ or where he or she becomes disqualified from being appointed or acting as a director of a company in terms of sections 218 and 219¹¹⁶⁵ of the Companies Act 61 of 1973.¹¹⁶⁶

The prescribed management rule dealing with trustee disqualification has recently been amended by the Amendment Regulation of 2013,¹¹⁶⁷ to add a sixth instance of automatic disqualification to continue in office. Prescribed management rule 13(g) has been inserted to read as follows:

¹¹⁶¹ Annexure 8 rule 13(a).

¹¹⁶² Annexure 8 rule 13(b).

¹¹⁶³ Annexure 8 rule 13(c).

¹¹⁶⁴ Annexure 8 rule 13(d).

¹¹⁶⁵ Now section 69 of the Companies Act 71 of 2008. Briefly these provisions are general principles to disqualify a person being a director of a company such as minority, un-rehabilitated insolvency, and removal from office of trust on account of misconduct.

¹¹⁶⁶ Annexures 8 rule 13(f). This provision should be amended to make reference to the Companies Act 71 of 2008.

¹¹⁶⁷ Published in GN R 196 in *GG* 36421 of 14-03-2013.

“A trustee shall now cease to hold office as such if he is in arrears for more than 60 days with any levies and contributions payable by him in respect of his unit or exclusive use area (if any) and he fails to bring such arrears up to date within seven days of being notified in writing to do so.”¹¹⁶⁸

Therefore, if a duly appointed trustee later defaults in levy payments his or her appointment will automatically lapse if he defaults and fails to comply with the notice. This complements and tightens up the embargo on the nomination and election of trustees who are in arrears in the new prescribed management rule 7.¹¹⁶⁹

The final and last instance where a trustee ceases to hold office is where he or she is removed by a resolution passed by a simple majority at a special general meeting of a body corporate.¹¹⁷⁰ The resolution would have to be passed at a special general meeting since the trustee holds office until the next annual general meeting. The intention to vote upon the removal of a particular trustee from office must be specified in the notice convening the meeting. Any person entitled to vote at a general meeting can presumably submit a motion to the trustees to have that person removed as trustee if that trustee, for example, regularly fails to attend trustee meetings, or fails to perform any functions conferred on him or her. A non-owner trustee who is entitled to remuneration for his services in terms of a contract with the body corporate may have a claim for damages if the body corporate breaches that contract by removing him or her from office without sufficient cause.¹¹⁷¹

At a general meeting the body corporate may appoint another trustee in the place of any trustee who has ceased to hold office in terms of prescribed management rule 13, for the unexpired part of the term of office of the trustee so replaced.¹¹⁷²

¹¹⁶⁸ Annexure 8 rule 13(g).

¹¹⁶⁹ Maree (April 2013) *MSC Courier* 2; Maree (July 2015) *MSC Courier* 1-2.

¹¹⁷⁰ Annexure 8 rule 13(e). This option is set out in paragraph 8 of *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 (5) SA 414 (W).

¹¹⁷¹ Van der Merwe *Sectional Titles* 14-129.

¹¹⁷² Annexure 8 rule 14.

8 6 2 Comparative survey

In New South Wales there are seven instances where an executive committee member automatically ceases to be a member of the committee.¹¹⁷³ These instances include where an owner committee member ceases to be an owner for instance by selling his lot;¹¹⁷⁴ where the nominator of a committee member or a corporation whose nominee is a committee member ceases to be the owner of a lot in the scheme;¹¹⁷⁵ where the nominator of a non-owner committee member or the corporation whose nominee is a committee member notifies the owners corporation in writing that the committee member's office is terminated;¹¹⁷⁶ where a committee member sends a written notice of his or her resignation to the owners corporation;¹¹⁷⁷ where all existing executive committee members automatically cease to hold office at the end of the next annual general meeting and a new executive committee is elected;¹¹⁷⁸ where the owners corporation passes a special resolution requiring that an executive committee member vacates his or her position¹¹⁷⁹ and finally where another person is elected as a committee member at a general meeting in the place of an executive committee member who was elected before the first annual general meeting.¹¹⁸⁰

In the second last instance all or any of the existing committee members can be removed from office by a special resolution of the owners corporation.¹¹⁸¹ Due to the fact that this is a restricted matter, neither the executive committee itself nor a managing agent has the power to terminate a member's office. The reasons for termination could be the committee member's bankruptcy, mental ill-health, irregular attendance of committee meetings or performance of tasks or conviction of embezzlement.

¹¹⁷³ NSW Strata Schemes Management Act, sch 3, cls 2(7)(d) and 4(1); Ilkin *NSW Strata* 101.

¹¹⁷⁴ NSW Strata Schemes Management Act, sch 3, cl 4(1)(a).

¹¹⁷⁵ NSW Strata Schemes Management Act, sch 3, cl 4(1)(b).

¹¹⁷⁶ Cl 4(1)(b). No reasons for terminating the member's office need to be supplied. The loss of support could be on account of the committee member's bankruptcy, mental ill-health, irregular attendance of committee meetings or performance of tasks, or conviction of embezzlement.

¹¹⁷⁷ NSW Strata Schemes Management Act, sch 3, cl 4(1)(c).

¹¹⁷⁸ Cl 4(1)(d).

¹¹⁷⁹ NSW Strata Schemes Management Act, sch 3, cl 4(1)(e); NSW Strata Titles Act 68 of 1973 s 72(1)(f) also required a special resolution for the trustee to be removed from office.

¹¹⁸⁰ NSW Strata Schemes Management Act, sch 3, cl 2(7)(d).

¹¹⁸¹ NSW Strata Schemes Management Act, sch 3, cl 4(3).

In Singapore the BMSMA specifies twelve instances where the chairperson, secretary or treasurer or another member of a council must vacate their office. Many of the instances are the same as under the New South Wales Act. A member will vacate office if he or she was a proprietor at the time of appointment or election and he or she ceases to be a proprietor;¹¹⁸² where he or she was nominated by a proprietor, and that proprietor ceases to be a proprietor;¹¹⁸³ or notifies the management corporation in writing that a member's office is terminated;¹¹⁸⁴ where a member fails to attend three consecutive meetings of the council without having first obtained the council's permission to be or to remain absent therefrom;¹¹⁸⁵ where the management corporation receives a written letter of resignation from a council member¹¹⁸⁶ or where a new council is elected by the management corporation at an annual general meeting or upon the election at a general meeting of another person to that office, if earlier.¹¹⁸⁷ Finally, a member will no longer be a member if the management corporation removes him or her from office;¹¹⁸⁸ he or she dies;¹¹⁸⁹ or becomes mentally disordered in terms of the Mental Disorders and Treatment Act¹¹⁹⁰ or is convicted by a court in Singapore or elsewhere of an offence involving fraud or dishonesty.¹¹⁹¹

Furthermore, a management corporation may remove a council member from office without a general meeting where the member is proprietor and is in arrears for more than three months with the payment of all or any part of his contributions or any other moneys levied or recoverable by the management corporation in respect of his or her lot.¹¹⁹² The same applies in a case of a nominee of a company that is in arrears to the same extent in respect of the lot.¹¹⁹³ In any other case a management corporation may remove a member from office by ordinary resolution at a general meeting, on grounds

¹¹⁸² BMSMA s 54(1)(a). See Kwang Sood *Strata Title* 337.

¹¹⁸³ BMSMA s 54(1)(b)(i).

¹¹⁸⁴ BMSMA s 54(1)(b)(ii).

¹¹⁸⁵ BMSMA s 54(1)(c). The granting of permission cannot be withheld unreasonably.

¹¹⁸⁶ BMSMA s 54(1)(d).

¹¹⁸⁷ BMSMA s 54(1)(e).

¹¹⁸⁸ BMSMA s 54(1)(g).

¹¹⁸⁹ BMSMA s 54(1)(h).

¹¹⁹⁰ BMSMA s 54(1)(i).

¹¹⁹¹ BMSMA s 54(1)(j).

¹¹⁹² BMSMA s 54(2)(a)(i).

¹¹⁹³ BMSMA s 54(2)(a)(ii).

that include misconduct, neglect of duty, incapacity or failure satisfactorily to carry out the duties of his office.¹¹⁹⁴

Under the Malaysian Strata Titles Act a member of the council ceases to hold office at the next annual general meeting.¹¹⁹⁵ Except where the council consists of all the proprietors, the management corporation may by resolution at an extraordinary general meeting remove a member of the council before the expiration of his or her term of office and appoint another proprietor in his or her place until the next annual general meeting.¹¹⁹⁶ A member of the council may also resign from office at any time by giving the management corporation a written notice of his resignation as member.¹¹⁹⁷

Under Chinese law the existing council members can be removed from office when the member is no longer a unit owner due to the fact that the unit has been sold or demolished; is absent from three or more consecutive council meetings without good cause; is not capable of performing his or her duties due to a serious physical or mental disease; has been convicted of a criminal offence; resigns from office by written notice or refuses to comply with his or her responsibilities as an owner such as paying contributions.¹¹⁹⁸

8 7 Recovery of books and records from previous trustees

Some sectional title schemes have experienced problems in recovering the books, records and property of the body corporate from a trustee or secretary once he or she is no longer in office. This problem can stem from the fact that the body corporate may refuse to reimburse the trustee for out of pocket expenses incurred while in office. Trustees owe the body corporate a fiduciary duty, and should not leave the body corporate in a position where they do not have access to the books and records.

¹¹⁹⁴ BMSMA s 54(2)(b)(i)-(iii).

¹¹⁹⁵ Strata Titles Act, Second Schedule, para 2(1).

¹¹⁹⁶ Strata Titles Act and Sarawak Ordinance, Second Schedule, para 2(3); Sabah Enactment, Second Schedule, para 2(4).

¹¹⁹⁷ Strata Titles Act and Sarawak Ordinance, Second Schedule, para 2(4); Sabah Enactment, Second Schedule, para 2(5).

¹¹⁹⁸ Regulation of the Owners' General Meetings of 2003 art 30; Chen *Chinese Condominium Law* 151.

In New South Wales there is a provision that contains a comprehensive procedure in situations where the owners corporation has difficulties in recovering books, records, accounts and other property from former officers.¹¹⁹⁹ The executive committee must give notice to a person who has possession or control of the property of the owners corporation requiring the person to deliver the property to the executive committee. The person must then, within seven days after receiving the notice, deliver that property to a member of the executive committee specified in the notice.¹²⁰⁰ Such a defaulter may be prosecuted and can be fined on conviction. The records and property can be recovered amongst others from the chairperson, secretary, treasurer, a committee member, the original owner (developer), an owner, a tenant, a caretaker, the accountant, auditor, surveyor, valuer, bank officer, or solicitor.¹²⁰¹ Caution must be exercised before serving such a notice on the original owner prior to the holding of the first annual general meeting due to the fact that the legislation does not require the original owner to deliver various documents until the holding of the first annual general meeting. It is therefore debatable if these records are “property” of the owners corporation before the first annual general meeting.¹²⁰²

To recover the property the executive committee must adopt a resolution to this effect and prepare a notice of the resolution. If the notice is sent by personal service the first seven days is computed from the day after service has been effected and if the seventh day falls on a Saturday, Sunday or holiday delivery of the property or records may be done on the first day thereafter that is not a Saturday, Sunday or holiday.¹²⁰³ In *Wuff v Hudson*¹²⁰⁴ the Court held that the offence will be committed if the property is not returned by midnight on the seventh day after the notice was served. The court reasoned that the offence was neither a form of strict liability nor an offence based on

¹¹⁹⁹ NSW Strata Schemes Management Act s 105.

¹²⁰⁰ NSW Strata Schemes Management Act s 105(1).

¹²⁰¹ NSW Strata Schemes Management Act s 105(1) confers an identical power on the executive committee in respect of strata managing agents.

¹²⁰² Ilkin *NSW Strata* 117.

¹²⁰³ Interpretation Act 1987 (NSW) s 36; Ilkin *NSW Strata* 108.

¹²⁰⁴ Unreported, Penrith Local Court, 14 November 1991, sc no 21; Ilkin *NSW Strata* 117-118.

intention, but rather based on carelessness or recklessness.¹²⁰⁵ If the property or records have not been delivered within this time frame the owners corporation should pass a resolution to instruct the secretary to request the local court to commence prosecution proceedings in the name of the owners corporation.¹²⁰⁶

In Singapore the BMSMA contains a similar provision. A person who has possession or control of any records, books of account or keys belonging to a management corporation,¹²⁰⁷ or the strata roll kept by a management corporation,¹²⁰⁸ or any other property of a management corporation¹²⁰⁹ must within seven days after service to him of notice of a resolution of the council requiring him to do so deliver those records or books of account or keys or strata roll and other property to the member of the council specified in the notice.¹²¹⁰ Every management corporation retains all its records, books of account and such other documents relating to any of its transactions or operations for a period of not less than five years from the end of the financial year in which the transactions or operations to which those documents relate are completed.¹²¹¹

8 8 Conclusion

Regarding the *duration of office* of trustees most of the selected jurisdictions provide that the trustees, once elected, hold office until the next annual general meeting. I suggest that, for the sake of continuity in management, a longer term may be considered, especially in large or mixed-use schemes.¹²¹² Naturally a trustee can still be removed from office by a resolution of the general meeting before the end of his or her term of office on account of non-performance of his or her duties to the standard required by the body corporate.

¹²⁰⁵ Under section 73(6) of the 1973 Act (being the equivalent of section 105(1) of the New South Wales Strata Schemes Management Act 138 of 1996.)

¹²⁰⁶ This provision does not take away or affect any claim or lien or other rights that a person has against the property: NSW Schemes Management Act s 105(3).

¹²⁰⁷ BMSMA s 48(1)(a).

¹²⁰⁸ BMSMA s 48(1)(b).

¹²⁰⁹ BMSMA s 48(1)(c).

¹²¹⁰ BMSMA s 48(1).

¹²¹¹ BMSMA s 48(2). Any management corporation which, without reasonable excuse, fails to comply with this shall be guilty of an offence in terms of section 48(3).

¹²¹² Chen *Chinese Condominium Law* 151 suggests a three year term.

In South Africa it is assumed that a *vacancy* in the number of trustees must be filled by the body corporate. This is confirmed in *Williams v Nathan and others*¹²¹³ which relies on prescribed management rule 6, dealing with the election of the trustees, that the election of trustees is the prerogative of the body corporate. This debars existing trustees to appoint additional trustees to fill a vacancy. I do not agree with this view. Prescribed management rule 8 stipulates:

“The trustees may fill any vacancy in their number. Any trustees so appointed shall hold office until the next annual general meeting when he shall retire and be eligible for re-election as though he had been elected at the previous annual general meeting.” (My emphasis added.)

In my opinion prescribed management rule 8 clearly and unambiguously states that the trustees may fill the vacancy in their number. The fact that the rule refers to such a trustee being “appointed” and not “elected,” and that he will be eligible to be “re-elected as if he had been elected” implies that the trustee is not nominated and elected according to prescribed management rule 6 in the usual manner by the body corporate. In my view the trustees can appoint the trustee to fill the vacancy.

This is also the position in the foreign jurisdictions that I examined. In New South Wales the executive committee is competent to pass a resolution to appoint a new committee member, provided that the general meeting has not removed this power from the committee.¹²¹⁴ Furthermore, the managing agent, who has been conferred the required power in the agency agreement or resolution of appointment, can appoint the new committee member by recording the replacement in the minute book of the owners corporation. This is also the case in Singapore and Malaysia. Therefore, I submit that these additional trustees be appointed by the existing trustees, and not by the body corporate in general meeting.

¹²¹³ [2006] JOL 18414 (W) para [34].

¹²¹⁴ NSW Strata Schemes Management Act, sch 3, cl 4(2).

There is also confusion as to whether an *alternate trustee* must be appointed by the trustees collectively or by the trustee who would not be able to attend meetings for a certain period.¹²¹⁵ Prescribed management rule 9(1) states:

“*The trustees* may appoint another person, whether or not he be the owner of a unit, to act as an alternate trustee during the absence or inability to act as a trustee.” (My emphasis added.)

From this it appears that it is the trustees collectively that must appoint the alternate. This is not always fair as the trustees are often divided into two camps representing different groups of owners. The trustees can then collectively choose an alternate who is sympathetic to the opposing camp’s views, without the consent of the absent trustee. Another argument is that an alternate trustee, who is not an owner, must claim his or her remuneration, if any, from the trustee who he or she replaced and not from the body corporate, unless the body corporate has been instructed in writing by such trustee to pay any portion of his remuneration to the alternate trustee.¹²¹⁶ The absent trustee could thus be hit with a bill for services rendered by an alternate trustee in whose appointment he or she had no say. It is suggested that the individual trustee should be allowed to appoint his or her own alternate especially if he or she was elected to serve a certain section of the sectional title community. It should not be left to the trustees collectively to appoint the trustee alone, as it could lead to inequitable results.¹²¹⁷

Further incidental support for this view is found in prescribed management rule 15(1) which stipulates:

“It shall not be necessary to give notice of a meeting of trustees to any trustee for the time being absent from the Republic, but notice of any such meeting shall be given to his alternate, if *he has appointed one*, where such an alternate is in the Republic.” (My emphasis added.)

¹²¹⁵ T Maree “Appointment of alternate trustees – an alternate view” (April 2010) 36 *MCS Courier* 13.

¹²¹⁶ Annexure 8 Rule 10(2).

¹²¹⁷ Maree (April 2010) *MCS Courier* 14.

I submit that the individual trustee who is absent or unable to act as such must appoint the alternate trustee. In this way the alternate trustee will represent the interests of the trustee that he or she is replacing. I further submit that individual trustees should appoint alternates at the first trustee meeting after the annual general meeting to act in their absence or inability to act. The proposed alternates could then be voted upon and approved by the trustees collectively, when the occasion arises.¹²¹⁸

It has been argued that bodies corporate should adopt a *rotation* system of trustees in terms of which one-third of the trustees resign or retire at every subsequent annual general meeting. In this way a majority of experienced trustees will remain in office, while providing for an infusion of new members. Another rule could set out a maximum term which any trustee may serve before becoming ineligible for re-election, which prevents trustees from being re-elected indefinitely. In view of the practical difficulty in finding persons willing to act as trustees, a limit on the number of terms a willing trustee may be re-elected might jeopardize the effective management of the scheme. Providing adequate provisions for the removal of incompetent trustees can mitigate this concern.

With regard to the *disqualification of trustees* to continue in office, I have shown that the foreign jurisdictions discussed provide, similar to the South African legislation, a few instances where trustees are automatically disqualified from continuing in office, as well as a provision that the general meeting may pass a resolution to remove a trustee from office.

From my comparative survey I have shown that one of the instances where an existing trustee automatically ceases to hold office is when he or she is no longer owner of a unit. This ground for removal only seems appropriate in jurisdictions that require that all trustees must be owners or spouses of owners. By contrast, the South African management rules only require that the majority of trustees must be owners or spouses of owners.¹²¹⁹ To introduce a provision that existing trustees will cease to trustees if

¹²¹⁸ Maree (April 2010) *MCS Courier* 14.

¹²¹⁹ Annexure 8 rule 5(a).

they are no longer owners of their units would involve a deletion of the above requirement and, with it, the opportunity to elect professional outsiders to serve on the board of trustees. The inclusion of this rule into the South African model rules does not merit any consideration.

Most of the other instances of automatic disqualification to continue in the office of trustee, mentioned in the South African management rules, correspond more or less with the instances mentioned in the foreign jurisdictions. One difference is that the Chinese provision sets out that council member automatically ceases to hold office where he or she has been convicted of any crime, while the South African approach is that trustees only automatically cease to hold office when they have been convicted of an offence involving dishonesty.¹²²⁰ The Chinese approach to the circumstances under which a trustee is removed from office is therefore a more stringent approach than the South African position on the removal of trustees. The reason why Chinese law needs to be strict regarding the council member's dismissal is to maintain a balance between the continuity of the member's office and the timely removal of incompetent council members.¹²²¹ The reason why the South African legislation is not as strict regarding trustees removal is due to the fact that sectional title unit owners struggle to get members willing to serve as trustees. I prefer the South African approach. If, for example, a Chinese council member is convicted of drunken driving he or she will automatically cease to hold the office as trustee despite the fact that the criminal conviction of drunken driving would not affect a trustee's ability to manage the scheme. It should therefore not lead to the automatic disqualification for holding the office as trustee. An offence involving fraud or dishonesty does however affect the trustee's suitability to continue to hold a position of trust in the scheme and to manage the scheme in the best interests and for the benefit of the body corporate. A trustee's competence to handle the funds of the scheme honestly and in good faith could be called into question when he or she has been convicted of an offence involving dishonesty his or her. A commentator notes that trustees are automatically disqualified

¹²²⁰ Annexure 8 rule 13(d).

¹²²¹ Chen *Chinese Condominium Law* 152.

from holding office only when they are convicted of an offence involving dishonesty while serving as trustee, and not if they have been convicted of such an offence before they became trustees.¹²²²

An instance of automatic disqualification to continue in the office of trustee worth considering for adoption as a management rule in South Africa is the provision in the respective Singapore and Chinese legislation that a trustee must automatically cease to hold office on failure to attend three consecutive meetings of the board of trustees without the board's permission, which may not be withheld unreasonably. Furthermore, I suggest the adoption of the Singaporean provision where a body corporate may so remove a member from office by ordinary resolution at a general meeting, including on the grounds of misconduct, neglect of duty or incapacity or failure to carry out satisfactorily the duties of his office.¹²²³ I suggest that a provision that requires a trustee to vacate office for reason of his or her dereliction of duty should be included in the management rules of South Africa. Such cavalier and blatant disregard for the office of trustee and dereliction of the interest of the community should not entitle the trustee concerned to continue in office.

In terms of the amended prescribed management rule 13 a trustee must cease to hold office as such if he or she is in arrears for more than 60 days with any levies and contributions payable by him in respect of his unit or exclusive use area (if any) and he fails to bring such arrears up to date within seven days of being notified in writing to do so.¹²²⁴ This is a splendid addition to the provisions relating to the automatic disqualification of existing trustees to continue in office as it ensures that responsible trustees who lead by example are maintained in office, while financially irresponsible trustees are removed. A commentator has suggested that there should be a distinction between trustees who have short term financial difficulties and chronic defaulters¹²²⁵ on

¹²²² G Paddock "Q & A with the Professor: Disqualification of a trustee" (March 2009) 4-3 *Paddocks Press Newsletter* 8.

¹²²³ BMSMA s 54(2)(b)(i)-(iii).

¹²²⁴ Annexure 8 rule 13(g).

¹²²⁵ G Paddock "Q & A with the Professor: Trustee in arrears with levies" (August 2012) 7-8 *Paddocks Press Newsletter* 4.

the ground that it is unlikely that chronic defaulters would be prepared to raise levies when necessary as it would place them in a worse financial position. For this reason the longer period of grace of three months in the Singapore legislation is perhaps preferable.

Apart from the number of instances where existing trustees are disqualified to continue in office, the South African provisions provide that a trustee may be removed from office before the expiry of the trustee's term of office by a resolution passed by a simple majority at a special general meeting of the body corporate on condition that the intention to vote upon the removal from office has been specified in the notification of the meeting.¹²²⁶ Since trustees hold office until the next annual meeting, it stands to reason that this resolution must be adopted at a special general meeting. Without being specified as a special resolution one must also accept that the resolution required is an ordinary majority resolution. Whereas the Singapore legislation also allows the general meeting to remove a member of the executive council by a majority resolution, the New South Wales legislation requires a special resolution to remove a member of an executive committee.¹²²⁷ The Singaporean provisions give a non-exhaustive list of grounds for such removal namely misconduct, neglect of duty or incapacity or failure to carry out satisfactorily the duties of his office.¹²²⁸

It can be argued that in view of the fact that it is a serious step to remove an office bearer from his or her position before the expiration of his or her term of office, the South African rules should require a special resolution to be passed in order for a trustee to be removed from office. However, I am of the view that an ordinary resolution is sufficient to discontinue the office of a trustee. Trustees are elected by the body corporate by ordinary resolution, and it follows that they should be disqualified by ordinary resolution. In the interest of the sectional title community as a whole, and the difficulty of proving specific causes, I do not think that the South African legislation

¹²²⁶ Annexure 8 rule 13(e). This option is set out in paragraph 8 of *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 (5) SA 414 (W).

¹²²⁷ BMSMA s 54(2)(b) and NSW Strata Management Act, sch 3, cl 4(1)(e).

¹²²⁸ BMSMA s 54(2)(b)(i)-(iii).

should in any way limit the grounds on which the office of trustees could be terminated by a resolution of the general meeting. Such a resolution would still stabilize the member's term in office.

After comparing the disqualification provisions in foreign jurisdictions I conclude that prescribed management rule 13 should be amended to include new circumstances under which a trustee ceases to hold office, and should now read (my italics):

A trustee shall cease to hold office as such

- (a) *at the end of the next annual general meeting where a new board of trustees is elected by the body corporate, or upon the election at a special general meeting of another person to that office, if earlier;*
- (b) if by notice in writing to the body corporate he *or she* resigns his office;
- (c) if he *or she* is or becomes *not capable of performing his or her duties due to a serious physical disability* or becomes of unsound mind *within the meaning of the Mental Health Care Act no 17 of 2002;*
- (d) *if he or she dies;*
- (e) if he *or she* surrenders his estate as insolvent, or his *or her* estate is sequestrated;
- (f) if he *or she* is convicted of an offence which involves *fraud or dishonesty;*
- (g) if he *or she* is or becomes disqualified in terms of *section 69 of the Companies Act 71 of 2008* from being appointed or acting as a director of a company;
- (h) *if he or she is in arrears for more than 60 days with any levies and contributions payable by him in respect of his unit or exclusive use area (if any) and he fails to bring such arrears up to date within seven days of being notified in writing to do so;*
- (i) if by *ordinary majority resolution* of a general meeting of the body corporate, he *or she* is removed from his office, provided that the intention to vote upon the removal from office has been specified in the notice convening the meeting;

(j) if he or she fails to attend three consecutive meetings of the council without having first obtained the council's permission to be or to remain absent therefrom. The granting of permission cannot be unreasonably withheld.

There is no equivalent provision in South Africa which would cater for a situation where records, books of account, keys, register or other property needs to be recovered from a trustee once he or she is no longer in office. The provision in New South Wales for the recovery of books, records and other property of the scheme from trustees should be adopted in South Africa. This provision should provide a comprehensive procedure where the trustees give notice to the person who has possession or control of property of the body corporate requiring him or her to deliver the property to the trustees. The provision could require that the trustee must, within seven days after receiving the notice, deliver that property to another member of the trustees specified in the notice.

Chapter 9: Reasons for the appointment of a managing agent

9 1 Introduction

In European countries such as France, Germany and Italy a professional manager must by law be appointed to perform the executive functions of the body corporate.¹²²⁹ In South Africa, New South Wales, Singapore and China the executive powers are placed in the hands of the trustees, the members of the executive committee, and the executive council respectively. However, in these countries a managing agent can be appointed to assist with the day-to-day management of the scheme.¹²³⁰

Even though the appointment of a managing agent is not mandatory in South Africa,¹²³¹ the trustees are empowered to appoint a managing agent to whom some or all of the duties of the body corporate are delegated, not by virtue of an office as such, but in terms of a written contract.¹²³² The scope of the managing agent's functions and powers will depend on the terms of his or her contract of appointment.¹²³³ The managing agent is not usually entrusted with decision or policy-making functions, but is mostly appointed to perform the administrative, secretarial and financial tasks usually performed by the trustees. Although the appointment of a managing agent is optional, prescribed management rule 46(1) may not be substituted, amended, added to or withdrawn by a developer when submitting an application for the opening of a sectional title register.¹²³⁴

¹²²⁹ Chen & Van der Merwe (2009) 1 *TSAR* 22.

¹²³⁰ STA ss 36(4) and 37 [STSMA ss 2(5) and 3]; NSW Strata Schemes Management Act s 27; BMSMA ss 66(1), 79(3) and 80(3); Property Code of 2007 s 76(4); Chen & Van der Merwe (2009) *TSAR* 22.

¹²³¹ Annexure 8 rule 42 and rule 46(1); Chen & Van der Merwe (2009) *TSAR* 22.

¹²³² Annexure 8 rule 46(1) provides that a managing agent must be appointed by a written contract. See below whether this contract is a contract of employment or a contract with an independent contractor for services.

¹²³³ CG van der Merwe "The role of a managing agent in the administration of a sectional title scheme" (1994) 5 *Stellenbosch Law Review* 314.

¹²³⁴ Regulation 30(1) made under the STA.

Since at least half of the trustees of a sectional title scheme must be owners or spouses of owners¹²³⁵ it is common practice in South African sectional title schemes to appoint a managing agent as many trustees have limited time at their disposal and lack the required experience, knowledge, qualifications and skills to manage the scheme themselves. The nature and size of the scheme will determine whether the trustees require assistance in the performance of their powers and duties. In my opinion it is better to appoint a managing agent to manage the larger sectional title schemes rather than to leave this task to the trustees. Through comparative analysis, I will propose suggestions for improvements in the sectional title legislation regulating all the aspects relating to the appointment of managing agents. Most importantly I will propose suggestions on how the South African sectional title legislation can be improved by the appointment of a professional manager as the executive organ of the body corporate in the place of the trustees.

I will start the discussion by explaining the need for the appointment of a managing agent to assist in the management of a sectional title scheme. The reasons for the appointment of the managing agent; the advantages and disadvantages of appointing a managing agent and the type of scheme that could benefit from the appointment a managing agent will be set out. Difficulties with regard to collecting arrear levies and organizing annual general meetings will be discussed in detail to show how complex and cumbersome the task of administering and managing a sectional title scheme can be, and how the appointment of a managing agent would make the functions of trustees less burdensome. As I have previously done, a comparative survey of the position in foreign jurisdictions will be presented.

9 2 Reasons for the appointment of a managing agent

9 2 1 Introduction

The trustees, who are responsible for the management of a sectional title scheme, are faced with a choice as to how they plan to manage the scheme. The trustees can opt to

¹²³⁵ Annexure 8 rule 5(a).

manage the scheme themselves. This option saves the cost of appointing a managing agent, and ensures “hands-on” management, but has many other drawbacks.¹²³⁶ The disadvantages of self-management by the trustees go directly toward promoting the appointment of a managing agent.¹²³⁷

The trustees may opt to employ a managing agent on a full-time basis. This is the best option for larger mixed-use schemes, owner-investment schemes and holiday resort schemes that require specialized financial training and a multitude of complex administrative tasks to be conducted successfully. Advantages of this type of management are the instant availability of the books and records of the scheme and the managing agent’s services. The cost of this service should be affordable as the monthly fee charged by the managing agent is divided by the number of units in the scheme. Furthermore, expensive legal costs for arbitration for disputes can be avoided if the owners are willing to accept the decisions of the managing agent.

Instead of a single professional managing agent, the trustees can opt to appoint a professional management company that will bring a high degree of skill in the required areas of property law, labour law, electronic accountancy, maintenance matters and conflict management. If the trustees were to ask for independent advice from specialists in these areas it would be far more costly.¹²³⁸ This is a good option even if the scheme is small. The fee charged by a managing company is often less than the fee to employ a full-time managing agent and a support department made up of secretaries, accountants and computer operators.

9 2 2 Advantages and disadvantages of appointing a managing agent

Several arguments may be advanced in favour of the appointment of a professional managing agent. The first argument relates to the continuity of the management structure. Trustees, who are usually owners of units, are nominated and elected on a

¹²³⁶ Woudberg *Basic Sectional Title Book One* (1999) 45.

¹²³⁷ 47.

¹²³⁸ 45.

year-to-year basis at the annual general meeting. They are free to sell their unit at any time and leave the remaining trustees and owners to continue the management of the scheme. Management companies provide continuity, regardless of changes in their staff or changes within the board of trustees.

Trustees, who are drawn mainly from the sectional owners,¹²³⁹ are more often than not, ill-equipped to perform complex tasks of management and administration of the scheme, and do not have the required knowledge and expertise regarding sectional titles legislation; precedents from case law or legal opinions where an ambiguity exists in the interpretation of the law.¹²⁴⁰ There is limited time at their disposal to manage the scheme, and even less time to study the intricacies of the applicable legislation and the manner of enforcement of the rules and regulations¹²⁴¹ as most trustees also have their own careers to consider.¹²⁴² Unskilled trustees postpone difficult and complicated decisions with which they cannot cope.¹²⁴³ Furthermore the trustees might use manual accounting systems that could make record keeping a time-consuming and cumbersome task. Managing agents, unlike trustees, usually have the required training, skill, knowledge, experience, and the necessary facilities and staff at their disposal to manage the scheme. In this way professional management is preferable as managing agents govern the scheme more effectively, efficiently and economically.

Trustees are not automatically entitled to remuneration¹²⁴⁴ for their time spent doing tasks related to the management of the scheme. Consequentially they would usually tend to do the bare minimum. The multitude of tasks that a managing agent must undertake includes dealing with illegal parking on the common property; unauthorized changes to the building or the common property; tenants who do not adhere to the rules of the scheme; budgeting, collecting and spending of body corporate money and the

¹²³⁹ Annexure 8 rule 5(a) requires that the majority of the trustees have to be sectional owners or spouses of owners.

¹²⁴⁰ Van der Merwe (1994) *Stellenbosch Law Review* 315; Van der Merwe *Sectional Titles* 15-3.

¹²⁴¹ Van der Merwe *Sectional Titles* 15-3.

¹²⁴² J Van der Walt "Why Knowledge Really is Power" (May 2008) 3-5 *Paddocks Press Newsletter* 1.

¹²⁴³ Constat & Bleijs *Demystifying Sectional Title* 42.

¹²⁴⁴ Annexure 8 rule 10(1); van der Merwe (1994) *Stellenbosch Law Review* 315.

enforcement and implementation of rules.¹²⁴⁵ Trustees are usually only willing to collect levies and make disbursements, and therefore usually put off dealing with potentially complicated problems until these problems develop into a crisis.¹²⁴⁶ It often occurs in practice that trustees fail to establish of an adequate reserve fund for the future maintenance, and are then forced to raise a special levy when unexpected expenses arise.

Trustees could be tempted to accept incentives from contractors for maintenance jobs that could lead to owners paying more than is necessary. It does occur that trustees sometimes act in their own interest to the detriment of the other owners, or the body corporate in general, despite their fiduciary duty to act in the best interests of all the members of the body corporate. Even though it is compulsory to appoint auditors to sign the financial statements,¹²⁴⁷ it is not the mandate of the auditor to detect bribery or report incidences of power abuse.

Trustees are indemnified against liability for negligence,¹²⁴⁸ and are therefore not entirely accountable to the body corporate. They are only held liable for damage caused on account of their *mala fides* or gross negligence. In all other cases the trustees must be indemnified out of funds of the body corporate. The body corporate will only have a claim against the trustees for damages in very limited circumstances. This indemnity does not extend to the managing agent.¹²⁴⁹ I suggest that a professional managing agent should be appointed as the sole executive arm of the body corporate. In this way the legislation would set out that the managing agent would owe a fiduciary duty to the body corporate which would render him or her liable for a breach of trust or a failure to exercise a reasonable duty of care and skill.

¹²⁴⁵ Van der Merwe *Sectional Titles* 15-4; Van der Walt (May 2008) *Paddocks Press Newsletter* 1.

¹²⁴⁶ Van der Merwe (1994) *Stellenbosch Law Review* 315.

¹²⁴⁷ Annexure 8 rule 40.

¹²⁴⁸ Annexure 8 rule 12(1)(a); Van der Merwe *Sectional Titles* 15-3.

¹²⁴⁹ Annexure 8 rule 12(2).

One of the most important tasks of the body corporate is the efficient collection of levies.¹²⁵⁰ The managing agent removes the onerous and often embarrassing duty of trustees to ask defaulting neighbours to pay their outstanding levies or to stop breaching the scheme rules. If the levies are not timeously collected the body corporate will not be able to pay its expenses such as water accounts, insurance premiums and salaries to the various body corporate employees. Levy payments are usually made monthly, and every owner then receives a levy statement indicating the payments made and the amounts still due to the body corporate. All the administration involved in the calculation and collection of levies is time-consuming and labour intensive. This alone is a compelling enough reason to appoint a managing agent.¹²⁵¹ The difficulties experienced in the collection of levies results in regular levy payers having to subsidize non-paying sectional owners. In *Jaftha v Schoeman and Others, van Rooyen v Stolz and Others*¹²⁵² the Constitutional Court upheld the constitutional principle that each citizen has the right of access to a home (also in the form of a sectional title unit). It required that due process be followed before a debtor's home can be sold in execution to satisfy arrear levies. The issue with the case was that many magistrates have since used the case as a blunt weapon to frustrate trustees in their efforts to collect arrear levies.¹²⁵³ For these reasons it is suggested that the trustees should entrust their levy collections to an attorney or managing agent who has experience in debt collection.¹²⁵⁴

Another time-consuming function is the preparation for the annual general meeting.¹²⁵⁵ All the owners must receive an agenda for the meeting; a copy of the minutes for the previous meeting; the scheme's audited financial statements; insurance schedules reflecting the replacement values of each section; a trustee's report and various other documents. These documents need to be sent either fourteen (where only ordinary resolutions are on the agenda) or 30 days (if a unanimous or special resolution is on the agenda) before the annual general meeting. It makes sense that the trustees should

¹²⁵⁰ Van der Walt (October 2007) *Paddocks Press Newsletter* 4.

¹²⁵¹ J Van der Walt "Does a body corporate need a managing agent?" (October 2007) 2-7 *Paddocks Press Newsletter* 4.

¹²⁵² 2005 (2) SA 140 (CC).

¹²⁵³ Maree (September 2009) *MCS Courier* 5.

¹²⁵⁴ 6.

¹²⁵⁵ Van der Walt (October 2007) *Paddocks Press Newsletter* 4.

delegate this cumbersome, primarily secretarial work, to a managing agent or a management agency firm.

The appointment of a managing agent also renders management more business-like as it removes the possibility of infighting based on personal considerations and animosity amongst the owners in the scheme, which is an inherent risk of internal management. A good managing agent employing financially sound and legally correct management procedures would timeously avoid problems, and in this way prevent any crisis.¹²⁵⁶ Moreover, institutional lenders will be more inclined to lend money and do business with bodies corporate that have employed a professional managing agent due to the fact that such schemes are more insulated against financial risks.¹²⁵⁷

The arguments against the appointment of a managing agent are two-fold. In the first place the appointment of professional managers can be expensive compared to self-management by trustees without any remuneration. The rate that managing agents charge bodies corporate differs depending on the managing agent and the nature and size of the scheme. However, in many ways having professional management can save the body corporate money. Inadequate management can lead to mistakes being made that are expensive to remedy. Arbitration or litigation fees in cases where disputes based on animosity and self-centeredness amongst the trustees or between trustees and other owners, can be solved and settled by a suitably qualified managing agent.

The second argument against appointing managing agents is that there is a loss of personal control of the body corporate. However, due to the fact that the trustees remain the executive organ of the management body, they still have the ultimate responsibility for the wellbeing and success of the scheme. If the trustees are, by legislation, replaced by a professional manager as the executive organ, it is recommended that the owners should retain some kind of personal involvement in the scheme. I recommend that the general meeting should still be empowered to appoint an

¹²⁵⁶ Van der Merwe (1994) *Stellenbosch Law Review* 315.

¹²⁵⁷ Chen & van der Merwe (2009) *TSAR* 36.

advisory board without any executive authority from amongst the owners to assist the managing agent in the management of the scheme.¹²⁵⁸ From this discussion it clear that the advantages of appointing a professional managing agent by far outweigh the disadvantages.

9 2 3 The type of scheme that could benefit by the appointment of a managing agent

The nature and size of the scheme usually determines whether the trustees would require assistance in the performance of their duties.¹²⁵⁹ The trustees could efficiently manage the body corporate of a smaller scheme, consisting of less than fifteen units, provided that they have the necessary accounting and legal knowledge and expertise. The trustees could merely employ an accountant or auditor to handle the more complicated financial matters. The prescribed management rules set out a duty on the body corporate to appoint an auditor at each annual general meeting for the following year.¹²⁶⁰ However, the auditors could only audit the annual financial statements each year if the owners furnish them with proper financial records that comply with generally accepted accounting principles. Added to this the body corporate would be unable to make decisions relating to maintenance and management if they do not have timeous financial information. If the accounting records are inadequate the auditors will have to reconstruct them at great expense to the body corporate. Consequently, it would be more economical to employ a managing agent in such circumstances.¹²⁶¹

Furthermore, difficulties can arise in smaller schemes trying to cope without a managing agent where the finances are in order, but the bigger picture of management is ignored. This can occur in the event that none of the trustees have sufficient knowledge of the legislation or rules that relate to the daily management of the building.¹²⁶² Trustees of larger mixed-use schemes, consisting of both residential and commercial units;

¹²⁵⁸ Van der Merwe *Sectional Titles* 15-25.

¹²⁵⁹ Van der Walt (October 2007) *Paddocks Press Newsletter* 4; Van der Merwe (1994) *Stellenbosch Law Review* 314.

¹²⁶⁰ Annexure 8 rule 40; van der Merwe *Sectional Titles* 15-3.

¹²⁶¹ T Woudberg *Basic Sectional Title Book Two* 2 ed (1999) 117.

¹²⁶² Constat & Bleijs *Demystifying Sectional Title* 42.

schemes which are predominantly occupied by tenants and holiday resort schemes that require specialized financial training¹²⁶³ will usually require a managing agent to handle the manifold tasks associated with managing such schemes.¹²⁶⁴ The failure to appoint an efficient, capable and qualified managing agent could lead to poor service delivery of basic and essential services and amenities ultimately causing a decline in the value of the units.¹²⁶⁵ It is for this reason that the Sectional Titles Regulation Board proposed that schemes consisting of more than fifty units should be obliged to appoint a managing agent, unless they employ a full-time manager.¹²⁶⁶

South African sectional title legislation is based on the principle that the average owner knows and understands the relevant legislation and knows how to manage the scheme in the best interests of all the owners. It is for this reason that the owners have been tasked with the responsibility of managing the scheme into which they purchase a unit. The owners manage the scheme through the general meeting and the trustees that they elect. The legislature was far too optimistic in this regard. Problems could start as early as when the developer overlooks construction faults and does not set up a workable management structure from the beginning. The problems mount when the inexperienced owners are confronted with complicated property and management issues. Maree lists four different management scenarios that schemes can fall under.¹²⁶⁷ Grade A schemes have excellent management that complies with all the requirements of the Act, and which protects and promotes the owners' investments. Grade B schemes have non-fatal defects of which the trustees are aware, for which they gather advice, and put solutions in place. Grade C schemes have non-fatal defects of which the trustees are not aware, for which they gather no advice, and put no solutions in place. Grade X schemes have fatal management problems. Grade A and B schemes offer a safe option of investment for owners and banks offering mortgage bonds to potential owners. Grade C schemes are not considered good investment

¹²⁶³ Annexure 8 rule 42 provides that managing agents may be appointed to operate current and savings accounts of the body corporate; Chen & Van der Merwe (2009) *TSAR* 22-23.

¹²⁶⁴ Van der Walt (October 2007) 2-7 *Paddocks Press Newsletter* 4.

¹²⁶⁵ Van der Merwe (1994) *Stellenbosch Law Review* 314.

¹²⁶⁶ Proposals to the Sectional Titles Regulation Board (March 2003) 3.2.2; Chen & Van der Merwe (2009) *TSAR* 23; Van der Merwe *Sectional Titles* 15-3.

¹²⁶⁷ T Maree "Goeie Bestuur deur Middel van Dwang" (August 2005) 17 *MCS Courier* 7.

potential as they would normally degenerate to Grade X status if no serious preventative steps are taken. Grade B schemes would be the best candidates for the appointment of a managing agent before the scheme degenerated into a Grade C scheme that can only be rehabilitated by the appointment of an administrator.¹²⁶⁸ The appointment of an efficient managing agent can do much to prevent the deterioration of management, but a managing agent is in no better position than the trustees when dealing with a body corporate that already has serious problems. This discussion illustrates that schemes are doomed to failure if they are not adequately managed. Professional management should no longer be optional, but should be made compulsory, especially in larger schemes or in schemes where the owners require initial assistance and training in the governance and management of the scheme.

9 3 Comparative survey

Due to the complexity of the management provisions of the NSW Strata Schemes Management Act and the serious repercussions of non-compliance with these provisions, most schemes opt to appoint a managing agent to assist the executive committee. A managing agent is a licensed person, whether an individual, a partnership or a company appointed by the owners corporation voluntarily at a general meeting in terms of section 27 of the NSW Strata Schemes Management Act to deal with as many of the management and administrative matters of the strata scheme as are delegated to the person or body concerned by the owners corporation subject to the limitations and conditions imposed.¹²⁶⁹ This managing agent is comparable to a managing agent appointed in terms of prescribed management rule 46 and, as in South Africa, it is not mandatory for the owners corporation to appoint a managing agent. It is assumed that the owners corporation and its executive committee will have the required knowledge, experience and infrastructure to administer, control, manage the common property for the benefit of all the owners.¹²⁷⁰ This is unfortunately not always the case. Since owners corporations are subject to increasingly more complex and onerous duties imposed by

¹²⁶⁸ STA s 46 [STSMA s 16].

¹²⁶⁹ Ilkin *NSW Strata* 146.

¹²⁷⁰ 148.

the strata titles legislation in New South Wales, it has become preferable to engage the services of a managing agent to perform most of these duties.¹²⁷¹ The appointment of a managing agent helps resolve disputes that displaces and avoids the personal animosity that often occurs between participants in the scheme.¹²⁷²

There are certain factors that an owners corporation needs to consider when deciding whether or not to appoint a managing agent.¹²⁷³ The first factor is whether the executive committee has the time to be educated in the intricacies of the applicable legislation and its methods of implementation. Then it needs to be considered whether the executive committee has the time, knowledge and experience to handle the daily management of the scheme. The history of animosity between the participants in the scheme and the likelihood of further disputes should be factored in. Another factor is whether the owners mostly reside in the scheme, or if most of the sections are rented out to tenants as managing a scheme of non-resident owners can be more difficult. It must be considered whether the managing agent is needed to perform all or only some of the functions, powers and duties of the owners corporation, its executive committee, and the secretary, treasurer and chairperson. The final factor is whether the appointment of a managing agent will reduce the risk of owners being held personally liable for negligent acts or omissions of the owners corporation.

In Singapore there are three procedures whereby a management agent can be appointed. One of these appointments can be equated to the appointment of a managing agent in terms of the South African management rules.¹²⁷⁴ As is the case in South Africa and New South Wales, the appointment of a managing agent by the management corporation is not compulsory. However, problems can result from the proprietor's inability to organize the scheme's management in a business-like manner due to the increasing complexities and onerous duties imposed by the BMSMA. Where the participants do not have the time, knowledge and experience to manage and

¹²⁷¹ 146.

¹²⁷² 146.

¹²⁷³ 147.

¹²⁷⁴ Annexure 8 rule 46(1)(a).

administer the scheme then the management corporation may voluntarily appoint a managing agent to perform all or only some of the functions of the management corporation, its office bearers and that of the executive council by ordinary resolution at the general meeting.¹²⁷⁵ The managing agent could serve as mediator and resolve any disputes based on animosity between scheme participants. The management corporation may voluntarily appoint a managing agent by ordinary resolution at the general meeting.¹²⁷⁶ The general meeting is the proper organ to appoint a managing agent due to the fact that the appointment affects all subsidiary owners and ensures that every proprietor would be aware of the decision and thus avoids possible abuses. A managing agent can also be voluntarily appointed by its executive council¹²⁷⁷ without a general meeting if duly authorized to do so by the proprietors at the last preceding general meeting of the corporation.¹²⁷⁸

As I discussed in chapter two, the executive organ of the German community of owners (*Gemeinschaft der Wohnungseigentümer*) is not an elected group of owners, but an appointed single professional manager (*Verwalter*),¹²⁷⁹ who may be assisted by an advisory council (*Verwaltungsbeirat*),¹²⁸⁰ consisting of unit owners. The *Verwalter* is not merely an agent or appointee of the community of owners as is the case of the managing agent of South Africa, New South Wales, Singapore and China but an executive organ appointed by the general meeting by majority vote in terms of section 26 of the *WEG*. He is then appointed contractually (*Verwaltersvertrag*) and his functions and duties are determined largely by the provisions of the *WEG*,¹²⁸¹ and not only by the terms of his or her contract of appointment and the resolutions of the *Gemeinschaft der Wohnungseigentümer* (body corporate), as is the case with the South African managing agent. The professional manager remains accountable to the general meeting who may

¹²⁷⁵ BMSMA s ss 66(1)(a) and 79(3); Keang Sood *Strata Title* 545.

¹²⁷⁶ BMSMA s ss 66(1)(a) and 79(3).

¹²⁷⁷ BMSMA s 80(3).

¹²⁷⁸ BMSMA s 66(1)(b).

¹²⁷⁹ Reinlein *A comparison of the legislative and executive management organs* (2012) 31.

¹²⁸⁰ *WEG* § 29; Pienaar *Sectional Titles* (2010) 173.

¹²⁸¹ *WEG* § 27; Pienaar *Sectional Titles* 174; Reinlein *A comparison of the legislative and executive management organs* 31.

dismiss the manager if he or it does not fulfill his or her executive functions in a professional manner.

While nothing prevents a skilled owner from being appointed as manager, a non-owner with knowledge and experience of sectional title administration or indeed a professional managing firm is almost invariably appointed in practice as manager of a scheme. This lack of personal interest is counteracted by the fact that the professional manager may be assisted by an advisory council consisting of unit owners. This ensures that the body corporate appoints a person with the necessary knowledge and expertise on a continuous basis. Although the *Verwalter* is basically in the same executive and management position as the trustees in the South African scheme, the difference is that he normally receives substantial remuneration for the proper performance of his executive functions and duties, and can be dismissed if he or she does not act in a professional manner. The *Verwalter* normally has the same knowledge and experience as the South African managing agent.

9 4 Conclusion

There is still regrettably a large degree of skepticism surrounding the appointment of a professional managing agent. This is perhaps due to the fact that some bodies corporate might have had negative experiences with a managing agent, and that others might have heard horror stories about managing agents running away with body corporate funds.¹²⁸² As in any industry there are always the select few that give managing agents a bad reputation.

However, it is for all the reasons enumerated in this chapter that I recommend that a professional manager should be appointed for larger sectional title schemes to assist the trustees in the executive governance of the scheme. The appointment of a professional manager reduces the risks and responsibilities faced by the trustees in managing the scheme.¹²⁸³ A good managing agent will not only avoid many problems,

¹²⁸² Constas & Bleijs *Demystifying Sectional Title* 43.

¹²⁸³ Woudberg *Basic Sectional Title Book Two* 117.

but will address them timeously in order to prevent a management catastrophe.¹²⁸⁴ It stands to reason that a managing agent must be properly appointed in accordance with correct procedures; must be suitably qualified and experienced to fulfill the tasks involved in managing the particular scheme; must be accountable and trustworthy and should have the competence and facilities required to manage the scheme. Where these provisos are met and financially sound and legally correct management procedures are followed, the sectional title scheme will be managed more effectively, efficiently and economically.

Managing agents are becoming increasingly qualified and experienced in a manifold of sectional title matters.¹²⁸⁵ A well trained professional managing agent can provide a wide range of additional services such as arranging, preparing and attending meetings; preparing budgets; attending to complaints; dealing with transgressions of rules; maintenance issues; unauthorized structures; chronic levy defaulters; assisting in dispute resolution in the scheme; project managing maintenance and repairs; attending trustees and owner meetings and the handling of all financial and secretarial matters.¹²⁸⁶ Most managing agents will serve the customized needs of a particular scheme, and will tailor their services and charges to suit the needs of the scheme. In the end it is the trustees that must decide whether they will need any assistance in the management of the scheme. The trustees should realize that the value of the scheme is more often than not determined by the quality of its management. Consequently, the trustees should opt for the appointment of professional managing agents to secure sectional owners' investment in the scheme and the enhancement of the economic value of the scheme.¹²⁸⁷

An advantage of a management by owners is their personal involvement. The owners will have a vested interest in the scheme, more so than an outsider. Often the owners of a scheme will be in a better position to know and understand the needs of the residents

¹²⁸⁴ Van der Merwe *Sectional Titles* 15-4.

¹²⁸⁵ Van der Walt (October 2007) *Paddocks Press Newsletter* 4.

¹²⁸⁶ Maree (September 2009) *MCS Courier* 5.

¹²⁸⁷ Woudberg *Basic Sectional Title Book One* 51.

and what management and maintenance measures have to be taken to ensure that the scheme runs efficiently. This can have the disadvantage of infighting between owners which could negatively influence the management.¹²⁸⁸ Being a trustee will require a significant amount of time. Owners might not have the necessary time at their disposal to volunteer for the office of a trustee due to the demands of their own jobs.¹²⁸⁹

The crucial issue with regard to the status of South African managing agents is whether the legislation should be amended to follow the German position by making provision for the appointment of professional manager to replace the trustees as executive organ of the scheme. The STA makes provision for the trustees to act as the executive organ of the sectional title scheme to perform the day-to-day management of the scheme. The trustees may, in terms of the prescribed management rules, supplement their expertise by appointing a managing agent to assist them in if need be. The majority of the trustees must be owners who often do not have any knowledge or experience of the administration and management responsibilities relating to sectional titles. It is my opinion the German system of appointing an experienced and knowledgeable professional single manager or managing agency firm as the executive organ of the body corporate (who is assisted by an advisory council) is preferable to the position in South Africa.

¹²⁸⁸ 45.

¹²⁸⁹ 44.

Chapter 10: Appointment and terms of appointment of a managing agent

10 1 Introduction

As I have mentioned in the previous chapter, the managing agent should be properly appointed according to the correct procedures. This chapter will focus on the procedures and requirements for the appointment of the managing agent. I will start with a discussion on how the managing agent is appointed in the initial period before the first general meeting. I will then set out the parties who can be appointed as managing agents; the parties who can appoint the managing agent and the requirements for the appointment itself. Special attention will be given to the managing agent's contract of appointment, which plays a fundamental role in the appointment of a managing agent.

10 2 Appointment of the managing agent in the initial period

10 2 1 Introduction

There are two situations under which a managing agent may be appointed. In the first place a managing agent may be appointed to manage the scheme during the initial period before the first general meeting is held. In the second place a managing agent may be appointed after the first general meeting by concluding a management contract with the body corporate or trustees.¹²⁹⁰ In what follows I will discuss the appointment of a managing agent in the initial period, and also examine how this is dealt with in foreign jurisdictions.

10 2 2 South African position

The responsibility for the management of the scheme during the initial period is in the hands of the developer and the original owners. Due to the fact that certain services, for

¹²⁹⁰ Chen & Van der Merwe (2009) *TSAR* 28.

example security and gardening services, will need to be established in these initial stages the developer would have to enter into contracts with certain service providers.

The developer can choose to appoint a managing agent in the initial phase. It is important to note that the contracts entered into by the developer with a managing agent for the continued management, control and administration of the scheme must be submitted to the first general meeting for consideration.¹²⁹¹ This creates the impression that such contracts need only be disclosed at the meeting and voted upon with the result that the stronger voting power of the developer would result in their automatic adoption or ratification at the first general meeting. However, this is not the case as it is not possible to conclude a contract on behalf of a non-existent entity. No debt or obligation arising from any agreement between the developer and any other person is enforceable against the body corporate.¹²⁹² A contract entered into by the developer in his or her name must be submitted to the first general meeting, and if it is approved it may be ceded to the body corporate. The agenda for the first general meeting must include the taking of cession of such contracts relating to the management, control and administration of the building as may have been entered into by the developer for the continual management, control and administration of the building and the common property. Contracts concluded by the developer on behalf of the body corporate before the latter came into being and concluded before the first general meeting are null and void and cannot be ceded. They can only continue if a new contract is concluded between the body corporate and the managing agent.¹²⁹³

10 2 3 Comparative survey

In New South Wales the managing agent can also be appointed during the initial period before the first general meeting. The same requirements for such appointment apply whether the engagement is done during the initial period or after its expiry. The only qualification is that during the initial period the appointment and delegation must not

¹²⁹¹ Annexure 8 rule 50(2)(iv).

¹²⁹² STA s 47(2) [STSMA s 15(2)]; Chen & van der Merwe (2009) *TSAR* 29.

¹²⁹³ T Maree “Are bodies corporate bound by the pre-incorporation agreements entered into by developers?” (2007) 3 *De Rebus* 45 46.

extend beyond the conclusion of the first general meeting. An owners corporation must not, during the initial period, appoint a managing agent, a caretaker or other person to assist it in the management for a period extending beyond the holding of the first general meeting, unless the owners corporation is authorised to do so by an order of the Strata Title Tribunal under section 182 of the NSW Strata Schemes Management Act.¹²⁹⁴ Without this provision the owners corporation, which consists solely of the developer, could have appointed a managing agent for the developer's benefit and for an indefinite period extending beyond the first general meeting. By contrast, one of the compulsory items on the agenda of the first general meeting, which must be held within two months after expiry of the initial period,¹²⁹⁵ is whether a managing agent must be appointed.¹²⁹⁶ If so appointed the termination of the initial managing agent will coincide with the appointment of the succeeding managing agent, who may be the same managing agent. Although the indefinite appointment of a managing agent would end as soon as the first general meeting is concluded, a Court of Appeal decision indicates that the agreement between the owners corporation and a caretaker is still binding on the owners corporation.

In *Bondlake Pty Ltd v The Owners – Strata Plan No 60285*¹²⁹⁷ the Supreme Court decided that an agreement entered into between the owners corporation and a caretaker during the initial period was valid and enforceable for a debt incurred by the owners corporation for the caretaker's fees that was in excess of the credit balance in its administrative and sinking funds.¹²⁹⁸ The Supreme Court's reasons were that the applicable section does not state that the agreement is unenforceable or that the caretaker cannot recover the fees due; the owners corporation is still liable to pay fees; the owners corporation can sue the developer for the debt, expenses or damages¹²⁹⁹ which acts as a penalty for the developer's debt; it would be a draconian step to declare the contract void; the innocent caretaker would be forced to suffer unfair consequences

¹²⁹⁴ NSW Strata Schemes Management Act s 113(1)(c); Ilkin *NSW Strata* 131, 149.

¹²⁹⁵ NSW Strata Schemes Management Act, sch 2, cl 2(1).

¹²⁹⁶ Ilkin *NSW Strata* 132.

¹²⁹⁷ (2005) 62 NSWLR 158; Ilkin *NSW Strata* 141.

¹²⁹⁸ This is a contravention of NSW Strata Schemes Management Act s 113(1)(b).

¹²⁹⁹ NSW Strata Schemes Management Act s 113(2).

if the agreement is declared void and would be placed in a worse position than the developer; it is unlikely that someone entering into a contract with the owners corporation would check if the initial period had expired or if the debt would exceed the money in the owners corporation's administrative or sinking fund and there is no public policy reason to declare the agreement void.

In Singapore, similar to New South Wales and South Africa, the appointment of a managing agent by the management corporation or its executive council can be made during or after the expiry of the initial period. However, where the managing agent is appointed during the initial period the appointment must not extend beyond the expiration of the initial period, unless authorized by an order of the Commissioner of Buildings¹³⁰⁰ if he is satisfied that it will serve the interests of the subsidiary proprietors interests or those having equitable interests in the lots.¹³⁰¹ The rationale for this is to ensure that the developer does not make decisions detrimental to minority proprietors. If the management corporation contravenes this then the managing agent forfeits his or her entitlement to fees and disbursements incurred since the expiration of the initial period, regardless of whether the latter knew of the breach.¹³⁰²

Instead of appointing a managing agent during the initial period the developer may alternatively appoint someone as his or her agent to exercise and perform the powers, duties and functions of chairperson, secretary and treasurer until a council is elected at the first annual general meeting of the corporation.¹³⁰³ Such an appointment made before the council is elected is more limited in its scope, but may extend beyond the expiration of the initial period as it is not subject to the abovementioned restriction that applies only if a managing agent is appointed.¹³⁰⁴

¹³⁰⁰ BMSMA ss 49(1)(g) and 51(1).

¹³⁰¹ BMSMA s 51(4).

¹³⁰² In *Re Mahmoud and Ispahani* [1921] 2 KB 716 at 729 the English Court of Appeal held that if a contract is illegal in its inception by statute, neither party thereto may enforce any rights that were intended to be created by it. Keang Sood *Strata Title* 549.

¹³⁰³ BMSMA s 23(3).

¹³⁰⁴ Keang Sood *Strata Title* 550.

In China a developer may also, in the initial period prior to the sale of condominium units, choose and appoint a managing agent to manage the scheme.¹³⁰⁵ The common Chinese practice, before the promulgation of the Property Management Regulation of 2003, for the initial period of management was that the developer managed the scheme. The developers would then sign “sweetheart” contracts with managing agents with whom the developer was affiliated. The problem was that these managing agents did not put the owners’ interests first. This could then result in considerably higher management costs with lower standards of service. These developer management contracts would also bind future owners for a long period of time.

The Property Management Regulation resolved this problem by providing that a developer has to select a qualified managing agent through a public bidding process.¹³⁰⁶ The developer is only allowed to choose a managing agent by agreement where there are three or less managing agents bidding for the position.¹³⁰⁷ Furthermore, the appointment is subject to the approval of the local real estate authority.¹³⁰⁸ Finally, the appointment has to be concluded in a written contract.¹³⁰⁹ The managing agent is under legal obligation to disclose any prior direct or indirect relationship with the developers in bidding for the job. It is generally thought that a developer owned managing company should be disqualified from bidding in order to avoid any undisclosed conflicts of interest and to better protect owner’s interests.¹³¹⁰ Under Chinese legislation the managing agent’s appointment is transitional until the first general meeting and cannot extend beyond the initial period, unless an extension is authorized at the first general meeting.¹³¹¹ When the executive council, created at the first general meeting, signs a formal management agreement with another managing agent, the transitional management contract is automatically terminated even if it has not expired yet.¹³¹²

¹³⁰⁵ Chen *Chinese Condominium Law* 162.

¹³⁰⁶ Property Management Regulation of 2003 art 24(1); Chen & Van der Merwe (2009) *TSAR* 29.

¹³⁰⁷ Property Management Regulation of 2003 art 24(2).

¹³⁰⁸ Property Management Regulation of 2003 art 7.

¹³⁰⁹ Property Management Regulation of 2003 art 21.

¹³¹⁰ Chen & Van der Merwe (2009) *TSAR* 29.

¹³¹¹ Property Management Regulation art 29(2); Chen & Van der Merwe (2009) *TSAR* 30.

¹³¹² Property Management Regulation of 2003 art 26.

10 3 Who may be appointed as a managing agent

10 3 1 Introduction

In what follows I will discuss which parties can be appointed as managing agents. Important issues here are whether individuals or management companies can be appointed as managing agents; whether the body corporate should employ estate agents as managing agents and whether the chairperson or a trustee can act as a managing agent. An important question that is brought to light by doing a comparative survey is whether the managing agent needs to have a license to be appointed. I will touch on this topic in what follows, but discuss it in more detail in chapter 11.

10 3 2 South African position

It is possible to appoint either a natural person or a managing agency company as a managing agent. A natural person includes a sectional owner and a trustee, but only if the trustee is also an owner.¹³¹³ Due to the extensive powers and functions exercised by the managing agent as well as the administrative infrastructure needed, an estate agent or a firm of estate agents is normally appointed.¹³¹⁴ Van der Merwe advocates that a firm of estate agents, a close corporation or a trust company with proven experience to manage the affairs of a sectional title scheme should be appointed as a managing agent due to the enormity of the job and the degree of expertise needed in the performance of a huge variety of tasks.¹³¹⁵ A management firm will be able to supply a management package that combines an on-site resident manager or caretaker together with off-site services such as bookkeeping facilities.¹³¹⁶

The most important question is whether the chairperson or trustee can act as a managing agent to his or her own body corporate. The prescribed management rules allow a trustee or chairperson to act as both a trustee and managing agent to the same

¹³¹³ Annexure 8 rule 5(b).

¹³¹⁴ Pienaar *Sectional Titles* 186.

¹³¹⁵ Van der Merwe (1994) *Stellenbosch Law Review* 316.

¹³¹⁶ Van der Merwe *Sectional Titles* 15-5.

scheme on the condition that the chairperson or trustee is also an owner.¹³¹⁷ There are possible objections to such a situation though.¹³¹⁸ A fiduciary relationship exists between the trustees and the body corporate, and no action may be taken by a managing agent, who is a trustee, that is in conflict with this relationship of trust. There is also the fear that if a trustee or chairperson was to become a managing agent that the owners would lose control of the affairs of the body corporate. However, it should always be remembered that the decisions in the management of the scheme are made by majority vote of the body corporate in general meetings. The advantage of having a managing agent at the helm is that he or she offers professional expertise in the daily management of the scheme and in the holding of meetings.¹³¹⁹

10 3 3 Comparative survey

In New South Wales the managing agent has a similar meaning to its South African counterpart.¹³²⁰ A managing agent is:

“A licensed person (whether an individual, a partnership or a company) appointed by an owners corporation voluntarily at a general meeting in terms of section 27 of the NSW Strata Schemes Management Act to undertake as many of the management and administrative matters of the strata scheme as are

¹³¹⁷ Annexure 8 rule 5(b); G Paddock “Q & A with the Professor: Can a trustee also be a managing agent?” (November 2012) 7-11 *Paddocks Press Newsletter* 4.

¹³¹⁸ AB Kenyon-Thompson “Chairman and Managing Agent – Can the chairman act as managing agent to his own body corporate?” (February 1987) 3.6 *Juta’s South African Journal of Property* 42.

¹³¹⁹ AB Kenyon-Thompson (February 1987) *Juta’s South African Journal of Property* 42.

¹³²⁰ Ilkin *NSW Strata* 146; In terms of the Property, Stock and Business Agents Act 2002 s 3(1) the managing agent is defined to mean: “...a person (whether or not such person carries on any other business) who, for reward (whether monetary or otherwise), exercises or performs any function of an owners corporation within the meaning of the Strata Schemes Management Act 1996, not being: (a) a person who: (i) is the owner of a lot to which the strata scheme for which the owners corporation is constituted relates; or (ii) is the lessee of a lot to which the leasehold strata scheme for which the owners corporation is constituted relates; or is the secretary or treasurer of the executive committee of the owners corporation, and who exercises or performs only functions of the owners corporation required, by the bylaws in force in respect of the strata scheme or leasehold strata scheme for which the owners corporation is constituted, to be exercised or performed by the secretary or treasurer of that executive committee or by the owners corporation; or (b) a person who maintains or repairs any property for the maintenance or repair of which the owners corporation is responsible.”

delegated to the person by the owners corporation, subject to the limitations and conditions imposed by the section.”¹³²¹

However, unlike the South African position, there are persons who are excluded from being appointed as a managing agent. These include the owner of a lot (section) to which the strata scheme for which the owners corporation is constituted relates;¹³²² the lessee of a lot to which the leasehold strata scheme for which the owners corporation is constituted relates¹³²³ or the secretary or treasurer of the executive committee of the owners corporation.¹³²⁴

Since 1 October 1981 all managing agents who are appointed to manage a scheme must hold a strata managing agent’s license referred to in sections 8 and 9 of the Property, Stock and Business Agents Act 2002 (the “Agents Act”). If an unlicensed managing agent is appointed the appointment is invalid and may not be enforced by the managing agent against the owners corporation.¹³²⁵

In Singapore it is a statutory requirement that a managing agent that is either directly or indirectly related to any proprietor of a lot must declare the nature of the relationship in writing prior to his or her appointment.¹³²⁶ The rationale for this requirement is that the managing agent will then act in the interest of the whole corporation and not in the interest of a few of the proprietors or the council. In this way it will prevent abuse, malpractice and corruption.¹³²⁷ Where, for example, the managing agent is related to any proprietor or is a company in which the proprietor has an interest it is possible that the managing agent could manage the scheme at a higher cost. If this is a possibility the council can be restricted from appointing such a managing agent by making it a restricted matter.¹³²⁸

¹³²¹ Ilkin *NSW Strata* 146.

¹³²² Agents Act s 3(1)(a)(i); Ilkin *NSW Strata* 146.

¹³²³ Agents Act s 3(1)(a)(ii).

¹³²⁴ Agents Act s 3(1)(a)(iii).

¹³²⁵ Agents Act s 26.

¹³²⁶ BMSMA s 66(4).

¹³²⁷ Keang Sood *Strata Title* 548.

¹³²⁸ BMSMA ss 58(1) and 4(b) and 59.

Chinese law only allows management companies with legal personality to be appointed as a managing agent.¹³²⁹ The exclusion of a natural person from being a managing agent is meant to distinguish a professional managing agent from an in-house self-managing team.¹³³⁰

10 4 Who may appoint the managing agent

10 4 1 Introduction

This discussion will focus on the three parties that have the power to request the appointment and to appoint a managing agent in South Africa. An interesting discussion in this regard is whether or not the trustees, executive committee, executive council or executive board is entitled to appoint the managing agent.

10 4 2 South African position

There are three parties that are involved in the appointment of a managing agent in South Africa. In the first place the trustees *may*, in their own discretion and without referring to a general meeting, appoint an agent after a resolution to that effect is taken at a trustees' meeting. In the second place a bank or any other registered mortgagee holding 25% of the units *may instruct* the trustees to appoint a managing agent. In the third place the members of the body corporate, on the strength of a normal resolution by a majority vote taken at a general meeting, *may instruct* the trustees to appoint a managing agent.¹³³¹ In the last two instances the trustees *must* appoint a managing agent.¹³³²

10 4 3 Comparative survey

In New South Wales the owners corporation can voluntarily appoint a managing agent¹³³³ by means of an ordinary resolution in a general meeting.¹³³⁴ The power of an

¹³²⁹ Property Management Regulation of 2003 art 32; Chen & van der Merwe (2009) *TSAR* 26.

¹³³⁰ Chen & Van der Merwe (2009) *TSAR* 26.

¹³³¹ Pienaar *Sectional Titles* 186.

¹³³² Annexure 8 rule 46(1)(a).

¹³³³ Ilkin *NSW Strata* 149.

executive committee (trustees) to appoint a managing agent in terms of the NSW Strata Titles Act 68 of 1973 was abolished in January 1980.¹³³⁵ A managing agent can only be appointed by an ordinary resolution in the general meeting.¹³³⁶ Furthermore, the owners corporation cannot delegate the power to appoint a managing agent to the executive committee, even if all the owners agree to such a delegation.¹³³⁷

In Singapore the management corporation may voluntarily appoint a managing agent by ordinary resolution at the general meeting.¹³³⁸ The appointment must be decided on at the general meeting because it affects all the proprietors and ensures that every one of them would be aware of the decision, which avoids abuses. A managing agent can also be voluntarily appointed by its council (trustees)¹³³⁹ without a general meeting if duly authorized to do so by the proprietors at the last preceding general meeting of the corporation.¹³⁴⁰ This is the only exception to appointing the managing agent at general meetings.

Chinese law stipulates that the executive council enters into a written contract with a managing agent chosen by the managing body.¹³⁴¹ At national level the Chinese legislation does not say much on the procedures to appoint the managing agent. Since many members of the executive council may be inexperienced, the Chinese Property Code provides that the final say on employing a managing company should rest with the management body at a general meeting.¹³⁴²

¹³³⁴ NSW Strata Schemes Management Act s 27.

¹³³⁵ Ilkin *NSW Strata* 149.

¹³³⁶ NSW Strata Titles Act 68 of 1973 s 78(1); Van der Merwe (1994) *Stellenbosch Law Review* 320.

¹³³⁷ Ilkin *NSW Strata* 149.

¹³³⁸ BMSMA s ss 66(1)(a) and 79(3).

¹³³⁹ BMSMA s 80(3).

¹³⁴⁰ BMSMA s 66(1)(b).

¹³⁴¹ Property Management Regulation art 35.

¹³⁴² Chinese Property Code art 76(1)-(4).

10 5 Requirements for the appointment of a managing agent

10 5 1 Introduction

Now that I have established who may be appointed as a managing agent and who may appoint the managing agent, I will focus on the appointment procedure itself. The requirements for the appointment will be set out and the contract of appointment, which is a fundamental requirement, will be discussed in detail.

10 5 2 South African position

Prescribed management rule 46(1) governs the appointment of the managing agent. This cannot be substituted by the developer when submitting an application for the opening of a sectional title register,¹³⁴³ and may only be substituted by a unanimous resolution of the body corporate once at least 30% of the units in the scheme have been transferred.¹³⁴⁴

The trustees may from time to time, and must if required by a registered mortgagee of 25% of the units, or by the members of the body corporate in a general meeting, appoint a managing agent in terms of a written contract.¹³⁴⁵ There are therefore two requirements that must be met in appointing a managing agent. The first requirement is that there must be a resolution by the trustees or general meeting, or a request by registered mortgagees of 25% of the units that a managing agent be appointed. The second requirement is that the managing agent must actually be appointed in the form of a written contract. I will discuss the nature of this contract in chapter 12.

The draft resolution for the meeting of trustees and the general meeting should be carefully prepared to ensure that the managing agent is both appointed, and that the necessary powers and functions are properly delegated.¹³⁴⁶ The resolution must indicate that an appointment had been made; the duration of the appointment; specify

¹³⁴³ Regulation 30(1) made under the STA.

¹³⁴⁴ Regulation 30(4) made under the STA.

¹³⁴⁵ Annexure 8 rule 46(1)(a).

¹³⁴⁶ Van der Merwe (1994) *Stellenbosch Law Review* 320-321.

the extent to which the powers, functions and duties of the body corporate and trustees are delegated to the managing agent and authorize a written agreement of appointment between the trustees and the managing agent.¹³⁴⁷

In 1997 a proviso was added to prescribed management rule 46(1) dealing with the appointment of the managing agents via a management contract. It stated that the agreement must be reduced to writing within thirty days of conclusion, failing which the contract is voidable at the instance of either party. This proviso was vague as it was not easy to define when the contract was “concluded” which made it difficult to apply in practice. It could be the date of the general meeting or trustees’ meeting at which the decision was taken; or the date upon which the appointment was confirmed in writing to the managing agent or the date upon which the managing agent is to commence his or her duties. It was unfair that the contract can be voidable simply because one of the parties forgot to sign it, or because one of the parties was unable to sign it within thirty days for a legitimate reason. The legislature’s intention was to encourage the swift conclusion of the contract between the body corporate and the trustees. A more practical provision would of been one that allows the managing agent at least ninety days from the commencement of his duties to have the contract concluded.¹³⁴⁸ The second proviso to rule 46(1) that the initial agreement between the trustees and the managing agent is voidable, unless reduced to writing within 30 days of conclusion, was deleted in an amendment to rule 46 in 2005.¹³⁴⁹ Now the appointment of the managing agent is only valid if the agreement reached between the parties is reduced to writing.¹³⁵⁰

A written agreement of appointment must be entered into between the trustees and the managing agent. The agreement must appoint the managing agent to the position, and all or some of the body corporate’s powers, functions and duties must be delegated to the managing agent. The implication here is that the managing agent should not merely

¹³⁴⁷ Van der Merwe *Sectional Titles* 15-15.

¹³⁴⁸ Woudberg *Basic Sectional Title Book One* 50.

¹³⁴⁹ GN R 1109 in *GG* 28217 of 18-11-2005.

¹³⁵⁰ Van der Merwe *Sectional Titles* 15-17.

be appointed, but that some powers and functions of the body corporate should be delegated or entrusted to him. The nature and basis of the relationship between the body corporate and managing agent must be clearly set out to avoid uncertainty and possible future disputes. The full services to be supplied by the managing agent should be listed under the headings administration, secretarial, accounting and ancillary. There should be a detailed breakdown of fees to be charged for the services to be rendered. The managing agent should include all additional costs in the contract to avoid any disputes at a later stage. He or she must also include the maximum amount that he will charge for the collection of special levies¹³⁵¹ that involves additional work, collection of these funds and exercising credit control.¹³⁵² Furthermore, the agent can charge a take-on fee to cover all the additional work required to install all the new information in the management agent's computer when he is employed by a scheme for the first time.¹³⁵³ Services that are supplied by the managing agent free of charge like stationery must also be included in the agreement so that the body corporate is assured that they will not be charged for these sundry items.¹³⁵⁴ The contract must also provide for annual adjustments to fees in order to hedge inflation. Adequate notice must be given so that these changes in the fee structure can be discussed before they are implemented.¹³⁵⁵ The managing agent is entitled to include an indemnity clause protecting him against any actions of the body corporate or a third party to recover losses or claim damages from the managing agent where he has been the cause of any financial losses provided that they are not as a result of gross negligence or fraud on the part of the managing agent.¹³⁵⁶

Apart from a description of services to be rendered by the managing agent, the content of which is solely within the discretion of the contracting parties, the rules also require the trustees to include specific matters in the contract relating to the tenure of the contract that includes how the contract can be terminated by either of the parties and

¹³⁵¹ A special levy is usually charged where the trustees need to raise additional funds for capital expenditure.

¹³⁵² Woudberg *Basic Sectional Title Book Two* 121.

¹³⁵³ 122.

¹³⁵⁴ 122.

¹³⁵⁵ 122.

¹³⁵⁶ Woudberg *Basic Sectional Titles Book Two* 123.

the notice period that must be given. The first is a provision that the managing agent is appointed for an initial period of one year, and thereafter such appointment shall automatically renewed from year to year unless the body corporate notifies the managing agent to the contrary.¹³⁵⁷ Therefore, the date on which the managing agent is to commence his or her services must be also be included in the contract as the managing agent is usually appointed for a period of twelve months and the commencement date becomes the anniversary date for reappointment purposes.¹³⁵⁸ Subject to section 39(1) of the STA no special resolution is needed to revoke the appointment of the managing agent, as a decision by the trustees is sufficient. This ensures a measure of continuity while leaving the option to the trustees to remove an inefficient managing agent if necessary.¹³⁵⁹

The second matter that must be included in the contract is a provision that the trustees may, without notice, cancel the contract of appointment under certain circumstances. These circumstances include situations where the managing agent is in breach of any provision in his contract, or if the managing agent is guilty of any conduct that would justify the cancellation of the contract of appointment in terms of common law. This clause must also provide that the managing agent may not have any claim against the body corporate or any of the owners in such a cancellation.¹³⁶⁰ The third matter that the contract must provide is a clause that the management agent's contract can be revoked and he shall cease to hold office in certain circumstances. These circumstances include the situation where the managing agent is under provisional liquidation or insolvent or placed under judicial management; where the managing agent is convicted of an offence involving fraud or dishonesty or if a special resolution of the body corporate is passed to that effect.¹³⁶¹ Where the managing agent's contract of appointment is revoked by the passing of a special resolution of the body corporate, the managing agent should not be deprived of his right to claim compensation or damages due to

¹³⁵⁷ Annexure 8 rule 46(1).

¹³⁵⁸ Woudberg *Basic Sectional Titles Book Two* 120.

¹³⁵⁹ Van der Merwe *Sectional Titles* 15-17.

¹³⁶⁰ Annexure 8 rule 46(2)(a).

¹³⁶¹ Annexure 8 rule 47.

breach of contract.¹³⁶² The trustees' omission to include these provisions in the contract of appointment would not invalidate the contract, but it would be unwise to do so.¹³⁶³

Certain other items must be incorporated into the contract in order to deal with all pertinent matters inherent in the relationship between the body corporate and the managing agent. For example, there needs to be a full description of the parties involved, as well as an inclusion of the *domocilium citandi et executandi* of the body corporate and the managing agent. This is important and must be disclosed fully for proper identification should it becomes necessary for a summons to be issued against either party to commence litigation.¹³⁶⁴ Both parties should sign the contract together with two witnesses.

10 5 3 Comparative survey

When a managing agent is voluntarily appointed by the owners corporation in New South Wales, both parties must fulfill a number of requirements in order to have a valid and enforceable agreement.¹³⁶⁵ The owners corporation must pass an ordinary resolution in a general meeting which must comprise both an appointment of the managing agent¹³⁶⁶ and a delegation of various powers, authorities, duties and functions.¹³⁶⁷ An instrument must then be completed in writing which both appoints and delegates various powers, authorities, duties and functions to the managing agent.

In terms of the Agents Act a written agency agreement containing any prescribed terms must be signed by, or on behalf of the managing agent and by, or on behalf of the owners corporation.¹³⁶⁸ The agreement must contain the prescribed terms.¹³⁶⁹ It requires that the agreement specify the extent to which the agent will be involved in the twelve tasks that the agent agrees to perform. The agency agreement must not contain

¹³⁶² Annexure 8 rule 47(iii); Van der Merwe *Sectional Titles* 15-17.

¹³⁶³ Van der Merwe *Sectional Titles* 15-17.

¹³⁶⁴ Woudberg *Basic Sectional Title Book Two* 120.

¹³⁶⁵ Ilkin *NSW Strata* 149.

¹³⁶⁶ NSW Strata Schemes Management Act s 27.

¹³⁶⁷ NSW Strata Schemes Management Act s 28.

¹³⁶⁸ Agents Act ss 27; 28; and 109.

¹³⁶⁹ Found in Schedules 7 and 14; Ilkin *NSW Strata* 152.

a term, condition or other provision that is inconsistent with Schedules 7 and 14.¹³⁷⁰ The managing agent must sign and serve a copy of the agency agreement on the owners corporation within 48 hours of the agreement being signed by the owners corporation in order to recover remuneration or reimbursement for expenses or charges.¹³⁷¹

Neither the written instrument of appointment and delegation, nor the agency agreements are prescribed documents.¹³⁷² A written instrument must exist for the appointment and delegation.¹³⁷³ However, for the last 30 years the managing agents have been incorporating the instrument of appointment and delegation in the agency agreement.¹³⁷⁴ The Real Estate Institute of New South Wales has recommended a standard form agency agreement that lets the owners corporation and the managing agent select the extent of delegation conferred to the agent. The two options correspond with section 28(1)(a) of the Agents Act which confers a complete delegation,

¹³⁷⁰ Agents Regulations reg 13(3); Ilkin *NSW Strata* 152.

¹³⁷¹ Agents Act s 55; Ilkin *NSW Strata* 153.

¹³⁷² Ilkin *NSW Strata* 151.

¹³⁷³ Agents Act ss 27; 28; and 109.

¹³⁷⁴ There are five requirements for a valid and legally enforceable agency agreement. It must be in writing, but it need not be expressed in the terms of a deed. It must be made between the correct parties, namely the licensed strata manager and the owners corporation. The managing agent can be an individual, a partnership or a company, but must be licensed. The executive committee cannot enter into the agreement or be a party to it. Furthermore the agreement must be signed by, or on behalf of, the licensed managing agent and the owners corporation. The owners corporation usually signs the agreement under its common seal, but it can authorize an individual to sign it. Ilkin (*Ilkin NSW Strata* 152) describes the best practice to adopt is where the managing agent attaches a complete agency agreement to the notice of the general meeting where the decision is being made to appoint the managing agent, and if approved the agreement should be signed with the seal and any alterations must be initialed by both parties. The agreement must contain the prescribed terms found in Schedules 7 and 14. It requires that the agreement specify the extent to which the agent will be involved in the twelve tasks that the agent agrees to perform. The agency agreement must not contain a term, condition or other provision that is inconsistent with the schedule 7 and 14 in terms of Agents Regulations reg 13(3). The managing agent must sign and serve a copy of the agency agreement on the owners corporation within 48 hours of the agreement being signed by the owners corporation in order to recover remuneration or reimbursement for expenses or charges in terms of Agents Act s 55. If the agreement is handed to the chairperson or secretary at the general meeting then this action must be noted in the minutes to satisfy the service requirement. Service by handing it over in person and obtaining a proof of receipt is the best option as proof of service is critical in contested cases as to whether the managing agent is entitled to commission and expenses. Where service does not occur within 48 hours the managing agent can recover commission and expenses if the Consumer, Trader and Tenancy Tribunal is satisfied that the failure was due to an oversight or other cause beyond the managing agent's control; it is fair and reasonable, considering all the circumstances, that the managing agent receives the commission; or failure to make the order would be unjust. If a provision in the agency agreement entered into since 24 April 1980 is unjust then the owners corporation may apply to the Supreme Court or District Court of New South Wales to review or vary such term pursuant to the powers conferred on the Court by the New South Wales Contracts review Act of 1980. Agency agreements are not liable to stamp duty because the New South Wales Duties Act of 1997 does not expressly impose any duty on agency agreements, and an unstamped agreement remains admissible in court proceedings.

and section 28(1)(b) which confers a partial delegation of powers, authorities, duties and functions.

The consequences of not having a valid agency agreement are two-fold¹³⁷⁵ and cannot be avoided. First, the managing agent is not entitled to any remuneration or reimbursement for expenses incurred. Secondly, if the agent had already been remunerated and reimbursed the owners corporation can recover the money by bringing proceedings against a managing agent in a court of competent jurisdiction if the managing agent refuses to return the money. It is unlikely that the managing agent could maintain a claim in *quantum meruit* against the owners corporation for reasonable remuneration or succeed with a defense of estoppel or ratification.¹³⁷⁶

10 7 Conclusion

Before the first general meeting has been held there are certain management and maintenance acts that need to be performed. Since the developer and initial owners are not ideally suited to perform these acts, managing agents are usually appointed in the initial period for this purpose. In order to prevent abuses by the developer, these contracts are usually not concluded for a period of time extending beyond the conclusion of the first annual general meeting. This seems to be a satisfactory position as it would not be desirable to have a managing agent that has not been selected or at least approved by the body corporate in the first general meeting.

In South Africa the appointment cannot extend beyond the initial period, unless at the inaugural meeting the contract is ceded to the body corporate.¹³⁷⁷ The Chinese legislation achieves the same result by providing that the managing agent's appointment cannot extend beyond the initial period, unless an extension is authorized at the first general meeting.¹³⁷⁸ Perhaps the South African legislation can benefit from the position in New South Wales and Singapore where the appointment can extend

¹³⁷⁵ Agents Act s 55.

¹³⁷⁶ Ilkin *NSW Strata* 153.

¹³⁷⁷ Annexure 8 rule 50(2)(iv).

¹³⁷⁸ Chen & Van der Merwe (2009) *TSAR* 30.

beyond the initial period if so authorised by the Tribunal or Commissioner of Buildings respectively. In South Africa such an extension could then be authorised if the CSOS (once in operation) is satisfied that it will serve the interests of the sectional owners to continue with the services of the existing managing agent. This would still ensure that the owner developer would act in the best interests of the minority sectional owners.

South African legislation can certainly learn from the Chinese position where a developer has to select a qualified managing agent through a public bidding process; here the appointment is subject to the approval of the local real estate authority and has to be concluded in a written contract. The managing agent is under a legal obligation to disclose any prior direct or indirect relationship with the developers in bidding for the job. A developer owned managing company is disqualified from bidding in order to avoid any undisclosed conflicts of interest and to better protect owner's interests. These measures increase the transparency of the management contract and avoid self-dealing transactions entered into by developers.¹³⁷⁹

The position in South Africa where both a natural person (where a natural person includes a sectional owner and a trustee who is also an owner) and a managing company can be appointed as a managing agent seems satisfactory to me.¹³⁸⁰ However, a managing agency firm with proven experience to manage the affairs of a sectional title scheme should be appointed due to the complexity of the job and the administrative infrastructure and the degree of expertise needed in the performance of a huge variety of tasks. However, the trend where estate agents secure a contract from the developer to manage the scheme in which they also act as selling agents should be avoided, as the estate agents are not focused on efficient management, but rather on retaining the position that they handle all future sales.¹³⁸¹ A high degree of expertise and experience is required in each field, and not only in one field.

¹³⁷⁹ Chen & Van der Merwe (2009) *TSAR* 29.

¹³⁸⁰ Annexure 8 rule 5(b).

¹³⁸¹ Woudberg *Basic Sectional Title Book One* 49.

Regarding the issue of who may appoint the managing agent it can be argued that if the body corporate in the general meeting alone could appoint the managing agent then the owners might avoid the appointment of a managing agent as it could mean increased levies for them. In New South Wales a managing agent can only be appointed by the owners corporation, who cannot delegate the power to appoint a managing agent to the executive committee, even if all the owners agree to such a delegation. In contrast in Singapore a managing agent can also be voluntarily appointed by its executive council if duly authorized to do so by the proprietors at the last preceding general meeting.

Van der Merwe states that the managing agent is in reality appointed to act on behalf of the body corporate. It is for this reason that the managing agent should be appointed by the body corporate in the general meeting and not by the trustees.¹³⁸² Since every owner has a real and vested interest in the appointment of an efficient managing agent, the trustees should not be able to make the decision to appoint a managing agent unilaterally.¹³⁸³ This makes sense, as the trustees cannot terminate the appointment of a managing agent on their own, so it follows logically that they should not be able to appoint one on their own. The law as it stands on the subject does not require owner involvement other than the trustees. This position should be altered to include owner involvement. A direction might be presumably passed at a general meeting that the trustees may not appoint a managing agent by a trustees' resolution, but only by a resolution of the general meeting.¹³⁸⁴

After considering the position in foreign jurisdictions I believe that the managing agent should be appointed either at the general meeting by an ordinary resolution or by the trustees if it has been authorized at a previous general meeting. It is my opinion that the trustees should be in a position to encourage the owners to appoint a managing agent where they feel they are not in the best position to handle the day-to-day management of the scheme. The trustees are required to enter into a written contract with a managing agent, but the final say on employing the managing agent should be vested in

¹³⁸² Van der Merwe (1994) *Stellenbosch Law Review* 329; van der Merwe *Sectional Titles* 15-25.

¹³⁸³ Constat & Bleijs *Demystifying Sectional Title* 44.

¹³⁸⁴ Van der Merwe *Sectional Titles* 15-12.

the body corporate at a general meeting. In this way the trustees have the responsibility of selecting a suitable managing agent and then explaining the selection procedure at the next general meeting.

In South Africa and New South Wales the managing agent must actually be appointed in form of a written contract as the appointment of the managing agent is only valid if the agreement reached between the parties is reduced to writing. In New South Wales the written agency agreement containing any prescribed terms must be signed by the managing agent and the owners corporation which must be served on the owners corporation within 48 hours of the agreement being signed by the owners corporation in order to recover remuneration or reimbursement for expenses or charges. In my opinion South Africa should adopt such a provision as it serves to tighten up and enforce the requirement that the managing agent be appointed in terms of a signed written contract.

Chapter 11: Qualities and qualifications of a managing agent

11 1 Introduction

The appointment of a professional managing agent assumes that the managing agent has some qualification, the necessary experience and is capable of performing the management tasks that he or she is appointed for.¹³⁸⁵ Unfortunately the legislative provisions regulating the qualities and qualifications required to become a managing agent are highly unsatisfactory.

I will start this chapter with a discussion of the qualities and qualifications that managing agents must have in order to be appointed as such in South Africa and in foreign jurisdictions. Since managing agents are required to register with the Estate Agency Affairs Board for a Fidelity Fund Certificate and have an obligation to open a trust account, I will review the relationship between managing agents and estate agents. I will then examine whether managing agents are considered “debt collectors” in terms of the Debt Collectors Act 114 of 1998 (the “Debt Collectors Act”) for the purposes of collecting levies. I will follow this up with an in depth discussion of the relevancy and purpose of the National Association of Managing Agents (“NAMA”). This will lead to the important topic of whether the Community Scheme Ombud Service (“CSOS”) established by the Community Scheme Ombud Service Act 9 of 2011 (“CSOSA”) should regulate managing agents once it is in operation. Finally I will consider how the Consumer Protection Act 68 of 2008 (the “CPA”) will affect the manner in which managing agents are required to perform their management services for the body corporate.

¹³⁸⁵ Chen & Van der Merwe (2009) *TSAR* 26.

11 2 Qualities and qualifications required to be a managing agent

11 2 1 Introduction

One of the most problematic aspects regarding the appointment of managing agents in South Africa is that there is no requirement for the managing agent to possess any particular qualification or license. In what follows, I will discuss the qualities and qualifications that managing agents should have to conduct a professional managing agency service. I shall look to the position in foreign jurisdictions to find possible solutions to this shortcoming in South African sectional title legislation.

11 2 2 South African position

The managing agent should be capable of exercising and performing all the powers and duties that the trustees are required to deal with on behalf of the body corporate in the day-to-day management of the scheme. These powers and duties will be examined in more detail in chapter thirteen. For now it is important to know that managing agents could have all or some of the managerial, secretarial and financial duties. The managing agent must have a good understanding of the relevant legislation, regulations, and the rules in general and the specific rules applicable to the scheme.¹³⁸⁶

There is an extensive clerical function in managing a sectional title scheme. It is for this reason that the managing agent will have to have sound secretarial and administrative experience together with the necessary staff and office equipment to deal with the huge volume of notices, agendas, minutes, correspondence, and circulars generated by this aspect of management. Managing agents are members of a service industry that is highly labour-orientated that involves high overheads for staff and office facilities. The services offered, staff requirements and overhead expenses would depend on the individual scheme and the capacity of the body corporate to pay.¹³⁸⁷

¹³⁸⁶ Van der Merwe *Sectional Titles* 15-5.

¹³⁸⁷ Van der Merwe (1994) *Stellenbosch Law Review* 317.

The managing agent should furthermore have a high level of accounting and financial knowledge and experience to enable him or her to interpret and understand financial statements and to compile balanced budgets. If the managing agent does not have these financial qualifications he or she should have staff qualified to do so.¹³⁸⁸ Added to this the managing agent should have the correct infrastructure to effectively perform all the financial and accounting tasks involved in the management of the scheme which includes the system of accounting that suits the scheme's needs. As I have mentioned the trustees cannot expect the auditors to audit the annual financial statements without being provided with the proper financial records that must comply with generally accepted accounting principles. There needs to be monthly financial reports so that trustees can acquire timeous information in order to make relevant financial decisions. These reports should include budget comparisons of monthly expenses, income and year to date figures, as well as cash flow and fully aged debtors' reports. If the accounting records are inadequate the auditors may have to reconstruct the records at a high cost to the body corporate.¹³⁸⁹

Managing agents are also required to have skills with regard to general maintenance problems such as gardening, plumbing, electrical, waterproofing, and structural and security matters. If he or she lacks any knowledge in these matters outside contractors would have to be employed to troubleshoot and do the job that would incur unnecessary expenditure for the body corporate.¹³⁹⁰ The managing agent should have a maintenance and repair inspection and service division to monitor the physical condition of the buildings in the scheme. The managing agent must be in regular contact with the trustees, and where there are problems, the agent should initiate repairs and maintenance at a relatively low cost before the problem spirals out of control and becomes too expensive to effect without an increase in levy contributions or the raising of a special levy.

¹³⁸⁸ Chen & Van der Merwe (2009) *TSAR* 26-28.

¹³⁸⁹ Woudberg *Basic Sectional Title Book Two* 117.

¹³⁹⁰ 118.

The managing agent should have a good reputation in the industry and a proven track record in property management.¹³⁹¹ Furthermore, the managing agent is required to continually deal with people of different racial, intellectual, educational, and cultural backgrounds. This requires an acquired humanistic and diplomatic skill.¹³⁹² The managing agent should also be in constant contact with the trustees so that communication is open, transparent and honest.

Each managing agent could have at least ten buildings that it manages, and this figure could be as high as fifty buildings. Sectional title schemes can have as many as five hundred units, and in some cases even more than that.¹³⁹³ The managing agent has to generate levy statements; ensure the utilities are read and charged for on time and deliver or post the levy statements. He or she has to capture receipts; deal with levy account queries; generate reminder letters for the late payers; hand over defaulters for collection; attend to daily complaints and issues; issue general correspondence to owners; attend to emails; settle invoices to council and suppliers once they have the signatures of two trustees approving payment; co-ordinate all maintenance issues for the complex; handle insurance claims via the appointed broker; attend monthly trustees meetings; arrange for special general meetings where necessary and prepare the complex for year-end audit and keep the trustees up to date with information and correspondence, whilst simultaneously dealing with the numerous municipal account queries. The managing agent must also ensure that the correct procedures are followed for those owners who wish to change or extend their sections.¹³⁹⁴

From this discussion alone it is clear that the management of a sectional title scheme requires the performance of a massive variety of tasks and that a high degree of expertise is required in not only a single field, but in a variety of fields. These various tasks require a diverse set of skills. It has been said that:

¹³⁹¹ Chen & Van der Merwe (2009) *TSAR* 26; Constat & Bleijs *Demystifying Sectional Title* 43.

¹³⁹² Woudberg *Basic Sectional Title Book Two* 118.

¹³⁹³ L Lenhof "A day in the life of a managing agent" (October 2008) 3-10 *Paddocks Press Newsletter* 1,3.

¹³⁹⁴ 1.

“There can be very few professions which require such a wide range of skill sets.”¹³⁹⁵

A successful managing agent will have to plan, council, organize, delegate and negotiate. Effectively a managing agent must have a proven record of property administration; hiring and letting and selling of property; property valuation and knowledge of insurance procedures, policies and replacement values. Furthermore, he or she is required to have experience, skills and training in diplomacy, secretarial work, estate agency, insurance, accounting and financial functions, painting, plumbing, electrician, building contractor, and human resources.¹³⁹⁶ The specialist qualifications need to be backed up with infrastructure such as offices equipped with computers, accounting programs, stationery and support staff.

It is therefore evident that the single most problematic aspect relating to the managing agent industry in South Africa is the lack of any requirement that the managing agent have any form of qualification or experience to act as such. Since the South African legislation does not prescribe any qualifications, the managing agent profession in South Africa remains largely self-regulatory.¹³⁹⁷ As a result many managing agents lack the required expertise, experience, skills, specialization, qualities and qualifications to provide a professional management service to manage a sectional title scheme effectively and efficiently. It is for this reason that trustees, who need to be prudent in their selection of a managing agent, often face a tough task in finding a suitably qualified and experienced managing agent with a proven track record of expertise and experience. Often the trustees are forced to appoint a less qualified agent because suitably qualified managing agents charge a high price for their service. Like accountants, attorneys, architects, engineers and doctors, the managing agents provide a professional service, which is valuable to the sectional title community and industry as a whole. Legislation should be adopted in South Africa to create a professional body to

¹³⁹⁵ G Paddock “Understanding the functions of sectional title property managers” (November 2007) 2-8 *Paddocks Press Newsletter* 6.

¹³⁹⁶ Van der Merwe (1994) *Stellenbosch Law Review* 320.

¹³⁹⁷ Chen & Van der Merwe (2009) *TSAR* 26.

stipulate qualifications needed to act as managing agents; to provide for their training and to regulate and oversee managing agent's actions to create and maintain a high degree of professionalism in the industry.

11 2 3 Comparative survey

For the last thirty years all managing agents appointed to manage a strata scheme in New South Wales are required to have a strata managing agent's license referred to in Agents Act.¹³⁹⁸ The appointment of an unlicensed managing agent is invalid and may not be enforced by the managing agent against the owners corporation.¹³⁹⁹ All managing agents must comply with the obligations contained in the Agents Act. Van der Merwe states that this specialization in the field of managing agents has led to the appointments of managing agents that are better qualified, and has prevented many financial and legal problems which could arise if strata schemes are managed by unskilled, inefficient and inexperienced managing agents.¹⁴⁰⁰ The modern trend is to appoint specialist sectional title managing agents rather than estate agents, accountants and attorneys.¹⁴⁰¹

Where the owners corporation decides to appoint a managing agent a resolution is passed that the secretary invite a managing agents to interview with an executive committee member. The managing agent must answer certain queries in person during the interview or must address these queries in a letter. These matters include requiring a copy of the draft agency agreement proposed by the managing agent; the managing agent's license number; whether the managing agent is an individual, a partnership or a company; whether the managing agent requires a complete or partial delegation of powers, authorities, duties and functions of the owners corporation; the duration of the appointment and delegation including any extension period; whether the proposed agreement allows for rescission by either party if either party is not fulfilling its duties; what services will be specifically listed in the agency agreement; the management fee,

¹³⁹⁸ Agents Act ss 8 and 9; Ilkin *NSW Strata* 147.

¹³⁹⁹ Agents Act s 26.

¹⁴⁰⁰ Van der Merwe *Sectional Titles* 15-6.

¹⁴⁰¹ 15-6.

expenses and charges for services provided, and a clear definition of what services are not included in the fees and the fees payable for these extra services if they should be required; the time when all fees, expenses and charges are payable; confirmation of the managing agents professional indemnity insurance which would be essential in the possible event of the managing agent's negligence; evidence of the managing agent's experience in managing schemes; the number of other schemes managed by the managing agent; the number of staff the managing agent has and who will be available to answer questions about the scheme; the likely compatibility of the managing agent and its staff with the scheme participants and contact details for the schemes that the managing agent can recommend as reference to the managing agent's reputation, services, compliance with the legislation, reliability and efficiency. If the executive committee recommends the appointment of a particular managing agent then a motion must be listed in the agenda of the general meeting where the final decision is to be made.¹⁴⁰²

In Singapore, similar to South Africa, the approach followed is not to legislate on the matter of the qualifications and accreditation of managing agents. The industry is encouraged to self-regulate with the assistance from relevant government authorities such as the Building and Construction Authority¹⁴⁰³ and SPRING Singapore, which is the national standards and conformance body. Ultimately the management corporations must make informed decisions, and be responsible for the decisions that they make.¹⁴⁰⁴ There is now a set of guidelines called the "Specification for Performance of Managing Agents for Strata Residential Properties" published by SPRING Singapore for the role that managing agents play in managing condominium schemes. There are also accreditation schemes for managing agents managed by various organizations and professional bodies such as the Association of Management Corporations in Singapore; the Association of Property and Facility Managers; and the Singapore Institute of Surveyors and Valuers.¹⁴⁰⁵

¹⁴⁰² Ilkin *NSW Strata* 147-148.

¹⁴⁰³ Established by the Building and Construction Authority Act of 2000.

¹⁴⁰⁴ Keang Sood *Strata Title* 546.

¹⁴⁰⁵ 547.

South Africa could also learn from Chinese law in the area of qualifications of managing agents. The Chinese Property Management Regulation stipulates that the management companies should be qualified and licensed before being employed.¹⁴⁰⁶ In order for the managing agent to obtain a license a certain degree of education, training, familiarity with relevant legislation and financial qualifications are required. Chinese law empowers the local real estate authority to order a management company that employs a person without a license to rectify the position and impose a fine.¹⁴⁰⁷ The shortcoming in this piece of legislation is that there is no provision that deals with the misconduct of a licensed agent. In such cases the local real estate authority should be empowered to revoke the license of the agent for continued misconduct and gross incompetence.¹⁴⁰⁸

There are accreditation systems which assure that the management company adheres to a certain standard and quality of service for managing agents under special departmental rule.¹⁴⁰⁹ The Property Management Regulation creates three classes of management companies.¹⁴¹⁰ The first class management company must have at least 30 licensed professionals in the fields of engineering and accounting with a registered capital of five million Yuan and must be accredited by the ministry of construction.¹⁴¹¹ The second-class management company must have at least twenty licensed professionals with a registered capital of three million Yuan and must be accredited by the ministry of construction.¹⁴¹² The third class has to have at least ten licensed professionals with a registered capital of five hundred thousand Yuan and must be accredited by the local real estate authority.¹⁴¹³ The level of accreditation determines the scope of business of the management agent. To illustrate this, the third class management agent cannot provide services for a project with 200,000 or more gross square meters in floor area.¹⁴¹⁴ All newly created management companies are originally

¹⁴⁰⁶ Property Management Regulation of 2003 arts 32(2) and 33; Chen & van der Merwe (2009) *TSAR* 27.

¹⁴⁰⁷ Property Management Regulation of 2003 art 61.

¹⁴⁰⁸ Chen & Van der Merwe (2009) *TSAR* 27.

¹⁴⁰⁹ See the Measure Governing the Property Managing Agent's Accreditation of 2004 issued by the ministry of construction on 17 March 2004; Chen & Van der Merwe (2009) *TSAR* 27.

¹⁴¹⁰ Property Management Regulation of 2003 art 5.

¹⁴¹¹ Property Management Regulation of 2003 art 5(1).

¹⁴¹² Property Management Regulation of 2003 art 5(2).

¹⁴¹³ Property Management Regulation of 2003 art 5(3).

¹⁴¹⁴ Property Management Regulation of 2003 art 8.

categorized as the third class and are re-evaluated by a real estate authority for one year.¹⁴¹⁵ The management company must provide full disclosure of its accreditation and experience when it tenders for a job. The accreditation ensures that the management body employs a properly qualified and experienced agent, and that the client will have professional management services of a high standard for its condominium community.

11 3 Are managing agents also estate agents?

The shortcoming in South Africa that no qualifications are required to enable a person to be appointed as a managing agent can only be remedied by legislation which would establish a body of Professional Sectional Title Managing Agents to ensure that the managing agents and their staff have some kind of minimum qualification and training to practice.¹⁴¹⁶ Such a body could function under the auspices of the Institute of Estate Agents. It could have its own qualifying examination, code of conduct, rules and ethics and a constitution in order to practice as a professional managing agent, as is the case for estate agents who are registered as such in terms of the Estate Agency Affairs Act 112 of 1976 (the “Estate Agency Affairs Act”) and who function under the Estate Agency Affairs Board. The activities, qualifications and training of the managing agents can then be monitored and controlled by the Estate Agency Affairs Board.¹⁴¹⁷

It is in the trustee’s best interests to appoint managing agents that are primarily involved in the property industry such as estate agents. Since 1981 managing agents who collect or receive levies for a body corporate have been defined as estate agents, with the result that the Estate Agency Affairs Act applies to the managing agent.¹⁴¹⁸ Managing agents are therefore, by definition, also estate agents. For this reason the managing agent will have to comply with all the applicable provisions of the Estate Agency Affairs Board Act and existing code of conduct for estate agents. The Estate Agency Affairs

¹⁴¹⁵ Property Management Regulation of 2003 art 7.

¹⁴¹⁶ Constat & Bleijs *Demysifying Sectional Title* 43.

¹⁴¹⁷ AB Kenyon-Thompson “The body corporate and the managing agent” (1983) *Juta’s SA Journal of Property* 42. Van der Merwe (1994) 316; Van der Merwe *Sectional Titles* 15-5.

¹⁴¹⁸ G Jooste “Trust Money, Trust Accounts and Managing Agents – What are the Best Rules” (January 2008) 3-1 *Paddocks Press Newsletter* 1-2.

¹⁴¹⁸ Van der Merwe *Sectional Titles* 15-7.

Board is in the process of promulgating a special code of conduct for management agents.¹⁴¹⁹ The proposed code contains specific provisions relating to managing agents. The duties imposed on managing agents by the proposed code are in favour of the managing body and not the individual owners. This means that only the managing body can lodge complaints with the Estate Agency Affairs Board for alleged contravention of the code.¹⁴²⁰ Unit owners with complaints would have to act through their management body. The proposed code also has a provision that the managing agent would be held vicariously liable for the acts or omissions by his or her employees.¹⁴²¹

As I have mentioned persons whose professional duties include the collection or receipt of levies for the sectional title body corporate falls under the jurisdiction of the Estate Agency Affairs Board because the Estate Agency Affairs Act defines an estate agent as:

“Any person who renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the *Gazette*.”¹⁴²²

One of these services specified by the Minister is the collecting or receiving money payable by any person or on behalf of a developer or a body corporate in respect of a sectional title unit. It is for this reason that all managing agents are under a legal obligation to register as an estate agent with the Estate Agency Affairs Board before he or she can collect or receive any levies, and should be in possession of a valid Fidelity Fund Certificate.¹⁴²³ Estate agents are required to take out fidelity insurance in the event that the agent misappropriates body corporate funds. It is very important for a managing agent to register with the Estate Agency Affairs Board because all amounts paid to the managing agent into its trust account is then protected by the Estate Agent’s

¹⁴¹⁹ Proposals to the Sectional Titles Regulation Board (March 2003) 3.1.1.12; Chen & Van der Merwe (2009) *TSAR* 26.

¹⁴²⁰ Van der Merwe *Sectional Titles* 15-7.

¹⁴²¹ 15-7.

¹⁴²² Estate Agency Affairs Act s 1(a)(iv).

¹⁴²³ Estate Agency Affairs Act s 28; J Paddock “Q & A with Jennifer Paddock: Registering managing agents” (January 2010) 5-5 *Paddocks Press Newsletter* 6; J Van der Walt “Registration of managing agents with Estate Agency Affairs Board” (April 2008) 3-4 *Paddocks Press Newsletter* 4.

Fidelity Fund. In order for the managing agent to operate a trust account he or she must be in possession of a valid Fidelity Fund Certificate, which protects the body corporate from financial losses, which could be caused by his or her staff's negligence or fraudulent activities.¹⁴²⁴

The managing agents must also manage trust money in accordance with the stipulations of the Estate Agency Affairs Act.¹⁴²⁵ Trust money is defined in the Estate Agency Affairs Act as:

“Money or other property entrusted to an estate agent in his or her capacity as an estate agent.”¹⁴²⁶

Managing agents often argue that if the money is deposited directly into the client's account then they are not “collecting or receiving” trust monies, and therefore they do not need to adhere to the Estate Agency Affairs Act. However, the word “collect” should be understood in both its narrow and wide meaning. The wider meaning includes all steps routinely taken to gather payments from persons normally willing to pay such as sending invoices, and reminder letters. Therefore, the managing agent does fall within the sphere of the Estate Agency Affairs Act in this regard. The Estate Agency Affairs Act stipulates that the managing agent must keep a record of the trust money received and must ensure that an audit is done within four months after the end of the financial year of the managing agent.¹⁴²⁷ All trust money, including individual accounts for each body corporate or a collective account (also known as a “bucket account”) for all bodies corporate must be included in the report that the auditor of the managing agent sends to the Estate Agency Affairs Board annually.

¹⁴²⁴ Woudberg *Basic Sectional Titles Book Two* 118.

¹⁴²⁵ Jooste (January 2008) *Paddocks Press Newsletter* 1.

¹⁴²⁶ Estate Agency Affairs Act s 1.

¹⁴²⁷ Estate Agency Affairs Act s 29.

The managing agent is obliged to open a trust account or accounts with a bank for the purpose of depositing monies received from clients.¹⁴²⁸ Only once money has been deposited into the current account¹⁴²⁹ may it be transferred into a savings or interest bearing account.¹⁴³⁰ Both accounts must be in the name of the managing agent and must contain a reference to section 32(1) or 31(2) of the Estate Agency Affairs Act as the case may be. All the accounts must be reconciled after every 30 days. The managing agent can therefore open a trust account for all of his clients collectively or separate accounts for each client. The managing agent must notify the Estate Agency Affairs Board of the details of the current account including the bank name and account number. There is no such requirement for the savings or interest bearing account, as the trust funds may not be deposited directly into a savings account.¹⁴³¹ In a letter to NAMA the Estate Agency Affairs Board stated that trustees may not have signing powers on the managing agent's accounts and the managing agents may not have signing powers on the body corporate's accounts.¹⁴³²

It is most important to note that the managing agent is not entitled to payment for any services rendered as an estate agent if he or she is not registered with the Estate Agency Affairs Board and is in possession of a valid Fidelity Fund Certificate.¹⁴³³ Managing agents must apply to the Estate Agency Affairs Board on an annual basis for the renewal of their Fidelity Fund Certificate. The Estate Agency Affairs Board will fine the managing agent if he or she does not apply for the renewal timeously and the Certificate will not be issued until the fine and all other prescribed fees have been paid.

If the managing agent steals from a body corporate's trust money the body corporate will be able to submit a claim to the Estate Agency Affairs Board against the Fidelity Fund and recover its losses from the Fidelity Fund. The Estate Agency Affairs Act refers specifically to theft of trust monies. The body corporate will not be entitled to claim from

¹⁴²⁸ Estate Agency Affairs Act s 32.

¹⁴²⁹ Estate Agency Affairs Act s 32(1).

¹⁴³⁰ Estate Agency Affairs Act s 32(2).

¹⁴³¹ Jooste (January 2008) *Paddocks Press Newsletter* 2.

¹⁴³² 2.

¹⁴³³ Van der Merwe *Sectional Titles* 15-8.

the Fidelity Fund if it cannot actually be proved that the managing agent stole from the body corporate. All claims against the Fund must be submitted within three months of the claimant becoming aware of the theft. Failure to do this within the allotted time can result in the claim being rejected. Although recovery is not guaranteed the claimant should always report the theft as soon as he or she become aware of the theft.

Despite the requirement that the managing agent register with the Estate Agency Affairs Board, there are still many managing agents that have not registered and who are not in possession of a valid Fidelity Fund Certificate. In cases where the managing agent is not registered with the Estate Agency Affairs Board or not in possession of a valid Fidelity Fund Certificate, commentators in the field of sectional titles are of the opinion that the Fidelity Fund will still entertain the possibility of repaying the claim.¹⁴³⁴ In such a case the Estate Agency Affairs Board will require the body corporate to exhaust all avenues of recovery for the loss such as liquidation of the managing agency business and the personal sequestration of the managing agent who committed the theft.

It is also important to note that the mere fact that a managing agent is registered as an estate agent does not guarantee that the members of staff chosen by the managing agent are also properly qualified.¹⁴³⁵ Trustees who self-administer the scheme will place the scheme at risk as they do not have the same protection. The trustees will have to obtain fidelity insurance, but in practice the body corporate seldom makes claims for such policies because insurance companies require the body corporate to lay criminal charges against the trustees in charge of the funds. The body corporate seldom does due to the implications for the trustee's employment and constraints in life that accompany a criminal record. The bodies corporate are more inclined to lay charges against the management agent as a third party.¹⁴³⁶

¹⁴³⁴ Van der Walt (April 2008) *Paddocks Press Newsletter* 4.

¹⁴³⁵ Woudberg *Basic Sectional Title Book Two* 124.

¹⁴³⁶ 118.

11 4 Are managing agents also debt collectors?

There has been uncertainty as to whether a managing agent should be considered a “debt collector” for the purpose of the Debt Collectors Act”. If this is the case the managing agent will be required to register with the Council for Debt Collectors and open and operate a separate trust account for this purpose under the Debt Collector’s Act, in addition to the trust account the managing agent must operate under section 32 of the Estate Agents Affairs Act.

A “debt collector” for the purposes of the Debt Collector’s Act is:

“A person, other than an attorney or his employee or a party to a factoring arrangement, who for reward collects debts owed to another on the latter’s behalf...”¹⁴³⁷

This definition is clearly wide enough to cover the levy collection activities carried out by managing agents. The National Credit Regulator has made an argument for managing agents being registered as a debt collector, having found a number of managing agents guilty of contravening the National Credit Act 34 of 2005 (the “National Credit Act”) because they charged more than the prescribed charges for debt collection activities. NAMA had also suggested that registration as a debt collector is not too onerous a task, and the hassle of registration may be offset by the profits that can be earned from this activity.¹⁴³⁸

Therefore, the trustees must confirm with the Council of Debt Collectors that the managing agent is a member of this compulsory body and is registered as a “debt collector” in terms of the Debt Collectors Act. Without such membership the managing agent would not be legally entitled to send statements or collect monies.¹⁴³⁹

¹⁴³⁷ Debt Collectors Act s 1(a).

¹⁴³⁸ G Paddock “Looking Back at 2009 - a Sectional Title Retrospective” (December 2009) 4-12 *Paddocks Press Newsletter* 1.

¹⁴³⁹ G Moore-Barnes “Steps to becoming a managing agent” (June 2013) 8-6 *Paddocks Press Newsletter* 2.

Both the Debt Collectors Act and Estate Agents Affairs Act could regulate the levy collecting activities. This creates an impractical situation where a managing agent has a statutory obligation to open trust accounts under both Acts. The management agent would then be limited to the prescribed charges for various debt collection activities.¹⁴⁴⁰

The uncertainty has now been cleared up. Dr. Gerhard Jooste from NAMA has reported that after extended negotiations with the Debt Collector's Council it has been formally confirmed that managing agents who collect levies do not need to open a separate account under the Debt Collectors Act.¹⁴⁴¹ The managing agent need not operate two separate trust accounts. A managing agent must credit all levies received to an estate agency trust account. The managing agent's use of a trust account opened under section 32 of the Estate Agents Affairs Act for levy receipts is considered compliance with the requirements of the Debt Collector's Act.

11 5 National Association of Managing Agents

In South Africa the National Association of Managing Agents ("NAMA") was formed in 2001.¹⁴⁴² It is interesting to note that this only occurred twenty years after a similar association was established in New South Wales. The lesson to be learnt from this is that comparative studies do help countries to develop their own legislation. Following the New South Wales model sooner could have prevented many of the management problems experienced in South Africa due to the lack of legislation requiring managing agents to have membership to a national management association. NAMA represents a number of managing agents in the Eastern Cape, Free State, Gauteng, Gauteng North, KwaZulu-Natal and the Western Cape, with its offices in Pretoria and secretaries in Johannesburg, Durban and Cape Town. The latest statistics available reveal that NAMA has 274 member firms who together manage 13 000 sectional title schemes. There are approximately 3500 property managers in South Africa who manage approximately ten

¹⁴⁴⁰ Paddock (December 2009) *Paddocks Press Newsletter* 1; Van der Merwe *Sectional Titles* 15-8.

¹⁴⁴¹ G Paddock "Application of the Debt Collectors Act to managing agency" (February 2014) 9 – 1 *Paddocks Press Newsletter* 2.

¹⁴⁴² The chairperson of NAMA for the first twelve years was Dr Gerhard Jooste, who was then replaced by Koos Croukamp; G Paddock "Tribute to Gerhard Jooste" (May 2013) 9-5 *Paddocks Press Newsletter* 4.

schemes each. Specialist sectional title property managers do manage approximately thirty sectional title schemes each, but have been known to manage up to fifty schemes each.¹⁴⁴³

It is important to note that these statistics are not accurate as not all managing agents are members of NAMA. The numbers of persons working as managing agents is far greater than the numbers enumerated above. What is clear is that the demand for sectional ownership is constantly increasing. When the first Sectional Titles Act¹⁴⁴⁴ came into operation in 1973 only 2 sectional title schemes were registered. According to the Chief Directorate of the Deeds Registration the statistics for schemes registered in the period from January 2008 to December 2011 totaled 8415 schemes over all the provinces in South Africa. During the same period the various registration offices issued 113945 certificates of registered sectional title, and 280171 transfers of sectional title units were registered.¹⁴⁴⁵ The increase in demand for sectional titles and all forms community schemes such as homeowners' associations, share block and retirement schemes have resulted in an increased need for professional property management. Community schemes, by their very nature, create more intensified relationships and responsibilities for the individual owners. Professional managing agents play a vital role in not only assisting in the management of these schemes, but also in the education of executive boards tasked with management responsibility. It stands to reason that these managing agents would therefore need to be qualified and experienced.

NAMA initiated a formal training course at the University of Cape Town by Adjunct Professor Graham Paddock, which rewards managing agents who pass the examination, with a Certificate in Sectional Title Scheme Management. The University of Cape Town Sectional Title Scheme Management Certificate Course which is offered under the auspices of the Faculty of Law was first presented in December 2005 and has been presented twice a year since that time. This course is structured to assist

¹⁴⁴³ G Paddock "State of Sectional Title Nation" (November 2008) 3-11 *Paddocks Press Newsletter* 3; Van der Merwe *Sectional Titles* 16-6.

¹⁴⁴⁴ 66 of 1971.

¹⁴⁴⁵ Van der Merwe *Sectional Titles* 1-30(2).

managing agents to use their learning to properly interpret and apply the provisions of the STA and the prescribed management rules in practice.¹⁴⁴⁶

NAMA directors also organize regular training seminars across the country to keep managing agents abreast with current and fresh training. NAMA published a standard scheme managing agreement to be used by all managing agents.¹⁴⁴⁷ It comprehensively covers all the STA requirements and other related statutory regulations. It identifies which persons are entitled to use the agreement as members of NAMA and encourages all its members to make use of the agreement. Setting ethical standards and ensuring transparency improves the professionalism of the managing agent. The Agreement includes Annexures that have been issued in a format that ensures that any amendment thereto must be identifiable and acknowledged by all the parties which protects the originality of the Agreement. The Annexures also allow the parties to the Agreement to tailor the terms to suit the individual needs, which makes it a broad based user-friendly contract. Adjunct Professor Paddock has also advised that the Agreement be included in the syllabus for the University of Cape Town Sectional Title Management Course, which ensures that all students who are certified in this training course have become familiar with this document.¹⁴⁴⁸

NAMA has organized Professor Henk Delpont from the Mercantile Department at the University of Port Elizabeth¹⁴⁴⁹ to draft a code of conduct for managing agents. The

¹⁴⁴⁶ The framework of the course enables learners to use the frame of reference in the exercising of their management tasks. The course starts with an introduction into the South African legal system with a focus on real property rights and management agency which gives the learner a basic knowledge and understanding of the system in which sectional titles operates. The learner is then given a definition and explanation of the specialised sectional title terms and basic concepts. The next step is for the learner to obtain a high-level overview of the sectional title body corporate dealing with the laws and rules that apply to these bodies. The learner is then in position to study the role of the managing agent. There is a focus on the contract between the managing agent and the trustees as well as the best practices applicable to managing agents as reflected in the NAMA Code of Conduct. From this the learner is taught the legal relationship between all the roleplayers; what the managing agent could be expected to do; the context in which these services are rendered. The course then goes on to deal with the administrative, physical and financial duties of the managing agent. The relevant provisions of the STA and rules are focussed on here. Finally the four principle methodologies applied to the resolution of disputes in sectional title schemes are introduced; G Paddock “Spotlight on Sectional Title Certifications” (May 2009) 4-5 *Paddocks Press Newsletter* 4.

¹⁴⁴⁷ G Moore-Barnes “NAMA publishes a standard scheme management agreement” (July 2008) 3-7 *Paddocks Press Newsletter* 1.

¹⁴⁴⁸ Moore-Barnes (July 2008) *Paddocks Press Newsletter* 2.

¹⁴⁴⁹ T Maree “NAMA makes progress” (November 2003) 11 *MCS Courier* 7.

Estate Agency Affairs Board has approved the code of conduct. After approval by the Department of Trade and Industry it is proposed that the code be made a part of the Regulations of the Estate Agency Affairs Act, applying to those estate agents that act as managing agents. The proposed code focuses on openness, transparency and full disclosure and is based on four principles.¹⁴⁵⁰ The first principle is that the managing agent should give full and proper disclosure of his or her qualifications and experience. This will enable the body corporate to make an informed decision when appointing a managing agent. Managing agents should be honest and the trustees should trust them in the exercise of the management functions. The second principle requires that there must be certainty regarding the nature of the relationship between the management body and managing agent and their respective responsibilities (agency, master and servant or fiduciary relationship).¹⁴⁵¹ This will have the effect of avoiding or at least reducing disputes. The third principle requires proper protection of management bodies against unscrupulous practices of managing agents. In this way managing agents will be held accountable in cases of negligence. The fourth and final principle requires the managing agent to discharge its management functions in a professional and responsible manner. The managing agent will stand in a fiduciary relationship to the body corporate and will be held responsible in cases of breach of this fiduciary relationship. The proposed code therefore requires the managing agent to make certain disclosures before an agreement is concluded. It stipulates that the agreement must be in writing. Certain terms must be included in the agreement. These terms include the management agent's responsibilities; the prohibition against unscrupulous conduct; the duty to account and report to the management body; an obligation on the managing agent to perform its services with due care and skill diligently on time and in accordance with the law; a requirement to avoid conflict of interest; to assign skilled staff to render the services in the management of the scheme and to make available all relevant documents on termination of its services.¹⁴⁵² This document will change the way in which the management industry will deliver service to customers and will enhance

¹⁴⁵⁰ Van der Merwe *Sectional Titles* 15-6.

¹⁴⁵¹ Pienaar *Sectional Titles* 190.

¹⁴⁵² Explanatory Memorandum on the Proposed Code of Conduct for Managing Agents cl 3-9; Van der Merwe *Sectional Titles* 15-7.

protection of consumers. This has been described as a groundbreaking and as a major step in the right direction for the managing agent industry.¹⁴⁵³ NAMA has adopted this code of conduct for managing agents to utilize as a set of standards to which the voluntary members of NAMA bind themselves and their employees.

11 6 Should the Community Scheme Ombud Service regulate managing agents?

As I have mentioned there is no law that specifically regulates the managing agency industry and it is not compulsory to join NAMA. The STA does not contain any provision that regulates the conduct of the managing agents. The Minister of Trade and Industry decided that there needed to be some kind of insurance against theft of the funds that the managing agent is entrusted with. The Estate Agency Affairs Board already operated a suitable insurance programme in the form of its Fidelity Fund. As I have mentioned managing agents become estate agents when they collect or receive money due to a body corporate. When managing agents are involved in this type of estate agency service the managing agent is obliged to put his or her client's money in a trust account, and any money stolen from this account is covered by the Estate Agency Affairs Board Fund.

However, the Estate Agency Affairs Act, its regulations and the code of conduct applicable to estate agents is not the best legislation to regulate the managing agency industry as it does not regulate the full scope of managing agent activities, but rather regulates the business of persons who directly or indirectly buy, sell and rent immovable property. The Estate Agency Affairs Act extends only to managing agents levy collection activities and not to the financial, legal and administrative services they render. Therefore, the clients of the managing agents are not protected from other types of mismanagement other than theft from the trust accounts. The limited supervisory role of the Estate Agency Affairs Board needs to be extended to cover all the functions of managing agents. Management agency therefore remains largely unregulated.

¹⁴⁵³ Maree (November 2003) *MCS Courier* 7.

NAMA was formed and it prepared a code of conduct specifically dealing with managing agents. However, this association is voluntary and neither the Department of Trade and Industry nor the Estate Agency Affairs Board have recognized the managing agents as a separate category of estate agents and has not adopted the code of conduct developed by NAMA. Managing agents pay the Estate Agency Affairs Board a registration fee for each business and for each of the principals involved in that business to whom it issues Fidelity Fund Certificates. These businesses also pay the Estate Agency Affairs Board one half of the interest that accrues on the money in their trust account and that is not claimed by their clients.

It has been suggested that the CSOS, once it is in operation, should take over regulation of the management agency from the Estate Agency Affairs Board.¹⁴⁵⁴ The CSOSA includes sectional title schemes among the “community schemes” that requires either volunteer or professional management services.¹⁴⁵⁵ It could provide a solution to this shortfall in the regulation of the managing agency industry.

Documentation for sectional title schemes is currently filed at the Deeds Registries Office, but since 1997 the quality of these documents filed has not been examined or controlled. Many of these documents have been amended or removed without authorization. The CSOS’s role in ensuring that sectional title scheme participants and

¹⁴⁵⁴ G Paddock “Should the Community Scheme Ombud Service regulate managing agents?” (October 2009) 4-10 *Paddocks Press Newsletter* 1.

¹⁴⁵⁵ In terms of section 2 of the CSOSA the purpose of the Act is to provide for the establishment of the Service; the functions, operations and governance of the Service; and a dispute resolution mechanism in community schemes. In terms of section 4 the functions of the Service are that the Service must develop and provide a dispute resolution service in terms of this Act; provide training for conciliators, adjudicators and other employees of the Service; regulate, monitor and control the quality of all sectional titles scheme governance documentation and such other scheme governance documentation as may be determined by the Minister by notice in the *Gazette*; and take custody of, preserve and provide public access electronically or by other means to sectional title scheme governance documentation and such other scheme governance documents as may be determined by the Minister by notice in the *Gazette*. In performing its functions the Service must promote good governance of community schemes; must provide education, information, documentation and such services as may be required to raise awareness to owners, occupiers, executive committees and other persons or entities who have rights and obligations in community schemes, as regards those rights and obligations; must monitor community scheme governance; and may generally, deal with any such matters as may be necessary to give effect to the objectives of this Act. Any person who is party to or materially affected by a dispute may make an application for dispute resolution in terms of section 38. The Service does not have unlimited jurisdiction and the dispute must fall into one of the categories set out in section 39 which includes financial issues; behavioral issues; governance issues; meetings; management services; works pertaining to private or common areas; or general and other issues.

role players have reliable and ready access to governance documentation will greatly improve the operation of the sectional title schemes.¹⁴⁵⁶ With regard to monitoring the fact that schemes will have to prepare annual returns including financial reports will keep trustees and managing agents accountable regarding the statutory governance requirements. There is a focus on educating those with rights and obligations in sectional title schemes. This awareness will serve to lower instances of disputes and will make governance of schemes more efficient.¹⁴⁵⁷

The CSOS will be able to make certain specific orders in regard to managing agents. The CSOS is empowered to grant an order requiring a managing agent to comply with the terms of the contract of appointment and any applicable code of conduct or authorization.¹⁴⁵⁸ The CSOS can also grant an order declaring that the association, or body corporate in the case of sectional title schemes, does or does not have the right to terminate the appointment of a managing agent, and that the appointment is or is not terminated.¹⁴⁵⁹ Therefore, the CSOS, once in operation, will be the most suitable forum for regulating the managing agent industry.

11 7 How does the Consumer Protection Act affect managing agents?

The Consumer Protection Act 68 of 2008 (the “Consumer Protection Act”) sets out the minimum requirements to ensure adequate consumer protection in South Africa. It is intended to promote fair and equitable conduct in the market place. All suppliers of services including managing agents will have to comply with these measures.¹⁴⁶⁰ The owners, and possibly even tenants will be consumers that are recipients or beneficiaries of the management services. Chapter 2 of the Consumer Protection Act affords the consumer (sectional owner) with a number of fundamental rights including protection against discriminatory marketing; the right to select suppliers; a cooling off period; the

¹⁴⁵⁶ CSOSA ss 4(1)(c); 4(1)(d); 4(2)(b); 4(2)(c) and 39(7)(a).

¹⁴⁵⁷ G Paddock “Overview of the Community Scheme Ombud Service Bill, 2010” (March 2011) 15 *Property Law Digest*; G Paddock “Overview of the CSOS Bill – recent advancements” (April 2011) 6-4 *Paddocks Press Newsletter* 2.

¹⁴⁵⁸ CSOSA s 39(7)(a).

¹⁴⁵⁹ CSOSA s 39(7)(b).

¹⁴⁶⁰ A managing agent who advertises and contracts to deliver management services to a body corporate is a supplier in terms of CPA s 1.

right to fair and honest dealing; the right to fair, just and equitable terms and conditions and the right to fair value, quality and safety. In practice it is unknown to what extent the owners can rely on these provisions, but they will be able in theory to insist on compliance and direct complaints to enforcement agencies.

11 8 Conclusion

A well-run scheme is always the result of good management.¹⁴⁶¹ One of the biggest causes of failure of sectional title developments is ignorance.¹⁴⁶² The managing agents will be required to provide guidance in good corporate governance, correct procedures and adherence with the legislative requirements to the trustees who are more often than not ill equipped to manage the scheme properly. Therefore, the success or failure of the scheme will often depend on the professional performance of the managing agent.

Due to the competitive nature in the career market, the managing agent with the best qualification and the most experience in the industry will be in a better position to secure a management contract with a body corporate. Qualifications set out the knowledge foundation that forms the basis for the interpretation of experience in practice.¹⁴⁶³ The sectional titles management industry is a very technical field and the managing agents are faced with many and varied issues on a daily basis. The more qualified the managing agent, the more secure the trustees can be in the knowledge that the managing agent knows and understands the relevant legislation and the rules applicable to the scheme. In this way problems and conflicts in the scheme can be avoided even before these occur. Furthermore, the more knowledge and experience the managing agent has in the field of sectional titles the more confident he or she will be with implementing the management decisions on a practical level. Therefore, a balance between knowledge and experience is exactly what a sectional title scheme needs to function optimally without unnecessary conflict and mismanagement.

¹⁴⁶¹ Mohamed S “Effective management is the backbone of a scheme” (March 2013) 8-3 *Paddocks Press Newsletter* 2.

¹⁴⁶² P Henry “Body corporate trustees and managing agents make or break sectional title developments” (August 2013) 8-2 *Paddocks Press Newsletter* 2.

¹⁴⁶³ Van der Walt (May 2008) *Paddocks Press Newsletter* 2.

When selecting a managing agent to manage a scheme certain factors must be considered. The managing agent should have some *qualification* by examination in a course specifically designed to train the managing agent in the specialized skills required in sectional title property administration. The managing agent should preferably possess a secretarial diploma or a commercial degree. The managing agent should at least possess a University of Cape Town Certificate in Sectional Titles Scheme Management, which would then be the minimal entry-level qualification for any person working in this industry.¹⁴⁶⁴ This course has been going on for ten years and is supported and approved by NAMA.¹⁴⁶⁵ Initial qualifications are preferable, but it is important to note that on-going training will also be necessary.¹⁴⁶⁶ The managing agent needs to keep his or her knowledge up to date. Companies that conduct business in these harsh economic times often decide to take expenses for staff training and development out of the budget to save money.¹⁴⁶⁷ This could be a very expensive mistake as the training of managing agents is integral to the success of the business that they conduct. Training is needed most in such times to ensure optimum efficiency in service delivery and that the highest level of client services is maintained. This has the result of saving time and ultimately costs. Porteous states that:

“Well equipped, trained and efficient staff is one of the biggest assets of a business in the service industry. Ultimately this translates into cost saving factor for clients as well as their peace of mind.”¹⁴⁶⁸

The managing agent should be very familiar with the relevant legislation and its amendments and should have a library of the Acts, regulations, rules, legal developments and administrative guidelines. Managing agents furthermore need to be computer literate. They need to deal with communications between varying persons including clients, contractors, municipal officials, trustees, tenants and owners.

¹⁴⁶⁴ L Reynard “Guidelines for choosing a sectional titles managing agent” (October 2008) 3-10 *Paddocks Press Newsletter* 6; Moore-Barnes (June 2013) *Paddocks Press Newsletter* 2.

¹⁴⁶⁵ Moore-Barnes (June 2013) *Paddocks Press Newsletter* 2.

¹⁴⁶⁶ 2.

¹⁴⁶⁷ D Porteous “The importance of sectional title training” (May 2009) 4-5 *Paddocks Press Newsletter* 1.

¹⁴⁶⁸ 1.

The *experience* of the agent should be determined, and the trustees should find out how long the management agency company has been around. If a company has been around for a long time and has a good reputation, the chances are that the problems in a particular scheme would have been dealt with before. New companies are under a higher risk of failing.¹⁴⁶⁹ The trustees should establish whether the managing agent acts as an individual, in a partnership or as a company. Woudberg is of the opinion that the managing agent should have at least five years' experience working in the field under another suitably qualified senior agent.¹⁴⁷⁰ In my opinion a managing agent should have at very least two years' experience in property management.

The next important factor to consider is whether the managing agent can supply *references* from at least ten existing and satisfied bodies corporate.¹⁴⁷¹ If the managing agent has a good track record it would be happy to supply references. The trustees should get the names and addresses of the schemes that the managing agent manages, and should then consult with trustees from these schemes to establish how the managing agent performs. The recommendation from other schemes managed by the managing agent could help the trustees establish what services the managing agent offers; the number of staff available and whether the staff gets along with the sectional owners; compliance with relevant legislation; reliability and efficiency and his or her reputation. This will assist the trustees in establishing whether the managing agent conducts his business in a professional and ethical manner.¹⁴⁷² Word of mouth is a good place to start when selecting a service provider. Trustees should ask their counterparts in other schemes in the area if they can recommend a good managing agent.¹⁴⁷³ Obviously there should be disqualification of persons who have a criminal record or who have been convicted of any offence involving fraud or dishonesty.¹⁴⁷⁴

¹⁴⁶⁹ Reynard (October 2008) *Paddocks Press Newsletter* 6.

¹⁴⁷⁰ Woudberg *Basic Sectional Title Book One* 49.

¹⁴⁷¹ Reynard (October 2008) *Paddocks Press Newsletter* 6-7.

¹⁴⁷² Moore-Barnes (June 2013) *Paddocks Press Newsletter* 2.

¹⁴⁷³ A Kelly "Choosing a good managing agent" February 2013 Volume 8 Issue 2 *Paddocks Press* 1.

¹⁴⁷⁴ Woudberg *Basic Sectional Title Book Two* 124.

The sectional title industry is still under threat of mismanagement of trust and unprotected funds by managing agents who believe that it is not necessary to register under the Estate Agency Affairs Board, and who therefore do not manage the funds in terms of the Estate Agency Affairs Act. An important aspect that must be established is whether the managing agent is a registered estate agent and whether the managing agent holds a *current and valid Fidelity Fund Certificate* issued by the Estate Agency Affairs Board. This will give the body corporate cover by the Fidelity Fund operated by the Estate Agency Board for loss arising from the theft of body corporate funds from the trust account by the managing agent. It is not necessary for every individual at the agency to be registered, as only the principal is required to be registered. If the managing agent collects levies then it is legally bound to register with the Estate Agency Affairs Board so that the body corporate's money is protected by the Fidelity Fund when it is deposited in its trust account. Leaving the trust money unprotected leaves it open to mismanagement, which places the trustees who appointed the managing agent in a vulnerable position in terms of their fiduciary relationship with the body corporate. Therefore, trustees should seek proof of the managing agent's Fidelity Fund Certificate. The Fidelity Fund cover is only for money stolen from the managing agent's trust account. Therefore, the trustees should establish with the managing agent's insurer that he or she has professional indemnity cover.¹⁴⁷⁵ The trustees will have to ensure that the body corporate takes out sufficient fidelity insurance in terms of prescribed management rule 29(2)(b), and that it is reviewed annually in the general meeting. The trustees will have to confirm with the *Council of Debt Collectors* that the managing agent is a member of this compulsory body.

A *code of conduct* should be adopted which, if breached, results in the agent being deregistered. The trustees should consider whether the managing agent is a member of NAMA and whether he or she is willing to agree in his or her contract to be bound by NAMA's code of conduct. Currently NAMA is a voluntary organization and there are no consequences for members who breach the code of conduct. It is my opinion that

¹⁴⁷⁵ Moore-Barnes (June 2013) *Paddocks Press Newsletter* 2.

managing agents must be held legally accountable to a code of conduct, thereby making the managing agency industry more professional.

One of the most important tasks of a managing agent is to assist the trustees and body corporate in the *management of finances*. The managing agent should offer more than just a bookkeeping service and needs to know and understand accounting and financial recording. At very least the managing agent must be able to read, understand and correctly interpret these financial documents due to the fact that reporting to the trustees and bodies corporate on these matters is subject to different bookkeeping standards. Managing agents are further required to have a sound knowledge of the relevant legislation as this assists them with the allocation of expenses. Further considerations are how the managing agent reports; how his or her levy collection policy works and whether outstanding levies are handed over to collection attorneys promptly. The trustees should request copies of the managing agent's monthly financial statements to see if they are understandable, and should ensure that all additional information they might need is available. All these requirements need to be set out clearly in the contract. The trustees must finally check the accounts and bank statements monthly to make sure that the bills are being paid and that the scheme's records are audited annually.¹⁴⁷⁶

The *personal attributes* of the managing agent are also important. Managing agents need to be committed and dedicated to their work. The trustees must ensure that the agents can be trusted and that there is not any serious personality clashes as the trustees and managing agents will have to work closely on various tasks. The managing agent should have a calm disposition, as he will work with people from different walks of life with varying demands.¹⁴⁷⁷ The trustees should organize a face-to-face meeting to assess the managing agent in an informal setting. This is a vital step in the selection process. It should be established if the management agent and his staff would get along with the trustees and the body corporate and individual sectional owners.¹⁴⁷⁸ The trustees should also visit the managing agents' place of business to ensure that the

¹⁴⁷⁶ Annexure 8 rule 40; G Moore-Barnes (June 2013) 9-6 *Paddocks Press Newsletter* 2.

¹⁴⁷⁷ Moore-Barnes (June 2013) *Paddocks Press Newsletter* 2.

¹⁴⁷⁸ Van der Merwe *Sectional Titles* 15-11; Van der Merwe (1994) *Stellenbosch Law Review* 320.

agent is not overworked or disorganized. The trustees can then see for themselves how the managing agent functions; what office infrastructure is available; how well the staff works together and who will do the work while the managing agent is on holiday or ill.

Managing agents spend much of their time attending various *meetings*.¹⁴⁷⁹ They need to manage these meetings; take accurate minutes and give advice at owner and trustee meetings. The trustees should factor in whether the agent can talk in public, deal with difficult people and handle conflict management.

The managing agent will have to be good at *time* management. The time spent managing sectional title schemes is not a normal 8:00am to 17:00pm job. Meetings are usually held after working hours as trustees and owners have their own jobs to consider. Managing agents will have to manage meetings and make sure that the matters in the agenda are dealt with and that no time is wasted. Delays in dealing with trustee instructions or resolving issues arising at meetings will cause more issues. Many managing agents in New South Wales have started to arrange meetings at their offices during business hours to minimize expensive and tiresome evening meetings at the premises. The trend is also to limit services to a minimum and to demand ever-increasing co-operation and assistance from sectional owners and the trustees. This trend will continue, unless more funds can be arranged for the fees.

The potential draft *agency agreements* must be studied and scrutinized. It should be discovered whether the managing agent would require a complete or partial delegation of powers, functions and duties and whether specific services will be provided for in the management agreement and what additional extra services are provided. The contract must set out exactly what is required from the managing agent.

The *cost* of the managing agent's fee is an important consideration. The trustees should obtain and compare quotes from as many reputable managing agent firms as is possible. The trustees must compare the management fees, expenses and charges for

¹⁴⁷⁹ Van der Merwe (1994) *Stellenbosch Law Review* 319.

services provided and when these charges, expenses and fees are payable. They should also consider any hidden costs in appointing a professional managing agent. Possible additional costs that could be levied against the body corporate are bank charges, printing and stationery, cost of administering levies and statistical returns.¹⁴⁸⁰ Bodies corporate should be prepared to pay the managing agent for the professional service that he or she will be offering. It is important to note that the cheapest quote is not always the best one. The managing agent should give a comprehensive and competent service at a competitive rate.¹⁴⁸¹ It is clear that the price of the managing agent should not be the only consideration when appointing a new managing agent.¹⁴⁸² There are various other factors that need to be taken into consideration. If the body corporate cannot afford the most prominent company, it is always best to employ a company that is personally run by its owners.¹⁴⁸³ The body corporate and the trustees must therefore exercise extreme caution when choosing a managing agent.

The most crucial aspect of the managing agent, besides transparency and integrity, is that of *education*. There should be a minimum education requirement for managing agents to be registered as such. The managing agent should be able to educate the trustees by way of trustee training and the sectional owners by way of newsletters and legislation updates. A good managing agent would share knowledge and guide the trustees so that the body corporate is managed efficiently and effectively. The managing agent should not keep all the information to himself and run the body corporate as though he or she owns it. A professional managing agent educates, guides and serves its bodies corporate in this fast changing industry. Often following the laws and rules applicable to sectional titles may not always be perceived by sectional title owners as being fair and correct. However upholding the STA and company name must be the driving force behind doing a difficult and arduous job well and with integrity.

¹⁴⁸⁰ Woudberg *Basic Sectional Title* 49.

¹⁴⁸¹ Reynard (October 2008) *Paddocks Press Newsletter* 7.

¹⁴⁸² 7.

¹⁴⁸³ 6.

It is essential for managing agents to work together and support one another to begin to establish a professional managing agent industry and profession.¹⁴⁸⁴ It is the only way to get the South African sectional title industry to the standard where New South Wales has been for years now. Managing agents should be registered as professionals similar to the way in which lawyers are required to be registered as such before they can operate their own practice. It will give the body corporate the security of knowing that its investment in the property is secure because it is in the good hands of the professional managing agent that is there to guide the trustees in their everyday management of the scheme.

Some of the most recent Chinese local regulations have recommended that a competent and autonomous professional body of managing agents ensure high standards of management services.¹⁴⁸⁵ Chen Lei and Van der Merwe state that such an autonomous professional body promotes the managing agent industry by standardizing the way in which managing agents' business is conducted and developing a code of conduct to monitor the managing agents' business conduct.¹⁴⁸⁶ This professional body should also provide specialized training and resolve internal disputes among its members. The code of conduct should require that the managing agent should conduct itself in a responsible manner in the best interests of the body corporate that it serves; that the managing agents and their employees have the required qualification and experience, and knowledge of the relevant statutes and must contain disciplinary procedures. The code should be included in the management contract.¹⁴⁸⁷

Trustees are increasingly opting to use managing agents that are members of NAMA as NAMA has the mission to expect high ethical and professional standards from its members.¹⁴⁸⁸ The trustees appointing a managing agent should make sure that the agent is not only a member of NAMA, but that the agent will adhere to the NAMA Code of Conduct. It is my hope that NAMA, or a similar regulatory board created in terms of

¹⁴⁸⁴ Lenhof (October 2008) *Paddocks Press Newsletter* 3.

¹⁴⁸⁵ Property Management Regulation of Shenzhen Special Economic Zone of 2007.

¹⁴⁸⁶ Chen & Van der Merwe (2009) *TSAR* 28.

¹⁴⁸⁷ Chen *Chinese Condominium Law* 162.

¹⁴⁸⁸ Moore-Barnes "(June 2013) *Paddocks Press Newsletter* 2 2.

the CSOSA, will create a situation where all managing agents will have to be suitably qualified and have proven track records of experience. In this way all agents will be professional and accountable for the responsible discharge of their management functions.

NAMA has an ongoing aim to provide facilities to its members that give value to their membership. Managing agents had no common voice to speak before NAMA was formed in 2001.¹⁴⁸⁹ It has given managing agents an forum to make representations to, and which can legitimize the industry of managing agents by enforcing a code of conduct, training, and maintaining accountability and the highest degree of professionalism in the industry. NAMA can further function to make continuous representations to the legislature to effect the necessary amendments to legislation governing the industry. NAMA should continuously expand and develop the examination curriculum to ensure that all managing agents are properly educated in all spheres of sectional titles. NAMA should advertise the industry to keep the professional body in the public eye and ultimately work to eradicate the existence of unqualified managing agents. It should send out regular newsletters to its members in order to keep them informed of any and all developments in the industry. NAMA, through its regional bodies, should organize regular seminars to provide a platform for discussing hot topics and developments in the industry. These motivational meetings create pride in NAMA and the industry that will attract a high caliber of members. Finally, NAMA can function to control and punish its members who abuse their position of trust by acting unethically towards their clients. In this way the public is protected from unscrupulous operators in this industry.¹⁴⁹⁰

Since the advent of the first Sectional Titles Act in 1971 the managing agent has played an ever-increasing role in the management of sectional title schemes. The standards required from managing agents have risen dramatically. These elevated standard requirements have been achieved largely due to the formation of NAMA and the

¹⁴⁸⁹ Maree (November 2003) *MCS Courier* 7.

¹⁴⁹⁰ Woudberg *Basic Sectional Titles Book Two* 140.

enthusiastic participation therein by the majority of managing agents. NAMA has improved the standard requirements for managing agents largely through education and an emphasis on ethical principles. Patently, NAMA has taken huge strides to promote the professionalism of the managing agency profession.¹⁴⁹¹ The sectional title industry is a dynamic, challenging and ever-changing environment. Managing agents have and will continue to play a significant role in the development and evolution of the industry as a whole.¹⁴⁹²

Managing agency still remains largely unregulated. Since the Estate Agency Affairs Act, its regulations and the code of conduct extends only to managing agents' levy collection activities and not to the financial, legal and administrative services they render, estate agency legislation is not the best legislation to regulate the managing agency industry. Furthermore, NAMA is a voluntary association, and neither the Department of Trade and Industry nor the Estate Agency Affairs Board have recognized managing agents as a separate category of estate agents and has not adopted the Code of Conduct developed by NAMA. It has been suggested that the CSOS should take over regulation of the management agency from the Estate Agency Affairs Board.¹⁴⁹³ It could provide a solution to this deficiency in the regulation of the managing agency industry. The Service must then be given the jurisdiction to rule on the various aspects of management agency and the capacity to investigate and solve all community scheme disputes relating to managing agents in a transparent and fair manner. The CSOS must be given the power to approve a code of conduct and to register management agents, arrange for their fidelity insurance, and investigate and hear complaints against managing agents accused of professional misconduct as being a species of dispute resolution procedure for which it is designed. In this way managing agents will have a duty to account for their management of schemes to the service thus granting the service the power of judicial oversight. This body is therefore more fundamentally suited

¹⁴⁹¹ Paddock (May 2013) *Paddocks Press Newsletter* 4.

¹⁴⁹² T Maree "The Managing Agent Issue" (December 2010) 38 *MCS Courier* 1.

¹⁴⁹³ Paddock (October 2009) *Paddocks Press Newsletter* 1.

to the job than the Estate Agency Affairs Board.¹⁴⁹⁴ If the CSOS were to be empowered to regulate managing agents it would have a positive effect on the property management industry as a whole.¹⁴⁹⁵ It is my hope that the managing agency industry become subject to mandatory regulation by professional standards boards in the same way as other professions are subject to maintain ethics and standards of service.

Finally the Consumer Protection Act could ensure that a more professional service is provided by managing agents. For example there is no prescribed fee for the certificate a conveyancer in terms of section 15(B)(3)(a) of the STA is obliged to obtain before a unit can be transferred. Managing agents have been known to charge high fees for rendering this service. Owners should take this matter up with the Consumer Protection Commission using the protection of the right to fair value.¹⁴⁹⁶

¹⁴⁹⁴ Paddock (October 2009) *Paddocks Press Newsletter 1*; Paddock (December 2009) 4-12 *Paddocks Press Newsletter 1*.

¹⁴⁹⁵ Moore-Barnes (June 2013) *Paddocks Press Newsletter 2*.

¹⁴⁹⁶ G Jooste “The Consumer Protection Act and managing agents” (August 2012) 7-8 *Paddocks Press Newsletter 2*.

Chapter 12: Legal status, liability, indemnity and remuneration of the managing agent

12 1 Introduction

The legal status of the managing agent will depend on whether the managing agent is merely an employee of the body corporate or something more. Connected to this enquiry is the issue of whether the managing agent stands in a fiduciary relationship with the body corporate, and thus owes the body corporate a fiduciary duty. Once this has been established, I will examine the liability of the managing agent, and the possibility for the body corporate to sue the managing agent for breach of duty. Following this I will examine whether the managing agent can avoid liability for negligent performance of his or her functions, and if the managing agent can be indemnified for any breach of duty. Finally, I will discuss the payment of remuneration and expenses to the managing agent in rendering the management services.

12 2 Legal status of the managing agent

Badenhorst, Pienaar and Mostert are correct in their assertion that there have been “*verbal oversights on the part of the legislature with regard to the position of the managing agent,*” and that “*the nature of the managing agent’s duties towards the body corporate has as of yet, not received sufficient scholarly attention.*”¹⁴⁹⁷ Professor Gerrit Pienaar is also of the opinion that “*the nature of the relationship between the body corporate and the managing agent is not completely clear.*”¹⁴⁹⁸

In what follows I will attempt to explain the legal status of a managing agent in relation to the body corporate and the trustees. The term “managing agent” is not used in the Act, although the body corporate has the power appoint such agents and employees as

¹⁴⁹⁷ Badenhorst, Pienaar & Mostert *Silberberg and Schoeman’s The Law of Property* 474.

¹⁴⁹⁸ Pienaar *Sectional Titles* 186.

it may deem fit.¹⁴⁹⁹ The managing agent, as an optional appointment under the prescribed management rules, does not qualify as an organ of the body corporate, but is appointed by the trustees in terms of a written agreement.¹⁵⁰⁰ Trustees automatically exercise and perform the powers and functions (duties) of the body corporate in terms of the STA and rules,¹⁵⁰¹ while specific powers and duties must be delegated to the managing agent in the contract.¹⁵⁰² The terms of the written contract, required in terms of prescribed management rule 46, read together with the management rules govern the legal relationship and the extent of the delegation of powers and duties to the managing agent.

Neither the STA nor the prescribed management rules provide any clarity on the nature of the agreement with the body corporate.¹⁵⁰³ The managing agent is appointed by the trustees on behalf of the body corporate to assist with the day-to-day management and maintenance of the sectional title scheme against payment of a fee. The appointment is authorized through the passing of a resolution by the board of trustees by majority vote. The resolution must indicate the fact of the appointment, the duration of the appointment and must authorize the written contract specifying the extent of the managing agent's powers and duties.¹⁵⁰⁴ The relationship between the managing agent and the body corporate is clearly contractual and the scope of the managing agent's powers and duties will be clearly and extensively specified and defined by the contract.¹⁵⁰⁵ The legal term "agent" must be understood in a contractual context. The unanswered question that I will deal with in the discussion that follows concerns the nature of the written contract concluded with the managing agent.

In this regard it is crucial to determine whether the contact with managing agent is merely a contract of employment, or something more. The relevance of this question

¹⁴⁹⁹ STA s 38(a) [STSMa s 4(a)] and Annexure 8 rule 26(1)(a).

¹⁵⁰⁰ Annexure 8 rule 46(1); Pienaar *Sectional Titles* 186.

¹⁵⁰¹ STA s 39(1) [STSMa s 7(1)] and Annexure 8 rule 28(1) and (2).

¹⁵⁰² Annexure 8 rule 46(1); Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 474; Pienaar *Sectional Titles* 186.

¹⁵⁰³ Pienaar *Sectional Titles* 187.

¹⁵⁰⁴ Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 473.

¹⁵⁰⁵ Annexure 8 rule 46(1); Chen & Van der Merwe (2009) *TSAR* 25.

pertains to the fact that if the managing agent is merely an employee of the body corporate or the trustees, then the managing agent does not stand in a fiduciary relationship to either of these parties, and the managing agent is only appointed to assist the trustees in exercising administrative functions.¹⁵⁰⁶ Although this view is supported by referring to the agreement as a “contract of master and servant” in the rules,¹⁵⁰⁷ several arguments could be advanced why the contract of appointment of the managing agent should not be construed as a contract of employment or service, and that the role of the managing agent should not be reduced to that of a mere employee of the trustees or the body corporate.¹⁵⁰⁸

In the first place there is no limitation in the prescribed management rules as to powers and duties that may be entrusted or delegated to a managing agent.¹⁵⁰⁹ The managing agent performs the executive functions usually performed by the trustees, which implies that even functions falling within the fiduciary responsibilities of the trustees may be entrusted to the managing agent.¹⁵¹⁰ In this way the managing agent assumes a fiduciary status, and he or she will have a duty of care and trust towards the body corporate.¹⁵¹¹

Secondly, the prescribed management rule pertaining to the requirements for the signing of documents on behalf of the body corporate provides that the levy clearance certificate, issued in terms of section 15B(3)(a)(i)(aa) of the STA, may be signed by the managing agent alone.¹⁵¹² All other documents and instruments of the body corporate need to be signed by two trustees or by one trustee and the managing agent. The levy clearance certificate is one of the most important mechanisms available to the body corporate in ensuring that owners who wish to sell and transfer their units cannot do so unless a clearance certificate certifies that all moneys still owed to the body corporate

¹⁵⁰⁶ Van der Merwe *Sectional Titles* 15-19.

¹⁵⁰⁷ Annexure 8 rules 46(2)(a) and (b); Van der Merwe *Sectional Titles* 15-19.

¹⁵⁰⁸ Van der Merwe (1994) *Stellenbosch Law Review* 324; G Paddock “Grahams Mutterings” (May 2009) 4-5 *Paddocks Press Newsletter* 8 9.

¹⁵⁰⁹ Annexure 8 rule 46(1).

¹⁵¹⁰ Pienaar *Sectional Titles* 187.

¹⁵¹¹ *Fairbrass v Estate Agents Board* 1999 4 SA 1052 (W); Chen & Van der Merwe (2009) *TSAR* 25.

¹⁵¹² Annexure 8 rule 27.

have been paid. The fact that the managing agent can sign this very important certificate on behalf of the body corporate shows that the managing agent stands in a fiduciary relationship to the body corporate, and that his or her status differs from that of the employee in terms of a contract of employment.

Thirdly, prescribed management rule 48 expressly provides that the managing agent has a fiduciary duty towards the body corporate to keep full records of his or her administration and to notify the body corporate and holders of registered mortgage bonds of all matters that detrimentally affect the value or amenity of the common property and any of the sections. Furthermore, the managing agent is expressly referred to as the holder of office in prescribed management rule 47.

The prescribed management rules have therefore elevated the legal status of the managing agent to approximate to some extent the status of an office bearer of the body corporate, depending on the powers and duties entrusted or delegated to the managing agent in his or her contract of appointment.¹⁵¹³ This status differs vastly from the status of the traditional employee of the body corporate.¹⁵¹⁴ As shall be seen later, the fact that the status of the managing agent is apparently elevated to that of an office bearer does not detract from the fact that ultimate control of the scheme rests with the trustees under the supervision of the body corporate, even though the trustees may appoint a managing agent and entrust him or her with certain functions and powers. Ultimately it seems as if the trustees have the capacity to delegate some of their powers to the managing agent, but cannot disentangle themselves from their functions as the official executive organ of the body corporate.

The final argument is that the managing agent is usually a firm of estate agents or company specializing in property management services.¹⁵¹⁵ The firm or company is clearly not an employee of the body corporate, particularly if it performs that role for several schemes.

¹⁵¹³ Chen & Van der Merwe (2009) *TSAR* 25.

¹⁵¹⁴ Van der Merwe *Sectional Titles* 15-4.

¹⁵¹⁵ Pienaar *Sectional Titles* 189.

Since the managing agent is usually entrusted to exercise certain powers and functions of the body corporate, his or her contract of appointment should be construed as a mandate rather than as a contract of employment.¹⁵¹⁶ A contract of mandate is a consensual contract between the mandator and the mandatary, in terms of which the mandatary undertakes to perform a mandate or commission for the mandator.¹⁵¹⁷ It is difficult to distinguish a contract of mandate involving the rendering of services from a contract of employment because remuneration may be agreed upon in both types of contract.¹⁵¹⁸ An employment contract usually involves the rendering of services over a period of time and is subject to the control of the employer. On the other hand a contract of mandate generally relates to an undertaking to complete a particular task, project or function, however long it may take without the mandatary being subject to the directions of the mandator as to the time, place or manner of carrying out the mandate. The mandatary must however comply with the instructions of the mandator given at the time of acceptance of the mandate, and he or she must not act in conflict with any of the instructions.¹⁵¹⁹ In my mind the nature of the contract by which the managing agent is appointed is more closely aligned with the contract of mandate due to the nature of the powers and functions that are delegated to the managing agent and the relative independence in the exercise thereof.¹⁵²⁰ The trustees do not usually supervise and control the manner in which the managing agent performs his or her functions or exercises his or her powers. The trustees opt to appoint a managing agent because they do not have the time to do the work themselves, and can therefore not control and supervise the entire range of governance obligations of a body corporate in a sectional title scheme.

A contract of mandate can relate to the performance of both juristic and non-juristic acts. This is important, as one of the primary functions of managing agents involves the collection and acceptance of levy contributions on behalf of the body corporate. It is

¹⁵¹⁶ Van der Merwe *Sectional Titles* 15-19.

¹⁵¹⁷ G Bradfield "Agency" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2009) 983 985.

¹⁵¹⁸ In Roman and Roman-Dutch law the contract of mandate was essentially gratuitous; DJ Joubert & DH Van Zyl "Mandate and Negotiorum Gestio" in LTC Harms & JA Faris *LAWSA* 17(1) 2 ed (2009) para 4.

¹⁵¹⁹ Joubert & Van Zyl "Mandate and Negotiorum Gestio" in *LAWSA* 17(1) para 5.

¹⁵²⁰ Pienaar *Sectional Titles* 187.

important to note that where the mandate includes the authority to represent the mandator, the mandatory is also an agent.¹⁵²¹ Therefore, in cases where the managing agent represents the body corporate, for example, entering into a contract with a security company on behalf of the body corporate, the managing agent will also act as agent for the body corporate. In this way it is clear to me that the contract with the body corporate is a contract of mandate rather than a contract of employment as the mandate gives the managing agent the authority to act as agent of the body corporate.

Further evidence for construing the contract concluded with a managing agent as a mandate can be garnered from the duties that attach to the mandatory and the mandator. In the first place the mandatory must take all reasonable steps to carry out the mandate that he or she accepted. The managing agent is likewise obliged to exercise and perform all powers and duties delegated to him or her in the contract of appointment. Secondly, the mandatory must not exceed the terms or the limitations imposed by the contract of mandate. This is true for the managing agent who must exercise the powers and comply with the duties as set out in the written contract without exceeding them. Thirdly, the mandatory must perform the mandate personally, unless there is an agreement between the parties that the mandatory can make use of the services of an employee or agent. The right to delegate must be either expressly authorised or tacitly implied in the mandate. A managing agent will, for example, make use of the services of a maintenance company rather than to mow the lawns of the scheme or paint the walls him or herself. Furthermore, the mandatory must act with reasonable care and diligence. If the mandatory fails to exercise reasonable care and diligence he or she can be held liable for such negligence.

Following on from this, the mandatory must act *bona fide* (in good faith) and must not act with malice or the intention to commit fraud against the mandator. The mandatory must act honestly and in the interest and for the benefit of the mandatory and must avoid conflicts of interest, for example by not making a secret profit when contracting on behalf of the body corporate, through accepting an undisclosed commission from the

¹⁵²¹ Bradfield “Agency” in *Wille’s Principles of South African Law* 986.

other party. This is the one of the main reasons why I submit that the agreement with the managing agent is based on mandate as this places the managing agent in a fiduciary relationship with the the body corporate. Consequently, the mandatory must render account of the performance of the mandate to the mandatory. This duty is in conformity with the duty set out in prescribed management rule 48 that the managing agent must keep full records of his or her administration and shall report to the body corporate and certain holders of registered sectional mortgage bonds of all matters that in his or her opinion detrimentally affect the value or amenity of the common property or any sections.

Finally, the mandatory has the duty to account to the mandator by the giving of the property and information back to the mandatory at the end of the mandate. This is in line with the managing agent's duty to return books, records, accounts and keys and other body corporate property after his contract has been terminated. I will discuss this duty of the managing agent in more detail in chapter 14.

The duties of the mandator include to refund the mandatory for expenses or losses incurred in the performance of the mandate and to pay the agreed remuneration to the mandatory. These two duties are also in line with the duties owed by the body corporate to the managing agent.

In South Africa the managing agent may exercise any powers and duties delegated or entrusted to him or her by the body corporate or trustees subject to their contract of appointment and the rules of the scheme. Where the managing agent contractually undertakes to perform the functions or duties assigned to the body corporate and trustees under the STA and rules, the managing agent's duty remains subsidiary to that of the trustees. As the law stands the ultimate control of the scheme rests with the trustees under the supervision of the body corporate, even though the trustees may appoint a managing agent. The body corporate and trustees have the final say as to what powers and duties are delegated to the managing agent in the written contract. By appointing a managing agent, the trustees are not absolved from their powers and

duties in terms of the STA and rules.¹⁵²² The fact that the managing agent is only allowed to attend the meetings of trustees with their consent¹⁵²³ also indicates that it is the trustees who ultimately have executive control over the scheme. In practice, however, it is not uncommon for the managing agent to take the leading role in trustee meetings and to handle all the administrative duties related thereto, including sending notices, setting the agenda, drawing the trustees attention to the matters requiring discussion, taking minutes and advising the trustees on the procedures that need to be followed in terms of the Act and rules.

In practice the managing agent is appointed to undertake broad administrative, secretarial and financial tasks. Therefore, when asking an owner to refrain from breaching the conduct rules, the managing agent would be acting on delegated authority of the trustees. However, managing agents are not normally entrusted with decision-making or policy-making functions such as giving permission to keep pets, to subdivide and consolidate units or to extend the common property. The general rule is that managing agents cannot make decisions that affect the lives or living conditions of the sectional owners.¹⁵²⁴ Therefore, it is clear that certain tasks cannot be delegated to or entrusted to managing agents.

Despite the fact that the prescribed management rules refer to the relationship as one of service,¹⁵²⁵ it is my view that the legal relationship between the managing agent and the trustees or body corporate should rather be classified as based on a contract of mandate. This has the legal effect that the managing agent will have a fiduciary duty to the body corporate, and will have a duty to carry out his or her delegated instructions with due care, skill and diligence.¹⁵²⁶

¹⁵²² Pienaar *Sectional Titles* 187, 191.

¹⁵²³ Annexure 8 rule 49(1).

¹⁵²⁴ Van der Merwe *Sectional Titles* 15-3.

¹⁵²⁵ Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 474.

¹⁵²⁶ Joubert & Van Zyl "Mandate and Negotiorum Gestio" in *LAWSA* 17(1) para 10; Bradfield "Agency" in *Wille's Principles of South African Law* 993.

As the appointment of a managing agent is not obligatory, it should be noted that there could be cases where the managing agent is appointed in terms of a contract of employment, for example in cases where the body corporate of a large scheme appoints an individual as managing agent with a contractual duty to work 40 hours a week for the body corporate under the supervision of the trustees, or where the body corporate appoints a full-time caretaker.

12 3 Liability of the managing agent

12 3 1 Introduction

As I have mentioned, the trustees, as the executive organ of the body corporate, appoint the managing agent to manage the affairs of the body corporate. Despite the fact that the relationship between the managing agent and the body corporate is not explicitly referred to as such, I am of the opinion that the nature of the written contract is a contract of mandate. This means that the managing agent has inherent fiduciary responsibilities to the body corporate and trustees, and owes both a duty of trust and a duty of care and skill towards the body corporate.¹⁵²⁷ Because of this fiduciary duty the managing agent could incur liability to the body corporate and trustees in appropriate circumstances. This is logical as the managing agent, more often than not, deals with substantial amounts of money.

12 3 2 South African position

As stated above the managing agent could incur delictual liability to the body corporate for certain negligent actions or omissions, Thus the body corporate could sue the managing agent for loss suffered on account of incorrect incorrect legal advice or interpretation furnished by the managing agent. The body corporate may in appropriate circumstances recover damages, even in cases where the advice was given free of charge.¹⁵²⁸ The same applies to prospective purchasers or mortgagees who rely on

¹⁵²⁷ Joubert & Van Zyl “Mandate and Negotiorum Gestio” in *LAWSA* 17(1) para 10.

¹⁵²⁸ Chen & Van der Merwe (2009) *TSAR* 25; Constat & Bleijs *Demystifying Sectional Title* 47.

advice given negligently by the managing agent, and who suffer loss in reliance on such advice.¹⁵²⁹

If the body corporate is under a duty to give information, contained for example in a certificate, the managing agent would be liable if he or she issues a false certificate without inspecting the relevant documents and records. This is the case even if the managing agent endeavoured to exclude liability by means of an exemption clause when handing over the certificate.

In cases where the managing agent fails to renew insurance when he or she was entrusted with the function of ensuring that the building is adequately insured, and damage is caused by fire, the managing agent will be held liable to the body corporate for the damage. The insurance firm would have compensated for the damage had the managing agent renewed the insurance. A reasonable and prudent managing agent would have taken prompt action to ensure that the insurance is renewed.

Where a managing agent pays an account for repairs without declaring that he or she is duly authorized, or where the repairs were not authorized by the body corporate and the managing agent failed to note that fact, the body corporate can claim reimbursement from the management agent.

In the situation where the managing agent fails to rectify defects for example in outdated electrical wiring which he should have observed in view of his or her expertise, and short-circuits in the flow of electricity cause damage to the building, the body corporate could recover the ensuing damages from the management agent.

Finally, if the managing agent contracts with a maintenance firm, in which he or she owns a substantial number of shares, without declaring his or her interests the contract

¹⁵²⁹ Chen & Van der Merwe (2009) *TSAR* 25 – 26; Van der Merwe *Sectional Titles* 15-20.

could be terminated and the managing agent could be required to hand over the benefit derived from the contract on account of a breach of his duty of trust.¹⁵³⁰

12 3 3 Comparative survey

Since 1964 New South Wales law has entitled natural and juristic persons such as the owners corporation, the executive committee, owners, tenants, other occupiers, visitors, solicitors, accountants, prospective purchasers, other managing agents, legal searchers and persons relying on a section 109 certificates to recover damages from the managing agent on account of negligent information or advice furnished on request. The Trade Practices Act of 1974 and the New South Wales Fair Trading Act of 1987 impose strict liability for conduct and statements that mislead or deceive other persons. Consequently, the managing agent can be held liable in damages on account of negligent misstatements in appropriate circumstances. The information or advice can be given verbally or in writing by a person whose business or profession includes giving advice or information or by a person who claims to have the required skill and competence. It is irrelevant whether or not the information or advice is given for a fee or free of charge. It must be proved that the skill and judgment of the adviser was relied on or trusted, the adviser must have been aware that the recipient intended to act on the information or advice and it must have been reasonably foreseeable that the recipient would suffer loss if the information was incorrect or the advice was unsound. When the adviser does not make it clear that the information or advice is given on the basis of the adviser not accepting responsibility or liability for its accuracy, the adviser can be held liable on the ground of negligent furnishing of information or advice. Examples of conduct which would render the managing agent liable are where he or she gives incorrect information to a prospective purchaser as to the structural soundness of the building or as to the good relations between the owners in the scheme; or he or she gives incorrect advice to the owners corporation as to the level of building insurance required for the scheme.¹⁵³¹

¹⁵³⁰ Van der Merwe *Sectional Titles* 15-20.

¹⁵³¹ Ilkin *NSW Strata* 176.

In Singapore the managing agent can also be liable for damages in contract where he has breached a term of the agency agreement entered into with the management corporation or the subsidiary management corporation. Liability for negligence arises where the managing agent does not take reasonable care to ensure that his or her actions, omissions and statements do not cause harm or loss to the proprietors, tenants and prospective purchasers. In such a case an award for damages may be made against the managing agent. Examples of negligence, similar to those in South Africa, are where the managing agent fails to renew the insurance; fails to take adequate measures to prevent injury occurring on the common property or in giving incorrect information or advice. Where loss or damage is suffered as a result of such negligence, the person concerned can recover damages from the managing agent.¹⁵³²

In the event that non-performance of a duty delegated to the managing agent carries a penalty, the managing agent is liable to the same penalty as the management corporation would be if proceeded against.¹⁵³³ This ensures that managing agents are made liable for offences committed by them as delegates whether or not he or she was conferred a complete or partial delegation. For example, where the managing agent has been delegated the duty to retain the records and books of account relating to any of the management corporation's transactions for a period of at least five years after the completion thereof,¹⁵³⁴ he or she is liable to prosecution involving the same penalty if he or she defaults in the performance of the duty.¹⁵³⁵

12 4 Avoidance of liability and indemnity

12 4 1 Introduction

In what follows I will consider the possibility of the managing agent avoiding personal liability, and the possible indemnity against liability.

¹⁵³² Keang Sood *Strata Title* 555.

¹⁵³³ BMSMA s 67(9)(a) and (b). A similar provision is found in NSW Strata Schemes Management Act s 30.

¹⁵³⁴ BMSMA s 48(2).

¹⁵³⁵ BMSMA ss 48(3) and 128.

12 4 2 South African position

It is a possible for managing agents to avoid personal liability by conducting itself by means of a limited liability company or close corporation instead of a partnership.¹⁵³⁶

Liability for furnishing incorrect legal advice or interpretation could be avoided by using an exemption clause that could read roughly as follows:

“The above information is given on the strict understanding that I accept no responsibility or liability on any account for any error or inaccuracy contained therein and I intend by this statement to exclude any such responsibility or liability.”¹⁵³⁷

Section 32 of the Estate Agency Affairs Act requires that estate agents be in possession of Fidelity Fund Certificate and effect fidelity insurance to the satisfaction of the Estate Agency Affairs Board.¹⁵³⁸ I have already mentioned that managing agents are deemed to be estate agents when they collect or receive money due to a body corporate. When managing agents are involved in this type of estate agency service the managing agent is obliged to deposit the client’s money into a trust account, and any money stolen from this account is covered by the Estate Agency Affairs Board Fidelity Fund. However, the Estate Agency Affairs Act, the regulations under the Act and the Code of Conduct applicable to estate agents is not the best legislation to regulate the managing agency industry as it does not cover the full scope of managing agent activities, but rather regulates the business of persons who directly or indirectly buy, sell and rent immovable property. The Estate Agency Affairs Act extends only to managing agents levy collection activities and not to the financial, legal and administrative services they render. Therefore, the clients of the managing agents are not protected from other types of mismanagement other than theft from trust accounts. The Estate Agency Affairs Board’s

¹⁵³⁶ Van der Merwe *Sectional Titles* 15-20.

¹⁵³⁷ Chen & Van der Merwe (2009) *TSAR* 26; Van der Merwe *Sectional Titles* 15-20 – 15-21.

¹⁵³⁸ Porteous (May 2009) *Paddocks Press Newsletter* 2.

limited supervisory role therefore needs to be extended to cover all the functions of managing agents.

The managing agent could also take out professional indemnity cover to protect him or herself against claims in the event of negligence.¹⁵³⁹

The fact that a professional managing agent is in a fiduciary position in relation to the body corporate puts managing agents on the same footing as trustees, although the managing agent is more qualified and more experienced to perform the functions. The fact that the managing agent owes a fiduciary duty to the body corporate does not limit the fiduciary duty that the trustees owe the body corporate. The trustees remain the official executive arm of the body corporate and have to supervise the exercise of powers and functions of the managing agent.¹⁵⁴⁰ Unless restricted in the managing contract, the managing agent may validly exercise all the powers and duties entrusted in the contract of appointment. Where the trustees feel that the managing agent failed to perform adequately, the trustees must take speedy remedial action.

The trustees are indemnified against all costs, losses, expenses or claims for which they become liable by reason of any acts done in the discharge of their duties as trustees. The only exception is where the trustees caused the costs, losses, expenses or claims by their *mala fide* or grossly negligent acts or omissions.¹⁵⁴¹ This indemnity is expressly excluded in the case of managing agents.¹⁵⁴² The managing agent would not be entitled to reimbursement of costs, losses, expenses or claims that he or she has to pay on account of breach of his or her fiduciary duty. Where the trustees have acted *mala fide* or with gross negligence in respect of the action for which the managing agent had to pay damages, the trustees should be required to reimburse the managing agent in appropriate circumstances.¹⁵⁴³

¹⁵³⁹ Van der Merwe *Sectional Titles* 15-21.

¹⁵⁴⁰ Van der Merwe (1994) 5 *Stellenbosch Law Review* 326.

¹⁵⁴¹ Annexure 8 rule 12(1)(a).

¹⁵⁴² Annexure 8 rule 12(2).

¹⁵⁴³ Van der Merwe (1994) 5 *Stellenbosch Law Review* 327; Van der Merwe *Sectional Titles* 15-21.

12 4 3 Comparative Survey

In order for the managing agent to avoid liability for negligent misstatements in New South Wales the managing agent should take care to make correct and accurate representations and respond correctly when giving information or advice. If the accuracy of the information is in doubt the management agent is advised to recommend the engagement of an expert or professional consultant to provide an opinion. Where the statement is gratuitous the managing agent should expressly and in writing disclaim or exclude liability. This disclaimer would not be valid when a fee is charged as those who pay for information or advice are entitled to rely on the managing agent's professional expertise, and should be able to recoup any loss or damage suffered. A disclaimer to a person not in a contractual relationship with the agent is effective. For example where a prospective purchaser employs a legal searcher, he or she can rely on the information provided to the legal searcher by the managing agent, regardless of whether or not the managing agent provided the information under a disclaimer clause as to its accuracy. A subsequent purchaser would not be in a contractual relationship with the managing agent and the information provided to the legal searcher by the managing agent would be subject to an agent's disclaimer clause as to its accuracy, and could not be relied upon by the subsequent purchaser.¹⁵⁴⁴

The managing agent can also obtain professional indemnity insurance protection.¹⁵⁴⁵ This will indemnify the managing agent against liability for damages resulting from its negligent acts or omissions and those of their partners or employees in the performance of its professional duties. It also extends to provide cover in respect of damages awarded against the managing agent for misleading and deceptive conduct referred to in section 42 of the Fair Trading Act of 1987. It does not extend to personal injury, property damage or fines resulting from a criminal charge under any legislation. It also does not provide automatic cover for defamation. An extension of the insurance policy needs to be obtained for additional protection. This insurance is not compulsory, but it is recommended.

¹⁵⁴⁴ Ilkin *NSW Strata* 176-177.

¹⁵⁴⁵ Agents Act s 22.

In Singapore managing agents can take out professional indemnity insurance policies that affords protection against liability for damages resulting from their negligent acts or omissions.¹⁵⁴⁶

12 5 Payment of remuneration and expenses

12 5 1 Introduction

The next discussion will focus on the payment of remuneration and expenses to the managing agent for rendering management services. A comparative review will describe the position in foreign jurisdictions.

12 5 2 South African position

The prescribed management rules do not contain a provision regarding the remuneration of a managing agent. The fee that the management agent can claim for his or her services is a matter to be negotiated between the parties. Managing agents generally charge a fee for a service that is a recurring cost to the sectional title scheme.¹⁵⁴⁷ Obviously the more powers, functions and duties the management agent are entrusted with, the higher fee he or she will be entitled to charge.¹⁵⁴⁸

The fee paid to a managing agent can be calculated in one of two ways.¹⁵⁴⁹ The first is on a pro rata basis where the monthly management fee is calculated on a percentage rate system and the monthly management fee is expressed as a certain percentage of the total levies collected. The Institute of Estate Agents has recommended a tariff of fees based on a percentage of levies collected which differs from region to region.¹⁵⁵⁰ The advantages of this system include the fact that if the agent forgets or fails to collect levies he or she does not receive any remuneration. This would encourage agents to perform their duties timeously and effectively.¹⁵⁵¹ The second advantage is that the fees

¹⁵⁴⁶ Keang Sood *Strata Title* 555.

¹⁵⁴⁷ Chen & Van der Merwe (2009) *TSAR* 31.

¹⁵⁴⁸ Constas & Bleijs *Demystifying Sectional Title* 45.

¹⁵⁴⁹ Chen & Van der Merwe (2009) *TSAR* 31.

¹⁵⁵⁰ Van der Merwe (1994) *Stellenbosch Law Review* 327.

¹⁵⁵¹ Van der Merwe *Sectional Titles* 15-22.

are inflation resistant because they automatically increase with the increase of levies, and the remuneration does not have to be renegotiated every year. The disadvantage of this system is that it loses sight of other important management functions of the managing agent. This may be potentially detrimental for managing agents who are responsible for extensive administrative functions and whose functions are not limited to the collection of levies.¹⁵⁵² The Institute of Estate Agent's recommendation is only a guideline and this tariff is seldom used in practice.

The second way in which the fee of a managing agent can be calculated is on a standard basis which means that a fixed amount per unit is paid to the managing agent. This standard system of remuneration is linked to the total cost of the project as in the case of the remuneration of architects and quantity surveyors. This method of calculation is preferable in most instances.¹⁵⁵³

It is important to note that an estate agent who acts as a managing agent without a valid Fidelity Fund Certificate is not entitled to be paid for estate agency services such as the collection of levies and related administrative functions.

Fees are subject to negotiation between the parties and are generally dictated by free market competition. Managing agents are, in current practice in South Africa, paid a monthly fee per unit and will usually in addition charge a specific fee to attend meetings.¹⁵⁵⁴ Most managing agents will be prepared to tailor their services and charges to suit the needs of a particular scheme.¹⁵⁵⁵

12 5 3 Comparative survey

In New South Wales managing agents are not bound by a prescribed scale of fees when they charge for their services. Theoretically their fees are dictated solely by free

¹⁵⁵² Pienaar *Sectional Titles* 190.

¹⁵⁵³ Van der Merwe *Sectional Titles* 15-22.

¹⁵⁵⁴ Chen & Van der Merwe (2009) *TSAR* 31; van der Walt (October 2007) *Paddocks Press Newsletter* 4.

¹⁵⁵⁵ Van der Walt (October 2007) 2-7 *Paddocks Press Newsletter* 4.

market competition. The Tribunal can vary the amount in the agency agreement, and certify a sum that will be binding on both parties that it believes is reasonable.¹⁵⁵⁶

In most instances, the managing agent will be delegated the authority to operate a cheque account on behalf of the owners corporation in order to deduct remuneration and expenses, except in the event of a partial delegation where the owners corporation decided to manage its own finances.¹⁵⁵⁷

In terms of the Agents Acts a managing agent must satisfy three conditions before he or she is entitled to commence legal proceedings to recover remuneration. These are that the managing agent must be licensed to perform services as a managing agent,¹⁵⁵⁸ a valid agency agreement must have been concluded between the managing agent and the owners corporation¹⁵⁵⁹ and the managing agent must serve personally or by post a statement of claim on the owners corporation specifying the amount claimed and the details of the services performed.¹⁵⁶⁰ The managing agent is only entitled to commence proceedings in court to recover the remuneration after 28 days after service of the statement of claim have elapsed. The owners corporation is allowed within a period of three years to apply, on the prescribed form, to approach the dispute resolution tribunal to determine whether the amount of the remuneration and expenses claimed are reasonable and whether the managing agent is entitled to receive the amount claimed.¹⁵⁶¹

The managing agent is not obliged to hand over any records on expiry of his or her appointment if he or she has any claim against or lien over the records or property of the owners corporation for outstanding fees.¹⁵⁶² If any of the three conditions are not satisfied then the managing agent is unlikely to have any valid claim or lien.¹⁵⁶³

¹⁵⁵⁶ Agents Act s 34(6).

¹⁵⁵⁷ Ilkin *NSW Strata* 162.

¹⁵⁵⁸ Agents Act ss 8 and 9,

¹⁵⁵⁹ Agents Act s 55.

¹⁵⁶⁰ Agents Act s 36.

¹⁵⁶¹ Consumer Claims Act 1998 s 7; Ilkin *NS Strata* 161.

¹⁵⁶² NSW Strata Schemes Management Act s 10(3).

¹⁵⁶³ NSW Strata Schemes Management Act s 36(4).

In Singapore managing agents negotiate the fees payable and are not subject to a prescribed scale of fees for their services. If the managing agent is appointed at a general meeting of the management corporation by ordinary resolution the fees and expenses are fixed at the general meeting, or if the appointment was authorized by the owners at the previous general meeting, the fees and remuneration are fixed by the executive council.¹⁵⁶⁴ Where the managing agent is appointed by the executive council, the fees and expenses are fixed by the council without a general meeting.¹⁵⁶⁵ Where the executive council is involved in negotiating the fees it is important to ascertain whether the executive council has the requisite authorization to do so in order to avoid any difficulties that may arise when the fees subsequently fall due.¹⁵⁶⁶

As in South Africa, Chinese law allows parties to select either method of payment namely on a pro rata or standard basis.¹⁵⁶⁷ Chinese local law does not have a prescribed scale of management fees, but accepts that the remuneration of a managing agent is a matter of negotiation between the management body or the developer and a managing agent.¹⁵⁶⁸ The executive council should continually monitor whether the scheme is getting value for the fee being paid. If not, the executive council should shop around for another management company.

12 5 Conclusion

In this chapter I have illustrated that there needs to be clarity in the legislation as to whether the contract of appointment of the managing agent is a contract of employment or a contract of mandate that creates a fiduciary relationship between the body corporate and the management agent as well as between the trustees and the management agent. The wording of in prescribed management rule 46 does not supply sufficient clarity in this regard, and it is hoped that legislative reform in this regard would remove that uncertainty. Clarity on this point is required because it defines the legal

¹⁵⁶⁴ BMSMA s 66(3)(a).

¹⁵⁶⁵ BMSMA s 66(3)(b).

¹⁵⁶⁶ Keang Sood *Strata Title* 558.

¹⁵⁶⁷ Measures Governing Property Management Fees Collection of 2003 arts 11 and 12; Chen & van der Merwe (2009) *TSAR* 31.

¹⁵⁶⁸ Property Management Regulation of Shenzhen Special Economic Zone of 2007 art 68.

status of the managing agent and establishes whether the managing agent is in a fiduciary relationship with the body corporate and trustees. If the managing agent is in a fiduciary relationship then he or she owes a fiduciary duty to the body corporate, and any failure in this regard could lead to the managing agent being held personally liable to the body corporate.

Badenhorst, Pienaar and Mostert correctly state that construing the relationship between the managing agent and body corporate as one of employment would not provide the body corporate with sufficient protection against fraudulent and negligent conduct of the managing agent.¹⁵⁶⁹ The relationship is construed as one with varying fiduciary dimensions in terms of which liability will be incurred by the managing agent, depending on the specific expectations of actions performed by the managing agent from case to case.¹⁵⁷⁰ However, as I have shown in this chapter the managing agent cannot be seen as mere employee of the body corporate. Construing the relationship between the body corporate and managing agent as a contract of mandate automatically requires that the managing agent act *bona fide* and with reasonable care, skill and diligence. If the managing agent, as the mandatory, fails to exercise reasonable care, skill and diligence he or she can be held liable for such negligence.

A balance must be struck between the responsibilities of the managing agent and the trustees. As the law stands the trustees should continuously supervise the managing agent. Furthermore, the trustees must authorize all expenditures made by managing agents.¹⁵⁷¹ The fact that the managing agent has been appointed will not discharge the trustees ultimate fiduciary duty to the body corporate. The trustees will ultimately be held liable in circumstances of gross negligence if they fail to fulfill their delegated duties in terms of the STA. This is one of the primary reasons why I am of the opinion that a professional manager should be the executive organ of the body corporate with the primary fiduciary duty toward the body corporate.

¹⁵⁶⁹ Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 475.

¹⁵⁷⁰ 475.

¹⁵⁷¹ Henry (August 2013) *Paddocks Press Newsletter* 2.

As the law now stands the trustees should take the utmost care in selecting a professional, reliable and reputable managing agent. Word of mouth referrals can be the most reliable and effective source for finding the best managing agent.¹⁵⁷² The selection process requires the trustees to obtain quotes from reputable managing firms. The trustees should scrutinize the draft agency agreements and establish whether the prospective managing agent acts as an individual, in a partnership or as a company; whether he would require a complete or partial delegation of powers, functions and duties; whether specific duties will be provided for by the managing agent; his management fee, expenses and charges and the time when they are payable; whether the management agent holds professional indemnity insurance; the experience of the managing agent in managing sectional title schemes together with the number and names of other schemes managed by the managing agent with a possible recommendation as to the agent's reputation, services, compliance with the Act, reliability and efficiency; the number of staff available and whether the managing agent and his staff would be a good fit for the scheme.

The fact that managing agents are appointed by the trustees can make it difficult for the managing agent to put trustees in their place when they are committing actions or omissions that are not acceptable in terms of the relevant legislation or the rules of the scheme. Trustees are not as qualified or knowledgeable when it comes to the laws applicable to the management of sectional title schemes. It is for this reason that all managing agents should have the duty to warn trustees that contravention of the relevant legislation or the rules of the scheme, could impair the the well-being and reputation of the scheme. It has been suggested that every managing agent should make a policy statement on his or her appointment that he or she will strictly follow the provisions of the STA and the rules of the scheme; that the trustees cannot expect him or her to deviate from these provisions and that it will be a breach of contract if the trustees terminate the contract with the managing agent if he or she refuses to deviate from these provisions.¹⁵⁷³ In cases where the managing agent is prepared to overlook

¹⁵⁷² Constas & Bleijs *Demystifying Sectional Title* 47.

¹⁵⁷³ Van der Merwe *Sectional Titles* 15-11; Maree (December 2010) 38 *MCS Courier* 8.

the strict application of the provisions of relevant legislation and rules of the scheme, the trustees should be more concerned that the managing agent is not a professional and ethical person, and should not be trusted in any other situation or especially with the finances of the scheme. In most cases the managing agent stands in a fiduciary position with the body corporate, which should take precedence over any loyalty to the trustees or to any single trustee.

As the law currently stands the managing agent and trustees should work together on almost all matters for the most successful management of the sectional title scheme. The managing agent should revert to the trustees constantly and should keep them updated on all developments affecting the scheme.¹⁵⁷⁴ It is important that there be regular, transparent and targeted communication between the trustees, managing agents and owners.¹⁵⁷⁵ The tensions that often result from communal living will escalate in cases where the participants are not privy to direct and speedy information, feedback and communication. Communication can be facilitated through channels such as the annual trustees report for general meetings; telephonic conversations; text messages; emails; online community portals; property websites and newsletters that can give relevant information and status reports regarding management and maintenance issues such as security, community events, meetings, and finances. Achieving harmony and reducing the tensions in communal living will be significantly promoted by consistent communication between all the participants.

It is important to note that a managing agent can also be elected as a trustee if he or she is also an owner. This could create problems as such person now has a fiduciary duty to supervise his or her own work and these two positions are now inextricably linked.¹⁵⁷⁶

¹⁵⁷⁴ Constas & Bleijs *Demystifying Sectional Title* 46.

¹⁵⁷⁵ A Schaefer "Communication between managing agents, trustees and owner" (July 2013) 8-7 *Paddocks Press Newsletter* 2.

¹⁵⁷⁶ J Paddock (December 2011) *Paddocks Press Newsletter* 5. Paddock (November 2012) *Paddocks Press Newsletter* 4.

It can be argued that the non-regulation of the fees payable to managing agents will detrimentally affect the industry. Regulation will create greater certainty and prevent disputes as well as time-consuming and expensive negotiations.

The body corporate, in reaching agreement on the management agent's fee, will have to consider whether the managing agent is offering a fully comprehensive service or just specific services limited to accounting and financial management; the size of the company the managing agent works for; its reputation and the availability of infrastructure such as staff, offices, computers, and accounting programs.¹⁵⁷⁷ Constas and Bleijs are of the opinion that "goedkoop is duurkoop" in this industry.¹⁵⁷⁸ If a cheaper managing agent is used instead of a reliable and reputable one, then the cost could increase rapidly in tandem with costly mistakes made by an unqualified and inexperienced managing agent.

The trustees should continually monitor whether the fees are competitive and whether the body corporate is getting value for money. If this is not the case, the trustees should renegotiate the fees charged or shop around for a new managing agent.¹⁵⁷⁹ It should be noted that there might be hidden costs.¹⁵⁸⁰ The trustees, before appointing the managing agent, should ask for a quotation that would include any additional costs.

¹⁵⁷⁷ Constas & Bleijs *Demystifying Sectional Title* 47.

¹⁵⁷⁸ 47.

¹⁵⁷⁹ Chen & Van der Merwe (2009) *TSAR* 31.

¹⁵⁸⁰ Woudberg *Basic Sectional Title Book One* 49.

Chapter 13: Powers and duties of the managing agent

13 1 Introduction

In order for a managing agent to assist the trustees in the day-to-day management of the sectional title scheme it is necessary that certain powers and duties are delegated and entrusted to him or her. I will start this chapter with a discussion on the delegation of powers and duties by the trustees to the managing agent, and the possible sub-delegation of powers and duties by the managing agent to others. I will then set out some of the possible specific powers and duties of the managing agent.

13 2 Delegation of powers and duties

13 2 1 Introduction

If certain powers and duties are not delegated to the managing agent, then he or she would be no more than a secretarial assistant of the trustees, and would be unable to act independently. In what follows I will set out the powers and duties that are capable of being delegated to the managing agent. I will discuss how the trustees delegate these powers and duties, and how the delegation can be revoked. I will also examine whether it is possible for the managing agent to delegate all or some of his or her duties and powers to another. An important matter to be considered is what the consequences are of the managing agent exercising a power or duty delegated to him or her.

13 2 2 South African position

A managing agent may exercise or perform any of the powers and duties entrusted to him or her in terms of the contract entered into with the body corporate or in terms of the management rules. Prescribed management rule 26(1) provides that:

“Subject to any restriction imposed or direction given at a general meeting of the body corporate, the powers of the trustees shall include the following: to appoint for and on behalf of the body corporate such agents and employees as they deem fit in connection with the control, management and administration of the common property;¹⁵⁸¹ and the exercise and performance of any or *all of the powers and duties* of the body corporate;¹⁵⁸² to delegate to one or more of the trustees such of their powers and duties as they deem fit, and at any time to revoke such delegation.¹⁵⁸³ (My emphasis added.)

The implication that all the powers and duties of the body corporate may be delegated to a managing agent¹⁵⁸⁴ is deceptive as obviously not all the powers and duties of the body corporate can be delegated to the managing agent. Although framed widely, this provision must be interpreted and applied restrictively and with caution, as there are exceptions. The managing agent cannot be authorized to appoint another managing agent. Furthermore, the power to make a unanimous or special resolution cannot be delegated to the managing agent. The trustees cannot delegate powers that they do not themselves possess and very importantly, the trustees are not entitled to delegate their power to formally determine levies.¹⁵⁸⁵

The routine administrative powers and duties required for the day-to-day management of the scheme should be delegated to the managing agent, but policy decisions should not be so delegated. Examples of policy decisions are the permission to keep pets;¹⁵⁸⁶ to subdivide or consolidate sections;¹⁵⁸⁷ to park on common property¹⁵⁸⁸ and to affix notices, billboards or advertisements on any external part of the building.¹⁵⁸⁹

¹⁵⁸¹ Annexure 8 rule 26(1)(a)(i).

¹⁵⁸² Annexure 8 rule 26(1)(a)(ii).

¹⁵⁸³ Annexure 8 rule 26(1)(b).

¹⁵⁸⁴ Maree (December 2010) 38 *MCS Courier* 3.

¹⁵⁸⁵ 3.

¹⁵⁸⁶ Annexure 9 rule 1(1).

¹⁵⁸⁷ STA s 20(1).

¹⁵⁸⁸ Annexure 9 rule 3(1).

¹⁵⁸⁹ Annexure 9 rule 6.

The managing agent could be made responsible for diverse tasks such as the sending of notices and accounts to the owners; the collection and banking of owners' contributions; the institution of legal proceedings for the recovery of levies; the preparation of a budget; supplying the trustees with monthly reports on income and expenditure; keeping accounting records available for perusal by the trustees; ensuring that all expenses are supported by documentation; ensuring that disbursements are made for maintenance of the common property; arranging the audit; recruiting and dismissing cleaning and gardening staff; paying staff salaries and all other accounts; arranging for insurance cover; investing the scheme's funds subject to the directions of the body corporate; enforcing the management and conduct rules; handling official correspondence and complaints and arranging how the swimming pool and recreation facilities may be used.¹⁵⁹⁰

To illustrate how delegation works in practice, we can look at prescribed management rule 42, which states that:

“The trustees may authorise the managing agent to administer and operate the account referred to in rule 41 and 43...”

The words “administer and operate” include the signing of cheques. However, the managing agent is not automatically authorized to sign cheques on the basis of rule 42 alone. Such a power must be specifically delegated to the managing agent in the managing contract or by a trustees' resolution.¹⁵⁹¹ Furthermore, the managing agent will have to sign the cheque subject to the requirement set out in prescribed management rule 27 that requires instruments to be signed by a trustee and managing agent for it to be valid and binding on the body corporate.

In terms of prescribed management rule 46(1) the powers and duties may be entrusted to the managing agent notwithstanding anything to the contrary contained in rule 28,

¹⁵⁹⁰ Van der Merwe *Sectional Titles* 15-16.

¹⁵⁹¹ Maree (December 2010) 38 *MCS Courier* 2.

and subject to the provisions of section 39(1) of the STA.¹⁵⁹² Prescribed management rule 28, which governs the general and statutory duties of the trustees, provides that the trustees shall perform the functions entrusted to them by sections 37¹⁵⁹³ and 39¹⁵⁹⁴ of the STA and exercise the powers of the body corporate on its behalf. The only restriction on the delegation of powers and duties is the fact that the appointment and delegation of powers are made subject to the provisions of section 39(1) of the STA in terms of which the functions and powers of the body corporate must, subject to the provisions of the Act, the rules and any restriction imposed or direction given at a general meeting of the owners, be performed and exercised by the trustees of the body corporate holding office in terms of the rules. Section 39(1) will be replaced by section 7(1) of the STSMA, which is a substantially similar provision. This implies that if the trustees' powers and functions are restricted in the above manner then those limitations would apply to functions and powers delegated to the managing agent.

The delegation of powers should never be effected in an informal manner, and neither the trustees nor the managing agent should assume that the agent is endowed with certain powers. The exact powers and duties should always be set out in writing in the agreement concluded with the managing agent which in turn should comply with both the substantial and formal requirements of the STA and the applicable management rules. Where a power or duty is not specified in writing in the management agreement, it may be delegated to the managing agent in terms of a formal minuted trustees' resolution, provided that the managing agent formally accepts it.

Prescribed management rule 26(1)(b) provides that the trustees have the power to delegate to one or more of the trustees such of their powers and duties as they deem fit, and at any time to revoke such delegation.¹⁵⁹⁵ The contract should also contain the power on the part of the trustees or the body corporate to revoke some of the duties or powers delegated to the managing agent if they wish to restrict the powers and duties

¹⁵⁹² Annexure 8 rule 46(1)(a).

¹⁵⁹³ STSMA s 3.

¹⁵⁹⁴ STSMA s 7.

¹⁵⁹⁵ Annexure 8 rule 26(1)(b).

previously delegated. This should only be done on the strength of a resolution passed by the trustees or the body corporate, and notification to the managing agent.

Regarding the delegation of powers and duties, a managing agent cannot unilaterally transfer the management contract to another without the consent of the body corporate. This limitation is consistent with the maxim *delegatus delegare non potest* which means that a delegate cannot further delegate his or her powers to someone else.¹⁵⁹⁶ The managing agent cannot transfer the management contract entirely, but can contract out certain tasks to specific third parties such as plumbers and electricians who are more skilled to perform the task.¹⁵⁹⁷ This is also in conformity with construing the contract of the managing agent as a contract of mandate in that one of the inherent obligations is that the mandatory is required to perform the mandate personally.¹⁵⁹⁸

Notwithstanding any delegation of powers and duties to the managing agent the body corporate would still be entitled to exercise all or any of these powers and duties, or place restrictions on the exercise thereof by the managing agent.¹⁵⁹⁹ Any act done or suffered by a managing agent in the exercise of the powers and functions delegated to him or her has the same effect as if it was done by the body corporate.

13 2 3 Comparative survey

In New South Wales the ordinary resolution of the general meeting authorising the appointment of a managing agent comprises both the appointment¹⁶⁰⁰ and a delegation of various powers, authorities, duties and functions to the managing agent.¹⁶⁰¹ The NSW Strata Management Act gives the owners corporation three options with regard to the type of delegation. In the first place it allows for a complete delegation where every

¹⁵⁹⁶ Chen & Van der Merwe (2009) *TSAR* 33.

¹⁵⁹⁷ 33.

¹⁵⁹⁸ Joubert & Van Zyl "Mandate and Negotiorum Gestio" in *LAWSA* 17(1) para 9.

¹⁵⁹⁹ Van der Merwe *Sectional Titles* 15-19.

¹⁶⁰⁰ NSW Strata Schemes Management Act s 27.

¹⁶⁰¹ S 28; Theoretically the owners corporation can pass a resolution of mere appointment without a delegation (known as a bare appointment), but this would serve no practical purpose as the managing agent would then not be able to perform any of the tasks associated the management of the scheme, and tis would defeat the purpose as the scheme would have a managing agent in name only; Ilkin *NSW Strata* 150; *The Owners – Strata Plan No 61643 v183 On Kent Management Pty Ltd* (2007) NSW Titles Cases 80 – 117.

power, authority, duty and function that the owners corporation possesses by virtue of the Act, regulations or by-laws may be delegated to the managing agent.¹⁶⁰² For example, the managing agent will be allowed to invest the owner corporation's money;¹⁶⁰³ make application to the Supreme Court to terminate the strata scheme; or change the scheme's insurance company.¹⁶⁰⁴ The exception to this delegation occurs where the Act specifies that the managing agent may not consider certain matters. Secondly it permits a partial delegation of one or more of its powers, authorities, duties and functions specified in the instrument of appointment, with the consequence that any act outside the instrument would be a breach of the delegation.¹⁶⁰⁵ The Institute of Strata Title Management has recommended a form that provides the managing agent with a clearly identifiable list of tasks that the managing agent is required to perform.¹⁶⁰⁶ Thirdly it also permits a partial delegation of powers, authorities, duties and functions except those specified in the instrument.¹⁶⁰⁷ The NSW Strata Schemes Management Act also allows the owners corporation to delegate all or some of the chairperson's, secretary's, treasurer's and executive committee's powers, authorities, duties and functions to the managing agent.¹⁶⁰⁸ The extent of the delegation with the conditions and limitations imposed thereon should be evident from the agency agreement.

Some managing agents are given a complete delegation, whilst others are only given a partial delegation. Added to this the owners corporation may impose many different conditions and limitations on the managing agent under either type of delegation. The Act specifies three matters that cannot be delegated to the managing agent.¹⁶⁰⁹ The first matter is "a delegation under this subsection" which means that the managing agent cannot allow a third person to exercise or perform the powers, authorities, duties and functions that have been delegated to the managing agent. This provision prohibits the managing agent from subcontracting to another managing agent. Matters involving a

¹⁶⁰² NSW Strata Schemes Management Act s 28(1)(a).

¹⁶⁰³ NSW Strata Schemes Management Act s 73.

¹⁶⁰⁴ NSW Strata Schemes Management Act s 84.

¹⁶⁰⁵ NSW Strata Schemes Management Act s 28(1)(a).

¹⁶⁰⁶ Ilkin *NSW Strata* 150.

¹⁶⁰⁷ NSW Strata Schemes Management Act s 28(1)(c).

¹⁶⁰⁸ NSW Strata Schemes Management Act s 29.

¹⁶⁰⁹ NSW Strata Schemes Management Act s 28(3).

discretionary use of power, authority, duty or function cannot be delegated to a third person. Where the managing agent is a company the whole firm has been appointed as the managing agent and any licensed individual can exercise the powers, authorities, duties and functions delegated under the agreement. Where a managing agent is a firm of licensed partners and one partner to whom a particular scheme has been allocated is ill or on holiday, then any other licensed partner can exercise the powers, authorities, duties and functions delegated under the agreement because the whole firm who has been appointed as the schemes managing agent, and not just the individual partner. The Agents Act allows a member of a partnership to be unlicensed, but that partner cannot carry out the functions of a managing agent. Either way the managing agent will delegate acts such as typing, posting of mail or the engagement of skilled and qualified tradespeople to carry out repairs.¹⁶¹⁰

The second matter is “a decision on a matter that is required to be decided by the owners corporation” which means that the managing agent cannot make a decision on a restricted matter. The third matter is “a determination relating to the levying or payment of contributions” which applies to managing agents and the executive committee.¹⁶¹¹ It is clear from these limitations that the legislature intended that the general meeting, and not the executive committee and managing agent, to decide what money needs to be raised to meet future expenses of the scheme.¹⁶¹²

A managing agent who has been given a complete delegation should follow certain procedural steps when making decisions, subject to the conditions and limitations imposed.¹⁶¹³ In the first place the managing agent should not take any action unless an initial resolution has been passed and recorded in the owners corporation’s minute book authorizing the action. The managing agent should keep record of any decision, which could be used as evidence. The managing agent may serve a written record of his or her decision seven days before the action is to be taken, but this is only necessary if the

¹⁶¹⁰ Ilkin *NSW Strata* 154.

¹⁶¹¹ NSW Strata Schemes Management Act s 76(2).

¹⁶¹² Ilkin *NSW Strata* 154.

¹⁶¹³ 155.

general meeting is to be consulted¹⁶¹⁴ If owners holding more than one-third of the aggregate unit entitlement lodge a written objection to a proposed decision the managing agent would be prevented from making that decision.¹⁶¹⁵ Once the managing agent has served the written record and the owners corporation or executive committee objects to the managing agent's decision, a meeting can be held in order to pass a resolution overruling the decision.¹⁶¹⁶

Secondly, the managing agent must, after taking action, make a written record specifying the function and the manner in which it was exercised and serve a copy on the owners corporation.¹⁶¹⁷ A managing agent who has a partial delegation must look to the agency agreement to see if that particular power, authority, duty or function has been delegated to him or her.¹⁶¹⁸

A managing agent that fails to perform a delegated duty that has a penalty in terms of the Act for non-performance, would be subject to the same penalty as the owners corporation if the latter had been convicted for failure to perform the duty instead.¹⁶¹⁹ When, for example, the duty to record the particulars of all notices and orders was delegated to the managing agent, he becomes liable to prosecution on the failure to do so.¹⁶²⁰

¹⁶¹⁴ A former Commissioner suggested that the managing agent affix an agenda detailing the matters proposed to be considered to the notice board at least 72 hours before he or she proposed to make a decision. It is appropriate that owners be given the opportunity to oppose the proposed decision, but the Commissioner's opinion is not supported by any cases or general law.

¹⁶¹⁵ NSW Strata Schemes Management Act, sch 3, cl 11(2).

¹⁶¹⁶ NSW Strata Schemes Management Act s 28(6).

¹⁶¹⁷ NSW Strata Schemes Management Act s 31 which requires decisions involving the exercise of the owners corporation powers, authorities, duties and functions to be served on the owners corporation, but not those of the chairperson, secretary and treasurer. A managing agent can exercise a power before making a record of the decision to do so, but it is better to record the proposed decision before the power has been exercised. The managing agent does not have to affix a notice of the decision to the schemes notice board as is the case with executive committee decisions. The managing agent must affix the common seal to those documents requiring it; Ilkin *NSW Strata* 156.

¹⁶¹⁸ Ilkin *NSW Strata* 157.

¹⁶¹⁹ NSW Strata Schemes Management Act s 30.

¹⁶²⁰ Ilkin *NSW Strata* 157.

Any condition or limitation may be imposed by the owners corporation provided that it is not contrary to law.¹⁶²¹ Despite the delegation of powers to the managing agent the owners corporation may still continue to exercise or perform all or any of its powers, authorities, duties and functions.¹⁶²² Any decision of a managing agent that is objected to may be rescinded, overruled or repealed by a decision of the owners corporation or the executive committee by passing a resolution.¹⁶²³ The only problem is that the managing agent is not required to notify the owners corporation, executive committee or any owner of the proposed decision, unless the agency agreement specifically requires it.¹⁶²⁴ The owners corporation might not become aware of the decision until it receives the written record from the managing agent.¹⁶²⁵

Any act done or allowed by the managing agent when acting under the terms of the delegation will be binding upon the owners corporation and it will have the same force and effect as if it had been done or allowed by the owners corporation.¹⁶²⁶ If a third party that contracts with the managing agent has ensured that a certain authority was delegated to the managing agent in the instrument then he or she will be entitled to rely on the managing agent's exercise of that power or duty, and will not need to make further enquiries.¹⁶²⁷

In Singapore the management corporation has a discretionary right to delegate certain powers and duties to the managing agent.¹⁶²⁸ The delegation is effected by a written instrument of delegation,¹⁶²⁹ and the form will be determined by the parties as it is not prescribed by the BMSMA. There can be a complete delegation¹⁶³⁰ to the managing agent of all the powers, duties and functions conferred on the management corporation

¹⁶²¹ NSW Strata Schemes Management Act s 28(5).

¹⁶²² NSW Strata Schemes Management Act s 28(4).

¹⁶²³ NSW Strata Schemes Management Act s 28(6).

¹⁶²⁴ NSW Strata Schemes Management Act s 28(5).

¹⁶²⁵ In terms of section 31.

¹⁶²⁶ NSW Strata Schemes Management Act s 28(7); It will be deemed to have been done or suffered by the owners corporation.

¹⁶²⁷ Ilkin *NSW Strata* 151.

¹⁶²⁸ Like in New South Wales an appointment without a delegation is possible; Keang Sood *Strata Title* 550.

¹⁶²⁹ BMSMA s 67(1).

¹⁶³⁰ BMSMA s 67(1)(a).

by the BMSMA and the relevant regulations or by-laws, subject to any limitations. The management corporation can also make a partial delegation of any one or more of its powers, duties and functions specified in the instrument with the result that any act outside the instrument would be a breach of the delegation¹⁶³¹ or a partial delegation of all of its powers, duties and functions, except those specified in the instrument.¹⁶³² The managing agent may exercise or perform the delegated powers, duties or functions whether complete or partial, from time to time in accordance with the delegation.¹⁶³³ The BMSMA also permits the corporation to make a delegation of all or some of the powers, duties and functions of the chairperson, secretary and treasurer or the executive council or those powers, duties and functions to the managing agent¹⁶³⁴ as specified in an ordinary resolution.¹⁶³⁵

There are limitations on the managing agent's exercise of the delegated powers, duties and functions. The BMSMA does not permit the management corporation to delegate to the managing agent its powers to make a delegation.¹⁶³⁶ Where the managing agent is an individual he or she would not be allowed to delegate his or her powers to a third party. Where the managing agent is a partnership or company the non-availability of a particular partner or employee does not prevent another from undertaking the task. A managing agent may delegate certain acts to a third party, and can delegate some tasks to a more qualified person, for example a more skilled person can undertake necessary repairs.

The BMSMA does not permit the corporation to make a decision on any matter that may only be made by the management corporation pursuant to a unanimous resolution, a special resolution, a 90% resolution, a resolution by consensus or at a general meeting

¹⁶³¹ BMSMA s 67(1)(b).

¹⁶³² BMSMA s 67(1)(c).

¹⁶³³ BMSMA s 67(4).

¹⁶³⁴ The managing agent can be delegated the secretary's duty to make available certain records for inspection or the treasurer's duty to prepare the certificate pertaining to the details of the amounts of any financial contributions, other money and interest due in respect of a lot in the circumstances specified in the Act; Keang Sood *Strata Title* 553.

¹⁶³⁵ BMSMA s 67(3).

¹⁶³⁶ BMSMA s 67(2)(a).

of the corporation.¹⁶³⁷ The management corporation cannot make a determination on any matter referred to in section 59 of the BMSMA (which deals with the restrictions imposed on the council by the management corporation in relation to what matters or class of matters shall be determined only by the latter in the general meeting¹⁶³⁸) and specified in a resolution of the management corporation passed for the purposes of that section.¹⁶³⁹ These last two limitations prohibit a managing agent from making a decision on a matter that only the management corporation may decide pursuant to the specified resolutions or in a general meeting. Where matters are restricted to being determined in a general meeting, it will defeat the managing agent's principal function of administering the scheme on a day-to-day basis.

A delegation, whether complete or partial, may be made subject to such conditions or limitations as to the exercise or performance of all or any of the powers, duties or functions, or as to time and circumstances, as may be specified in the instrument of delegation.¹⁶⁴⁰ As an example the managing agent could be prohibited from arranging for the repair and maintenance of any one item of common property exceeding a specified cost without prior approval from the executive council.

The managing agent is also prohibited from engaging in election activity of the executive council including canvassing for proxy votes, and cannot by word, message, writing or in any other manner endeavor to persuade or dissuade any person to vote or abstain from voting, by proxy or in person, in any particular way at any such election.¹⁶⁴¹ The managing agent is not permitted to visit any person entitled to vote at the election at his or her home or place of work for the purposes of any candidate's election¹⁶⁴² or to conduct any other activity in this regard.¹⁶⁴³ Contravention of this is an offence.¹⁶⁴⁴ A vote by a proxy who is a managing agent is invalid if it would obtain or assist in

¹⁶³⁷ BMSMA s 67(2)(b).

¹⁶³⁸ BMSMA s 79(3).

¹⁶³⁹ BMSMA s 67(2)(c).

¹⁶⁴⁰ BMSMA s 67(5).

¹⁶⁴¹ BMSMA s 68(1)(a).

¹⁶⁴² BMSMA s 68(1)(b).

¹⁶⁴³ BMSMA s 68(1)(c).

¹⁶⁴⁴ BMSMA s 68(3).

obtaining a pecuniary interest for, or confer or assist in conferring any other material benefit on the proxy.¹⁶⁴⁵ Examples of benefits includes an extension of the term or an additional term of appointment of the proxy as managing agent; an increase in the remuneration of the proxy; a decision of the management corporation not to proceed with, withdraw, to delay, to compromise or to settle litigation or other legal proceedings relating to the proxy; or any other decision of the corporation that affects litigation or other legal proceedings relating to the proxy.¹⁶⁴⁶

Notwithstanding any delegation made the management corporation, office bearers, or executive council may continue to exercise or perform all or any of the delegated powers, duties or functions.¹⁶⁴⁷ If the corporation disagrees with a decision of a managing agent on a matter it may pass a resolution rescinding or repealing the decision. It is however improbable that a managing agents decision may be revoked after it has been put into force and given effect to for instance if work has been undertaken or an item has been purchased. This follows from the fact that there is no duty on the managing agent to notify the corporation, executive council or any proprietors of proposed decisions unless the instrument of delegation requires the managing agent to give prior notice.¹⁶⁴⁸

Any properly effected act or thing done or allowed by the managing agent while acting in the exercise of a delegation shall have the same force and effect as if it had been done or allowed by the management corporation.¹⁶⁴⁹ This ensures that any act by the managing agent with a third party will be binding upon the management corporation. Once the third person is satisfied that the managing agent has been delegated the particular power, he or she can rely on it without making further enquiries to the management corporation, office bearers, or the executive council.¹⁶⁵⁰

¹⁶⁴⁵ BMSMA s 68(2).

¹⁶⁴⁶ BMSMA s 68(4)(a)-(d).

¹⁶⁴⁷ BMSMA s 67(6).

¹⁶⁴⁸ Keang Sood *Strata Title* 556.

¹⁶⁴⁹ BMSMA s 67(7)(a) and (b).

¹⁶⁵⁰ BMSMA s 68(a) and (b).

13 3 Powers and duties of the managing agent

13 3 1 Introduction

Having established how the powers and duties are delegated to the managing agent, what powers and duties are capable of being delegated and their sub-delegation to other persons, I will set out some of the specific powers and duties of the managing agent.

13 3 2 South African position

The STA does not contain any provisions on managing agents. The only possible exception is section 38(a) of the STA¹⁶⁵¹ which states that the body corporate has the power to appoint such employees and agents as it deems fit. The powers and duties of a managing agent are mainly set out in the prescribed management rules in Annexure 8 to the STA, read together with the provisions in the management agreement concluded with the trustees on behalf of the body corporate. The prescribed management rules deal with the managing agent's contract of appointment, and stipulate a few functions of the managing agent, but do not provide an exhaustive list.¹⁶⁵² Prescribed management rule 46(1)(a) states that:

“The managing agent is appointed in terms of a written contract to control, manage, and administer the common property and the obligations to any public or local authority by the body corporate on behalf of the unit owners, and to exercise such powers and duties as may be entrusted to the managing agent, including the power to collect levies and to appoint a supervisor or caretaker.”¹⁶⁵³

However, prescribed management rule 46 is not the only rule that impacts the powers and duties of the managing agent.¹⁶⁵⁴ Generally, a managing agent's function is to assist the body corporate to administer and maintain the common property and to

¹⁶⁵¹ STSMA s 4(a).

¹⁶⁵² Chen & Van der Merwe (2009) *TSAR* 24-25.

¹⁶⁵³ Annexure 8 rule 46(1)(a).

¹⁶⁵⁴ Maree (December 2010) 38 *MSC Courier* 2.

enforce the rules of the scheme. The managing agent needs to co-ordinate and deal with the issues involving the owners, tenants, visitors and others.¹⁶⁵⁵ He or she is also entitled to be given reasonable prior notice of meetings of the trustees, and from time to time to be furnished with copies of the minutes of the trustees' meetings and of the general meeting.¹⁶⁵⁶ However, the managing agent can only attend meetings of the trustees with their consent.¹⁶⁵⁷

The managing agent should keep records and reports up to date, and to give access to and to allow for inspection of this information. In an article dealing with the daily life of a managing agent the author wrote that:

“Being a professional managing agent does not mean hogging all the information to yourself and trying to run the body corporate as though you own it.”¹⁶⁵⁸

Prescribed management rule 48 obliges the managing agent to keep full records of his or her administration and to notify the body corporate and all holders of registered sectional mortgage bonds of all matters that in his or her opinion detrimentally affect the value of the common property and any of the sections.¹⁶⁵⁹ Before this rule was amended in 1997 the managing agent had to report to all registered sectional bondholders, even if they had not notified the body corporate of their interest. The report must now be made to registered sectional bondholders who have notified the body corporate of their interest.¹⁶⁶⁰ In this way the body corporate will have the addresses of the interested sectional bondholders. The amendment avoids unnecessary reporting and additional expenses. It is also more practical in that the managing agent need not make arduous inquiries of the addresses of all sectional bondholders as the body corporate would have been furnished with the addresses of interested bondholders. The reference to rule 54(1)(b) also limits sectional bondholders to those holders of

¹⁶⁵⁵ Chen & Van der Merwe (2009) *TSAR* 31.

¹⁶⁵⁶ Annexure 8 rule 49(1) and (2).

¹⁶⁵⁷ Annexure 8 rule 49(1).

¹⁶⁵⁸ Lenhoff (October 2008) *Paddocks Press Newsletter* 3.

¹⁶⁵⁹ Annexure 8 rule 48.

¹⁶⁶⁰ Annexure 8 rule 54(1)(b).

registered sectional mortgage bonds over units, and excludes sectional bondholders over exclusive use areas and over the right to develop the scheme in phases in terms of section 25 of the STA. Van der Merwe states that since the reporting to the body corporate would be by way of a report to the general meeting, it should be sufficient reporting to a sectional bondholder who has informed the body corporate of his interest in attending general meetings.¹⁶⁶¹ In practice reporting to the body corporate would, however, usually be in a report to the trustees.¹⁶⁶²

These provisions have the purpose of imposing an obligation on the managing agent. The trustees should add a clause in the managing agent's contract of appointment that would require the managing agent to notify the body corporate and all holders of registered bonds over units in the scheme of all matters which in his or her opinion detrimentally affect the value or amenity of the common property and any of the sections. This should include an obligation on the managing agent to regularly inspect the common property and sections to seek out problems that could have a detrimental effect. Such problems are not only limited to the physical condition of the building, but should extend to the operations and affairs of the body corporate and trustees generally. The trustees should also include a term in the managing agent's contract of appointment that specifies which records the managing agent is required to keep of his or her administration of the scheme. This duty to keep record of administration is important as it keeps the managing agent accountable.

Managerial problems may result when the body corporate's records and reports are not up to date. As the trustees will be unaware of the financial situation of the scheme from month to month, the management rules and contract of appointment dealing with the duties of managing agents should include a clause similar to this:

"The managing agent shall keep the records and accounts of the body corporate up to date. The books of account shall be balanced on a monthly basis and

¹⁶⁶¹ Van der Merwe *Sectional Titles* 15-18.

¹⁶⁶² 15-18.

financial reports issued to the trustees at the end of each month. Failure to comply with this rule shall be grounds for terminating the services of the managing agents.”¹⁶⁶³

Managing agents are in possession of contact details including addresses of the owners of units. It is important to know who is entitled to access this information and whether there is a cost involved.¹⁶⁶⁴ Prescribed management rule 35 requires that:

“The trustees shall cause proper books of account and records to be kept so as fairly to explain the transactions and financial position of the body corporate including... a register of owners and of registered mortgagees of units and of all other persons having real rights in such units (insofar as written notice shall have been given to the trustee by such owners, mortgagees or other persons) showing in each case their addresses.”¹⁶⁶⁵

The rule states further that on application of any owner, registered mortgagee or the managing agent, the trustees shall make all or any of the books of account and records available for inspection by such owner, mortgagee or managing agent.¹⁶⁶⁶ The managing agent exercises its duties for the body corporate and is not the agent of any individual owner. If a municipality wishes to send notices regarding the valuation of individual sectional title units to the individual owners or to collect rates and taxes then it should request the owners’ addresses using the PAIA. The body corporate is considered a private body in terms of the PAIA.¹⁶⁶⁷ The municipality must complete a form whereupon it, as the applicant, must indicate the right that it wishes to exercise. The trustees, as the executive organ of the body corporate, then have thirty days to respond to the request for information and upon payment of the access fee, furnish the contact details of the owners to the municipality. The municipality should not dump its

¹⁶⁶³ AB Kenyon-Thompson “Body corporate rules: Are they effective?” (October 1987) 4.2 *Juta’s South African Journal of Property* 50.

¹⁶⁶⁴ Maree (March 2007) 22 *MCS Courier* 8.

¹⁶⁶⁵ Annexure 8 rule 35(1)(c).

¹⁶⁶⁶ Annexure 8 rule 35(2).

¹⁶⁶⁷ Maree (March 2007) 22 *MCS Courier* 8.

notices at the door of the managing agent who is not employed by the individual owners, but by the body corporate. The municipality should send them to the individual owners after receiving their contact details from the trustees.¹⁶⁶⁸

The scope of the managing agent's powers and duties will depend on the terms in this contract of appointment and the circumstances of the scheme.¹⁶⁶⁹ The variety of powers and duties of the managing agent depends largely on the size and nature of the sectional title scheme, and on the capacity of its members to pay for a professional managing agent.¹⁶⁷⁰ The body corporate and trustees can tailor the management package to suit their scheme's needs.¹⁶⁷¹ The main tasks, duties and functions of the managing agent can be divided into managerial, secretarial and financial services.¹⁶⁷²

The *managerial services* are mostly administrative in nature.¹⁶⁷³ The managing agent could be made responsible to open and operate a current or savings account with a bank or building society, and to charge bank charges per unit per month. As I have explained in chapter 11 all managing agents that collect or receive levies for a body corporate have been defined as estate agents, and the Estate Agency Affairs Act applies to the managing agent. Therefore, all managing agents are under a legal obligation to register as an estate agent with the Estate Agency Affairs Board before he or she can collect or receive any levies and should be in possession of a valid Fidelity Fund Certificate and effect fidelity insurance to the satisfaction of the Estate Agency Affairs Act.¹⁶⁷⁴

The managing agent is also responsible to manage trust money and operate a trust account in terms of section 32 of the Estate Agency Affairs Act.¹⁶⁷⁵ In the unreported

¹⁶⁶⁸ Maree (March 2007) 22 *MCS Courier* 8.

¹⁶⁶⁹ Chen & Van der Merwe (2009) *TSAR* 31-33.

¹⁶⁷⁰ Van der Merwe *Sectional Titles* 15-8.

¹⁶⁷¹ Constas & Bleijs *Demystifying Sectional Title* 45.

¹⁶⁷² Van der Merwe *Sectional Titles* 15-8.

¹⁶⁷³ Lenhoff (October 2008) 3-10 *Paddocks Press Newsletter* 1,3.

¹⁶⁷⁴ Estate Agency Affairs Act s 28; Paddock (January 2010) *Paddocks Press Newsletter* 6; Van der Walt (April 2008) *Paddocks Press Newsletter* 4; Van der Merwe *Sectional Titles* 15-9; Jooste (January 2008) *Paddocks Press Newsletter* 1-2.

¹⁶⁷⁵ Jooste (January 2008) *Paddocks Press Newsletter* 1.

case of *Body Corporate of Fucia Gardens et al v Bakenkop (Pty) Ltd t/a Wierda et al*¹⁶⁷⁶ the court decided that, where a managing agent agreed to pay levies collected into a trust account, but failed to open the trust account and paid it into his business account, such money had to be paid to the various bodies corporate, and did not fall into the insolvent estate of the managing agent. The managing agent is obliged to open a trust account or accounts with a bank for the purpose of depositing monies received from clients.¹⁶⁷⁷ Only once money has been deposited into the current account¹⁶⁷⁸ may it be transferred into a savings (interest bearing) account.¹⁶⁷⁹ Both accounts must be in the name of the managing agent and must contain a reference to section 32(1) or 31(2) of the Estate Agency Affairs Act as the case may be. The managing agent can therefore open a trust account for all of his clients collectively or separate accounts for each client. All the accounts must be reconciled after every 30 days. The managing agent must notify the Estate Agency Affairs Board of the details of the current account including the bank name and account number. There is no such requirement for the savings or interest bearing account as the trust funds may not be deposited directly into a savings account.¹⁶⁸⁰

The Estate Agency Affairs Act stipulates that the managing agent must keep a record of the trust money received and must ensure that an audit is done within four months after the end of the financial year of the managing agent.¹⁶⁸¹ All trust money, including individual accounts for each body corporate or a collective account for all bodies corporate, must be included in the report that the auditor of the managing agent sends to the Estate Agency Affairs Board annually.

Prescribed management rules 41 to 44 of the STA provide more options when dealing with trust money. Rule 41 instructs the managing agent to deposit all monies in the account of the body corporate. Rule 42 provides that the trustees may authorize the

¹⁶⁷⁶ Unreported Case 50444/2007 (T) of 4 April 2008.

¹⁶⁷⁷ Estate Agency Affairs Act s 32.

¹⁶⁷⁸ Estate Agency Affairs Act s 32(1).

¹⁶⁷⁹ Estate Agency Affairs Act s 32(2)

¹⁶⁸⁰ Jooste (January 2008) *Paddocks Press Newsletter* 2.

¹⁶⁸¹ Estate Agency Affairs Act s 29.

managing agent to administer and operate these accounts of the body corporate. It further adds that the trustees may authorize the managing agent to deposit the money in a trust account in terms of the Estate Agency Affairs Act. This leaves the impression that the trustees have the option to instruct the managing agent to either manage their funds on their own account or on the account of the managing agent. The Estate Agency Affairs Act only gives the option to receive or manage trust funds on a trust account.¹⁶⁸²

The managing agent therefore has duties that include the collection of contributions and levies, rentals, other sundry fees, ancillary charges from owners, and any other income due to the body corporate and must then deposit such receipts into the trust account. Late or non-payment of levies can lead to financial loss for the body corporate. Outside managing agents are in a much better position than the trustees to collect levies, to warn owners who are in arrears and finally to institute legal proceedings for the recovery of arrears.¹⁶⁸³ The managing agent is also responsible for exercising credit control in respect of all amounts owing by timeously addressing letters of reminder to owners in arrears; following due process in the imposition of fines in terms of a penalty clause in the rules applicable to the scheme for arrear levies; corresponding with attorneys in the case of serious defaulters; charging interest on arrears where necessary and taking other steps as directed by the trustees for the recovery of the arrears. He should also conduct a regular analysis of debtors and charge an administration fee to defaulting debtors for each final demand issued and for litigation action taken. Finally, the managing agent must also furnish a monthly statement to the trustees showing amounts due and received from each owner, as well as a monthly report on owners in arrears.

The managing agent could also be made responsible for the preparation of annual expenditure estimates for tabling at the annual general meeting, a periodic review for comparisons of year-date actual expenditure to budget¹⁶⁸⁴ and the investment of any surplus income. He must provide the trustees with a monthly statement of receipts and

¹⁶⁸² Jooste (January 2008) *Paddocks Press Newsletter* 2.

¹⁶⁸³ Van der Merwe *Sectional Title* 15-8.

¹⁶⁸⁴ Woudberg *Basic Sectional Title Book One* 46.

expenditure and must verify and pay all accounts and expenses from available funds in the administration fund of the body corporate, subject to any restrictions imposed or directions given by the trustees. Accounts are paid with or without authority from the trustees or the body corporate, depending upon the amount of money involved and the extent of the delegation of powers to the managing agent.¹⁶⁸⁵ The managing agent must keep records of guarantees and of service contracts for lifts, plant and machinery and check that the related accounts are correct. He must insist that maintenance work is properly carried out to his or her satisfaction

The managing agent has various duties regarding insurance. These duties may include assisting the trustees in determining the replacement value of the buildings and improvements to the common property and the replacement value of each of the units for the purpose of insurance; negotiating with the insurance firm for the best cover and premiums possible; ensuring that proper and adequate insurance is obtained and renewed; and attending to insurance claims with regard to the common property. If the managing agent has contacts with reputable insurance companies he or she should be able to arrange the best possible deal for cover and premiums for the body corporate. The managing agent's relationship with the insurance company should furthermore ensure a satisfactory and speedy settlement of all claims.¹⁶⁸⁶

The managing agent should arrange for the maintenance, repair and replacement of common property.¹⁶⁸⁷ In this regard the managing agent should inspect the property regularly. A service and inspection division could inspect a scheme twice weekly or immediately in a case of an emergency. It could furthermore supervise cleaning staff; deliver cleaning materials; supply petrol for the lawnmower; ensure that the gardens and common areas are kept clean and tidy and report breaches of rules and damage to the common property to the office. This division could also affect minor repairs and maintenance, especially in schemes predominantly occupied by tenants. The managing agent should therefore assist and advise the trustees with all matters relating to

¹⁶⁸⁵ Van der Merwe *Sectional Titles* 15-8.

¹⁶⁸⁶ 15-9.

¹⁶⁸⁷ Chen & Van der Merwe (2009) *TSAR* 32.

maintenance of the common property including negotiating and obtaining of quotations on the repair and maintenance of common property and the employment of plumbers, electricians and other contractors where necessary. They usually have regular contact with service providers such as electricians, plumbers, building contractors, architects and quantity surveyors. For this reason maintenance contracts can be easily negotiated and arranged so that maintenance or repairs can be speedily effected. Negotiations with local authorities and governmental bodies can furthermore speedily be arranged and conducted if necessary since managing agents generally know a person in these various departments who helps with obtaining permits and consent. The managing agent must generally fulfill any obligations towards any public or local authority on behalf of the scheme or the body corporate in terms of the STA and the rules.¹⁶⁸⁸

The managing agent could be made responsible to appoint, control, pay, supervise and if necessary dismiss gardeners, cleaning staff, caretakers and any other staff. This includes the payment of salaries and calculation of the contributions for the employees for the Unemployment Insurance Fund and workmen's compensation fund. This also includes the furnishing of the necessary employees Pay As You Earn ("PAYE") contribution and the completion and submission of income tax returns.¹⁶⁸⁹ The written contract should specify whether the remuneration of the caretaker, supervisor or employees should be paid as administrative expenses of the body corporate out of levies, or funded by the managing agent itself as part of its management fees.¹⁶⁹⁰

The impartial manager could handle disputes better than the owner trustees who would usually avoid dissatisfaction and friction in the scheme.¹⁶⁹¹ The managing agent is therefore the most suitable person to deal with complaints and queries of the unit owners, mortgagees or third parties, and to manage any possible conflict in the sectional title scheme.

¹⁶⁸⁸ Pienaar *Sectional Title* 191.

¹⁶⁸⁹ Van der Merwe *Sectional Titles* 15-9.

¹⁶⁹⁰ Pienaar *Sectional Titles* 191.

¹⁶⁹¹ Van der Merwe *Sectional Titles* 15-9.

The most frequent *secretarial tasks* performed by the managing agent include the arrangement of meetings of trustees, special general meetings and the annual general meeting of the body corporate. This includes the organization of the notices, preparation of resolutions, and proxies. This task is extremely time-consuming and can include the drafting of the Chairperson's report.¹⁶⁹² The managing agent must assist and advise members, trustees, and the chairperson on such matters as the general meetings, special general meetings, quorums, proxies, resolutions (special and unanimous) and voting rights. Managing agents attend numerous meetings that give them much knowledge and experience in this field. The managing agent must examine proxies and nominations and prepare agendas, budgets and insurance schedules for the general meeting. The managing agent may prepare and serve meeting notices including notices for entering individual units to do repairs and for levying maintenance contributions. The managing agent must attend the annual general meeting and prepare and distribute minutes at this meeting. To ensure continuity and personal involvement the managing agent should also attend and take minutes at important special general meetings and quarterly meetings of the trustees.¹⁶⁹³ It has been suggested that the management agent should not merely offer answers to the questions at the meetings, but should make the scheme's governance documents available, understand the scheme's finances and be willing to solve problems.¹⁶⁹⁴

Another secretarial task of the managing agent is the storing and safeguarding of the books with the meeting's minutes, records, notices, sectional plans, levy schedules, conduct rules and all other important documents and statutory records related to the sectional title scheme. Maintenance of the statutory records of the body corporate is an important task. The managing agent is also responsible to keep address lists and registers of owners and mortgagees up to date. This task can be difficult in large sectional title schemes where most units are let out and the tenants move frequently

¹⁶⁹² 15-10.

¹⁶⁹³ 15-10.

¹⁶⁹⁴ G Paddock "Extracts from the Law of Sectional Title Meeting Course" (December 2009) 4-12 *Paddocks Press Newsletter 2*; Van der Merwe *Sectional Titles* 15-10.

without notifying the trustees. The use of computers to store such important information would be ideal, but could be expensive to purchase.¹⁶⁹⁵

The managing agent should read and respond to correspondence and liaise with litigation attorneys. He is should is also responsible for the compilation and enforcement of the management and conduct rules as required by the trustees. Another important task is that the managing agent should advise the body corporate, the trustees and the chairperson regarding their role in terms of the STA and the rules and resolutions of the scheme.¹⁶⁹⁶ The managing agent therefore provides the members, trustees, and the chairperson with knowledge of the relevant legislation and the enforcement of the provisions of such legislation. The managing agent is contracted by the trustees to assist them in their statutory management duties, which includes paralegal advice of what trustees can and cannot do.¹⁶⁹⁷ This means that if the trustees act contrary to the STA the managing agent concerned should distance him or herself from such illegal action. This means that if the trustees act contrary to the STA the managing agent concerned should distance him or herself from that illegal action, and make it clear that he or she is not associated with that action. Furthermore, the managing agent has a duty to inform the trustees if they intend to act against the Act or the rules of a scheme. Every managing agent should make a policy statement on appointment that he or she will strictly follow the provisions of the Act and the rules and that the trustees should not expect him to deviate from these provisions.¹⁶⁹⁸ The managing agent should read and respond to correspondence and liaise with litigation attorneys.

The *financial and accounting services* require that the managing agent must keep record of financial management according to generally accepted accounting practices and maintain adequate accounting records. The managing agent must prepare an annual budget of income and expenditure for the following year for approval by the trustees and the general meeting. The managing agent must determine the monthly

¹⁶⁹⁵ Van der Merwe *Sectional Titles* 15-10.

¹⁶⁹⁶ Pienaar *Sectional Title* 192.

¹⁶⁹⁷ Paddock (May 2009) *Paddocks Press* 8.

¹⁶⁹⁸ Maree (December 2010) 38 *MSC Courier* 7 8.

levy that would meet the proposed budget and have it approved by the trustees. The budgeted expenditure should be revised periodically throughout the year and the managing agent should advise the trustees on whether special levies are required. The managing agent must prepare monthly unaudited accounts of income and expenses so that the cash flow of the body corporate can be monitored by the trustees. The managing agent is also responsible for the preparation of interim and draft annual financial statements for audit, and should arrange audits of the accounts as required by the body corporate from time to time, and should work in association with reputable auditors.¹⁶⁹⁹ He or she is also responsible for the submission of income tax returns relating to the body corporate. Finally, the managing agents have the duty to tend to the investment of the body corporate members.

Financial management of a sectional title scheme is of the utmost importance. The trustees who are elected at the annual general meeting cannot abdicate their responsibility for the body corporate's financial interests. The trustees often place the entire task of financial management on the shoulders of the managing agent. This can be done, but the managing agent will not be liable, unless he or she has committed some unjustifiable act with regard to the financial management. For this reason trustees are advised to have intimate and consistent knowledge of the financial affairs of the sectional title scheme. The trustees should be familiar with matters such as which owners are in arrears with their levies and what action has been taken to collect the arrears; which body corporate accounts still need to be paid; the balances in the accounts held by the body corporate; whether insurance claims have been submitted and if the insurance claim has been paid out by the insurance company. This information can be made available to the trustees at monthly meetings or can be sent to the trustees with a copy of the monthly accounts.

13 3 3 Comparative survey

In New South Wales the actual powers and duties delegated to the managing agent by the owners corporation will be found in the resolution of appointment and the agency

¹⁶⁹⁹ Constas & Bleijs *Demystifying Sectional Title* 46.

agreement, which must contain a specific appointment and delegation of powers, authorities, duties and functions of the owners corporation to the managing agent.¹⁷⁰⁰ The managing agent can have a complete or partial delegation, and therefore the extent of the delegation can vary.¹⁷⁰¹

In addition to the duties delegated to the managing agents by the owners corporations in terms of the NSW Strata Schemes Management Act, managing agents must comply with their obligations in terms of the Agents Act and the NSW Property, Stock and Business Agents Regulations 2003 (the “Agents Regulations”).¹⁷⁰² In terms of these legislative instruments the managing agent has eight major financial and accounting obligations regardless of whether the managing agent has a complete or partial delegation.

The managing agent must have a trust account with an authorized deposit-taking institution such as a bank, and must notify the institution in writing that the account is a trust account¹⁷⁰³ in the name of the managing agent that appears on the agency agreement. Since 1 September 1994 all managing agents (including licensed real estate agents) have the option of deciding whether to keep a separate trust account for each owners corporation, or one general trust account for all the owners corporations that he or she manages. All moneys received by the managing agent on behalf of the owners corporation should be paid into a general or separate trust account until the owners corporation informs the managing agent how the money should be disbursed.¹⁷⁰⁴ In total six specific trust account books and records must be kept by all managing agents.¹⁷⁰⁵

¹⁷⁰⁰ NSW Strata Schemes Management Act s 27 and s 28.

¹⁷⁰¹ Ilkin *NSW Strata* 147.

¹⁷⁰² Ilkin *NSW Strata* 166.

¹⁷⁰³ Agents Act s 86(4).

¹⁷⁰⁴ Agents Act s 86.

¹⁷⁰⁵ Agents Regulations regs 22, 23 and 24. These include a trust receipt book; a trust deposit book; a trust account cash receipts and payments book; a trust account ledger; a trust account ledger trial balance; and a trust transfer journal. The trust accounts and records can be kept by a computer system.

Within three months of 30 June of each year (unless the Director General has fixed another date) a managing agent must cause the records and documents relating to moneys kept in a trust account and held during the year to be audited and must lodge the auditor's report with the Director General.¹⁷⁰⁶ During January of each year a managing agent must furnish the Director General with a statement in the approved form showing details of moneys received more than two years previously and which were held in the managing agent's trust account.¹⁷⁰⁷

The Director General has to establish and maintain an account called the Property Services Statutory Interest Account.¹⁷⁰⁸ The money in the account is applied for the purposes specified in the Agents Act, for example towards administration costs of the Consumer, Trader and Tenancy Tribunal.¹⁷⁰⁹ In the case of a general trust account kept by the managing agent the Director General raises funds for the account via the authorized deposit-taking institution using a formula to the general trust account on the first business day after the end of each month.

Each application for a license or renewal of a license by a managing agent must include a monetary contribution to the Property Services Compensation Fund¹⁷¹⁰ (commonly called the fidelity fund).¹⁷¹¹ The purpose is to compensate persons who suffer pecuniary loss on account of a failure to account to a licensee, an associate of a licensee or a person reasonably believed to be a licensee or associate.¹⁷¹² For example, owners may lose money if the managing agent misappropriates maintenance levies for his or her

¹⁷⁰⁶ Agents Act s 111. The managing agent is responsible for the payment of the auditor's fee for preparing the report as it is an administrative requirement that must be fulfilled in order to retain a practicing license. The managing agent must retain the report for three years in terms of the Agents Act s 113(3).

¹⁷⁰⁷ Agents Act s 96.

¹⁷⁰⁸ Agents Act 63B.

¹⁷⁰⁹ Agents Act s 189 and 190.

¹⁷¹⁰ Established under Agents Act s 165.

¹⁷¹¹ Agents Act s 168; Agents Regulations reg 46.

¹⁷¹² Agents Act ss 171 and 173.

own purpose. The fund is not available for compensation to persons who sustain loss or damage through the negligence of a licensee.¹⁷¹³

Managing agents must permit an authorized officer to inspect the trust account and other accounts kept by them¹⁷¹⁴ in order to safeguard the Compensation Fund and those who have dealings with licensees. The authorized officer completes a confidential report noting any alleged or suspected irregularity for consideration by the Director General. If the Director General thinks that the irregularities have substance he or she can apply to the Supreme Court to have a receiver appointed for the property held by the managing agent.¹⁷¹⁵

In New South Wales owners and tenants often wish to obtain information about the scheme from the managing agent. The managing agent is only obliged to comply with such a request if he or she has been delegated such a duty. The NSW Strata Schemes Management Act sets out seven requirements that must be met before the managing agent is obliged to provide information on request.¹⁷¹⁶ The application must be in writing and must set out what is sought. Each application must be in respect of one specified lot. Only an owner, mortgagee or authorized person may apply for such information and a prescribed fee must be paid. The application must be served in a prescribed manner. A time and place for the inspection of the records must be set. An Adjudicator is not required to comply with these requirements.¹⁷¹⁷

There are six methods available for the owners corporation to obtain financial information, including information about the trust account, from the managing agent. The NSW Strata Schemes Management Act¹⁷¹⁸ sets out that an owners corporation may serve a notice on the managing agent requiring him or her to supply the specified

¹⁷¹³ Legal fees are also not recoverable from the fund. Claims must be made within the period specified in terms of s 173. One person is restricted to a claim of \$500, 000, while a number of people combined can claim a maximum amount of \$2 million in terms of Agents Act s 175.

¹⁷¹⁴ Agents Act 105.

¹⁷¹⁵ Agents Act 138.

¹⁷¹⁶ Agents Act s 108 and 109; Ilkin *NSW Strata* 190.

¹⁷¹⁷ Agents Act s 175.

¹⁷¹⁸ NSW Strata Schemes Management s 33-40.

executive committee member with a written statement setting out information about one or more of the following matters as requested: the names of the trust accounts, the name of the financial institution with whom the accounts are kept, the credit balance of each account at the date specified in the notice and particulars of cheques drawn on the accounts, but not presented and paid;¹⁷¹⁹ the names of any non-trust accounts that he agent operates for the owners corporation; the name of the financial institution with whom the accounts are kept; the credit balance of each account at the date specified in the notice and particulars of checks drawn on the accounts, but not presented and paid;¹⁷²⁰ particulars, including the manner and time of disbursement of money paid or received by the managing agent on behalf of the owners corporation where the money is no longer held by the managing agent¹⁷²¹ and particulars of any specified transaction involving the managing agent when acting for or on behalf of the owners corporation,¹⁷²² but not in respect of any transaction that occurred more than three years before service of the owners corporation notice. The statement must be provided within seven days of receipt of the notice.

The Agents Regulations permit only executive committee members to inspect the managing agent's records and books of account.¹⁷²³ The managing agent may not charge a fee for making the records available for inspection. The Regulations set out the requirements of the financial management report that the managing agent must prepare, sign and forward to the treasurer within one month of its preparation and to the owners corporation at regular intervals.¹⁷²⁴ On payment of the prescribed fee the owner, mortgagee, covenant chargee or authorized person who applies is entitled to the certificates and to inspect all the documents.¹⁷²⁵ The owners corporation or any other person who has been directly involved in any transaction by or with the managing agent may require him or her to supply an itemized account of the transaction within fourteen days of request, provided that the transaction took place not more than six months

¹⁷¹⁹ NSW Strata Schemes Management s 33.

¹⁷²⁰ NSW Strata Schemes Management s 34.

¹⁷²¹ NSW Strata Schemes Management s 35.

¹⁷²² NSW Strata Schemes Management s 36.

¹⁷²³ Agents Regulations reg 40(10).

¹⁷²⁴ Agents Regulations reg 39.

¹⁷²⁵ Referred to in the NSW Strata Schemes Management Act ss 108 and 109.

before the request was made¹⁷²⁶ There is a mechanism to seek delivery of the various records and property of the owners corporation held by the managing agent.¹⁷²⁷

Contravention of or failure to comply with any of these obligations is an offence and can result in the managing agent facing criminal conviction with monetary penalties and imprisonment;¹⁷²⁸ civil proceedings for recovery of money improperly taken;¹⁷²⁹ penalty notice by an authorized officer requiring the agent to pay the specified monetary penalty;¹⁷³⁰ disciplinary action by the Director General resulting in the managing agent's license being suspended or cancelled or the agent being disqualified from holding a license¹⁷³¹ or a warning notice by the Director General advising the public of the particular risks involved in dealing with the particular agent.¹⁷³²

The Agents Act and Regulations also impose a number of general obligations on the managing agent. These obligations include the responsibility to have a licensed person in charge of each place of business;¹⁷³³ to have a registered office within New South Wales;¹⁷³⁴ to notify the Director General of a change to the registered office's address within the time period specified in the regulations;¹⁷³⁵ to legibly display the managing agent's name, description as licensee and type of license held outside the registered office and each place of business;¹⁷³⁶ to keep written record of all transactions at the registered office for three years;¹⁷³⁷ to furnish the Director General with a statement of the trust account particulars and other money held within seven days of request;¹⁷³⁸ to provide an itemized account to a person concerned in a transaction within fourteen days

¹⁷²⁶ Agents Act s 101.

¹⁷²⁷ NSW Strata Schemes Management Act ss 105; Ilkin *NSW Strata* 173.

¹⁷²⁸ NSW Strata Schemes Management Act s 215.

¹⁷²⁹ NSW Strata Schemes Management Act s 215(4).

¹⁷³⁰ NSW Strata Schemes Management Act s 216.

¹⁷³¹ NSW Strata Schemes Management Act ss 191 – 200.

¹⁷³² NSW Strata Schemes Management Act s 201.

¹⁷³³ NSW Strata Schemes Management Act s 31.

¹⁷³⁴ NSW Strata Schemes Management Act s 28.

¹⁷³⁵ NSW Strata Schemes Management Act s 28(4).

¹⁷³⁶ NSW Strata Schemes Management Act s 29

¹⁷³⁷ NSW Strata Schemes Management Act s 104.

¹⁷³⁸ NSW Strata Schemes Management Act s 100.

of the request;¹⁷³⁹ to permit an authorized officer to inspect and make notes, copies or extracts of the books of account and other records;¹⁷⁴⁰ not to employ disqualified persons whose license or certificate of registration has been cancelled or suspended and nor replaced or whose application was refused due to not being a fit and proper person;¹⁷⁴¹ not to share fees with persons other than employees or licensees;¹⁷⁴² to show his or her license when requested by authorized officers;¹⁷⁴³ not to let out or lend their license;¹⁷⁴⁴ to show the instrument of appointment and delegation of each scheme managed to an authorized officer on demand;¹⁷⁴⁵ not to solicit clients through false and misleading advertising;¹⁷⁴⁶ to notify the Director General of any failure to account as soon as possible or of any overdrawing of a trust account within five days;¹⁷⁴⁷ not to fraudulently convert or fail to account for trust money or to render a false account or statement of commission or expenses;¹⁷⁴⁸ to comply with the Agents Regulations;¹⁷⁴⁹ to observe the Rules of Conduct in Schedule 1 of the Agents Regulations, unless the managing agent has a good reason not to do so;¹⁷⁵⁰ to observe the specific rules of conduct applicable to managing agents in Schedule 6 of the Agents Regulations and to observe the specific rules applicable to agency agreements in Schedule 14 of the Agents Regulations.

13 5 Conclusion

The scope of the powers and functions that are capable of being delegated to the managing agent is quite wide and is only limited by the scope of the actual delegation to the managing agent in terms of the contract; the powers and functions specifically reserved for the trustees or body corporate by the STA or the rules and the powers

¹⁷³⁹ NSW Strata Schemes Management Act s 101.

¹⁷⁴⁰ NSW Strata Schemes Management Act ss 105 and 107.

¹⁷⁴¹ NSW Strata Schemes Management Act s 43.

¹⁷⁴² NSW Strata Schemes Management Act s 33.

¹⁷⁴³ NSW Strata Schemes Management Act s 12.

¹⁷⁴⁴ NSW Strata Schemes Management Act s 13.

¹⁷⁴⁵ NSW Strata Schemes Management Act ss 109 and 110.

¹⁷⁴⁶ NSW Strata Schemes Management Act s 51.

¹⁷⁴⁷ NSW Strata Schemes Management Act ss 39 and 89.

¹⁷⁴⁸ NSW Strata Schemes Management Act ss 211 and 212.

¹⁷⁴⁹ NSW Strata Schemes Management Act ss 191 and 230.

¹⁷⁵⁰ Agents Regulation reg 11.

which fall outside the capacity of the trustees, and which may therefore not be delegated to the managing agent.¹⁷⁵¹ The fact that it is not always clear what powers and duties can and cannot be delegated to the managing agent, could lead to uncertainty.¹⁷⁵²

All powers and functions that are delegated to the management agent must be assessed restrictively and according to its own nature before it can be determined whether they are capable of being delegated to the managing agent or not. The general rule should be that the managing agent should not make any decisions that will affect the lives or living conditions of the owners or residents in the sectional title scheme. In this way the trustees' position can be compared to a board of directors of a company, while the position of the managing agent would correspond to that of a general manager of a company.¹⁷⁵³ The trustees should seek legal advice in cases of uncertainty as to whether the power or duty can be delegated or not.

To avoid this uncertainty South African legislation should adopt the New South Wales and Singaporean provisions that create three options of how the powers and functions can be delegated to the managing agent. The first option, consisting of a complete delegation, avoids any confusion as to who is responsible for which task. The second option is a partial delegation of a clearly identifiable list of tasks specified in the instrument. The third option, which consists of a partial delegation of powers, authorities, duties and functions except for those specified in the instrument, is the best option where the managing agent is required to undertake most, but not all of the powers, authorities, duties and functions. It is better to list the particular identifiable matters that the managing agent is not permitted to undertake. South African legislation could also provide for the delegation of all or some of the chairperson's, secretary's, treasurer's and trustees' powers, authorities, duties and functions to the managing agent.

¹⁷⁵¹ Maree (December 2010) 38 *MCS Courier* 4.

¹⁷⁵² 3.

¹⁷⁵³ Van der Merwe *Sectional Titles* 15-16.

The exercise and performance of the powers and duties by the managing agent should also be subject to certain limitations. The South African legislation should ensure that there is a prohibition on allowing a third person to exercise or perform the powers, authorities, duties and functions that have been delegated to the managing agent. This is consistent with the principle *delegatus non potest delegare* which means that a delegate cannot further delegate his or her powers to someone else.¹⁷⁵⁴ This ensures that the powers and duties are exercised by the very delegate to whom the body corporate had entrusted them, and not just by any third party whom the body corporate might not even know. The justification for this is that the body corporate relies on the judgement and wisdom of the managing agent to whom the powers and duties have been delegated. This limitation illustrates how important it is to consider how the managing agent operates, and who should be appointed as the managing agent in the agreement. If an individual is named as the managing agent then he or she cannot delegate. If a partnership is listed then the powers, authorities, duties and functions could be shared between the partners. If a corporate managing agent is listed then there must be a delegation to an authorized person. The managing agent cannot transfer the management contract entirely, but can contract out certain tasks to certain third parties who are more skilled to perform the task such as to plumbers and electricians.¹⁷⁵⁵ Either way the extent of the delegation with the conditions and limitations imposed should be evident from the agency agreement with the managing agent.

Other limitations restrain a managing agent from making a decision on a matter preserved for the body corporate pursuant to a particular resolution. For example the general meeting, and not the trustees or managing agent, should decide what money needs to be raised to meet future expenses in the scheme. Where too many matters are preserved for decision by the general meeting, it could defeat the managing agent's primary function of administering the scheme on a day-to-day basis. These two

¹⁷⁵⁴ Chen & Van der Merwe (2009) *TSAR* 33.

¹⁷⁵⁵ 33.

considerations need to be balanced when powers and duties are delegated to the managing agent.

The South African legislation could adopt the Singaporean provision that prohibits the managing agent from engaging in activities that concern the election of the executive council, including canvassing for proxy votes. This prevents abuse by executive council members or owners in directing the managing agent to solicit for votes on their behalf.

A managing agent's business is highly labour orientated.¹⁷⁵⁶ The minimum functions of the managing agent should be incorporated in the prescribed management rules in order to guarantee the quality of service and to assess whether the managing agent is acting within his or her authority. As the law now stands these functions will have to be included in the contract between the body corporate and managing agent. The managing agent would then not be able to exercise and perform the duties or powers in excess of the body corporate or trustees' authority. This will avoid potential management uncertainty, incompetence, abuses and disputes.¹⁷⁵⁷ The duties and powers that are delegated to the managing agent should also be clearly set out in the written contract of appointment, regardless of how insignificant the task may seem. This would save time, avoid uncertainty, and the confusion, chaos and disputes that could arise if the managing agent is not certain of the scope of his or her appointment and of the functions and powers delegated to him or her. The more detailed these duties and powers are specified, the fewer misunderstandings and disputes are likely to occur.¹⁷⁵⁸

Based on the New South Wales provisions, any act performed by the managing agent in the exercise of powers or functions delegated to him or her in the contract of appointment has the same force and effect as if it had been performed by the body corporate.¹⁷⁵⁹ Therefore, the managing agent should keep full and complete records of all acts of administration and management, and notify the trustees in writing of such

¹⁷⁵⁶ Chen & Van der Merwe (2009) *TSAR* 31.

¹⁷⁵⁷ 32.

¹⁷⁵⁸ 33.

¹⁷⁵⁹ Van der Merwe *Sectional Titles* 15-18.

acts immediately after they have been performed as is required in New South Wales. If a third party that contracts with the managing agent has made sure that the certain authority was delegated to the managing agent in the instrument of appointment, then he or she will be entitled to rely on the managing agent's exercise of that power or duty, and will not need to make further enquiries.

Following on from this reasoning it should be noted that the body corporate should still be entitled to exercise any or all of these delegated powers and functions, or to restrict the exercise thereof by the managing agent.¹⁷⁶⁰ Likewise, the trustees are not absolved from their duties, functions and powers by appointing a managing agent.¹⁷⁶¹ Furthermore, any decision of a managing agent that is objected to could be rescinded, overruled or repealed by a resolution of the body corporate or the trustees. The instrument of delegation should specifically require the managing agent to give prior notice before it takes any decision that would have serious financial implications for the body corporate. The South African legislation should include a provision whereby a managing agent that fails to perform a delegated duty should be subject to some form of penalty.

¹⁷⁶⁰ 15-9.

¹⁷⁶¹ Annexure 8 rule 46(1) read with STA s 39(1); Annexure 8 rule 28; Pienaar *Sectional Titles* 191.

Chapter 14: Term of appointment of the managing agent

14 1 Introduction

In this chapter I will discuss the term of appointment of a managing agent including topics such as the period of the appointment and the termination of appointment. I will then answer the question of whether the managing agent can retain the books and records of the body corporate after his or her services have been terminated. As before I will do a comparative survey on all these topics.

14 2 Period of appointment of a managing agent

14 2 1 Introduction

In what follows I will discuss the period of appointment of the managing agent in detail. I will set out the minimum period of appointment; the notice requirements for terminating the appointment of the managing agent and the level of consensus necessary to terminate the appointment.

14 2 2 South African position

The provision regulating the appointment and duration of appointment of a managing agent, contained in prescribed management rule 46(1), was amended in 2008. Before the amendment of rule 46(1) the appointment of a managing agent was restricted to a minimum period of one year, after which the appointment could be terminated on one months' written notice of termination of appointment by either party. The contract would then come to an end after the one month notice period had lapsed. At the May 2006 meeting of the Sectional Titles Regulations Board (the "Board"), at the suggestion of NAMA and due to many complaints by managing agents that they could not work on a month-to-month basis, it was decided to recommend to the Minister of Land Affairs that the management rule regulating managing agent contracts be amended to restore the

year-to-year renewal of managing agents' contracts, in the absence of a contrary decision by the body corporate.¹⁷⁶² It also addressed the practice of making managing agency contracts more difficult to cancel by the incorporation of a clause that would require a special resolution to cancel the contract. However, the Board decided that an ordinary resolution would be sufficient to cancel the contract. Therefore, notice of termination of the contract may be given by the trustees in accordance with a resolution taken at a meeting of trustees, or as directed by an ordinary resolution of the general meeting. The proposal of NAMA was therefore accepted with only minor amendments, and the legislator accepted this recommendation.

The Minister of Agriculture and Land Affairs then amended the Regulations promulgated under the STA.¹⁷⁶³ The amendment became effective on 28 November 2008. It reverted to the original position before the 2005 amendment. The position that applied before 18 November 2005, and that applies again, is that if by the end of the initial or any subsequent one year period the body corporate has not given notice that the contract will be terminated then the contract will be automatically renewed for another year. The rule has been substituted to provide for the automatic renewal of managing agency contracts as well as the types of resolutions required to authorize the termination of such a contract.¹⁷⁶⁴ Prescribed management rule 46(1)(b) was amended to read:

“A managing agent is appointed for an initial period of one year and thereafter such appointment shall automatically be renewed from year to year unless the body corporate notifies the managing agent to the contrary: provided that notice of termination of the contract may be given by the trustees in accordance with a resolution taken at a trustee meeting or an ordinary resolution taken at a general meeting.”

¹⁷⁶² Chen & Van der Merwe (2009) *TSAR* 34.

¹⁷⁶³ By amendment to the Regulations by section 6(g) of GN R1264 in *GG* 31626 of 28-11-2008.

¹⁷⁶⁴ G Paddock “Overview of the November 2008 Amendments to the Sectional Titles Regulations” (December 2008) 3-12 *Paddocks Press Newsletter* 1; CG Van der Merwe “Review of the recent amendments to the Sectional Title Regulations” (2009) 3 *TSAR* 560.

The managing agent is therefore appointed for an initial fixed period of one year from the date of appointment with automatic renewal year upon year, unless the appointment is terminated by the body corporate by notice to the managing agent prior to the end of any year of appointment. The notice of discontinuance, to be given by the trustees, may be on the authority of a trustees' resolution or an ordinary members' resolution.¹⁷⁶⁵

There was no change to the provision that the managing agent is appointed for an initial period of one year. The possible reason for this minimum initial period of appointment of one year is that the management tasks involved in taking on of a new scheme to manage is a time-consuming and labour intensive task with minimum associated income. It involves taking collecting all the required and relevant documentation and preparing administrative systems and establishing working relationships with all the key players such as the trustees and service providers such as accountants, auditors and caretakers. The initial year period gives the managing agent time to recover setup expenses and to start making a profit from the contract.¹⁷⁶⁶

To provide job security for managing agents, it is no longer possible to terminate the contract of a managing agent upon one months' written notice after the initial year. Instead, his or her contract will be automatically renewed from year to year, unless the body corporate notifies the managing agent to the contrary. The effect of this provision is that if by the end of the initial or any subsequent one year period the body corporate has not notified the managing agent that the contract will be terminated, the contract is renewed automatically for another year. Consequently, if the trustees conclude a contract with a managing agent from 31 December 2013 to 30 December 2014, the contract will continue for another year, unless the trustees notify the managing agent during 2014 that the contract will expire at the end of 2014. The contract will then automatically continue until 30 December 2015.¹⁷⁶⁷

¹⁷⁶⁵ T Maree "Amendments relating to removal of improvements and appointment of managing agent" (December 2008) 33 *MCS Courier* 5.

¹⁷⁶⁶ Paddock (December 2008) 3-12 *Paddocks Press Newsletter* 8; Van der Merwe (2009) *TSAR* 561.

¹⁷⁶⁷ Van der Merwe (2009) *TSAR* 561.

This provision is subject to the proviso that the trustees may give notice of termination of the contract in accordance with a resolution taken at a meeting of trustees or an ordinary resolution taken at a general meeting.¹⁷⁶⁸ The proviso to subrule 46(1)(b) therefore deals with the authority for the termination of the contract and specifies the level of consensus necessary to terminate the appointment.¹⁷⁶⁹ In the past some managing agents have included a clause in their contract that in the absence of breach by the managing agent, the trustees can only give notice if it is authorized by a special resolution of the body corporate.¹⁷⁷⁰ It is clear from the above provision that either the trustees by a resolution passed at a trustees meeting or the owners by ordinary resolution passed at a general meeting can authorize notice of termination of the management agency contract. This provision is applicable to normal termination in the absence of breach of contract by the managing agent.¹⁷⁷¹

It is important to note that the rule contains no period of notice. Previously it was provided that there needed to be a minimum one months' notice period. Now there is no stipulation on a minimum notice period that must be given. The notice period is presumably covered in the contract of appointment between the trustees and the managing agent with which the parties will have to comply. It must be assumed that a reasonable period of notice is required, and that the termination of the appointment takes place at the end of the year. The notice may be given irrespective of whether there is a breach of contract or not.

There is a circumstance under which no notice is required. Prescribed management rule 46(2)(a) states that the trustees must ensure that there is included in the contract of appointment of all managing agents a provision to the effect that if the managing agent is in breach of any provision in the contract or if the managing agent is guilty of conduct which in terms of common law would justify termination of a contract between master and servant, then the trustees can cancel the contract without any notice. Prescribed

¹⁷⁶⁸ Annexure 8 rule 46(1)(b).

¹⁷⁶⁹ Paddock (December 2008) 3-12 *Paddocks Press Newsletter* 8.

¹⁷⁷⁰ Van der Merwe (2009) *TSAR* 561.

¹⁷⁷¹ Pienaar *Sectional Titles* 187.

management rule 46(2)(b) states that any one or more of the owners or mortgagees of sections in the building may require the trustees to cancel the contract in the same circumstances as above.

The terms of the proviso to rule 46(1)(b) go further than those of rule 46(2)(b). This rule allows any owner or mortgagee who is willing to furnish the trustees with appropriate security and to indemnify the body corporate against costs which could result from cancellation, to request the trustees to cancel the contract in cases where the managing agent has breached the contract.¹⁷⁷² This provision does not detract from the trustees' entitlement to cancel the contract or the entitlement of a majority of owners to give notice of termination of the contract at a general meeting irrespective of whether there is a breach or not and without furnishing security and provide an indemnity against potential loss caused as a result of the cancellation.¹⁷⁷³

The consequences of rule 46 are threefold. The first consequence is that a contract of appointment is required in all cases. The second consequence is that the appointment will be renewed automatically from year-to-year, unless the body corporate notifies the managing agent that there will be no renewal. The third consequence is that the trustees or the general meeting can, at any time, by a majority vote decide to notify the managing agent that the contract is terminated, or will not continue after its renewal date.¹⁷⁷⁴

14 2 3 Comparative survey

In terms of the agency agreement of the New South Wales Institute of Strata Title Management, a managing agent is appointed for an initial term of twelve months with a provision for the agreement to automatically roll over for successive terms of the same length. The owners corporation can terminate the agreement by giving the managing agent at least three months' written notice before the end of a term or successive term.

¹⁷⁷² Rule 46(2)(b) read with rule 46(2)(c) and (d)

¹⁷⁷³ Paddock (December 2008) 3-12 *Paddocks Press Newsletter* 9.

¹⁷⁷⁴ G Paddock "Q & A with the Professor: Question on management agreements" (June 2007) 2-5 *Paddocks Press Newsletter* 6; Van der Merwe *Sectional Titles* 15-14.

Where the managing agent has been so appointed the owners corporation can consider whether to continue the appointment and delegation during the initial twelve month period or during a successive term.

Sections 27 and 28 of the NSW Strata Schemes Management Act confer the power on the owners corporation, and not the executive committee, to revoke the appointment and delegation of the managing agent by passing an ordinary resolution at a general meeting to that effect.¹⁷⁷⁵

In Singapore a managing agent stays in office until the conclusion of the third annual general meeting of the management corporation after his or her appointment; the expiry of the term of appointment or the termination of his or her appointment in accordance with the BMSMA, whichever occurs first.¹⁷⁷⁶

A local condominium management rule of Chinese law provides that management contracts must last between two and five years.¹⁷⁷⁷

14 3 Termination of appointment of a managing agent

14 3 1 Introduction

In the event that the services rendered by the managing agent is not up to standard or where there is a personality clash between the trustees and the managing agent, the body corporate may wish to terminate the appointment of its managing agent and appoint a new one. The prescribed management rules provide the body corporate or the trustees with four ways to terminate the appointment.¹⁷⁷⁸ The next discussion will deal with these, and indicate the often hidden implications and consequences that may create liabilities at a later stage for the body corporate.¹⁷⁷⁹

¹⁷⁷⁵ Ilkin *NSW Strata* 158.

¹⁷⁷⁶ BMSMA s 66 (2)(a)-(c).

¹⁷⁷⁷ Property Management Regulation of Shenzhen Special Economic Zone of 2007 art 69; Chen & Van der Merwe (2009) *TSAR* 34.

¹⁷⁷⁸ A Kelly "Termination of a managing agent's contract" (July 2011) 6-7 *Paddocks Press Newsletter* 1.

¹⁷⁷⁹ Constas & Bleijs *Demystifying Sectional Title* 48.

14 3 2 South African position

In terms of prescribed management rule 46 the contract of appointment of a managing agent can be terminated in four ways.¹⁷⁸⁰ First, as already indicated, the trustees may by means of a trustees' resolution, or the body corporate may by means of a majority resolution of the general meeting, notify the managing agent that his or her contract will not be renewed automatically for the next year.¹⁷⁸¹ The decision not to renew is usually taken by the trustees, unless the body corporate has reserved for itself the right to decide on the renewal of the contract of the managing agent.¹⁷⁸² This provision is applicable to normal termination of the contract in the absence of breach of contract by the managing agent.¹⁷⁸³ No period of notice is specified, but sufficient and reasonable written notice should be given. I suggest that at least one months' notice should be given before the expiry of the year and then termination will take place at the end of the specific one-year term. If the written notice were given less than one month before the end of the year, then the contract would be automatically renewed for another year.¹⁷⁸⁴

The second manner of termination occurs when trustees have ensured that the contract of appointment includes a provision to the effect that if the managing agent is in breach of any of the provisions of his or her contract, or if he or she is guilty of conduct which at common law would justify the termination of a contract between master and servant, the trustees may, without notice, cancel such contract of appointment. The inclusion of the appropriate provision in the contract would empower the trustees to cancel the contract in these circumstances. In such a case the managing agent will not have any claim against the body corporate or any of the owners as a result of the cancellation.¹⁷⁸⁵ Failure by the trustees to include such a provision in the contract of appointment

¹⁷⁸⁰ Van der Merwe (1994) *Stellenbosch Law Review* 327; van der Merwe (2009) *TSAR* 33-35; Van der Merwe *Sectional Titles* 15-22.

¹⁷⁸¹ Annexure 8 rule 46(1)(b).

¹⁷⁸² STA s 39(1) [STSMA s 7(1)].

¹⁷⁸³ Pienaar *Sectional Titles* 187.

¹⁷⁸⁴ Van der Merwe *Sectional Titles* 15-23.

¹⁷⁸⁵ Annexure 8 rule 46(2)(a); Van der Merwe *Sectional Titles* 15-23.

renders the trustees liable for compensation to the body corporate, as this is an example of gross negligence that is not covered by the indemnity of the trustees.¹⁷⁸⁶

The third manner of termination occurs when any sectional owner or mortgagee of a section requests the trustees to cancel the managing agent's contract in cases where he or she is in breach of the provisions of his or her contract or is guilty of any conduct which justifies the termination of a contract between master and servant at common law.¹⁷⁸⁷ The reference to "master and servant" in this rule, as in rule 46(2)(a), is misleading and creates the impression that the managing agent is an employee of the body corporate. It is my submission that this rule should be amended to state:

"...if he or she is guilty of conduct which at common law would justify the termination of a *contract of mandate*..."

This legislative amendment would remove the uncertainty surrounding the nature of the contract between the managing agent and trustees. The trustees are not required to cancel the contract of appointment, unless and until the owner or mortgagee has furnished them with the security and indemnity as specified in prescribed management rule 46(2)(c).¹⁷⁸⁸ The trustees must, in their discretion, determine what amount of security would be sufficient to indemnify them against all claims resulting from the cancellation. This includes all litigation costs reasonably incurred by the trustees in enforcing the cancellation against the managing agent¹⁷⁸⁹ as well as any costs and damages resulting from the cancellation, purported cancellation or litigation for which the trustees or the body corporate might be liable up to the time such owner or mortgagee formally notifies the trustees that he or she no longer requires them to pursue the action.¹⁷⁹⁰ The trustees may also require the owner or mortgagee to indemnify the trustees and the body corporate against costs and damages. The trustees are not required to cancel the contract of appointment of the managing agent unless

¹⁷⁸⁶ Annexure 8 rule 12(1); Pienaar *Sectional Titles* 188.

¹⁷⁸⁷ Annexure 8 rule 46(2)(b).

¹⁷⁸⁸ Annexure 8 rule 46(2)(d).

¹⁷⁸⁹ Annexure 8 rule 46(2)(c)(i).

¹⁷⁹⁰ Annexure 8 rule 46(2)(c)(ii).

and until the owner or mortgagee requiring cancellation has furnished the trustees with the security and indemnity.¹⁷⁹¹ The trustees may therefore refrain from any action until a sufficient security payment and/or indemnity has been furnished.

The final manner of termination occurs when the contract contains a mandatory clause that allows the contract of appointment to be legally revoked, in which case the managing agent will cease to hold office under certain circumstances.¹⁷⁹² The first circumstance occurs where the agent is a natural person and he or she applies for the surrender of his or her estate as insolvent or his or her estate is sequestrated either provisionally, or finally or where the managing agent is a juristic person such a company, and an order is made for its provisional or final liquidation or it is placed under business rescue.¹⁷⁹³

The second circumstance is where the managing agent himself or herself, or where the managing agent is a company or close corporation and any of its directors or members are convicted of an offence involving an element of fraud or dishonesty.¹⁷⁹⁴ A further provision to this rule was deleted on 31 October 1997.¹⁷⁹⁵ That provision allowed for the valid revocation of the contract of appointment of a managing agent that is a close corporation where any of its members is convicted of any offence. Shortcomings of this provision were that it did not apply to directors of a close corporation, but only to any of its members and that it covered included a conviction of any offence, which could include traffic offences. The current and narrower provision is preferable, although it still implies that a managing agent could be penalized if a director of his or her company who had nothing to do with the particular scheme is convicted of an offence involving fraud or dishonesty.

¹⁷⁹¹ Annexure 8 rule 46(2)(d).

¹⁷⁹² Annexure 8 rule 47.

¹⁷⁹³ Annexure 8 rule 47(i).

¹⁷⁹⁴ Annexure 8 rule 47(ii).

¹⁷⁹⁵ By regulation 24(k) of GN R1422 in *GG 18377* of 31-10-1997.

The final circumstance is where a special resolution of the members of the body corporate is passed to revoke the appointment of the managing agent.¹⁷⁹⁶ This circumstance is expressly made subject to the proviso that the managing agent removed from his or her office in such a way must not be deprived of any claim for compensation or damages for breach of contract.¹⁷⁹⁷ Before terminating the managing agent's contract by special resolution, the contractual liability of the body corporate should be carefully considered. If the managing agent is appointed for a specific term or is entitled to a specific period of notice then the body corporate could incur liability for damages if the contract is terminated before the term of the contract has expired or if insufficient notice was given. By way of explanation, since the managing agent is appointed for an initial period of one year,¹⁷⁹⁸ the termination of a managing agent by special resolution after nine months would entitle the managing agent to claim for damages on account of his or her loss of income for the last three months.

These instances of termination are dependent upon an appropriate provision being included in the contract of appointment. If these provisions have not been included, the body corporate or trustees will have to use normal common law provisions to justify the termination of the contract.¹⁷⁹⁹ The inclusion of these provisions in the contract with the managing agent is mandatory. Therefore, if the managing agent claims compensation or damages in the absence of the provision then the body corporate can reclaim this from the trustees, as this is a manifestation of gross negligence that is not covered by the trustees' indemnity.¹⁸⁰⁰

14 3 3 Comparative survey

I have already indicated that a managing agent is appointed in New South Wales for an initial term of twelve months with a provision for the agreement to automatically roll over for successive terms of the same length. The owners corporation can terminate the

¹⁷⁹⁶ Annexure 8 rule 47(iii).

¹⁷⁹⁷ Van der Merwe (1994) 5 *Stellenbosch Law Review* 328.

¹⁷⁹⁸ Annexure 8 rule 46(1)(b).

¹⁷⁹⁹ Van der Merwe *Sectional Titles* 15-24.

¹⁸⁰⁰ Pienaar *Sectional Titles* 189.

agreement by giving the managing agent at least three month's written notice before the end of a term or successive term. The owners corporation further has the power to revoke the appointment and delegation of the managing agent by passing an ordinary resolution at a general meeting to that effect.¹⁸⁰¹ Prior to revocation the owners corporation must consider the terms of the agency agreement to determine the most appropriate method to revoke the contract, and to familiarize itself with the consequences of such an action.¹⁸⁰²

There are three methods of termination during the initial twelve-month period, which is called the first term. The first method is termination for breach in which case strict compliance with certain provisions in the Act is essential if the agreement is to be validly terminated. The owners corporation must pass a resolution that authorizes notifying the managing agent of the breach. If the breach continues for 28 days, the owners corporation is entitled to pass a further resolution and issue notification of termination to the managing agent. If the agreement is terminated due to the managing agent's breach, then he or she will forfeit any entitlement to fees due for the remainder of the twelve-month term, provided that the owners corporation was not in breach.¹⁸⁰³

Secondly, the owners corporation can give the managing agent three months' written notice of termination of the agreement. Due to the wording of the applicable clause, which states that the termination is effective "on the expiry date," the termination will only be effective at the end of the term, and not at the end of the three months. Good cause for the termination will be unnecessary. An ordinary resolution must be passed in the general meeting and then a prescribed form must be served on the managing agent in accordance with the method of service specified in the agreement. It is recommended that the notice be served personally and that the server obtain receipt of service as proof in case the service is contested.¹⁸⁰⁴

¹⁸⁰¹ NSW Strata Management Act ss 27 and 28.

¹⁸⁰² Ilkin *NSW Strata* 157.

¹⁸⁰³ 158.

¹⁸⁰⁴ Ilkin *NSW Strata* 158.

Finally, the agreement can be terminated in terms of general law such as when there is a breach of a condition of the agreement or pursuant to a court order made under the Contracts Review Act of 1980. If the owners corporation does not terminate the agreement in accordance with the terms in the contract or the general law, then the managing agent might have a claim for damages for fees due for the rest of the term which would be based on a breach of contract due to the fact that the agreement is terminated prematurely without legal justification. The damages are likely to be assessed at an amount less than the total fee payable for the balance of the agency period because revocation would free the managing agent to earn fees elsewhere.¹⁸⁰⁵ The managing agent need not serve a statement of claim¹⁸⁰⁶ to recover damages as the damages are not in respect of services performed, but rather in respect of services to be performed. The termination will not avoid the obligation of the owners corporation to pay the managing agent any remuneration already earned or to reimburse and indemnify the managing agent for expenditure or liability already incurred.¹⁸⁰⁷

The managing agent's agreement can also be terminated during a successive term. If the agreement provides for a successive term of appointment and delegation after the first term has expired for more than three months, then the owners corporation can terminate the agreement without penalty by giving the managing agent three months' notice at any time during the successive term. The agreement will be validly terminated at the end of the three months. An ordinary resolution must be passed in the general meeting and then a prescribed notice form must be served on the managing agent in accordance with the method of service specified in the agreement.¹⁸⁰⁸

The most difficult step for the owners corporation in seeking to revoke the managing agent's appointment is convening a meeting to pass the resolution of revocation whilst the managing agent holds the scheme's records. The managing agent should convene such a meeting on the request of an executive committee member, but if the owners

¹⁸⁰⁵ 158.

¹⁸⁰⁶ Agents Act s 36.

¹⁸⁰⁷ Ilkin *NSW Strata* 158.

¹⁸⁰⁸ 159.

corporation fails to secure the managing agent's co-operation in this matter there are four options that the owners corporation can pursue. The first option is to hold an executive committee meeting and pass a motion to have the managing agent convene an extraordinary general meeting.¹⁸⁰⁹ If the resolution is passed then the secretary must send a letter to the managing agent informing him or her of this decision. If the managing agent still refuses, then an interim order can be sought by an Adjudicator requiring the managing agent to convene the meeting.¹⁸¹⁰

If an interim order is not made under section 170 and in view of the fact that an Adjudicator's order in terms of section 138 takes a long time,¹⁸¹¹ it is better to use the second option which entitles the executive committee to obtain the owners corporation's records and property from the managing agent.¹⁸¹² The executive committee can then convene an extraordinary general meeting to pass the resolution and serve this on the managing agent. A strata searcher is used to obtain a list of all the owners and their addresses from the managing agent.¹⁸¹³

The third option applies where there is no executive committee. In such a case the owners can convene an extraordinary general meeting of the owners corporation. The requisition should be addressed to the managing agent and list on the agenda motions depending on the circumstances. If the motions are passed, a prescribed form can be served on the managing agent.¹⁸¹⁴ The last option applies where there is an executive committee, but no chairperson, secretary or treasurer. In such a case an owner can apply to the Adjudicator to appoint a person (often the proposed new managing agent) to hold an executive committee meeting to pass the resolution.¹⁸¹⁵

As I have mentioned, a managing agent stays in office in Singapore until the conclusion of the third annual general meeting of the management corporation after his or her

¹⁸⁰⁹ NSW Strata Schemes Management Act, sch 2, cl 31(2).

¹⁸¹⁰ Under NSW Strata Schemes Management Act s 138 or 170; Ilkin *NSW Strata* 159.

¹⁸¹¹ Ilkin *NSW Strata* 159.

¹⁸¹² By using the NSW Strata Schemes Management Act s 105 procedure.

¹⁸¹³ NSW Strata Schemes Management Act s 108.

¹⁸¹⁴ Ilkin *NSW Strata* 159.

¹⁸¹⁵ NSW Strata Schemes Management Act s 19.

appointment; the expiry of the term of appointment or the termination of his appointment in accordance with the BMSMA, whichever occurs first.¹⁸¹⁶ The managing agent's performance must be reviewed annually. The appointment must be terminated at the annual general meeting where it is shown that his or her performance is unsatisfactory. A managing agent that retires is still eligible for re-appointment.¹⁸¹⁷

The management corporation, and not the executive council, has the power to terminate the appointment of the managing agent. This could occur where the latter was guilty of gross misconduct for example where he or she is convicted on a charge of stealing from the corporation. This appointment can be terminated at any time in accordance with the terms of the appointment and if authorized by an ordinary resolution at a general meeting, or without a general meeting if authorized by its subsidiary proprietors at the last general meeting.¹⁸¹⁸ This ensures that the subsidiary proprietors participate in the decision making process of termination. In the absence of such authorization it may prove difficult to convene a general meeting to pass a resolution of termination where the managing agent holds the records. If the managing agent withholds his or her co-operation in convening the meeting then the executive council should first obtain the corporation's records and property from the managing agent. Once this is done a general meeting may then be convened to pass the resolution of termination. Where there is no executive council, the proprietors themselves may convene an extraordinary general meeting to pass the resolution of termination.¹⁸¹⁹

14 4 Can the managing agent retain the books and records of the body corporate after his or her services have been terminated?

14 4 1 Introduction

The body corporate often finds it difficult to recover its books and records from former managing agents after termination of their appointment. This can be for a variety of reasons including animosity between the parties concerned or allegations by the

¹⁸¹⁶ BMSMA s 66 (2)(a)-(c).

¹⁸¹⁷ BMSMA s 66(5).

¹⁸¹⁸ BMSMA s 66(6)(a) and (b).

¹⁸¹⁹ Keang Sood *Strata Title* 558.

managing agent of improper termination of his or her appointment. I will discuss how this is dealt with in South Africa and then present a comparative survey of how other jurisdictions deal with the issue.

14 4 2 South African position

The question of whether the managing agent can retain the books and records of the body corporate after his or her services have been terminated is a problematic issue. The answer to this question could depend on whether the termination of the managing agent was legally valid or not. If the termination was valid then the only way in which the managing agent can retain the books is in cases where the body corporate still owes the managing agent money for past services. In such a case the managing agent has a lien over the body corporate's books and records and possible funds until remuneration has been paid in full.¹⁸²⁰ If the termination was illegal then the managing agent may refuse to recognize the cancellation of the contract and can continue managing the scheme and retain the records.¹⁸²¹

In terms of the prescribed management rules the managing agent is obliged to keep full records of his administration,¹⁸²² but there is no duty on him or her to make these records available to his or her successor when the appointment is terminated. This lacuna in the rules often causes problems in practice. A newly appointed managing agent will not be in a position to manage the scheme effectively without these documents, and probable detriment to the scheme will ensue. There should therefore be a provision in the management rules that requires the managing agent to hand over all relevant documentation on termination of his or her services. The trustees should be required to send a notice to the departing managing agent that would require all records and documents to be returned within a specified time period.

¹⁸²⁰ Van der Merwe (1994) 5 *Stellenbosch Law Review* 329; Van der Merwe *Sectional Titles* 15-24; G Paddock "Q & A with the Prof: Changing Managing Agent" (December 2010) 5-12 *Paddocks Press Newsletter* 6.

¹⁸²¹ Constat & Bleis *Demystifying Sectional Title* 49.

¹⁸²² Annexure 8 rule 48.

An attorney has a right of retention on all documents that are the product of his or her labour, skill and knowledge as security for payment for labour expended and expenses incurred in connection with that property and until his or her client has paid his or her account in full.¹⁸²³ The right of an attorney to retain papers and documents that he has drawn up, or upon which he has done work arises from the debtor and creditor retention lien.¹⁸²⁴ The attorney has the right to retain the documents in his or her possession until he or she has been compensated in terms of the contract, or if no agreement exists, until such time that the attorney has been compensated for work done and expenses incurred to the extent that the client has been enriched.

Similar to an attorney, the managing agent's contract should be construed as that of mandate. This has the benefit that the mandatory (the managing agent) has the duty to account to the mandator (the body corporate and trustees) by giving of the property and information back to the mandatory at the end of the mandate. In this way the managing agent has an inherent contractual duty to return books, records, accounts and keys and other body corporate property after his contract has been terminated.

The CSOS, once it is operational, would be the most appropriate forum for enforcing this obligation. One of the prayers of relief for an application in terms of the CSOSA in respect of management services is for an order requiring a managing agent to comply with the terms of the contract of appointment and any applicable code of conduct or authorization.¹⁸²⁵ It is therefore important that trustees ensure that the contract includes a provision requiring that the managing agent return all records and documents to the body corporate within a specified time period after notice of termination of the contract. This also illustrates the importance for the notice period for termination to be reasonable so that the managing agent has an opportunity to gather all the relevant information.

Any person may make an application to the CSOS for an order on any one or more of

¹⁸²³ CG van der Merwe & Anne Pope "Real security" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2009) 630 661.

¹⁸²⁴ *Botha NO v EM Mchunu* 1992 (4) SA 740 (N).

¹⁸²⁵ CSOSA s 39(5)(a).

the prayers of relief if such person is a party to or affected materially by a dispute.¹⁸²⁶ The application must include statements of the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39 of the CSOSA.¹⁸²⁷ One of the prayers of relief for an application in terms of the CSOSA is an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association (body corporate) to make such information or documents available within a specified time¹⁸²⁸ or any other order proposed by the chief ombud.¹⁸²⁹ An application for such an order would require that the managing agent must return all books and records.

14 4 3 Comparative survey

When the appointment of a managing agent comes to an end in New South Wales there are certain books and records that should be obtained from the managing agent. These records include a trust cheque payable to the owners corporation for the balance of money to the credit of the administrative fund and sinking fund; a cheque for the balance of money to the credit of any investment and savings account books whether with a bank, building society or other financial institution; all of the owners corporation's income tax returns and assessment notices; a certified copy of all records and books of account kept by the managing agent; all statements of income and expenditure prepared until the date prior to the last general meeting; all statements of the existing financial situation and estimated receipts and payments; a Financial Management Report within fourteen days of ceasing to be the managing agent; the common seal; the levy register; correspondence; keys (for example to the letterbox and electricity meter box); the strata roll; the notices and orders register; notices and minutes of meetings of the owners corporation and executive committee including minutes of delegated authority exercised by the strata managing agent; the documents required to be handed over by the original owner; original insurance policy documents, including receipts for payment of the latest policies and copies of claims made on those insurances; proxy

¹⁸²⁶ CSOSA s 38(1).

¹⁸²⁷ CSOSA s 38(2)(a)

¹⁸²⁸ CSOSA s 39(7)(a).

¹⁸²⁹ CSOSA s 39(7)(b).

notices; voting papers; duplicate copies of levy contribution notices and section 118 notices.¹⁸³⁰ A receipt of acknowledgment that all the records of the owners corporation have been handed over should not be signed unless all of the items I have listed have been individually checked. Two owners should collect these records so that there is a corroborating witness to verify which records are received and which records are missing.¹⁸³¹

The comprehensive procedure for recovering books, records and other property that are not handed to the owners corporation by former officers and the managing agent is set out on section 105(2) of the NSW Strata Schemes Management Act. The defaulter can be subject to prosecution proceedings and can be liable for a fine.¹⁸³² If the executive committee gives a notice to a person who has possession or control of books, records or property of the owners corporation advising of the decision to terminate the contract, then the managing agent must, within 7 days after receiving the notice, deliver that property to a member of the executive committee specified in the notice.¹⁸³³ This provision does not take away or affect any just claim or lien or other rights which the managing agent may have against or on any records or other property of the owners corporation.¹⁸³⁴

In Singapore the BMSMA contains a similar provision. If the managing agent withholds his or her co-operation in convening the meeting to pass a resolution of termination then the executive council should first obtain the corporation's records and property from the managing agent. It could be difficult to obtain these records due to animosity between the parties concerned or allegations by the managing agent of improper termination of his or her services. Any person who has possession or control of any records, books of account or keys belonging to a management corporation,¹⁸³⁵ or the strata roll kept by a

¹⁸³⁰ Ilkin *NSW Strata* 160.

¹⁸³¹ 161.

¹⁸³² 108.

¹⁸³³ NSW Schemes Management Act s 105(2).

¹⁸³⁴ NSW Schemes Management Act s 105(3).

¹⁸³⁵ BMSMA s 48(1)(a).

management corporation,¹⁸³⁶ or any other property of a management corporation¹⁸³⁷ must within seven days after service to him or her of notice of a resolution of the council requiring him to do so, deliver those records or books of account or keys or strata roll and other property to the member of the council specified in the notice.¹⁸³⁸ The requirements relating to a resolution of the executive council (not the management corporation) and a notice of the resolution must be complied with so as to ensure that the recovery of such records or documents from the managing agent is validly affected.¹⁸³⁹ Once this is done a general meeting may then be convened to pass the resolution of termination.

14 6 Conclusion

Before the amendment of prescribed management rule 46(1) in 2008 the appointment of a managing agent was restricted to a minimum period of one year, whereafter it could be terminated on one month's written notice of termination of appointment by either party. The contract would then terminate after the one-month notice period had lapsed. The rule now stipulates that a managing agent is appointed for an initial period of one year and that thereafter such appointment shall be renewed automatically from year-to-year, unless the body corporate notifies the managing agent to the contrary. The amendment of this management rule improved the job security of managing agents.¹⁸⁴⁰

The STA does not indicate whether this will have retrospective effect. If not, then all management contracts concluded after this date are governed by the amended provision, while contracts concluded before this date will be governed by the previous provision. The case is probably that contracts entered into before 18 November 2008 will be bound by rule 46 as it stood at the time that the contract was entered into as well as the terms of the contract as long as they do not conflict with rule 46 of that time.¹⁸⁴¹ It

¹⁸³⁶ S 48(1)(b).

¹⁸³⁷ S 48(1)(c).

¹⁸³⁸ S 48(1).

¹⁸³⁹ Keang Sood *Strata Title* 559.

¹⁸⁴⁰ Van der Merwe (2009) *TSAR* 555.

¹⁸⁴¹ J Paddock "The effect of the amendment to the PMR 46(1)" (December 2008) 3-12 *Paddocks Press Newsletter* 9.

is my opinion that contracts entered into between 18 November 2005 and 28 November 2008 should be changed if their terms conflict with prescribed management rule 46.

For the sake of the success of the scheme it is in the best interests of both the body corporate and the managing agent to maintain continuity of services.¹⁸⁴² A South African managing agent is appointed for one year at a time. Chinese law provides that management contracts must last between two and five years.¹⁸⁴³ In Singapore a managing agent stays in office until the conclusion of the third annual general meeting of the management corporation after his or her appointment. The three-year term enables the managing agent to put a maintenance plan in order instead of merely doing ad hoc repairs.¹⁸⁴⁴ This needs to be balanced against the need to review the managing agent's performance annually. The appointment must be terminated where it is shown that his or her performance is unsatisfactory at the annual general meeting.

There needs to be a balance between the principle of continuity of services of a managing agent and maintaining the services of a substandard managing agent. On expiry of the term the appointment can either be renewed or terminated. The fact that the managing agent's contract is automatically renewed from year-to-year, except if the general meeting resolves to terminate his or her appointment, or there is termination on the grounds set out in rule 46(2) and rule 47, is a good compromise which ensures stability in the industry and continuity in services provided by good managing agents.¹⁸⁴⁵ In order to maintain the continuity of management services here should not be a limit on the number of times that a contract of appointment can be renewed when the trustees are satisfied with the services provided by the managing agent.¹⁸⁴⁶

Managing agents often face an insecure position due to the fact that they can be replaced after the first year of service. It often occurs that the managing agent clashes

¹⁸⁴² Chen & Van der Merwe (2009) *TSAR* 33.

¹⁸⁴³ Property Management Regulation of Shenzhen Special Economic Zone of 2007 art 69; Chen & Van der Merwe (2009) *TSAR* 34.

¹⁸⁴⁴ Keang Sood *Strata Titles* 549.

¹⁸⁴⁵ Chen & van der Merwe (2009) *TSAR* 35.

¹⁸⁴⁶ 34.

with an owner in one year due to, for example, the collection of arrear levies from that owner who then becomes a trustee in the next year. If trustees can cancel a managing agent's contract simply by giving notice then the managing agent is at risk of having his or her contract cancelled due to a personality clash with a trustee, and not due to contract breach. There should be some protection for the managing agent. If for example the trustees have to motivate their reasoning to the body corporate then the managing agent's contract would only be terminated if the body corporate also thinks it is fair to do so. It has been argued that in cases where the working relationship has broken down irretrievably, the trustees should put the decision to terminate the managing agent to a vote at the general meeting. If the decision is taken to terminate the appointment of the managing agent then written notice must be given to that effect.

In New South Wales and Singapore it is the owners corporation, and not the executive committee, who have the power to revoke the appointment and delegation of the managing agent by passing an ordinary resolution at a general meeting to that effect. The rationale for this is that it ensures that the owners participate in the decision making process of termination. However, the most difficult step for the owners corporation in New South Wales in seeking to revoke the managing agent's appointment is convening a meeting to pass the resolution of revocation whilst the managing agent holds the scheme's records. The managing agent should convene such a meeting on the request of an executive committee member, but the owners corporation often fails to secure the managing agent's co-operation in this matter. There are four options for solving this problem. Similarly in Singapore, where the managing agent withholds his or her co-operation in convening the meeting, the executive council should first obtain the records and property from the managing agent. Once this is done a general meeting may then be convened to pass the resolution of termination. Where there is no executive council, the proprietors themselves may requisition an extraordinary general meeting to pass the resolution of termination. This seems very complicated to me.

There is nothing in the South African rules that requires that the trustees obtain the body corporate's approval to cancel the managing agent's contract. A managing agent

has the same common law rights as any other contracting party. If the contract is not renewed on its expiry or is terminated in accordance with a cancellation provision then the managing agent does not have any recourse. A provision in the contract that states that the trustees may not cancel the contract (except if the managing agent is in breach or if common law principles would justify cancellation), unless it is supported by a resolution of the body corporate would not be enforceable because prescribed management rule 46(1)(b) was specifically amended to allow cancellation on the basis of trustee resolutions or ordinary member's resolutions. Otherwise managing agents could entrench their management contracts.¹⁸⁴⁷ It is theoretically possible as an owner to control the managing agent, but in practical terms it is the trustees who control the managing agent.¹⁸⁴⁸ It is therefore desirable that the trustees can terminate the managing agent on their own.

In New South Wales, when a managing agent's contract is terminated for breach during the initial twelve month period, the owners corporation must pass a resolution that authorizes notifying the managing agent of the breach and, if it continues for 28 days, the owners corporation is entitled to pass a further resolution and issue notification of termination to the managing agent. If the agreement is terminated due to the managing agent's breach then he or she will forfeit any entitlement to fees due for the remainder of the twelve-month term, provided that the owners corporation was not in breach. I think that in South Africa the managing agent should be given adequate notice of a possible termination to give the managing agent an opportunity to remedy his or her behavior before being dismissed. This notice of warning should list details of the misconduct. This remedial notice could serve the purpose of inspiring the managing agent to remedy the omission or misconduct and to comply with the STA and terms in his or her contract.

The relationship between the body corporate, trustees and the managing agent are primarily regulated by prescribed management rule 46, but it is also governed by the

¹⁸⁴⁷ G Paddock "Q & A with the Professor: When are trustees entitled to cancel a managing agent contract?" (October 2011) 6-10 *Paddocks Press Newsletter* 5.

¹⁸⁴⁸ G Paddock "Q & A with the Professor: Petitions and controlling the managing agent." (February 2011) 6-2 *Paddocks Press Newsletter* 5.

terms of the contract. It is important to note that the contract can never conflict with rule 46. Rule 46(1) is one of the rules which cannot be altered by a developer on submission of an application for the opening of a sectional title register.¹⁸⁴⁹ For example the contract cannot state that if the trustees fail to give notice then the contract will be renewed for a period of two years instead of the prescribed one year. The contract can prescribe a minimum notice period though, as rule 46 does not prescribe one. This notice period will have to be reasonable. I suggest one month's written notice. Then the trustees would have to comply with this notice period set out in the contract as well as the provisions in rule 46. The termination of the appointment will then take place at the end of the year.

It is important to note that the rules do not deal with the cancellation of the contract of appointment by the managing agent. This is presumably catered for in the contract of appointment between the body corporate and the managing agent.¹⁸⁵⁰ This once again illustrates how the contract of appointment is so pivotal. There is also no provision made in the rules for remedies in the case of breach of contract by the trustees or the body corporate.¹⁸⁵¹ If there is no provision made in the written contract of appointment the managing agent will have to make use of the normal common law remedies for breach of contract.

When considering terminating the contract of appointment of the managing agent, the body corporate or trustees should look to the legal source of the relationship, which is the contract of mandate. If the body corporate does not wish to renew the contract for another year then the body corporate must consider what the notice period for termination is. If this notice period cannot be fitted into the year in question then the body corporate cannot terminate the managing agent's contract, and will have to retain his or her services for another year. However, if the body corporate wishes to terminate the managing agent's contract due to his or her breach of provisions in the contract, or if the managing agent is guilty of conduct which in terms of common law would justify termination of a contract of mandate, then the body corporate can cancel the contract of

¹⁸⁴⁹ Regulation 30(1) made under the STA.

¹⁸⁵⁰ Van der Merwe *Sectional Title* 15-13.

¹⁸⁵¹ Pienaar *Sectional Titles* 188.

appointment without notice if the trustees had added a clause in the contract to this effect. The body corporate can also immediately revoke the managing agent's contract in cases where he has been sequestered, or the company is liquidated or if the agent or directors or members of the managing company have committed and were convicted of an offence involving fraud or dishonesty. The various manners of termination of the contract of appointment of the management agent should be provided for directly instead of clothing them indirectly as mandatory provisions of the contract of appointment.¹⁸⁵²

If one of the owners or a mortgagee insists that the managing agent's contract should be terminated because the managing agent has breached his or her contract or acted in a manner which constitutes a breach of the master servant relationship then he or she can ask the trustees to do so. However, the trustees will require the owner to put up an amount of security at their discretion to cover litigation costs or damages that they foresee that the managing agent could bring against the body corporate. The trustees will not be obliged to cancel the contract unless they have received the security. If the owner or mortgagee does provide the security the trustees must terminate the appointment. If more than one owner support the decision to terminate the managing agent then this can be done by obtaining a special resolution. The managing agent will retain his or her right to claim compensation from the body corporate for damages for breach of contract. The body corporate can, after obtaining a special resolution, remunerate the managing agent for the duration of his or her contract instead of allowing the managing agent to complete his or her full contract.¹⁸⁵³

The body corporate or trustees can therefore terminate the managing agent's service in terms of a contract or, if there is no contract, in terms of common law and the rules. Prescribed management rule 46 only deals with written contracts. Where there is no contract and the managing agent was appointed at the annual general meeting then he or she can be dismissed at the annual general meeting. No special resolution will be

¹⁸⁵² Van der Merwe (1994) 5 *Stellenbosch Law Review* 329; van der Merwe *Sectional Titles* 15-24.

¹⁸⁵³ Constat & Bleijs *Demystifying Sectional Title* 48-49.

required because no written contract exists. If the trustees cannot wait for the annual general meeting then they may terminate the contract with one months' notice, as this is acceptable notice period in terms of common law. The reason for the termination will have to be sound, or the body corporate could be sued by the managing agent for an unfair termination.¹⁸⁵⁴

There needs to be legislative certainty as to whether the managing agent will enjoy labour law protection if the management contract is terminated. Labour law protection requires that the correct practices and procedures in dismissing employees must be followed to avoid the possible costly and time-consuming legal battles that could arise with the unfair dismissal of an employee. As I have discussed an argument can be made that the prescribed management rules 46(2)(a) and 46(2)(b) make reference to "master and servant," and therefore the managing agent is merely an employee of the body corporate. However, I have shown in this thesis that the managing agent is more than an employee, and is an agent of the body corporate in terms of a contract of mandate. Pienaar argues that, due to the managing agent's relatively independent duties and functions the relationship between the body corporate and the managing agent is based on agency, and not merely on a master and servant agreement.¹⁸⁵⁵ In this regard I agree with Pienaar that the managing agent is therefore placed outside the sphere of labour protection.¹⁸⁵⁶

Certain principles that can be extracted from fair labour practice should still, in my opinion, be applied when the managing agent's contract is terminated. The termination must be fair on two grounds, namely substantive and procedural fairness. Substantive fairness weighs up whether the termination is appropriate in the circumstances. Procedural fairness considers the rights of the managing agent to be treated justly in the course of the procedure that is followed in the termination process. This requires that the trustees should warn the managing agent that his or her work is not up to standard, and that if the necessary standard is not achieved, the contract will be terminated. The

¹⁸⁵⁴ Woudberg *Basic Sectional Title Book Two* 118-119.

¹⁸⁵⁵ Pienaar *Sectional Titles* 188.

¹⁸⁵⁶ 188.

managing agent should understand the complaint against him or her, and be given enough time to respond to the trustees. The trustees should hear the explanation before deciding on the termination, and should ultimately have fair reason and follow due process in terminating the contract.

In cases where the managing agent is a one-man show and it is no longer possible to work with him then it is advisable to terminate his contract and appoint another. However, in cases where the managing agent is merely one portfolio manager who is part of a large corporation then it is better to have another portfolio manager from the same corporation assigned to manage the scheme. Before terminating the contract with that portfolio manager the trustees should investigate whether the same management company can still deal with the management of the scheme. The reason why this is a preferable situation is that the previous portfolio manager's knowledge of the operation of the scheme and documentation relating to the scheme is valuable. It could take a new portfolio manager a long time to build a similar understanding in the governance of the scheme and to become familiar with the existing governing bodies. Furthermore, there might be resistance from the outgoing managing agent in handing over the documents relating to the management of the scheme.¹⁸⁵⁷ If the portfolio manager is connected to the managing company, he would be contractually obligated to pass this valuable information over to the new portfolio manager within the management company if he wants to keep his job.

Once the CSOS is in operation it will have jurisdiction to decide on whether the termination of the managing agent's contract is valid or not. The CSOS is empowered to grant an order declaring that the association (body corporate) does or does not have the right to terminate the appointment of a managing agent, and that the appointment is or is not terminated.¹⁸⁵⁸ This gives the managing agent a forum to dispute the validity of an unfair dismissal.

¹⁸⁵⁷ Paddock (December 2010) *Paddocks Press Newsletter* 6.

¹⁸⁵⁸ CSOSA s 39(7)(b).

The managing agent should maintain professionalism at all times and should hand the books and records back to the body corporate on termination of its contract, and then have recourse to the circumstance that his or her appointment was unjustifiably and unlawfully terminated. The managing agent should consider its reputation and not prejudice the scheme in any way on its termination.¹⁸⁵⁹ However, in circumstances where the managing agent refuses to hand over the property, books and records of the body corporate there should be a specific provision, as in New South Wales and Singapore, that the failure to do so is an offence subject to some form of penalty. There should also be a consequence for failure in this regard. The CSOS, when in operation, will be best forum for the recovery of books, records and other property from former managing agents.

¹⁸⁵⁹ Constas & Bleis *Demystifying Sectional Title 49*.

Chapter 15: Conclusion

The Roman law maxim *superficies solo cedit*¹⁸⁶⁰ was taken over into South African law. This had the result that the law did not recognize separate ownership in a building or parts of a building apart from ownership of the land on which the building was erected. It was essential that legislative recognition needed to be given to separate ownership of sections in a scheme built on one piece of land. It was only in 1973 that the first generation Sectional Titles Act 66 of 1971 came into operation. The second generation Sectional Titles Act 95 of 1986 came into operation in 1988. The next development came in 2011 with the promulgation of the Sectional Titles Schemes Management Act 8 of 2011 and the Community Schemes Management Act 9 of 2011, both of which are yet to come into operation. What is clear is that there has been much development in the law of sectional titles over a relatively short period of time.

South Africa has experienced a shift from an emphasis on individual title to that of communal living. Van der Merwe states that almost 50% of all ownership is now in the form of some kind of community scheme including sectional title schemes, share block schemes, retirement schemes and homeowner's associations.¹⁸⁶¹ This illustrates how important the recognition of sectional ownership is to the social, economic and psychological needs of the South African society, especially in urban areas.¹⁸⁶² This increasing need for sectional ownership can be attributed to many reasons. The fast growth in the population and limited urban land available makes optimum use of available land a necessity. Pienaar also attributes mass urbanisation to the demise of apartheid and repeal of racially based legislation¹⁸⁶³ that provided for the system of separate residential areas for different races in South Africa.¹⁸⁶⁴

¹⁸⁶⁰ In terms of which a landowner was also considered owner of any building erected on it; Van der Merwe *Sectional Titles* 1-3.

¹⁸⁶¹ Van der Merwe *Sectional Titles* 1-30(12).

¹⁸⁶² 1-10(1).

¹⁸⁶³ The Abolition of Racially Based Land Measures Act 108 of 1991 repealed the Group Areas Act 36 of 1966 and the Black Communities Development Act 4 of 1984.

¹⁸⁶⁴ Pienaar *Sectional Titles* 8.

Within the context of the wider interpretation of property in terms of the new constitutional dispensation in South Africa, the most important aim of sectional title ownership is to provide residential accommodation for all income brackets within commuting distance from employment. The use of sectional title schemes as a tool to develop housing in South Africa offers the fastest and most cost effective option to make access to ownership available for a broader group of citizens. Conventional home ownership may be exclusive, individualistic and may offer maximum privacy, but sectional ownership offers a wide range of benefits such as a closer social life, additional amenities (with the costs being shared) and security.¹⁸⁶⁵ However, most of the difficulties experienced in sectional title schemes arise from the shared common property and the more intensified communal element. It is for this reason that sectional title schemes require a centralized administrative and management executive.

A large section of the South African population was previously excluded from acquiring home ownership in certain areas. In addition to this, the concept of sectional title is relatively new in the context of South African property law, the 1971 Act having only come in operation in 1973. This contribution to the understanding of how these schemes should be managed cannot, in itself, solve the housing shortage in urban areas in South Africa. However, it is my hope that a better understanding of how sectional title schemes should be managed, would contribute to the sustainability and success of sectional title schemes catering for a larger segment of the population. In this way the use of sectional title schemes to provide access to adequate housing to those South Africans who were previously excluded from home ownership in certain areas would become a more viable option.

As I have shown in this thesis the success of the sectional title scheme is largely dependent on a well-organized management structure being put into place. Each sectional unit owner automatically becomes a member of a central management body

¹⁸⁶⁵ Van der Merwe *Sectional Title* 1-12.

called the body corporate when the unit is registered in his or her name.¹⁸⁶⁶ The body corporate is responsible for the control, management and administration of the common property for the benefit of all owners.¹⁸⁶⁷ Besides the general meeting, the two most important *dramatis personae* in the management of sectional title schemes are the trustees and the managing agent. The trustees are elected to act as the executive board of the body corporate and their duties and powers are subject to the STA, the rules and any restriction imposed, or direction given at a general meeting.¹⁸⁶⁸ The general meeting sets out the standards and policies for the administration and management of the scheme, whereas the trustees handle the routine management functions of the scheme with the possible assistance of a managing agent.

Trustees need to know and understand the sectional title legislation, and follow the applicable rules in such a way so as to organise the sectional title scheme in the owners' best interests. The legislation creates onerous and complex duties. What has become clear in the 40 years of sectional title ownership and management in South Africa is that the legislator was far too optimistic with regard to the trust placed in the trustees' capabilities in managing the scheme.¹⁸⁶⁹ The body corporate or the trustees, the majority of whom must be owners or spouses of owners, are not always able to resolve certain difficulties and manage conflict. In challenging circumstances the body corporate or trustees may be unwilling, unable, or incapable of properly managing, controlling and administering the scheme.

A prudent community of sectional title owners can take certain steps to prevent the breakdown of the community of owners. In terms of the prescribed management rules:

“The trustees may whenever they think fit and shall upon a request in writing made either by owners entitled to 25% of the total of the quotas of all sections or

¹⁸⁶⁶ STA s 36(1) which has been amended by the STSMA by the substitution of this subsection to now read “when a unit is registered in the name of any person other than the developer, the registrar must issue a certificate in the prescribed form.”

¹⁸⁶⁷ STA s 36(4) [STSMA s 2(5)].

¹⁸⁶⁸ STA s 39(1) [STSMA s 7(1)].

¹⁸⁶⁹ Maree (August 2005) *MCS Courier* 6 7.

by any mortgagee holding mortgage bonds over not less than 25% in number of the units, convene a special general meeting. If the trustees fail to call a meeting so requested within fourteen days of the request, the owners or mortgagee concerned shall be entitled themselves to call the meeting.”¹⁸⁷⁰

At this special general meeting the body corporate can discuss the irregularities in the management of the scheme, and attempt to find appropriate solutions. Moreover, the irregularities can be placed on the agenda for the next annual general meeting, which must be held within four months from the end of the financial year.¹⁸⁷¹ At the general meeting the owners can attempt to find solutions or can, if necessary, elect new trustees who are more capable and qualified of sorting out the problems in the scheme. If no one is willing to act as trustee then one possibility is for the body corporate to offer to pay an amount of money to professionals to act as trustees.¹⁸⁷² This possibility is subject to the restriction that the majority of trustees will still need to be owners or spouses of owners.¹⁸⁷³ Another option available to trustees is appoint a managing agent who could diffuse arguments in the community and deal with the financial mismanagement.¹⁸⁷⁴

However, the solution of convening a special meeting to get the co-operation of all the owners; the election of new trustees; paying a professional to act as a trustee or the appointment of a managing agent might not be practical possibilities anymore. If the above steps have already been taken and were unsuccessful, or would probably not produce permanent solutions, then the appointment of an administrator could be considered.¹⁸⁷⁵ After an attempt to organise the body corporate’s financial and management affairs fails and the scheme has reached management atrophy, the appointment of an administrator becomes the only workable solution to prevent the

¹⁸⁷⁰ Annexure 8 rule 53.

¹⁸⁷¹ Annexure 8 rule 50; Van der Merwe *Apartment Ownership* 658.

¹⁸⁷² Annexure 8 rule 10. CM Durham “No financials or BC – I can’t sell” (20-06-2014) *Property24* <<http://http://www.property24.com/articles/no-financials-or-bc-i-cant-sell!/20073>> (accessed 15-08-2014).

¹⁸⁷³ Annexure 8 rule 5.

¹⁸⁷⁴ Annexure 8 rule 46.

¹⁸⁷⁵ Van der Merwe CG “Criteria for the appointment of an administrator of a sectional title scheme” (4) 2011 *TSAR* 750; *Williams v Nathan* 2006 JOL 18414 (W).

breakdown of the community of owners, and the possible deemed destruction of the scheme.¹⁸⁷⁶

Section 46 of the STA makes provision for the appointment of an administrator by the court upon being approached by interested parties.¹⁸⁷⁷ This is the best option in the circumstances where a body corporate in general, and its trustees in particular, are unwilling or unable to properly manage and administer the scheme in accordance with the Act and the scheme's rules. It is the most effective mechanism to ensure proper management of the scheme and due compliance by the body corporate and its organs with its statutory obligations,¹⁸⁷⁸ and serves as one of the most important tools of protection available to owners of units in sectional title schemes. The appointment of an administrator is a drastic step, by removing the control of the affairs of the body corporate from the trustees elected by its members, and placing it in the hands of the administrator.¹⁸⁷⁹ It is for this reason that the enquiry into the need for the appointment of an administrator will inevitably turn on whether the affairs of the body corporate need to be taken out of the hands of the trustees and members of the body corporate in order to address and resolve the problems giving rise to the application.¹⁸⁸⁰ Van der Merwe points out that an administrator should therefore only be appointed when the trustees are not in a position to properly perform the functions assigned to them; when the body corporate has not elected trustees; or where for some other reason the affairs of the body corporate are not being, or are not capable of being, administered in the manner envisaged by the STA and the rules applicable to the scheme.¹⁸⁸¹ Therefore, the court will only exercise its discretion to appoint an administrator in exceptional

¹⁸⁷⁶ STA s 48(6) [STSMA s 17].

¹⁸⁷⁷ These interested parties include a body corporate, a local authority, a judgement creditor of the body corporate for an amount of not less than R500, or any owner or any person having a registered real right in or over a unit may apply to court for the appointment of an administrator; STA s 46(1) [STSMA s 16(1)].

¹⁸⁷⁸ Van der Merwe & Kloppers “Die aanstelling van ‘n administrateur by wanbestuur van ‘n deeltitelskema” 1997 *Stell LR* 309; T Maree “Sectional Title Administrators: When is appointment justified?” February 2003 *MCS Courier* 6.

¹⁸⁷⁹ *Grundler NO v Rambadursing* (13500/2010) 2011 ZAKZDHC 24 (20 May 2011) para 11-12.

¹⁸⁸⁰ *Herald Investments Share Block (Pty) Ltd v Meer; Meer Body Corporate of Belmont Arcade* 2010 6 SA 599 (KZD) par 46; Van der Merwe 2011 *TSAR* 751.

¹⁸⁸¹ Van der Merwe 2011 *TSAR* 751.

circumstances¹⁸⁸² including cases where the sectional title scheme is under pressure of confusion and chaos due to severe mismanagement. In this way the appointment of an administrator is considered as a measure of last resort.¹⁸⁸³ The purpose of appointing an administrator is remedial. The management of the affairs of the scheme should subsequently be restored to the members of the body corporate.

The possible results that can be achieved by the appointment of an administrator can be outweighed by the risks inherent in that appointment. Van der Merwe¹⁸⁸⁴ lists these risks. First, the legal costs involved in the appointment of an administrator are high as a paid professional will be doing what the volunteer trustees would usually do free of charge. The administrative costs increase as both the administrator and the managing agent (if one has been appointed) must be remunerated.¹⁸⁸⁵ This will mean increased levies for the body corporate, as funds will have to be made available to rehabilitate the scheme. Some owners will possibly not be able to afford this. Smaller schemes, especially those schemes that are having financial problems, might not have available funds for such an application. Secondly, there is a shortage of suitable, trained and disinterested persons available to fill the positions. The STA contains few guidelines on how the administrators should function. Thirdly, there is the risk, if the managing agent is appointed as administrator, that he will not necessarily come to grips with the administrative problems speedily and properly. There is no quick fix to the problems that have escalated over some time.¹⁸⁸⁶

In order to avoid the mismanagement of the scheme and to avoid the possible appointment of an administrator it is important to have an efficient management structure in place. Without an executive the general meeting of owners would have to convene a general meeting every time a decision needs to be taken regarding the management of the scheme. In practice many of the owners do not attend the annual

¹⁸⁸² Van der Merwe and Kloppers 1997 *Stell LR* 323.

¹⁸⁸³ *Williams v Nathan and others* [2006] JOL 18414 (W)[22]; van der Merwe 2011 *TSAR* 751; van der Merwe *Sectional Titles* 18-82.

¹⁸⁸⁴ Van der Mewe *Sectional Titles* 14-150.

¹⁸⁸⁵ STA 46(5) [STSMA s 16(5)(d)].

¹⁸⁸⁶ Maree (August 2005) 17 *MCS Courier* 8-9.

general meetings. If the owners are reluctant to attend the general meetings, where vital decisions relating to the scheme must be made, it is clear that getting the entire body corporate together to make routine decisions would be a practical impossibility.¹⁸⁸⁷ For this reason it is essential that provision needs to be made in the South African sectional title legislation for the constitution of an executive organ. As I have repeatedly emphasised in this thesis the existence of an executive organ to manage the day-to-day operation of a sectional title scheme is of the utmost importance for the effective and efficient governance of the scheme.

Currently the STA and the prescribed management rules make provision for the trustees to act as the executive organ of the scheme. As I have repeatedly highlighted throughout this thesis the trustees, most of whom are owners, are not always the most experienced or qualified persons to take on the task of administering the scheme for the benefit of all the members of the body corporate. Owners might not have the necessary time at their disposal to volunteer for the office of a trustee due to the demands of their own full-time jobs and family responsibilities. Being a trustee requires a significant amount of time and effort, especially in large mixed-use schemes that consist of many units.¹⁸⁸⁸ It involves hard work, dealing with varied and strong personalities including apathetic and ignorant owners, and complicated physical, financial and legal issues. However, trustees do have a certain degree of control in the administration of the scheme; can contribute constructively to the scheme and the value of the property and can ultimately play a vital role in the success of the scheme. Ideally trustees should be properly elected, experienced and qualified in all matters relating to sectional titles. Trustees, as their name implies, are in a position of trust and must manage the scheme for the benefit and in the interest of all the owners.

In my experience, most of the persons who are elected as trustees do not understand the nature and extent of an ideal involvement in the running of an office of trustees. The management and financial functions of the trustees have social and financial

¹⁸⁸⁷ A Kelly "How the trustee system works: trustee decisions" (May 2014) 9-5 *Paddocks Press Newsletter* 1.

¹⁸⁸⁸ Woudberg *Basic Sectional Title book One* 45.

consequences for the unit owners. The fact that trustees, more often than not, do not have the requisite expertise and experience to fulfil the functions of a trustee in a professional way indicates the dilemma facing sectional title scheme management. It is common practice in South Africa for the trustees to supplement their expertise by appointing a managing agent to assist them if need be. The problem is that it is not mandatory to do so. As a result, unqualified and incapable owners can manage even large schemes. Furthermore, even if a managing agent is appointed to assist in the management of the scheme, the trustees remain the executive organ of the scheme, and must continue to have a supervisory role over the exercise of the powers and performance of functions delegated to the managing agent.

Management by a board of trustees with an optional employment of a managing agent could be appropriate in smaller schemes.¹⁸⁸⁹ However, it should be kept in mind that there are small schemes that have complicated management issues due to the nature of the scheme. It is not only the size of the scheme that affects the complexity of the administration functions. Management of larger mixed-use schemes in South Africa would be better facilitated by introducing a mandatory professional manager as the executive organ of the body corporate, similar to the German *Verwalter*. This would avoid the problems experienced by South African bodies corporate of finding qualified trustees, and could prevent the issues that arise due to mismanagement by unprofessional trustees.¹⁸⁹⁰ The involvement of the owners in the management of the scheme could be integrated by establishing, especially for larger schemes, a small committee of owners to act as an advisory council, similar to the German *Verwaltungsbeirat*.

Therefore, in my opinion the German system of appointing an experienced and knowledgeable single professional manager or managing agency firm as an executive organ of the body corporate, who may be assisted by an advisory council, is preferable to the position in South Africa where the trustees are elected as the executive arm of

¹⁸⁸⁹ Reinlein *A comparison of the legislative and executive management organs* 44.

¹⁸⁹⁰ 46.

the scheme, and who may supplement their expertise by appointing a managing agent to assist them in the day-to-day management of the scheme. I set out the advantages for the appointment of a managing agent in chapter 9. This reasoning would also apply to the appointment of a professional manager appointed as the executive organ of the body corporate. In my view the compulsory appointment of a professional manager as the executive organ of the body corporate, instead of the voluntary appointment of a managing agent would place the routine management of sectional title schemes in the most capable hands.

As I have shown the management of a scheme requires a high level of knowledge and experience in various fields such as physical maintenance, accounting, meetings, human resources, banking, law, and insurance. Although outsiders can also be trustees, the majority of trustees are required to be sectional owners.¹⁸⁹¹ By contrast the professional manager would have the required knowledge, training, experience and skill for the management of a scheme. Furthermore, the professional manager would not act alone, but employ staff such as accountants and secretaries. Consequently, a professional manager rather than a group of owners and outsiders chosen at random would be given the task of administering larger sectional title schemes. The professional manager could run a specialised management company with professional facilities and infrastructure at his or her disposal, which would render the management of the scheme much more professional and business-like.¹⁸⁹²

In chapter 4 it was shown that in South Africa the trustees owe the members of the body corporate a fiduciary duty.¹⁸⁹³ They are indemnified against liability for negligent administration.¹⁸⁹⁴ This is standard and typical of an honorary office, but is not suitable for the high financial and legal responsibility that the management of a large sectional title scheme entails.¹⁸⁹⁵ As the trustees are indemnified against liability for negligent administration themselves, they cannot be held liable for the wrongdoing of the

¹⁸⁹¹ Annexure 8 rule 5.

¹⁸⁹² Reinlein *A comparison of the legislative and executive management organs* 45.

¹⁸⁹³ STA s 40.

¹⁸⁹⁴ Annexure 8 rule 12.

¹⁸⁹⁵ Reinlein *A comparison of the legislative and executive management organs* 44.

managing agent. There are often not a sufficient number of owners who are prepared to stand for election as trustees and the law does not want to discourage owners who volunteer for that office by burdening them with possible personal liability and excessive limitations. As the law stands the managing agent can be held accountable to the body corporate on the basis of contractual breach. In my view this is not ideal and the South African legislation should elevate the managing agent to that of executive organ of the body corporate. In this way the legislation would expressly create fiduciary duties for the managing agent. The professional manager, as the executive organ, could then be held legally responsible for his or her mismanagement of the scheme. The professional manager could take out fidelity insurance to cover these risks.

Unlike the German *Verwalter*, the South African managing agent is not an executive organ of the body corporate. At the law stands the trustees are tasked with appointing and supervising the actions of the managing agent. The trustees are still able to take over the executive tasks themselves, which can lead to conflict and confusion between the managing agent and the trustees with regard to competence and authority. There should be clear separation of powers and duties to avoid this confusion.

As I have explained the trustees in South Africa are entrusted with the day-to-day management of the scheme and are empowered to exercise all the powers and perform all the duties of the body corporate, subject to certain restrictions. This general and wide empowerment could, and often does, lead to trustees mismanaging the scheme. Most owners may not be aware of their competence to limit and restrict the powers of the trustees by imposing restrictions and giving directions at the general meeting.¹⁸⁹⁶ The trustees could burden the body corporate with excessive obligations, and could rule the scheme in a way that is financially unsound. On the other hand it should also be noted that no minimum amount of powers is guaranteed to the board of trustees. The powers of the trustees could be reduced substantially by directions and restrictions imposed on trustees in the general meeting.¹⁸⁹⁷ In such an event the trustees would not be able to

¹⁸⁹⁶ STA s 39(1); Annexure 8 rule 56(g).

¹⁸⁹⁷ STA s 39(1).

perform the most basic and necessary maintenance and management measures for the upkeep of the scheme without explicit permission of the general meeting.¹⁸⁹⁸

By contrast the German *Verwalter* is only empowered to exercise the powers and perform the functions that have been explicitly assigned to him.¹⁸⁹⁹ His powers and duties are determined largely by the provisions of the *WEG*,¹⁹⁰⁰ and not only by the terms of his contract of appointment and the resolutions of the body corporate, as is the case with the South African managing agent. The *Verwalter* has wide general powers to manage the scheme which include all measures that are necessary for the maintenance of the common property and the financial management of the scheme. These tasks and powers of the *Verwalter* are mandatory and cannot be taken away.¹⁹⁰¹ I suggest that the minimum powers and duties of the professional manager in South Africa need to be included in the legislation.

The German *Verwalter* is usually not a sectional owner, but an outsider. While nothing prevents a skilled owner from being appointed as professional manager, a non-owner with knowledge and experience of sectional title administration or indeed a professional managing firm is almost invariably appointed in practice as professional manager of a scheme. Management by owners has the advantage that there is personal involvement. The owners will have an invested interest in the scheme, more so than an outsider. Often the owners of a scheme will be in a better position to know and understand the needs of the residents of a scheme and what management and maintenance measures have to be taken to ensure that the scheme runs efficiently. This can have the disadvantage of conflict and infighting between owners which could negatively influence the management.¹⁹⁰² Furthermore, the fact that the majority of trustees must be owners or spouses of owners does not necessarily mean that their actions will always be to the benefit of the scheme.¹⁹⁰³ There is a risk that they might misuse their powers to their

¹⁸⁹⁸ Reinlein *A comparison of the legislative and executive management organs* 43.

¹⁸⁹⁹ 43.

¹⁹⁰⁰ *WEG* § 27; Pienaar *Sectional Titles* 174.

¹⁹⁰¹ *WEG* § 27(4); Reinlein *A comparison of the legislative and executive management organs* 31.

¹⁹⁰² Reinlein *A comparison of the legislative and executive management organs* 45.

¹⁹⁰³ 43.

individual advantage, and to the disadvantage of the community of owners. In this way the objectivity offered by a professional manager will be advantageous to the scheme. The argument that non-owner outsider professionals managing the scheme leads to a lack of personal interest can be counteracted by the fact that an advisory council consisting of unit owners may assist the professional manager.

The disadvantage of management by a professional manager is the higher cost. Management by trustees has the advantage that it is in general done for free or is at least cheaper than the management by a professional manager. Although the German *Verwalter* is basically in the same executive and management position as the trustees in the South African scheme, the difference is that he normally receives remuneration for performing his executive functions. This equates the *Verwalter* with the South African managing agent, but with the difference that he holds an office and is not appointed as an agent of the body corporate. A professional manager like the *Verwalter* charges a relatively high fee for his services.¹⁹⁰⁴ However, schemes managed by unqualified owners usually consider it a good investment to make use of managing agents which could be equally expensive. Since the office of the board of trustees is an honorary office, often exercised without remuneration, some trustees will do the minimum amount of work. Every owner would be interested in the management of his unit, but not necessarily in the management of the whole scheme.¹⁹⁰⁵

A further disadvantage is that a professional manager operates as a business and has profit as the main objective. If a professional manager takes on too many schemes to increase his earnings, he or she might not be able to pay sufficient attention to each individual scheme, which could lead to a loss of quality of management.¹⁹⁰⁶ However, the professional manager would be accountable for the efficient administration of the scheme in terms of not only the contract with the body corporate, but also in terms of the minimum powers and duties set out in the legislation.

¹⁹⁰⁴ 45.

¹⁹⁰⁵ 43.

¹⁹⁰⁶ 46.

Another reason why it would be better to have the executive functions entrusted to a professional manager in South Africa is the lack of continuity in the current executive structure. It is possible for the same trustees to be elected to office year after year until they are removed from office and as there is not a requirement for rotation of trustees, the same trustees could be in office for a long time leading to stagnation in the management of the scheme. In contrast the German *Verwalter* is initially appointed for a period of three years, which may be extended for an additional term of five years.¹⁹⁰⁷ This ensures that the body corporate appoints a person with the necessary knowledge and expertise on a continuous basis. Although the *Verwalter* is basically in the same executive and management position as the trustees in the South African scheme, the difference is that the *Verwalter* is appointed contractually (*Verwaltersvertrag*), and may be dismissed by the body corporate if he or she does not fulfill his executive functions in a professional manner. This is yet another convincing reason why I suggest that South Africa consider following the German position.

It is therefore my opinion that the appointment of a professional manager in larger schemes should be made compulsory in South Africa. Unlike managing agents appointed in terms of prescribed management rule 46, the professional manager would then be the sole executive arm of the body corporate. This would place the professional manager in a fiduciary relationship with the body corporate, and he or she would be held liable, not only in contract, but also for any breach of this trust or breach of his or her duty of care and skill. This increase in accountability will serve to render the property management industry more professional.

It is my submission that these professional managers should obtain a minimum entry-level qualification. In this regard I advocate that professional managers should be accredited; adhere to a professional code of conduct and be held accountable for the ethical management of sectional title schemes by a regulatory body. In terms of current established infrastructural support in South Africa, the professional manager should register as an estate agent with the Estate Agency Affairs Board, and manage the body

¹⁹⁰⁷ *WEG* § 26; Pienaar *Sectional Titles* 173.

corporate funds in terms of the Estate Agency Affairs Act, which requires that the manager hold a current and valid Fidelity Fund Certificate.

In my opinion the CSOS, once in operation, would be better suited to oversee the regulation of this industry. It could be given the power to approve a code of conduct; to register professional managers; to arrange for their fidelity insurance; and investigate and hear complaints against professional managers accused of professional misconduct, as being a species of dispute resolution procedure for which it is designed. If the CSOS were empowered to regulate managing agents it would have a positive effect on the property management industry as a whole.¹⁹⁰⁸ It my hope that the managing agency industry become subject to mandatory regulation by a professional standards board in the same way as other professions such as accountants, lawyers, doctors and engineers are subject to maintain ethics and standards of service.

In my final analysis, the general meeting would maintain its legislative function, while the professional manager would take over the executive function from the trustees. Furthermore, to maintain some kind of personal involvement in the management of the sectional title scheme, the general meeting should be given the power to appoint an advisory board from amongst the owners to assist the professional manager in the administration of the scheme. Some functions could be delegated to this board, but its role should be essentially advisory without any executive authority. Therefore, the legal status of the South African managing agent should be increased to that of a professional manager and executive organ of the body corporate.

Throughout my thesis I have made suggestions for improvements in the sectional title legislation regulating all the aspects relating to the appointment of managing agents. If these suggestions could be incorporated into the STSMA and the Regulations and rules made thereunder, then the suggestion that the professional managing agent become the executive arm of the body corporate would not only be a academic possibility, but could become a practical reality.

¹⁹⁰⁸ Moore-Barnes (June 2013) *Paddocks Press Newsletter* 2.

In conclusion, if the South African legislation were amended to follow this approach it could go a long way toward solving the financial and administrative difficulties currently experienced in sectional titles schemes. With a more efficient management structure in place sectional title schemes could be used to make an invaluable contribution to urgently needed harmonious residential housing, not only for the affluent sector of the population, but also for those who are currently living in informal settlements. The provision of housing in the form of sectional title offers the most practical and workable solution to fulfill the constitutional objective of promoting access to adequate housing to all South African citizens.¹⁹⁰⁹ The state should take these reasonable legislative steps, within its available resources, to achieve the progressive realisation of the constitutional right to adequate housing.¹⁹¹⁰ In my view this constitutional objective could be achieved by sectional title schemes, which offer affordable residential accommodation to a large section of the population in multi-unit buildings, while at the same time offering a more efficient utilisation of available residential land in congested urban areas.

¹⁹⁰⁹ Constitution of the Republic of South Africa, 1996 s 26(1).

¹⁹¹⁰ S 26(2).

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